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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1103, 1208, 1216, 1240, 1244, and 1245

[EOIR Docket No. 18-0101; A.G. Order No. 4929-2020]

RIN 1125-AA90

Executive Office for Immigration Review; Fee Review

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Final rule.

SUMMARY: On February 28, 2020, the Department of Justice (“the Department” or “DOJ”) published a notice of proposed rulemaking (“NPRM” or “proposed rule”) that would increase the fees for those Executive Office for Immigration Review (“EOIR”) applications, appeals, and motions that are subject to an EOIR-determined fee, based on a fee review conducted by EOIR. The proposed rule would not affect fees established by the Department of Homeland Security (“DHS”) with respect to DHS forms for applications that are filed or submitted in EOIR proceedings. The proposal would not affect the ability of aliens to submit fee waiver requests, nor would it add new fees. The proposed rule would also update cross-references to DHS regulations regarding fees and make a technical change regarding requests under the Freedom of Information Act (“FOIA”). This final rule responds to comments received in response to the NPRM and adopts the fee amounts proposed in the NPRM without change.

DATES: This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Falls Church, VA 22041, telephone (703) 305–0289 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

On February 28, 2020, the Department published an NPRM that would increase the fees for those EOIR applications, appeals, and motions that are subject to an EOIR-determined fee, based on a fee review conducted by EOIR. Executive Office for Immigration Review; Fee Review, 85 FR 11866 (Feb. 28, 2020). The proposed rule would not affect fees established by DHS with respect to DHS forms for applications that are also filed or submitted in EOIR proceedings. The proposal would not affect the ability of aliens to submit fee waiver requests, nor would it add fees for any EOIR forms or applications other than those which currently have a fee imposed. The proposed rule would also update cross-references to DHS regulations regarding fees to match changes to the organization and structure of DHS’s regulations regarding fees for applications and make a non-substantive correction to the regulatory cross-reference for requests under the FOIA.

A. Authority and Legal Framework

The Department published the proposed rule pursuant to its authority to charge fees, also referred to as user charges. 85 FR at 11866–67.

Pursuant to section 286(m) of the Immigration and Nationality Act (the “Act” or “INA”) (8 U.S.C. 1356(m)), the Attorney General and the Secretary of Homeland Security may charge fees for adjudication and naturalization services at a rate that would

ensure recovery of both the full cost of providing all such services, including similar services that may be provided without charge to certain categories of aliens, and any additional administrative costs associated with the fees collected.¹ 85 FR at 11867. Accordingly, adjudication fees, as designated in the regulations, are deposited into the Immigration Examinations Fee Account (“IEFA”) in the Treasury of the United States and “remain available until expended to the Attorney General [or the Secretary] to reimburse any appropriation the amount paid out of such appropriation for expenses in providing immigration adjudication and naturalization services and the collection, safeguarding and accounting for fees deposited in and funds reimbursed from the [IEFA].” INA 286(n), 8 U.S.C. 1356(n); *see also* 85 FR at 11867.² The Act authorizes the Attorney General and Secretary of Homeland Security to promulgate regulations to carry out this authority. INA 286(j), 8 U.S.C. 1356(j).

In addition, the Department notes that this rule is also authorized by title V of the Independent Offices Appropriations Act of 1952 (“IOAA”), Pub. L. 82-137, 65 Stat. 268, 290 (1951) (codified at 31 U.S.C. 9701). The IOAA provides government-wide authority to charge fees to individuals who receive special services from an agency. 31 U.S.C.

¹ Following the Homeland Security Act of 2002 (“HSA”), the Attorney General retained the same authority and functions related to immigration and naturalization of aliens exercised by EOIR or the Attorney General prior to the HSA’s effective date. Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135; *see* INA 103(g)(1) (8 U.S.C. 1103(g)(1)). Further, the Attorney General retained the authority to perform actions as necessary, including promulgating regulations, in order to carry out authority under the immigration laws. *See* INA 103(g)(2), 8 U.S.C. 1103(g)(2).

² All other payments received for fees and administrative fines and penalties are deposited into the Treasury as miscellaneous receipts, not including some exceptions that are irrelevant for the purposes of this final rule. *See* INA 286(c), 8 U.S.C. 1356(c); 85 FR at 11867.

9701(a)–(b).³ Those fees must be “fair” and based on government costs, value provided to the recipient, the public policy or interest served, and other relevant factors. *Id.*

The proposed rule is likewise consistent with Circular No. A-25 Revised,⁴ which has been determined to be a “proper construction” of the IOAA,⁵ and provides guidance to executive branch agencies regarding the scope and types of activities that may be covered by user fees and how to set such fees. Covering all Federal activities, including agency programs, that convey special benefits to recipients beyond those that the general public receives, it instructs agencies to review user charges for such activities biennially. *See* Circular No. A-25 Revised at sec. 8(e); *see also* 31 U.S.C. 902(a)(8) (directing an “agency Chief Financial Officer” to “review, on a biennial basis, the fees, royalties, rents, and other charges imposed by the agency for services and things of value it provides, and make recommendations on revising those charges to reflect costs incurred by it in providing those services and things of value”).

B. Purpose of the Proposed Rule

Before the proposed rule’s publication, the Department had fallen out of compliance with Circular No. A-25 Revised and 31 U.S.C. 902(a)(8) regarding the review of EOIR’s fees on a biennial basis. For over 30 years the Department did not either review or update the fees charged for applications, appeals, and motions for which EOIR levies a fee. *See* 85 FR at 11869. Accordingly, in order to ensure compliance with

³ Title V of the IOAA was first codified at 31 U.S.C. 841. In 1982, the language from title V of the IOAA was subsequently codified, with minor changes and the addition of paragraphing, at 31 U.S.C. 9701. Act of Sept. 13, 1982, Pub. L. 97–258, 96 Stat. 877, 1051 (revising, codifying, and enacting without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, “Money and Finance”).

⁴ Circular No. A-25 was published in 1959. Circular No. A-25 Revised rescinded and replaced Circular No. A-25 and its accompanying Transmittal Memoranda 1 and 2. *See* Office of Management and Budget (“OMB”) Circular A-25, 58 FR 38142, 38144 (July 15, 1993).

⁵ *See Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345, 349–51 (1974).

the IOAA (31 U.S.C. 9701), section 286(m) of the Act (8 U.S.C. 1356(m)), 31 U.S.C. 902(a)(8), and Circular No. A-25 Revised, “EOIR conducted a comprehensive study using activity-based costing to determine the cost to EOIR for each type of application, appeal, and motion for which EOIR levies a fee under 8 CFR 1103.7(b).” *Id.*

Through the 3-phase study, EOIR determined the cost for each form and motion by allocating average direct salary costs to each step in an average process map for how the fee, application, or motion works through the adjudicatory process. *See* 85 FR at 11869. In other words, EOIR totaled the total salary costs for the different EOIR staff involved in the processing and adjudication for each form and motion, based on the average time each type of official spends on that processing and adjudication, to determine an average processing cost. *See id.* Despite EOIR’s authority to recover the full cost of providing adjudication services, EOIR’s study did not include costs aside from the direct salary costs for the involved staff. Specifically, the study did not include: (1) overhead costs, which the Department determined would occur regardless of how many applications, appeals, or motions to which a fee applies are filed; (2) non-salary benefits, which may vary greatly from person to person depending on which benefits, if any, are selected; or (3) costs associated with filing related documents that may be submitted with the application, appeal, or motion to which a fee applies. *Id.*

Despite including only the direct salary costs in this cost study, the results clearly demonstrated that the processing costs for the applications, appeals, and motions to which a fee applies under 8 CFR 1103.7(b) significantly exceed the fees imposed in 1986. 85 FR at 11870. Accordingly, the Department issued the NPRM to begin rulemaking to update the fees in accordance with the processing costs identified by the EOIR fee study

so that the fee amounts “more accurately reflect the costs for EOIR’s adjudications of these matters.” *Id.*

Because the proposed rule roughly matched the new fee amounts with the processing costs that were identified by a study that did not consider the complete cost to the agency, as explained above, the proposed rule inherently subsidized the costs of adjudicating these applications, appeals, and motions. In other words, the updated fee amounts balance “the public interest in ensuring that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system” with the fact that “these applications for relief, appeals, and motions represent statutorily provided relief and important procedural tools that serve the public interest and provide value to those who are parties to the proceedings by ensuring accurate administrative proceedings.” *Id.* Put more simply, the proposed rule intentionally put forth fee amounts that were less than the cost to the agency in order to effectively serve the public interest.

C. Provisions of the Proposed Rule

In determining the fees to charge, the agency considered the various public policy interests involved, including ensuring that immigration courts continue to be accessible for aliens seeking relief and that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system. *See id.* Based on the cost study and these considerations, the NPRM proposed the following changes to EOIR’s fees:

1. Increase the fee for Form EOIR-26 from \$110 to \$975.
2. Increase the fee for Form EOIR-29 from \$110 to \$705.
3. Increase the fee for Form EOIR-40 from \$100 to \$305.
4. Increase the fee for Form EOIR-42A from \$100 to \$305.

5. Increase the fee for Form EOIR-42B from \$100 to \$360.

6. Increase the fee for Form EOIR-45 from \$110 to \$675.

7. Increase the fee for filing a motion to reopen or reconsider from \$110 before both the immigration courts within the Office of the Chief Immigration Judge (“OCIJ”) and the Board of Immigration Appeals (“BIA” or “Board”) to \$145 if either motion is filed before the OCIJ, and \$895 if either motion is filed before the BIA.

The NPRM also proposed numerous technical corrections to fee-related citations to both DHS’s regulations in chapter I and EOIR’s regulations in chapter V of title 8 of the Code of Federal Regulations following DHS’s publication of an NPRM regarding DHS-imposed fees. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 62280 (Nov. 14, 2019). The Department’s NPRM included proposed changes to cross-references to those DHS regulations as used in EOIR’s regulations to ensure that all cross-references were accurate in accordance with DHS’s proposed rule. *See* 85 FR at 11871–72.

Finally, the proposed rule made additional technical corrections to EOIR’s regulations to correct cross-references, both to a provision regarding requests pursuant to FOIA and to EOIR’s own fee-related regulations. 85 FR at 11872.

More specifically, the NPRM proposed the following changes to EOIR’s regulations.

a. Part 1003 – Executive Office for Immigration Review

First, the NPRM proposed to amend 8 CFR part 1003 by updating citations contained in this part. In accordance with DHS’s rulemaking, the NPRM proposed to

change “8 CFR 103.7(a)” to “§ 1103.7(b)” in § 1003.8(a)(4)(ii), and it proposed to change “8 CFR 103.7” to “8 CFR 103.7 and 8 CFR part 106” in § 1003.24(a) and (c).

b. Part 1103 – Appeals, Records, and Fees

Also, in accordance with DHS’s rulemaking, the NPRM proposed to amend 8 CFR 1103.7 by changing (1) the citation “8 CFR 103.7(a)(1)” to “8 CFR 103.7(a)” in paragraph (a)(3); (2) the citation “8 CFR 103.7(a)(2)” to “8 CFR 103.7(c) and 8 CFR 106.1” in paragraph (a)(3); and (3) the citation “8 CFR 103.7” to “8 CFR 103.7 and 8 CFR part 106” in paragraph (b)(4)(ii). In addition, the NPRM proposed revising paragraph (b)(4)(ii) of § 1103.7 to clarify that despite DHS’s proposed assignment of a \$50 fee for filing a Form I-589, Application for Asylum and for Withholding of Removal, such fee would not apply for a Form I-589 filed with an immigration judge “for the sole purpose of seeking withholding of removal under section 241(b)(3) of the Act or protection under the Convention Against Torture regulations.”

Next, the NPRM proposed to revise paragraphs (b)(1), (b)(2), and (b)(4)(i) to reflect the updated fee amounts. Paragraph (b)(1) would contain updated fees for Forms EOIR-26, -29, and -45. Paragraph (b)(2) would contain updated fees for motions to reopen or to reconsider before the immigration court and motions to reopen or to reconsider before the BIA. Paragraph (b)(4)(i) would contain updated fees for Forms EOIR-40, -42A, and -42B.

The NPRM also proposed to revise paragraph (d) to correct a cross-reference to the regulations regarding FOIA. The current regulation incorrectly stated that the FOIA regulation is located at 28 CFR 16.11, and the NPRM corrected that cross-reference to 28 CFR 16.10.

c. Part 1208 – Procedures for Asylum and Withholding of Removal

The NPRM proposed to amend 8 CFR 1208.7 to change the citation “§ 103.7(c)” to “8 CFR 106.3” in paragraph (c), in accordance with DHS’s proposed rule.

d. Part 1216 – Conditional Basis of Lawful Permanent Residence Status

Also in accordance with DHS’s rulemaking, the NPRM proposed to amend 8 CFR part 1216. In § 1216.4, the NPRM proposed to change the citation “§ 103.7(b)” to “§ 106.2” in paragraph (a)(1). It also proposed to change the citation “§ 103.7(b)” to “§ 106.2” in paragraph (b). In § 1216.6, the NPRM proposed to change the citation “§ 103.7(b)(1)” to “§ 106.2” in paragraph (a)(1).

e. Part 1235 – Inspection of Persons Applying for Admission

Also in accordance with DHS’s rulemaking, the NPRM proposed to amend 8 CFR 1235.1 to change the citation “§ 103.7(b)(1)” to “§ 103.7(d)” in paragraphs (e)(1)(iii), (e)(2), and (f)(1). This final rule, however, does not adopt that change because an intervening rulemaking, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, signed by the Attorney General and the Acting Secretary of Homeland Security on December 2, 2020, removed and reserved 8 CFR 1235.1 altogether.

f. Part 1240 – Proceedings to Determine Removability of Aliens in the United States

The NPRM proposed to amend 8 CFR part 1240 to correct cross-references to EOIR’s own regulations. In § 1240.11, the NPRM proposed to change the citation “§ 103.7(b)(1) of 8 CFR chapter I” to “§ 1103.7(b)(1) of this chapter” in paragraph (f). In

§ 1240.20, the NPRM proposed to change the citation “§ 103.7(b) of 8 CFR chapter I” to “§ 1103.7(b) of this chapter” in paragraph (a).

g. Part 1244 – Temporary Protected Status for Nationals of Designated States

The NPRM proposed to amend 8 CFR part 1244 in accordance with DHS’s proposed rulemaking. In § 1244.6, the NPRM proposed to change the citation “§ 103.7 of this chapter” to “8 CFR 106.2”. Further, in § 1244.20, the NPRM proposed to change the citation “8 CFR 103.7(b)” to “8 CFR 106.2” in paragraph (a).

h. Part 1245 – Adjustment of Status to that of Person Admitted for Permanent Residence

The NPRM proposed to amend 8 CFR part 1245 in accordance with DHS’s proposed rule.

In § 1245.7, the NPRM proposed to change the citation “§ 103.7 of this chapter” to “8 CFR 103.7 and 8 CFR 103.17” in paragraph (a).

In § 1245.10, the NPRM proposed to change the citation “§ 103.7(b)(1) of this chapter” to “8 CFR 106.2” in paragraph (c).

In § 1245.13, the NPRM proposed to change the citation “§ 103.7(b)(1)” to “§ 106.2” in paragraphs (e)(1), (g), (j)(1), and (k)(1), and it proposed to change the citation “§ 103.7(b)(1)” to “§ 103.7(a)(2)” in paragraph (e)(2).

In § 1245.15, the NPRM proposed to change the citation “§ 103.7(b)(1) of this chapter” to “8 CFR 106.2” in paragraph (c)(2)(iv)(A), and it proposed to change the citation “§ 103.7(c)” to “§ 106.3” in paragraph (c)(2)(iv)(B). Further, in 1245.15, the NPRM proposed to change the citation “§ 103.7(b)(1)” to “§ 106.2” in paragraph (h)(1),

(n)(1), and (t)(1), and it proposed to change the citation “§ 103.7(b)(1)” to “§ 103.2(a)(2)” in paragraph (h)(2).

In § 1245.20, the NPRM proposed to change the citation “§ 103.7(b)(1)” to “§ 106.2” in paragraphs (d)(1), (f), and (g).

In § 1245.21, the NPRM proposed to change the citation “§ 103.7(b)(1) of this chapter” to “8 CFR 106.2” in paragraph (b)(2), and it proposed to change the citation “8 CFR 103.7(b)(1)” to “8 CFR 106.2” in paragraphs (h) and (i).

II. Public Comments on the Proposed Rule

A. Summary of Public Comments

The comment period for the NPRM closed on March 30, 2020, with 601 comments received.⁶ Organizations (including non-governmental organizations, legal advocacy groups, non-profit organizations, and religious organizations), congressional committees, and groups of members of Congress submitted 157 comments, and individual commenters submitted the rest. Most individual comments opposed the NPRM. All organizations but one opposed the NPRM.

B. Comments Expressing Support for the Proposed Rule

Comment: Some individuals and one organization expressed support for the NPRM. Some supportive commenters noted the length of time since EOIR last reviewed and updated its fees and agreed that the fee amounts should be brought more in line with the modern processing costs to the agency and the costs imposed by United States Citizenship and Immigration Services (“USCIS”) for similar forms or services.

⁶ The Department reviewed all 601 comments submitted in response to the rule; however, the Department did not post five of the comments to regulations.gov for public inspection. Of these comments, three were duplicates of another comment written by the same commenter, one was a blank comment without any attachment, and one was a comment specific to a prior agency rulemaking.

One commenter noted that the criminal and civil court systems also impose fees and fines. Commenters expressed gratitude that the rule would protect taxpayer dollars and stated that taxpayers should not have to be burdened by or pay for immigration-related costs and the immigration court system for non-citizens. Instead, commenters stated that immigrants need to pay for their own immigration-related expenses.

Two commenters characterized the current status quo without the rule as allowing some form of “free” immigration, which commenters stated should not be allowed.

Commenters also expressed a belief that the United States cannot afford the current immigration system any longer.

One commenter noted that the commenter’s father was an immigrant who paid all his own immigration-related costs.

Response: The Department appreciates the commenters’ support for the rule.

Comment: Four commenters who supported the Department’s reasoning for increasing EOIR’s fees suggested that the Department should consider a more modest fee increase instead of the full amounts proposed. These commenters were concerned that the proposed amounts might be too large and too sudden for people to afford, could render services unattainable, or are simply too high. On the other hand, two commenters suggested that the fees should instead be set at a higher amount.

One commenter suggested that the Department should require supporting documents for any fee-waiver requests. One commenter suggested in the future the Department should propose smaller increases every few years instead of waiting a lengthy period of time to impose such a substantial fee increase.

Response: The Department appreciates the commenters' suggestions and has taken the suggestions under advisement. Regarding suggestions about the proposed changes to the fee amounts, further discussion on the specific fee amounts to be imposed is contained below in Section II.C.4 of this preamble and further discussion on fee waivers is contained below in Section II.C.5. The Department also acknowledges the comment regarding not waiting thirty years to increase fees again in the future and, going forward, expects to adhere more closely to the biennial fee review timetable established by the Office of Management and Budget ("OMB") and Congress.

C. Comments Expressing Opposition to the Proposed Rule

1. General opposition

Comment: Numerous commenters expressed general opposition to the NPRM and provided little to no reasoning for their opposition.⁷ Many commenters asked the Department to withdraw the NPRM with no supporting rationale. Other commenters expressed opposition to the NPRM based generally upon their belief that it undermines American values. One commenter opposed the NPRM as "rule by executive decree" that eroded the separation between Congress and the Executive Branch.

Response: The Department is unable to provide a detailed response to comments that express only general opposition without providing reasoning for such opposition, but the Department reiterates the need to implement this rulemaking in accordance with authority under section 286 of the Act (8 U.S.C. 1356) and the IOAA, especially in light of the length of time since EOIR's fees were last reviewed, notwithstanding Circular No.

⁷ Several comments expressed various USCIS-related concerns, such as opposition to USCIS-imposed fees for appeals and waiver requests. As a component of DHS, USCIS is a distinct agency from EOIR, a component of DOJ. This rule does not affect fees established by DHS. See 85 FR at 11866. Therefore, such concerns are outside the scope of this rulemaking.

A-25 Revised and 31 U.S.C. 902(a)(8). In subsequent sections of this final rule, the Department responds to comments that provided specific points of opposition or reasoning underlying their opposition.

Further, the Department disagrees that the rule undermines American values. The rulemaking is promulgated in accordance with the IOAA and section 286(m) of the Act (8 U.S.C. 1356(m)), which statutorily authorize DOJ to charge fees for immigration adjudication and naturalization services. Accordingly, since promulgation of this rule is squarely within the Department's congressionally authorized purview, the Department believes that this rule furthers American values, including the rule of law.

The rule does not constitute "rule by executive decree." Section 286(j) of the Act (8 U.S.C. 1356(j)) authorizes the Attorney General to promulgate regulations to carry out section 286 of the Act. The Administrative Procedure Act ("APA") establishes rulemaking procedures that agencies must follow when engaging in regulatory activity. *See generally* 5 U.S.C. 553. The Department properly exercised its regulatory authority under section 286(j) of the Act (8 U.S.C. 1356(j)) and followed all relevant APA procedures. Further, the IOAA provides additional authority for this action. See Section II.C.9. of this preamble for further discussion.

2. Opposition to current United States immigration system

Comment: Numerous commenters expressed general opposition to the current U.S. immigration system as a whole and included the following perceived concerns: inefficiencies throughout the system; problems with agency management and personnel; poor treatment of refugees and immigrants in comparison to the United States' wealth and the inscription on the Statue of Liberty; funding for a border wall; politicization of

immigration-related issues; and implementation of recent immigration policies, such as the Migrant Protection Protocols (“MPP”) and immigration judge performance measures, which commenters described as “case completion quotas.”

Many commenters emphasized the positive contributions of immigrants to American society and the economy; relatedly, commenters stated that taxpayers should share some of the cost burden for the forms, applications, or motions affected by this rule because the United States benefits from immigration. These commenters supported simplifying the immigration system so that immigrants may more readily immigrate to the United States and join American communities. Commenters also alleged that, if implemented, the rule would result in a decline in immigration, promote inequality within the immigration system, and overall harm the country.

Response: Commenters’ concerns regarding the immigration system as a whole and interest in more sweeping changes to the immigration system are far outside the scope of this rulemaking. The rule amends EOIR regulations specifically in regard to fees for applications, motions, and forms before EOIR. More specifically, and in accordance with EOIR’s fee review, the rule increases fees for EOIR applications, appeals, and motions in accordance with the authority discussed in Section I.A of this preamble and EOIR’s 2018 fee study; updates cross-references and discussion of DHS regulations regarding fees in response to DHS’s rulemaking regarding its immigration fees; and makes technical changes regarding FOIA requests and other internal cross-references. *See generally* 85 FR 11866. Accordingly, comments concerning Federal immigration policy across the Government and the immigration system as a whole are outside the rule’s limited scope of EOIR fees.

3. Objections to fee increases as a funding mechanism for EOIR

Comment: Commenters opposed the NPRM by stating that fees should not serve as a funding mechanism for EOIR's adjudication costs for various reasons: the Department is not statutorily required to recover the full cost of adjudications; the Department lacks authority to recover the full cost; and the Department, as a congressionally appropriated agency (rather than a fee-based agency), should be funded through such appropriations rather than fees. Further, commenters found the Department's determination that it was necessary to update its fees despite being an appropriated agency inadequate and conclusory. Commenters stated that congressional appropriations could adequately support EOIR operations. Some commenters stated that congressional appropriations would have been sufficient, but asserted that the President had diverted EOIR funding toward building a wall on the Southern border with Mexico.

Some commenters explained that fees need not recover the full cost because taxpayers should subsidize the fees in order to keep the relevant forms, applications, or motions "affordable" and "accessible" for certain people, such as asylum seekers, who would be unable to cover the full proposed fees. One commenter suggested the Department should in fact impose no fees. Another commenter suggested that EOIR should request additional congressional appropriations if the agency is concerned about the budgetary impacts of filing processing.

One commenter alleged that the Department exceeded its statutory authority because section 286(m) of the Act (8 U.S.C. 1356(m)) does not authorize "[r]aising fees that were previously sufficient, or near sufficient, by seven, eight, and even nine times their current amount."

Response: As an initial matter, commenters are correct that the Department, including EOIR, is funded by congressional appropriations. *See, e.g.*, Consolidated Appropriations Act, 2020, Pub. L. 116–93, 133 Stat. 2317, 2396 (Dec. 20, 2019) (appropriating to EOIR “\$672,966,000, of which \$4,000,000 shall be derived by transfer from the Executive Office for Immigration Review fees deposited in the ‘Immigration Examinations Fee’ account, and of which not less than \$18,000,000 shall be available for services and activities provided by the Legal Orientation Program”). It retains authority, however, to charge fees for immigration adjudications to recover up to the full costs expended by the agency in providing such services. INA 286(m), 8 U.S.C. 1356(m); *see also* Circular No. A-25 Revised (available at 58 FR 38142 (July 15, 1993)); 31 U.S.C. 9701(a)–(b) (encouraging agencies to be as self-sustaining as possible). Although the statutory authority requires consideration of various relevant factors, it is not restricted by a strict limit or cap, conditions related to taxpayer contributions or congressional appropriations, or principles of “affordability” or “accessibility”; therefore, the Department’s authority to impose fees is not limited in the ways proposed by the commenters. Despite its statutory authority and a rise in caseload and adjudication costs, EOIR’s fees have not been updated since 1986—over thirty years ago.

While the Department agrees with commenters that some agency costs are covered by appropriation, this does not obviate the purpose of the rulemaking, which is to lower costs to the taxpayers while still ensuring access to the immigration courts, as appropriated funds reflect costs to taxpayers. Commenters are incorrect that any of EOIR’s appropriated funds have been diverted outside the agency to fund construction of a border wall. Moreover, some of EOIR’s funding—e.g., the funding for the general

Legal Orientation Program (LOP)—cannot be re-purposed to offset costseven though a portion of that funding itself has been found to be financially wasteful. *See* LOP Cohort Analysis (Phase I) (Sept. 5, 2018), <https://www.justice.gov/eoir/file/1091801/download>; LOP Cohort Analysis Addendum (Phase I) (Jan. 29, 2019), and <https://www.justice.gov/eoir/file/1125596/download>.

The sufficiency of EOIR’s congressional appropriations is irrelevant for the purpose of this rule, which is to ensure EOIR fees more accurately reflect the costs for EOIR’s adjudications, consistent with the Department’s authority to impose fees under the IOAA (31 U.S.C. 9701) and section 286(m) of the Act (8 U.S.C. 1356(m)). These authorities demonstrate a congressional intent that, to the extent possible, agencies should levy a fee designed to ensure maximum self-sufficiency, even if the overall budget is supported and funded via congressional appropriations.

The updated fees are based on an assessment that accounted only for direct salary costs required for processing those documents subject to the rule. *See* 85 FR at 11869 (explaining that the survey did not consider overhead costs, costs of non-salary benefits, or costs associated with processing corresponding applications or documents that may be filed with the applications, appeals, and motions subject to the rule). Accordingly, the updated fees are based on a reduced estimate of the processing costs and, thus, inherently do not cover all related costs. The proposed rule did not, and the final rule does not, purport to cover all costs; instead, the rule seeks to update fees so that the fee amounts “more accurately reflect the costs for EOIR’s adjudications of these matters” while at the same time balancing “both the public interest in ensuring that the immigration courts are accessible to aliens seeking relief and the public interest in ensuring that U.S. taxpayers

do not bear a disproportionate burden in funding the immigration system.” 85 FR at 11870.

The Department never intended for this rulemaking to update fees in order to recover the entirety of processing costs or to fully fund EOIR’s adjudication costs. On the contrary, the Department balanced the public policy interest maintaining accessibility of the immigration courts for aliens while ensuring that U.S. taxpayers do not pay a disproportionate amount to fund the immigration court system. 85 FR at 11870. Indeed, as explained in the NPRM, the Government seeks to “recoup some of its costs when possible and . . . also protect the public policy interests involved.” *Id.*

4. Objections to amount of fee increases

Comment: Commenters generally objected to the amount of fee increases, stating that the fee increases were too high.

Commenters asserted that one of the Department’s justifications for its proposed adjusted fees was premised on a miscalculation. Specifically, commenters stated that the Department calculated what the estimated increase in fees would have been if the Department had raised its fees on an annual basis since it last adjusted fees in 1986 by calculating the compound annual growth rate (“CAGR”), but asserted that the Department miscalculated the CAGR in some of the filings addressed in the NPRM: the Forms EOIR-40 and -42A and motions to reopen before the immigration court. *See* 85 FR at 11874. Commenters asserted that although these alleged miscalculations were small, they called the Department’s computational accuracy into question in arriving at the proposed fees.

Commenters asserted that the Department calculated the CAGR for Form EOIR-40 and Form EOIR-42A as 3.33 percent by inputting the \$305 proposed fees, \$100 current fees, and the 33-year time period. Commenters asserted that the Department was 0.11 percent too low in its calculation, which should have yielded 3.44 percent CAGR for these forms. Likewise, commenters asserted that the Department miscalculated the CAGR for Form EOIR-42B, at a 3.84 percent CAGR. Commenters asserted that to reach this CAGR, the Department should have input the \$360 proposed fee for the Form EOIR-42B, as well as the \$100 current fee for the form, and the 33-year time period passing between 1986 and 2019 to get a 3.96 percent CAGR. Instead, DOJ calculated a 3.84 percent CAGR for this form. Commenters also asserted that the Department miscalculated the CAGR for motions to reopen before the immigration court, which it calculated as 0.82 percent. Commenters stated that the Department should have input the proposed \$145 fee to file a motion to reopen before the immigration court, the \$110 current fee for this motion, and the 33-year timespan to reach a 0.84 percent CAGR.

Commenters similarly criticized the Department's methodology in calculating the costs for each application because the Department did not provide justification or explanation on how the Department determined the estimated costs. Additionally, commenters objected to the fees based on the assertion that the fee increases are unrelated to the cost of inflation.

Commenters further objected to the Department's estimates of the costs associated with processing applications because they were based on current processing methods and failed to account for foreseeable changes in future processing costs. As an example of a consideration the Department failed to include, commenters cited the increased

prevalence of affirmances without opinion (“AWO”) on appeals to the BIA following the publication of the final rule, Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 84 FR 31463, on September 3, 2019. Commenters also asserted that the Department failed to consider that the proposed rule would have the effect of reducing the number of case filings, which would result in a decrease to the Department’s expenses. Commenters objected to the Department’s inclusion of \$327.83 of administrative costs in the total costs of appeal, which they stated was one third of the overall calculated cost.

Commenters expressed concern regarding the Department’s reliance on a spring 2018 study conducted within the Department. Commenters asserted that the Department failed to provide necessary detail about the survey process and therefore the commenters were concerned because they were unable to verify the validity of the study.

Commenters suggested that, at a minimum, the Department should have addressed whether aliens who are currently making the relevant filings are able to afford the filing fees and should have set fees at a level that most individuals are able to pay.

Commenters also suggested that recently implemented “case completion quotas” would affect the EOIR cost analysis, because immigration judges would take less time to make decisions.

Response: The Department notes that some commenters believe that the Department miscalculated the CAGR for Form EOIR-40, Form EOIR-42A, and motions to reopen before the immigration court. Regardless of any miscalculations with respect to the CAGR, as commenters recognized, the Department’s calculations differed from the commenters’ recommended calculations to a small degree (.11, .12, and .02 percent

differentials, respectively) such that they could be attributed to differences in rounding estimates. Even assuming, arguendo, that the commenters' assertions are correct, the Department notes that such calculations need not be exact, so long as the "fees are no greater than *the rough actual cost* of providing the services." *Ayuda, Inc. v. Att'y Gen.*, 661 F. Supp. 33, 36 (D.D.C. 1987) ("*Ayuda I*") (emphasis added), *aff'd*, 848 F.2d 1297 (D.C. Cir. 1988) ("*Ayuda II*"); *see also Nat'l Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1108 (D.C. Cir. 1976) ("To be valid, a fee need only bear a *reasonable* relationship to the cost of the services rendered by the agency." (emphasis in original)). In addition, these calculations were provided for illustrative purposes only and are unrelated to the underlying calculations of the new fee amounts based on the agency's adjudicatory costs.⁸ The Department notes, for example, its decision to round several of its fees to the nearest five-dollar increment and its decision to round the average of actual costs for motions to reopen and reconsider before the immigration courts. 85 FR at 11870. The Department notes that it did not receive any comments objecting to this decision. Accordingly, the Department believes that its calculations are reasonable and fair given the rough actual cost of providing the services and will not make any alterations to the proposed fees on this basis.

The inclusion of administrative costs in EOIR's cost calculations when determining the new fees was appropriate. Administrative costs are essential to the processing and, in turn, the adjudication of these applications, appeals, and motions and are part of a long-standing process necessary to handle the volume of appeals with expediency, appropriate case management, and ensuring that parties before the BIA

⁸ Further, the CAGR calculations have been updated below in section IV.D.

receive appropriate notice that is essential for due process. *See Board of Immigration Appeals Practice Manual*, Board of Immigration Appeals, <https://www.justice.gov/eoir/page/file/1250701/download> (last updated Oct. 5, 2020) (describing duties of Clerk’s Office at 1.3(e)). Further, while the Department agrees with commenters that some costs are covered by appropriations, this does not obviate the purpose of the rulemaking, which is to lower costs to the taxpayers while still ensuring access to the immigration courts, as appropriated funds necessarily reflect costs to taxpayers. Moreover, regardless of appropriations, OMB Circular No. A-25 Revised and 31 U.S.C. 902(a)(8) instruct agencies to review fees biennially and to recommend revisions to fees to reflect costs incurred.

The Department disagrees with commenters’ concerns that it did not adequately explain its methodology or justification for increasing costs. The Department has clearly stated that its purpose for the rulemaking is to ensure that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system while also ensuring that immigration courts remain accessible to aliens seeking relief. 85 FR at 11870. Neither OMB Circular No. A-25 Revised nor 31 U.S.C. 9701 indexes or otherwise limits a government agency’s ability to increase fees only to the level of inflation. Moreover, the underlying costs that go into EOIR’s fee calculations—e.g., salary costs—are not necessarily indexed to inflation, making an inflation percentage a poor metric for calculating appropriate fees. Additionally, the Department has explained its methodology in calculating the CAGR and its consideration of the availability of fee waivers. 85 FR at 11874 (“Taken over the 33-year timespan from 1986 to 2019, the proposed fee increases would represent compound annual growth rates ranging from 0.82 percent to 6.84

percent. As demonstrated in the chart above, these increases are marginal in terms of inflation-adjusted dollars. While EOIR recognizes that the new fees will be more burdensome, fee waivers are still possible for those who seek them.”). However, in light of numerous comment requests, the Department is publishing the data collected in its spring 2018 study, accompanied by an updated dataset that was applied to that study when finalizing this rule, upon which it has based its calculations in the docket of this rulemaking. This data should further illustrate the Department’s careful process and data-driven consideration behind setting the new fees. The Department disagrees with commenters’ statements that the Department has failed to consider future changes to foreseeable processing costs. Commenters’ suggestions that processing costs would change as a result of more AWO decisions, fee waiver adjudications, three-member BIA decisions, and use of video conferencing (VTC) are too speculative, illogical, or not supported by evidence. For example, regarding the use of VTC, EOIR must engage in the same adjudicatory steps, which would presumably result in the same processing costs as with in-person hearings. Similarly, EOIR engages in the same adjudicatory steps to determine whether a decision is issued by one Board member or a three-member panel, so the processing costs of those steps would be largely unaltered. *See* 8 CFR 1003.1(e). Moreover, although the number of appeals has increased significantly in the past three years, and is expected to continue increasing, the specific mix of decisions produced by those appeals—e.g., AWO, summary dismissals, single-member decisions, three-member panel decisions—is impossible to predict and depends on the facts of each appeal applied to the relevant regulatory criteria. *See Exec. Office for Immigration Rev. Adjudication Statistics: All Appeals Filed, Completed, and Pending*, Exec. Office for Immigration

Rev., July 14, 2020, *available at*

<https://www.justice.gov/eoir/page/file/1248506/download>; 8 CFR 1003.1(d)(2); 8 CFR 1003.1(e)(4)-(6). Commenters opined that because of the higher fees associated with filings, there might be a possible reduction in case filings; however, neither the projection that a significant number of aliens would be unable to afford filing fees nor the projection that there would be a reduction in filings is supported by evidence. Some commenters stated that the Department did not appropriately consider whether cases decided by the BIA would be precedential or non-precedential; however, the Department fails to see how the precedential impact of a case would affect processing costs for an individual case. Moreover, as the fee charged for an appeal is unrelated to the subject-matter of that appeal, there is no basis to expect that the changes to the appeal fees will cause more or fewer decisions to be designated as precedential.

With respect to comments that the Department should have set the filing fees at a rate that most aliens would be able to pay, the Department notes that it does not generally have an alien's financial records at its disposal for review. In those circumstances in which the agency might have such information available, it is due to the information's submission in support of fee waivers filed under the current fee schedule—submissions made by a group of people who would be in the same circumstance under the new amounts. Moreover, to the extent the Department possesses information that may serve as a proxy for an alien's financial status—e.g., the ability of an alien to retain representation or the ability of an alien to pay application fees set by DHS, which are generally much higher than those set by EOIR—that information suggests that most aliens would be able to afford EOIR's proposed fees.

Comment: Commenters also stated that the Department's calculations are flawed because its calculations are based on the cost to the taxpayer per adjudication, but the Department does not break down the number of appeals filed by the Government as compared with the number of appeals filed by the alien. The commenters asserted that it is fundamentally flawed logic to calculate the cost to the taxpayer of the current number of appeals without specifying how many appeals are filed by DHS, particularly in light of anecdotal evidence that DHS has recently filed appeals in a higher percentage of cases than in the past. Commenters noted that DHS does not have a filing fee associated with its appeals, so there is no incentive for DHS to limit its filings to meritorious appeals. Similarly, commenters averred that if the Department's concern relates to the high pending case load, then DHS should bear some financial responsibility in the process because DHS has control over the number of cases filed and therefore initiated before immigration courts.

Response: Commenters misconstrue the Department's analysis regarding the basis for the new fees. As explained in the NPRM, EOIR conducted a comprehensive study using activity-based costing to determine the cost to EOIR for each form and motion for which EOIR imposes a fee under 8 CFR 1103.7(b). 85 FR at 11869. This study was completed to comply with the IOAA and section 286(m) (8 U.S.C. 1356(m)) of the Act; it was not a response to the high pending case load, though the increased volume in recent years highlights the Department's failure to bring the fees more in line with the current costs. Through the 3-phase study, EOIR determined the cost for each form and motion by allocating average direct salary costs to each step in an average process map for how the fee, application, or motion works through the adjudicatory process. *See id.*

In other words, EOIR totaled the total salary costs for the different EOIR staff involved in the processing and adjudication for each form and motion, based on the average time each type of official spends in that processing and adjudication, to determine an average processing cost. *See id.*

The processing costs identified by the fee study, and in turn the new amounts to be charged for these forms and applications, are, as a result, not tied to the volume of the forms or motions filed, either in total or by DHS. Instead, for example, the identified cost for the adjudication of a Form EOIR-26 for an appeal to the BIA from an immigration judge decision, as determined by the study, would be the same if the Department received one appeal as it would be if EOIR received any other number. This is because it would take the same time, considered as an average, for the different BIA staff members to process each individual appeal. Accordingly, the relative volume of appeals (or other forms or motions) DHS files, including trends in those filings, is irrelevant to the Department's determination to update the fee amounts. Nevertheless, in response to the commenters' concerns, the Department has recalculated the receipts reflected in the NPRM to attempt to best account only for those filings by aliens and the resulting costs to the taxpayers.⁹

Form/Motion	Current Fee	1986 Fee Inflated to 2019 Dollars	Proposed Fee	FY 2018 Receipts	Current Fee Collection	Proposed Fee Collection	Fee Collection Difference
EOIR-26	\$110	\$252.63	\$975	29,123	\$3,203,530	\$28,394,925	\$25,191,395
EOIR-29	\$110	\$252.63	\$705	1,914	\$210,540	\$1,349,370	\$1,138,830
EOIR-40	\$100	\$229.66	\$305	158	\$15,800	\$48,190	\$32,390
EOIR-42A	\$100	\$229.66	\$305	3,426	\$342,600	\$1,044,930	\$702,330
EOIR-42B	\$100	\$229.66	\$360	30,421	\$3,042,100	\$10,951,360	\$7,909,460
MTR	\$690	\$252.63	\$145	18,132	\$1,994,520	\$2,629,140	\$634,620
OCIJ ¹⁰	\$110	\$252.63	\$895	7,414	\$815,540	\$6,635,530	\$5,819,990

¹¹ These numbers include both motions to reopen and motions to reconsider filed at the BIA level.

EOIR-45	\$110	\$252.63	\$675	0	\$0	\$0	\$0
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85 FR at 11870–71.

The Department also disagrees that the lack of a set fee for DHS incentivizes DHS to file non-meritorious forms or motions any more than the relatively low fees currently in place incentivize respondents to file non-meritorious forms or motions. DHS is represented before EOIR by attorneys from U.S. Immigration and Customs Enforcement (“ICE”), Office of the Principal Legal Advisor, in Field Offices around the country. DHS attorneys are bound by the same standards of professional conduct as private attorneys, and the Department expects all EOIR practitioners to behave in a professional manner consistent with such obligations, including by not filing knowingly unmeritorious appeals or other applications or motions. *See, e.g.,* Model Rules of Professional Conduct R. 3.1 (2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_1_meritorious_claims_contentions/ (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

Comment: Commenters noted that the fees in the NPRM are higher than fees charged in various Federal courts. Some commenters opined that EOIR’s fees should be lower than Federal court fees due to the breadth of issues covered in some Federal courts, as well as their structural complexity. Additionally, commenters stated that the proposed fees are higher than the fees charged by several other agency bodies that perform adjudicative functions. In light of these comparisons, commenters asserted that the fees

in the NPRM are unreasonable. One commenter stated that the BIA appeal fee would be the highest appeal fee charged by any court.

Response: The immigration court system is distinct from the Federal court system. Immigration judges are appointed as administrative judges by the Attorney General to conduct specified proceedings under the Act and by regulation, and the BIA is an administrative tribunal that primarily decides appeals from immigration judges. *See* 8 CFR 1003.10(a); 8 CFR 1003.1(b). In contrast, Federal courts are established under Article III of the U.S. Constitution, and Article III judges are appointed by the President and confirmed by the Senate. *See* U.S. Const. art. III, sec. 1.

The Department is authorized to charge fees for immigration adjudication and naturalization services and to set those fees at a level that ensures full recovery of providing such services. INA 286(m), 8 U.S.C. 1356(m); *see also* 31 U.S.C. 9701(a) (explaining that “each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible”). In contrast, the Federal court system is not explicitly required by statute to focus on cost recovery and burdens to taxpayers when setting fee schedules. *See generally* 28 U.S.C. ch. 123.

Moreover, Article III courts pass along additional costs to litigants that EOIR does not, making a simple comparison of appeal fees misleading.¹² For example, appellants in civil cases in Article III courts may be required to post an appellate bond to ensure payment of costs on appeal, which is not a requirement for an appeal within EOIR. *See*

¹² Commenters appear to draw a comparison between appeals of immigration judge decisions to the BIA and petitions for review of BIA decisions filed in Federal court, but that comparison mixes appeals from a trial level to an appellate level with petitions for review from a final agency decision filed directly at the appellate level. A more appropriate comparison would be comparing only appeals from a trial level to an appellate level and, thus, comparing appeals from an immigration court to the BIA with appeals from a Federal district court to a circuit court of appeals.

Fed. R. App. P. 7. Similarly, the appellant in an Article III case is generally required to pay for the cost of the transcript of the proceeding below, whereas the BIA provides a transcript to both parties at no cost. *See* Fed. R. App. P. 10(b)(4). Once these additional costs are factored into the cost of an appeal in Federal court, it is not clear that the cost of a Federal appeal from a district court decision is lower than the cost of an appeal from an immigration judge to the BIA.

Regarding commenters' assertions about Federal courts dealing with more complex and wider-ranging issues, the IOAA sets out a list of factors for consideration when setting fee amounts: fairness, "the costs to the Government," "the value of the service or thing to the recipient," the "public policy or interest served," and "other relevant facts." 31 U.S.C. 9701(b). Even if the "breadth of issues" before a court or the issues' "structural complexity" could be considered an "other relevant fact" under the IOAA, the Department disputes that either of those factors could even be quantified, as suggested by the commenters. Moreover, courts have determined that fees "need only bear a reasonable relationship to the cost of services rendered by the agency." *Ayuda I*, 661 F. Supp. at 36 (quoting *Nat'l Cable Television Ass'n*, 554 F.2d at 1108).

The Department also disagrees with commenters' comparisons of EOIR's fees with fees charged by other agencies and the conclusion that EOIR's fees are consequently unreasonable. First, the *Ayuda* court succinctly resolved the first argument: "Plaintiffs' final challenge to the amount of the fees involves the assertion that they are excessive compared with certain court fees and emphasizes that other agencies are not charging for similar services within the purview of the statutes they administer. None of these observations are relevant. Each agency is entitled to set its own fees as it chooses and

make its own decisions. Additionally, the missions of other agencies do not exclusively focus on handling matters of those without lawful status in the United States. The acts of one are not controlling on another.” *Ayuda I*, 661 F. Supp. at 36. Second, as previously explained, the court found that fees must be reasonably related to the cost of the service provided. *See id.* Accordingly, the Department finds comments to the contrary unsupported by case law and retains the updated fee amounts as proposed in the NPRM.¹³

Comment: Commenters opposed the NPRM because they believed that the proposed increases in fees, which would establish fees three to eight times higher than existing fees, would result in many more applications for fee waivers. Commenters asserted that the Department did not account for the fact that this increased number of fee waiver requests would add costs and divert judges’ time from substantive claims. Commenters opined that this was particularly true with respect to the costs recouped from the \$50 fee for asylum applications, and one commenter noted that EOIR should be making it more efficient to apply for asylum rather than requiring additional hurdles.

Commenters also predicted that because more people would request fee waivers for the increased fees, EOIR would likely lose revenue, rather than make revenue.

Additionally, commenters stated that in DHS’s proposed fee schedule, USCIS would exclude asylum seekers from eligibility for a fee waiver, and commenters expressed concern that the Department would similarly do so. Another commenter expressed concerns about the fee waiver process for USCIS.

¹³ The Department does note that even if comparisons to other agencies were relevant, the fees charged by other agencies adjudicating immigration-related applications have been substantially higher than fees charged by EOIR for many years. For example, the current fee for an appeal or motion charged by USCIS is \$675, which is well above EOIR’s current \$110 fee and will remain significantly higher than EOIR’s new fee for a motion to reopen filed with an immigration court.

Commenters asserted that if the Department were to impose a filing fee for asylum applications, the fee waiver process should be clear, reviewable, and robust. One commenter recommended that a one-page fee waiver form specifically for asylum applications be made available in several languages. The commenter explained that it would be comparable to proceeding in forma pauperis, common in the Federal court system.

One commenter noted that Federal courts give a party 21 days to pay the fee or file a renewed fee waiver request following a denied fee waiver request. That commenter noted that while a fee waiver is available for individuals before EOIR, it is not comparable to the policies in the Federal court system.

Second, commenters alleged that the fee waiver process is an insufficient remedy for low-income individuals because determinations are inconsistent. Commenters explained that, in their experience, some immigration courts granted fee waivers as a matter of course, while other immigration courts rarely granted fee waivers at all. Some commenters noted that, while USCIS provides criteria for fee waivers, it was impossible to know the criteria by which EOIR adjudicates fee waiver requests and that the lack of standards could be considered arbitrary and capricious under the APA. 5 U.S.C. 706(2)(A). Commenters suggested that criteria could include specific documentation to file with the request and qualification guidelines, such as income thresholds, for eligibility. Commenters also noted that relevant information about fee waivers is not provided by immigration judge advisals or the Practice Manuals, and, when information is provided (e.g., chapter 3.4(d) of the Immigration Court Practice Manual), such information is inconsistent among various sources. *See Immigration Court Practice*

Manual, Exec. Office for Immigration Rev.,

<https://www.justice.gov/eoir/page/file/1258536/download> (last updated Nov. 18, 2020);

Board of Immigration Appeals Practice Manual, Exec. Office for Immigration Rev.,

<https://www.justice.gov/eoir/page/file/1250701/download> (last updated Oct. 5, 2020).

Commenters were also concerned that fee waivers, if granted, constitute a negative factor in a public charge determination.

Third, commenters opposed fee waivers as a viable solution because of the discretionary nature of fee waiver determinations. One organization opposed the rule, stating that the “possibility of a discretionary fee waiver does not serve the same function as a reasonable fee that most individuals subject to EOIR proceedings can afford.” The organization explained that requesting a fee waiver under the current fee waiver process does not equate to paying the associated fee with an application because paying the fee provides, as a matter of right, an opportunity to have such application adjudicated by the agency while requesting a fee waiver “simply provides the adjudicator with the option of granting a fee waiver and then considering the merits of the underlying filing. . . . Although immigration judges *may* grant a fee waiver if individuals establish that they are unable to pay, the regulations do not require them to grant fee waivers even to an individual who has provided proof of inability to pay.” Relatedly, commenters expressed skepticism of such discretion, stating that immigration judges are not independent and are instead subject to the Attorney General’s guidance and orders. For aliens who file a Form EOIR-26A and lack work authorization, another commenter suggested that the Department institute a rebuttable presumption that the alien is unable to pay the fee.

Some commenters stated that it was proper for the Department to rely on taxpayers to subsidize adjudication costs, rather than rely on fee increases and fee waivers, stating, for example, “[t]he burden of correcting for unjust outcomes SHOULD be borne [sic] by society (e.g. the ‘taxpayers’) not by the affected person alone.”

One commenter was also concerned that the proposed high fees would deter individuals from even considering filing the applications.

One commenter explained that the lack of guaranteed representation in immigration proceedings exacerbated concerns regarding fee waivers, and an organization explained several other aspects about the current fee waiver process that are problematic, including the signature requirement and procurement of income documentation.

Overall, commenters recommended that the Department make fee waivers more “broadly available.”

Response: While the Department agrees that it is possible—and perhaps even probable—that the increased fees may lead more aliens to seek a fee waiver than would without this rule, specific concerns regarding the effects of such fee waivers on adjudications or the ultimate total volume of fee waiver applications that EOIR will receive are speculative. Respondents’ financial information submitted in support of fee waiver requests has not been tracked or universally evaluated to provide any indication that an increase in fees, regardless of amount, will necessarily result in an increase in fee waiver applications. Moreover, for most of the proposed fees, respondents’ general ability to obtain work authorization while an application is pending, their access to financial resources allowing them to travel to the United States in the first instance, their access to financial resources in the United States for a sufficient period of time necessary

to even trigger the need for a filing that requires a fee, their general ability to obtain representation, their general ability to pay existing fees for applications or for ancillary applications, and the ultimate importance of the benefit they seek (i.e., legal status or being able to remain in the United States indefinitely) are all potential countervailing considerations that would not necessarily support the conclusion that the proposed fee increases will inevitably lead to more fee waiver applications. Put more simply, a respondent who could not afford a lesser amount will presumably not be able to afford the new, higher amount, but it is speculative to assert that all who could afford the lower amount will necessarily not be able to pay the higher fee. Rather, a particular subset of those who can afford the current fees currently may not be able to after the increases, but the precise size of that subset, though potentially not as large as commenters suggested for the reasons given above, is not estimated.

EOIR has adjudicated fee waivers for many decades, and both Board members and immigration judges are experienced in adjudicating such requests. Although differences in adjudicatory outcomes are inherent in any system rooted in adjudicator discretion, there is no evidence that Board members or immigration judges would be unable or unwilling to adjudicate fee waiver requests consistent with applicable law and their respective independent judgment and discretion. *See* 8 CFR 1003.1(d)(1)(ii), 1003.10(b). Commenters have not presented any evidence that EOIR would not continue to grant appropriate fee waivers. *See Ayuda II*, 848 F.2d at 1299 n.4 (“Appellants intimate that the waiver provision, 8 C.F.R. § 103.7(c)(1) (1986), does not in fact mitigate the deterrent effect of the increased fees because the Attorney General retains discretion to decline to waive the fees even after an applicant has demonstrated his or her inability to pay. We

have been directed to no evidence, however, that the Attorney General has in fact exercised his discretion in this manner.”). Any calculations attempted by the Department to “account for” the effects of fee waiver adjudications in light of the updated fees would be unreliable because fee waivers are discretionary by nature and the updated fees have not been in force. Accordingly, while the Department acknowledges that it did not include in the NPRM projected costs related to adjudication of fee waivers resulting from the rule, the Department disagrees that inclusion of such costs is necessary or beneficial. Moreover, including such costs would have likely led to a greater fee increase. Further, because concerns regarding lost revenue are “purely speculative,” the Department is unable to respond.¹⁴ In addition, the agency is committed to ongoing review and, as necessary, updating of its fees. If the new fees lead to unanticipated results, the agency can evaluate those results upon its next biennial review.

Regarding commenters’ concerns with USCIS’s proposed fee waiver regulations regarding the Form I-589 application or USCIS’s fee waiver process in general, the Department notes that USCIS is a component of DHS, which is a separate agency from DOJ, of which EOIR is a component. *See Operational and Support Components,*

¹⁴ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (per curiam). “In determining what points are significant, the ‘arbitrary and capricious’ standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true.” *Id.* The purpose of updating the fees is to better align the fees with the agency’s current processing and adjudication costs following an over 30-year period in which the fees were not updated, not to subsidize the Department’s, including EOIR’s, congressional appropriations. As a result, the number of fee waivers requested does not directly correlate with the Department’s total revenue. Accordingly, even if the number of fee waiver requests increased, the Department’s conclusions in the rulemaking would still be reasonable: processing costs would continue to exceed the assessed fees, hence the decision to update the fees to more accurately reflect and recover EOIR’s adjudication costs. Further, commenters’ concerns on this point provide no factual or policy bases to which the Department may provide a response; thus, the Department finds such concerns to be mere speculation and is unable to provide a response.

Department of Homeland Security, <https://www.dhs.gov/operational-and-support-components> (last updated Nov. 17, 2018). Further, this rulemaking specifically involves EOIR fees, and the USCIS fees and applications referenced by the commenters pertain to a separate USCIS-specific rulemaking. See U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 84 FR 62280 (Nov. 14, 2019) (proposed rule); 85 FR 46788 (Aug. 3, 2020) (final rule).¹⁵

Further, this rule does not amend the current procedure regarding how DHS forms are treated in immigration court. Accordingly, this rule does not change the practice that neither the BIA nor the immigration judge may grant a fee waiver “with respect to the fee prescribed for a Department of Homeland Security form or action that is identified as non-waivable in regulations of the Department of Homeland Security.” 8 CFR 1103.7(c). Accordingly, the waivability of the fee for the Form I-589 filed with USCIS is ultimately determined by DHS’s regulations and the waivability of the fee for the Form I-589 filed with EOIR is determined by the DOJ regulation that, in turn, cross-references DHS regulations.¹⁶

¹⁵ The final rule related to fees charged by DHS was preliminarily enjoined by two federal district courts prior to its effective date. *Immigrant Legal Resource Ctr. v. Wolf*, No. 20-cv-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020); *Nw. Immigrants Rights Proj. v. U.S. Citizenship & Immigration Servs.*, No. 19-3283 (RDM), 2020 WL 5995206 (Oct. 8, 2020). Although this final rule updates cross-references in EOIR’s regulations to DHS’s regulations to account for the DHS rule’s amendments of DHS’s regulations, the DHS fees remain governed by DHS’s previous regulations while the aforementioned injunctions remain in effect. Because the ultimate resolution of the litigation challenging the DHS fee rule is unknown, this final rule amends EOIR’s regulations to include cross-references to both the previous DHS regulations and the new regulations to ensure that the cross-references do not become inaccurate regardless of how the litigation is resolved.

¹⁶ The Department notes that DHS’s 2019 fee NPRM proposed reorganizing its regulations regarding fee waivers. Compare 8 CFR 103.7(c), with 84 FR 62363 (proposed 8 CFR 106.3 (Fee waivers and exemptions)). That reorganization was adopted by a final rule, 85 FR at 46920, but that rule was subsequently enjoined before it took effect. See note 16, *supra*. To the extent that DHS’s regulations allow a fee waiver for a DHS form, the Department would continue to apply that same fee waiver eligibility for the form when it is submitted to EOIR.

The rule makes no substantive amendments to EOIR's asylum regulations located at 8 CFR part 1208 or DHS's fee schedule. *See* 8 CFR 1103.7(b)(4)(ii). Further, the Department continues to apply USCIS fees in accordance with the regulation at 8 CFR 1103.7(b)(4)(ii). For these reasons, comments related to USCIS's asylum application and the corresponding \$50 fee are outside the scope of this rulemaking.

Regarding comments referencing USCIS's criteria for fee waivers and the Department's lack of similar, consistent criteria and information dissemination, the Department appreciates this feedback. At present, USCIS adjudicates 22 applications eligible for a fee waiver, 8 CFR 103.7(c)(3)-(4),¹⁷ including many that are not adjudicated by EOIR, such as applications for naturalization. Thus, USCIS receives many more fee waiver requests than EOIR.¹⁸ Further, fee waivers directly impact USCIS's budget and, thus, its operations as a generally fee-funded agency. For example, USCIS recently estimated that it would forgo over \$900 million due to fee waivers and exemptions, which is significantly more than EOIR's total budget. *See* 84 FR at 62298.

Consequently, it is appropriate for USCIS to have more defined criteria for fee waivers than EOIR because the two agencies are not similarly situated in terms of the impact of such waivers. Nevertheless, the Department may consider the issue further in a future rulemaking should a need for additional clarifications regarding adjudication of fee waivers arise following this rule's implementation. Moreover, the Department also notes that nothing precludes the Board, which receives most fee waiver requests and has

¹⁷ If the current injunctions against the DHS fee rule are lifted, DHS's fee waiver provisions will be located in 8 CFR 106.3.

¹⁸ USCIS estimates receipt of approximately 1.5 million applications in FY 2019/2020 without a fee payment, which is significantly higher than EOIR's receipt of all applications and higher than EOIR's total pending caseload. *See* 84 FR at 62288.

extensive experience adjudicating them, from issuing a precedential decision regarding the appropriate criteria for a fee waiver, consistent with its authority to “provide clear and uniform guidance to [DHS], the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations.” 8 CFR 1003.1(d)(1).

Despite commenters’ allegations that fee waivers are inconsistent around the country, the Department has no evidence or data, and none was provided by commenters, regarding the specific adjudications of fee waivers that would support such statements.

The Department disagrees with commenters that the discretionary nature of fee waivers is problematic. Fee waiver determinations are a matter of discretionary authority and are based upon the unique facts of each case. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c). When evaluating such requests, EOIR adjudicators, including immigration judges and Board members, exercise independent judgment and discretion. *See* 8 CFR 1003.1(d)(1)(ii), 1003.10(b). The appropriate regulations, 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c), clearly delineate the requirements for fee waivers, and the Department expects its adjudicators to issue fee waiver determinations in a fair manner and consistent with the regulations. The Attorney General does not mandate a specific outcome for fee waiver determinations.

Given this discretionary nature, filing a fee waiver request does not automatically render the request granted. Moreover, the Department has determined, and courts agree, that the fee waiver process is a proper, viable solution for aliens who may be unable to pay updated fees. *See Ayuda II*, 848 F.2d at 1299 & n.4 (holding, in part, that the alleged

deterrent effects of increased fees are “mitigated by the provision for waiver of fees for aliens who certify their inability to pay”).

The Department agrees with commenters that some taxpayer subsidization for the costs of processing and adjudicating these EOIR applications and motions is appropriate; however, the Department disagrees with the extent of the commenters’ recommended subsidization. As stated in the NPRM, the updated fees do not cover the full adjudication costs. *See* 85 FR at 11868–69. Some costs—such as overhead costs, cost of non-salary benefits, or costs related to corresponding applications or documents accompanying items for which the Department updated fees—were not included in the Department’s calculations and are subsequently covered by congressional appropriation, which is funded, in part, by taxpayer dollars. *See id.* Accordingly, individuals who pay the updated fees will not bear the full adjudication costs, but taxpayers will also not bear a disproportionate share of the costs. *See* 85 FR at 11870.

The Department acknowledges commenters’ concerns that fees may affect an individual’s decision to file an application, but there is no evidence that filing fees discourage individuals from filing for lawful immigration status to which they believe they are entitled.¹⁹ The Department also emphasizes that an EOIR fee waiver remains available for those individuals who aver that they cannot pay the fee, and individuals should utilize the fee waiver process if they are concerned about the ability to pay fees. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c).

¹⁹ To the extent that increased filing fees may discourage individuals without valid claims from pursuing non-meritorious applications for dilatory purposes, the Department does not believe that possible consequence is sufficiently compelling to warrant not changing the fees to the levels proposed in the NPRM.

The remaining concerns likewise exceed the bounds of this rulemaking. The rule does not change the regulations regarding representation, or, as repeatedly mentioned, eligibility for fee waivers, which includes the signature requirement and income documentation. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c); *see generally* 8 CFR part 1292; 8 CFR 1003.16(b).

5. Concerns with fee increases for filing appeals with the BIA

Comment: Commenters' primary concerns regarding the proposed fee (\$975) for appeals to the BIA were that the fee is too high and too expensive for aliens in proceedings to afford and that, as a result, the fee will foreclose aliens' access to due process via administrative and, in turn, Federal appellate review of the immigration judge's decision(s). Commenters indicated a belief that this concern is exacerbated by the proposal to increase the fee by such a significant amount in the context of the COVID-19 pandemic. Many commenters highlighted that the proposed fee is an 800 percent increase (or a multiple of 8.6) from the \$110 fee currently attached to appeals.

Commenters highlighted particular classes of aliens who commenters believe would have a particularly difficult time paying the proposed fee, including individuals in immigration detention, asylum seekers, and "working class" respondents.

One commenter argued that the proposed fee is particularly unreasonable due to the number of BIA decisions issued as AWO, which the commenter says are "little more than a stepping-stone on the way to actual review by a circuit court." *See* 8 CFR 1003.1(e)(4).

Commenters compared the fee increase for filing an appeal to the BIA to other government programs that were struck down for conditioning access to services based on

an individual's ability to pay and discriminating between indigent and non-indigent individuals. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 380–82 (1971) (holding that due process of law prohibits a State from denying individuals access to the courts for the purposes of divorce proceedings based solely on an ability to pay); *Burns v. Ohio*, 360 U.S. 252, 257–58 (1959) (“There is no rational basis for assuming that indigents’ motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.”); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that a State cannot condition access to a trial transcript on the ability to pay and explaining that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”).

Commenters expressed concerns that the proposed rule would effectively render immigration judge decisions as final orders because the proposed fee increases would make it financially impossible for aliens to afford to pursue appeals before the BIA. *See* 8 CFR 1003.39 (“Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first.”). Commenters suggested that it is particularly important for aliens to have access to appeals because immigration judges do not have sufficient time to devote to each case and because “it is not uncommon for immigration judges to make errors.” Commenters stated that appellate review was necessary to correct errors that resulted in significant variations in grant rates of applications between

immigration courts. Commenters also stated that criticism of EOIR by the circuit courts demonstrated the necessity of BIA appeals for aliens who seek to assert their rights.

Commenters stated that recent administrative changes to immigration procedures make an alien's access to appeals and motions more important than ever. Specifically, commenters cited the following: the implementation of performance metrics for immigration judges; the implementation of a special docket for families who have arrived recently in the United States; docket shuffling; inaccurate court dates in Notices to Appear and Notices of Hearing; recent guidance on administrative closure determinations; recent guidance on continuance determinations; recent case-processing requirements for the BIA; and recent guidance on termination and dismissal determinations. Commenters also asserted that EOIR has become politicized by instituting an Office of Policy and appointing sitting immigration judges with asylum-denial rates of over 90 percent as permanent members of the BIA who could participate in precedential decision making. Commenters asserted that, because of these practices and policies, immigration judges are incentivized to issue removal orders and aliens face an increased likelihood of wanting to file appeals with the BIA. In support of these concerns with the immigration court system, commenters noted that the courts of appeals have at times similarly criticized the immigration courts. *See, e.g., Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (“[T]he adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”) Commenters further asserted that it was disingenuous for the Department to argue that increased appeals have become such a burden as to necessitate the promulgation of this rule when the increase in appeals has been a direct result of these Department actions.

Commenters further asserted that the increase in fees would prevent noncitizens from accessing Federal court review because they would be unable to afford the fees to appeal to the BIA, which is required for a decision to be administratively final for judicial review. *See* INA 242(a), 8 U.S.C. 1252(a) (allowing for judicial review of a “final order of removal”); *see also, e.g., J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016) (“Despite the gravity of their claims, the minors cannot bypass the immigration courts and proceed directly to district court. Instead, they must exhaust the administrative process before they can access the federal courts.”). Commenters averred that the proposed rule demonstrates the Department’s attempt to avoid oversight from the Federal courts by making appeals inaccessible. One commenter noted that the proposed fee for an appeal will increase the total cost for adjudication for aliens who go on to file a petition for review in Federal court to \$1,475. Commenters characterized this effect of the rule as allowing “the administration to both set immigration policy and adjudicate it without meaningful review by an independent judiciary,” noting that the Seventh Circuit recently criticized the BIA for failing to abide by its instructions. *See Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035–36 (7th Cir. 2020) (“In sum, the Board flatly refused to implement our decision. . . . We have never before encountered defiance of a remand order, and we hope never to see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt . . .”).

Commenters indicated a belief that the proposed fee for an appeal is purposefully designed to limit aliens’ access to due process or to dissuade aliens from filing an appeal. Commenters characterized the proposal as an intentional barrier to filing an appeal.

Commenters noted that appeals have secondary benefits beyond those which accrue to the appealing party alone. For example, appeals are the vehicle for the BIA to publish precedential decisions, which help the development of case law to properly implement the law in different and evolving circumstances and which help ensure consistency across the country. Commenters explained that this development of case law benefits the Nation generally by ensuring that the immigration laws are accurately and consistently applied.

Commenters noted that the proposed fee will be particularly difficult for aliens to raise in the 30 days allowed for an alien to file an appeal from an immigration judge's final decision.

Commenters explained that the rule is particularly harsh because the Department will not refund fees even when the noncitizen prevails on his or her appeal. Commenters asserted that when the BIA determines that an immigration judge erred it necessarily means that the noncitizen was treated unfairly by the immigration judge. While recognizing that the Equal Access to Justice Act does not directly apply in removal proceedings, commenters asserted that the Department could nonetheless refund appeal fees when noncitizen litigants are successful.

Response: First, the Department rejects commenters' allegations that the proposed rule is purposefully designed to limit access to appeals or impede aliens' due process rights. As explained in the NPRM, the rule is designed to ensure that the Department exercises its authorities under the IOAA, section 286(m) of the Act (8 U.S.C. 1356(m)), and OMB's Circular No. A-25 Revised. *See* 85 FR at 11866–67. Although the rule changes the amount that would be charged for filing an appeal, the Department has been

careful through the entire process to ensure that it does not affect the availability of a fee waiver.²⁰

As explained in the NPRM, the proposed fee for an appeal was determined following a comprehensive activity-based cost study that determined the cost incurred by EOIR to process those applications, appeals, and motions for which EOIR levies a fee. *See* 85 FR at 11868–70. The Department proposed the \$975 fee for filing an appeal with the BIA only after (1) determining the appropriate staff levels and time required to process and adjudicate each appeal and the average salary rates for applicable staff levels, based on data from the Office of Personnel Management (“OPM”) and the General Services Administration (“GSA”); (2) developing step-by-step process maps, with assigned times and staff levels, for how the BIA processes each appeal; and (3) allocating the salary costs from the GSA and OPM data to each step in the process, based on the time the step takes, the average salary of the responsible staff, and the percentage of total cases in which the step occurs. 85 FR at 11869. The Department acknowledges that \$975 is an increase from the \$110 fee that has been levied since 1986, though it amounts to an average annual increase of only slightly more than \$25 per year. Nevertheless, that is the amount that in fact represents the agency’s best estimate of the current processing costs for appeals, which are complex adjudications that require significant staffing input. In response to the commenter who argued that the proposed fee is unreasonable due to the BIA’s issuance of AWO decisions, the Department notes that \$975 is an average processing cost. Some appeals, such as those that raise multiple issues on appeal or that involve a particularly complex set of facts, take more time to adjudicate than others. By

²⁰ For further discussion of the availability of fee waivers, see section II.C.4.

regulation, Board members are to issue an AWO for certain less complex cases. 8 CFR 1003.1(e)(4). Because the determination of whether a case is appropriate for an AWO is a matter of legal judgment for the Board member after the initial review of the appeal, it would not be possible to charge one, possibly lower, fee for appeals in which the immigration judge order is ultimately affirmed without an opinion and a different fee for appeals that result in a written BIA decision. Instead, the Department believes it is reasonable to charge a single average processing cost for all appeals.

Fees cannot be based upon the reason for appeal or the result of the appeal. Fees are levied based on averages; this is common practice throughout government. For example, DHS charges a flat filing fee that is based on the average complexity of that filing's adjudications. *See, e.g.*, 84 FR at 62309 (proposing fee changes to H-2A and H-2B visas based on average adjudication times estimated by USCIS). To illustrate, DHS charges the same filing fee for an N-400, Application for Naturalization, regardless of whether the applicant is an 18-year-old who has not traveled outside of the United States since entry or an 80-year-old who has traveled back to his or her country of origin once a year for several decades. Adjudicating eligibility for the latter is likely to be far more complex and time-consuming.

In response to comments suggesting that variations in grant rates and circuit court criticism demonstrate the necessity for appellate review, the Department reiterates that nothing in this rule forecloses appellate review by the Board. Further, discussions of grant rate disparities often do not account for the unique factors of each case or the relevant applicable law, including variations in circuit law. Moreover, they frequently

also do not account for ecological inference problems by attempting to draw conclusions about individual adjudicators based solely on aggregate data.

The Department also notes that criticism is to be expected at times for any adjudicatory body, and that the vast majority of cases go without such critique.²¹ *See Exec. Office for Immigration Rev. Adjudication Statistics: Circuit Court Remands Filed*, Exec. Office for Immigration Rev., July 14, 2020, <https://www.justice.gov/eoir/page/file/1199211/download> (showing drop in circuit court remands filed from 1,081 in 2010 to 602 in 2019, and 134 in the first quarter of 2020). Moreover, as only the alien can appeal a case to Federal court, assertions based on circuit court decisions present only part of the overall picture of adjudications. Further, the Department states again that it does not believe that this rulemaking will limit an alien's right to seek appellate review.

As stated in the NPRM, this rule does not foreclose or limit the ability of aliens to seek a fee waiver for the appeal fee. *See* 8 CFR 1003.8(a)(3) (“The Board has the discretion to waive a fee for an appeal, motion to reconsider, or motion to reopen upon a showing that the filing party is unable to pay the fee.”); 85 FR at 11871. To the extent that an individual in immigration proceedings is concerned about his or her ability to pay the fee for an appeal, the Department expects that such an alien would file the Form EOIR-26A, Fee Waiver Request, and proceed with his or her case in the same manner as before the change in the fee.

²¹ The Department unequivocally rejects comments impugning the integrity or competence of its adjudicators and the suggestion that they behave incompetently or unethically solely because they do not grant every request for relief that the commenters believe should be granted.

Accordingly, the Department disagrees that the appeal fee is akin to other court fees cited by commenters that have been struck down for conditioning access on the ability to pay. *See, e.g., Boddie*, 401 U.S. 371; *Burns*, 360 U.S. 252; *Griffin*, 351 U.S. 12. In those cases there was no allowance made for individuals who were unable to pay the state-imposed fee. *See, e.g., Griffin*, 351 U.S. at 14 (“Indigent defendants sentenced to death are provided with a free transcript at the expense of the county where convicted. In all other criminal cases defendants needing a transcript, whether indigent or not, must themselves buy it.” (footnote omitted)). Here, however, the proposed fee does not prevent indigent individuals from accessing the BIA’s administrative review, and in turn the Federal courts, because a fee waiver remains available for those who are unable to pay the fee. 8 CFR 1003.8(a)(3).

In addition, because fee waivers remain available and the rule will not prevent aliens from filing an appeal with the BIA, the Department also disagrees with commenters that the increased fee for filing a BIA appeal will render immigration judge decisions final orders or foreclose Federal judicial review of EOIR decisions through alien-initiated petitions for review.²² To the extent that commenters believe that EOIR policies or procedures have increased the frequency or need for filing an appeal from an immigration judge to the BIA and, in turn, from the BIA to a circuit court, the

²² To the extent that commenters argued that the fee for an appeal is too high when considered together with the cost for filing a petition for review at the circuit court, the Department notes that consideration of any possible Federal court costs is unrelated to the expenses incurred by EOIR to process the appeal and outside the scope of this rule. Moreover, this comment presumes that the alien’s appeal at the BIA will be unsuccessful, which is not necessarily the case, or that the BIA’s decision is somehow legally deficient, which is a presumption the Department declines to make. Nevertheless, EOIR notes that other court systems also provide for fee waivers in recognition of the fact that some parties will be unable to pay fees relevant to their cases. Further discussion of the comparison of this rule’s fees with the costs of other court systems is contained at Section II.C.4 of this preamble.

Department believes that aliens' access to appeals is protected through the fee waiver allowance as explained above.²³

As explained above, commenters argued that BIA appeals have benefits beyond the individual direct benefits related to an alien's particular personal interest in his or her case and that, as a result, the appeal fee is too high. First, the Department believes that the overarching purpose of each individual appeal is the individual benefit for the appealing party who seeks to correct an alleged error of law. At the same time, however, the Department agrees that administrative and appellate review can, at times, provide national benefits for immigration adjudications, such as providing clarity on complex topics that in turn creates efficiencies for immigration judges. *See, e.g., Amicus Invitation No. 20-24-02*, Board of Immigration Appeals, Feb. 24, 2020, available at <https://www.justice.gov/eoir/page/file/1251526/download> (welcoming amicus curiae briefs regarding selected issues involving Notices to Appear). The Department believes that this public interest is balanced against the need to recover EOIR's costs for providing an individual service and benefit for the appealing party by the Department's choice not to set the fees at amounts that would account for full cost recovery by including (1) overhead costs, (2) cost of non-salary benefits, and (3) costs that stem from processing corresponding applications or documents that may be filed in conjunction with those items for which EOIR charges a fee. *See* 85 FR at 11869. Had these items been included

²³ In addition, despite commenters' concerns that recent Department and EOIR policies and procedures have resulted in greater error rates or other problematic decisions, the Department notes that in fact remands from the circuit courts to the BIA have decreased in recent years even as EOIR's total adjudication volume has increased. *See Exec. Office for Immigration Rev. Adjudication Statistics: Circuit Court Remands Filed*, Exec. Office for Immigration Rev., July 14, 2020, <https://www.justice.gov/eoir/page/file/1199211/download>; *Exec. Office for Immigration Rev. Adjudication Statistics: New Cases and Total Completions*, Exec. Office for Immigration Rev., Jan. 23, 2020, <https://www.justice.gov/eoir/page/file/1238741/download>.

in the analysis, the fee required to align with EOIR's processing costs would assumedly have been higher than \$975.

Regarding commenters' concerns that the appeal fee will be difficult to raise in the time period allowed for filing an appeal with the BIA, *see* 8 CFR 1003.38(b) (instructing that appeals must be filed with the BIA within 30 calendar days after the immigration judge decision), the Department notes that the public will be on notice about the new fee amount as of this rule's publication. The new fee will be stated in the regulations at 8 CFR 1103.7(b)(1), published in the instructions to the EOIR-26 appeal form, and published on the EOIR website where EOIR forms are made available. Moreover, immigration judges are required in every removal case to ascertain that an alien has received a copy of the alien's appeal rights, which typically includes the appeal form and instructions that will provide information on both the fee and the fee waiver process. 8 CFR 1240.10(a)(3). An alien who is concerned that he or she may wish to appeal the immigration judge's decision should, accordingly, use that time between the initiation of the proceeding and the immigration judge's issuance of a final decision to begin arranging funds for the future payment of the appeal.

Finally, the Department disagrees with commenters that the Department should refund appeal fees when the alien succeeds on the merits. This argument misses the Department's purpose to more accurately reflect the Department's costs in processing and adjudicating the appeal. *See* 85 FR at 11870. EOIR's costs for the adjudication of an appeal are the same regardless of which party prevails on the merits, and the fact that the alien may ultimately demonstrate error by the immigration judge does not lessen the cost

incurred by the BIA staff, attorneys, and Board members who were involved in the determination of the alien's success.

6. Concerns with fee increases for cancellation of removal forms

Comment: Commenters expressed concern regarding the increased fees for applications for cancellation of removal (Forms EOIR-42A and -42B). Some commenters noted that applicants for these forms of relief have remained in the United States for many years, creating ties between applicants and their communities. Commenters explained that because applicants would likely be unable to afford the NPRM's increased fees for cancellation of removal, these communities would be negatively impacted by the severance of those ties.

Specifically regarding the Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, commenters noted that successful applicants must demonstrate exceptional and extremely unusual hardship to a qualifying relative who is either a United States citizen or a lawful permanent resident. *See* INA 240A(b)(1)(D), 8 U.S.C. 1229b(b)(1)(D). According to commenters, this level of hardship often additionally results in economic hardship for the applicant. For example, commenters pointed to economic hardship that results from the applicant's qualifying relatives suffering severe medical issues.

Further, some commenters noted that applicants for cancellation of removal are unable to procure employment authorization until after the application is filed. Thus, some commenters opined that some applicants for cancellation of removal would be unable to generate the necessary income to pay the increased fees.

As to those applicants for cancellation of removal under the Violence Against Women Act (“VAWA”), *see* INA 240A(b)(2) (8 U.S.C. 1229b(b)(2)), commenters asserted that the increase in fees would run “contrary to congressional intent to strengthen protections for victims of intra-familial violence.” In support of this, some commenters noted that affirmative applications to USCIS for relief under VAWA have no filing fees.

Response: Whether communities in the United States will suffer greater harm due to an increased number of unlawful aliens departing the country rather than filing applications for cancellation of removal is both speculative and beyond the scope of this rulemaking. To the extent that commenters are concerned that eligible aliens will not file applications for cancellation of removal due to the increased cost, the Department notes that both immigration judges and the BIA would continue to entertain requests from aliens for fee waivers and retain the discretionary authority to grant such waivers upon a showing that the alien is unable to pay. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c). Moreover, the Department does not expect that individuals who have resided in the United States for at least seven or ten years before being placed in immigration proceedings will generally be destitute, and there is no evidence that the filing fee will dissuade an alien with a valid claim—as opposed to one filing an application for dilatory purposes—from pursuing that claim.

As to the comments regarding the economic hardship faced by aliens filing Form EOIR-42B, the Department again notes the availability of requests for fee waivers. Although some aliens may be unable to afford the fee for an application based on the timing of work authorization, the Department notes that this will vary by case, and for those aliens for whom it is true, the Department refers commenters to its prior discussion

of fee waivers. Further, the Department disagrees that evidence an alien's removal would cause his or her qualifying family member an exceptional and extremely unusual hardship is related to the alien's hypothetical ability to pay the application fee. Instead, it misplaces the analysis, which focuses on the future harm to the family without the alien's presence rather than a current consideration of the alien's financial picture with his or her residence in the United States.

To the extent commenters expressed concern that applicants for cancellation of removal may not be able to afford the new fee because they lack employment authorization documents, the Department first notes that such an assumption is not true for all cancellation applicants. Instead, all applicants who would submit the Form EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents, are lawful permanent residents who must have had that status for at least five years. INA 240A(a)(1), 8 U.S.C. 1229b(a)(1). All lawful permanent residents are entitled to employment authorization. *See* 8 CFR 274a.12(a)(1). Second, eligibility for cancellation of removal for nonpermanent residents requires the alien to demonstrate certain levels of harm to a qualifying family member, demonstrating that the alien has other individuals from whom they may be able to seek assistance in paying the fee. *See* INA 240A(b)(1)(D), 8 U.S.C. 1229b(b)(1)(D); INA 240A(b)(2)(A)(v), 8 U.S.C. 1229b(b)(2)(A)(v). Further, all such applicants must have resided in the United States for at least ten years prior to being placed in removal proceedings, indicating that they do possess access to available resources to live in the United States and that such resources would presumably assist them in paying the application fee. Finally, the Department again emphasizes that a fee waiver remains available for a cancellation applicant, such as

possibly an applicant without employment authorization, who is unable to pay the fee. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c).

The Department disagrees that an increase in the fee for applications for cancellation of removal runs contrary to congressional intent. Congress’s stated intent in enacting VAWA was to combat violence and crimes against women. *See* H.R. Rep. No. 103-395, at 25–27 (1993); S. Rep. No. 103-138, at 37–38, 41 (1993). The original act, and its subsequent reauthorizations, provided various protections for victims of domestic and sexual violence. 159 Cong. Rec. S44-01 (Jan. 22, 2013) (statement of Sen. Reid). One such protection is the unique avenue of cancellation of removal available to certain victims of domestic violence. *See* INA 240A(b)(2)(A), 8 U.S.C. 1229b(b)(2)(A). Congress instructed only that aliens seeking, inter alia, VAWA cancellation of removal must be permitted “to apply for a waiver of any fees”—not that no fee apply in all cases. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), Pub. L. 110–457, 122 Stat. 5044, 5054 (adding paragraph (7) to section 245(*I*) of the Act (8 U.S.C. 1255(*I*))). Accordingly, the increased fee, in conjunction with the fee waiver, does not obstruct the availability of such discretionary relief, just as the previous \$100 fee did not impede the availability of VAWA cancellation of removal.

7. Concerns with fee increases for motions to reopen or reconsider

Comment: Some commenters also expressed concerns specifically with the proposed fee increases that would apply to motions to reopen or motions to reconsider. *See* 85 FR at 11870.²⁴ As with comments regarding the fees generally, commenters expressed a belief that the proposed fee increase for these motions, particularly for

²⁴ To the extent commenters conflated the fees for motions to reopen with the fees for an appeal, the Department notes that fees for appeals are discussed above in Section II.C.5 of this preamble.

motions before the BIA, is too high. Commenters expressed concern that although the INA provides a statutory right to file a motion to reopen as well as a motion to reconsider, *see* INA 240(c)(6)-(7) (8 U.S.C. 1229a(c)(6)-(7)), the proposed fees will prevent aliens from being able to access these procedural options or discourage aliens from filing available motions.

Commenters stated that recent EOIR procedures and policies have also resulted in increased numbers of in absentia removal orders, necessitating the filing of motions to reopen and rescind such orders. Commenters described motions to reopen and reconsider as essential tools for the protection of due process, noting their usage to, for example, seek redress for ineffective assistance of counsel and demonstrate changed country conditions in the country of removal. Other commenters noted that motions to reopen allow children who are granted Special Immigrant Juvenile (“SIJ”) visas (INA 101(a)(27)(J) (8 U.S.C. 1101(a)(27)(J))), trafficking survivors who are granted T nonimmigrant visas (INA 101(a)(15)(T) (8 U.S.C. 1101(a)(15)(T))), and crime victims who are granted U nonimmigrant visas (INA 101(a)(15)(U) (8 U.S.C. 1101(a)(15)(U))) to reopen their prior proceedings and gain long-term stability for their immigration status. Accordingly, commenters argue that these individuals would remain at risk of removal despite qualifying for special forms of protection. In other words, commenters argued that the proposed fees will prevent individuals from getting a “second chance.”

Response: The Department disagrees that this rule will prevent aliens from accessing their statutory right to file a motion to reopen or a motion to reconsider²⁵ or leave aliens without access to these procedural options.

As noted by the commenters, the increase for the fee for a motion to reopen or reconsider when the proceeding is before the BIA is a notable increase, from \$110 to \$895. However, as explained in the NPRM, the new fees represent EOIR's cost to adjudicate motions to reopen and reconsider, less the overhead costs, cost of non-salary benefits, or costs stemming from processing documents that correspond with those for which a fee applies. *See* 85 FR at 11869–71. This analysis is consistent with the Department's obligations under section 286(m) of the Act (8 U.S.C. 1356(m)) and the IOAA, 31 U.S.C. 9701(a).²⁶

Although some aliens will be required to pay a greater amount to file a motion to reopen or reconsider under this rule than without its implementation, the Department disagrees that aliens will be prevented from filing a motion to reopen or reconsider simply due to an inability to pay the higher fee.²⁷ Consistent with longstanding practice, a fee waiver remains available for motions to reopen and motions to reconsider. *See* 8 CFR 1003.8(a)(3) (“The Board has the discretion to waive a fee for an appeal, motion to reconsider, or motion to reopen upon a showing that the filing party is unable to pay the

²⁵ To the extent commenters may have implied that the Department cannot charge a fee for a motion to reopen or reconsider because the INA generally affords aliens the right to file such a motion, the Department disagrees. Other forms of relief for which the Department and DHS charge fees are included in the INA, *see, e.g.*, INA 240B (8 U.S.C. 1229b) (cancellation of removal), but there has never been any indication that a fee is inappropriate simply because the relief is in the INA. In fact, such logic is contradicted by section 286(m) of the Act (8 U.S.C. 1356(m)), which provides rules for the imposition of fees for “adjudication and naturalization services”—services that are directly guided by the INA’s provisions.

²⁶ Further discussion of the proposed fee amounts in general is contained above in Section II.C.4 of this preamble.

²⁷ Further discussion of fee waiver availability is contained above in Section II.C.5 of this preamble.

fee.”); 8 CFR 1003.24(d) (“The immigration judge has the discretion to waive a fee for a motion or application for relief upon a showing that the filing party is unable to pay the fee.”). EOIR adjudicators act with independent discretion when making all legal determinations, and the Department expects adjudicators to adjudicate fee waivers fairly and consistent with the regulations. In addition, the Department notes that the rule does not change the exceptions to the otherwise applicable fee for a motion to reopen or reconsider. *See* 8 CFR 1003.8(a)(2)(i)–(viii); 8 CFR 1003.24(b)(2)(i)–(viii). Thus, filing a motion to reopen an in absentia order of removal premised on a lack of notice will continue to not require a filing fee. 8 CFR 1003.24(b)(2)(v). Further, the filing fee for a motion to reopen would not apply if, inter alia, the “motion is agreed upon by all parties and is jointly filed.” 8 CFR 1003.8(a)(2)(vii); 8 CFR 1003.24(b)(2)(vii). Accordingly, joint motions to reopen following the approval of U or T nonimmigrant visas will also continue to not require a filing fee. 8 CFR 214.14(c)(5)(i); 8 CFR 214.11(d)(9)(ii); 8 CFR 1003.24(b)(2)(vii).²⁸

8. Concerns with imposing \$50 fee for asylum applications

Comment: Commenters objected to the NPRM because they claimed that it would result in a \$50 filing fee for asylum applications. Commenters asserted that such a fee would be immoral. A commenter stated that the fee would establish a “pay for play” system for those fleeing persecution. Commenters stated that a fee for asylum relief was akin to applicants having to pay a price for their survival. Commenters also stated that an

²⁸ The approval of an SIJ visa, if the priority date is current, may allow an alien to seek reopening in order to apply for adjustment of status. 8 U.S.C. 1255(a), (h). The fee for the Form I-485, Application for Adjustment of Status, is either \$750 or \$1140, depending on the age of the applicant and whether the applicant is filing the application with a parent. Thus, the Department expects that an individual with an approved, current SIJ visa who is able to pay this underlying application fee would, in many cases, also be able to pay the fee for a motion to reopen.

asylum-application fee would be unprecedented. Commenters stated that in the past, “the process of seeking asylum has been subsidized entirely by surcharges on other fee applications.” Many commenters who are legal service providers stated that a large number of their clients would be negatively impacted by the proposed rule but did not provide specific data to support this assertion. Many commenters suggested that asylum applications should be free while other commenters stated that the Department should provide a better justification for imposing a fee on asylum applications.

Some commenters stated that the NPRM misstated that the proposed rule would not add any new fees because, commenters stated, a \$50 filing fee for asylum applications would be new. Commenters stated that the NPRM did not reference an asylum fee in the charts that the Department used to discuss other fee increases.²⁹ *See* 85 FR at 11871.

Commenters asserted that asylum protection is an internationally guaranteed human right and stated that denying protection for asylum seekers based on their ability to pay the filing fee would violate the United States’ treaty obligations, as a signatory to the Protocol Relating to the Status of Refugees (“Protocol” or “1967 Protocol”), which incorporates Articles 2 to 34 of the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”); domestic laws, such as the Refugee Act of 1980; international principles of non-refoulement; and regulations. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223; Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6233, 6259–6276; Refugee Act of 1980, Pub. L. 96–212, 94 Stat. 102. Commenters cited Article 29(1) of the Refugee Convention, which

²⁹ Commenters did not comment specifically regarding fee increases proposed by DHS for other DHS applications adjudicated by EOIR—e.g., I-485, I-601, I-751, I-821, I-881—which were also not included in the chart of fees for EOIR applications.

commenters asserted prohibits any physical charges “whatsoever” other than those that may be “levied on [signatories’] nationals in similar situations,” for example by requiring asylum seekers in the United States to pay income taxes.

Commenters stated that a large majority of signatories to the Refugee Convention or 1967 Protocol do not charge a fee for asylum applications. A commenter stated that if the United States were to charge a filing fee for asylum applications, it would be joining “an adversary on which [the United States] imposes sanctions (Iran), a small island nation (Fiji), and one that has been condemned by an independent body of the United Nations Human Rights Council for its mistreatment of asylum seekers (Australia).” Commenters asserted that, of those three countries, Australia’s fee is half of the proposed fee, Fiji offers a fee waiver, and Iran’s fee applies only to families of five or more and allows exemptions.

Commenters expressed concern that if the United States began charging filing fees for asylum applications, other countries might follow suit. Commenters stated that such a pattern could have detrimental effects on refugee resettlement at a time when the number of refugees and displaced people “are at historic highs.” Commenters stated that charging a fee for asylum applications could render the entire international framework to safeguard humanitarian protections for asylum seekers vulnerable because it would undermine longstanding international agreements that asylum is intended to provide relief and support. Commenters suggested that charging a fee for asylum applications, but not for withholding of removal or Convention Against Torture (“CAT”) applications, suggested that the Department recognized that it would run afoul of international law to

deny protection to individuals who could not afford it and indicated an attempt to keep people from accessing “full protection as they should under our Constitution.”

Commenters expressed concern that the fee would prevent asylum seekers who cannot afford the fee from applying for asylum altogether in the event that their requests for a fee waiver are also denied.

Commenters explained that sometimes it is best practice for each member of a family to file an individual asylum claim because long-standing precedent upon which a lead applicant’s claim is based could be overturned. If asylum applicants would be required to pay a filing fee for each member of their family, and possibly all dependents, the actual financial burden would then be much greater than \$50. Commenters suggested that the rule, if issued, should clarify that there is no fee for dependents’ asylum applications. Commenters stated that to not do so might result in hundreds of dollars of fees for asylum applicants. Commenters offered the example that a family of five—two parents and three children—might have five primary asylum applications, as well as each spouse listed as a dependent on the other spouse’s application and each child listed as a dependent on each parent’s Form I-589 for a total of 10 separate dependent applications and 15 applications altogether. Commenters expressed concerns that if the Department did not make such an exception, family units of asylum seekers would be forced to choose to only file one asylum application in order to save money.

Commenters stated that the \$50 fee would pose an even heavier burden in cases where asylum seekers had to pay for counsel, which, commenters stated, is critical in an asylum case.

Commenters stated that they believe asylum-seekers face unique vulnerabilities that could hinder them from being able to afford a \$50 filing fee for asylum applications. For example, commenters stated that asylum seekers often use all of their savings to travel to the United States such that even a \$50 additional expense would pose a significant burden. Additionally, commenters stated, asylum applicants often arrive to the United States financially indebted to those who assisted them with their journey. Commenters expressed concerns that establishing filing fees for asylum applications could provide smugglers and traffickers with additional opportunities to exploit asylum seekers. Commenters also noted that, because asylum-seekers must file their applications for asylum within one year of their arrival to the United States, they may not have the time to accrue the resources to pay the filing fee for their applications.

Commenters also stated that asylum seekers must wait until 150 days after they file their applications to apply for an employment authorization document (“EAD”) and that the EAD would not be issued until after the application has been pending for 180 days. *See* 8 CFR 208.7(a)(1). Accordingly, commenters asserted, asylum seekers cannot begin to financially stabilize themselves until six months after their applications have been filed. Commenters noted that proposed DHS rules, if implemented, would eliminate the requirement that USCIS process EAD applications within 30 days of filing and would lengthen the amount of time that asylum seekers would have to wait to file their EAD applications to 365 days after their asylum applications have been filed. *See* Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 84 FR 47148 (Sep. 9, 2019); *see also* Asylum Application, Interview, and Employment Authorization for Applicants, 84 FR 62374, 62377 (Nov. 14,

2019).³⁰ Commenters suggested that the combined effect of DHS’s rules and EOIR’s policies would encourage asylum seekers to engage in unauthorized employment.

Commenters asserted that it would be unreasonable to require an asylum seeker who is not lawfully permitted to work to pay a fee for filing his or her asylum application.

Commenters also noted that asylum seekers are generally prohibited from receiving public benefits and thus do not have access to a “safety net.” Commenters also stated that asylum-seekers often have few, if any, contacts in the United States on whom they can rely. Commenters stated that when asylum-seekers first arrive in the United States, they may not be able to open a bank account, have access to a credit card, or have any prior experience with money orders.

Commenters stated that “[t]echnical glitches” regularly lead to rejections of applications to USCIS but did not specify further the sort of glitches to which they were referring.

Commenters also raised concerns that the Department did not properly explain how individuals who are subject to the MPP, and are not actually in the United States, would be required to pay such a fee as they do not have physical access to the immigration courts.

Commenters stated that in the past, the former Immigration and Naturalization Service (“INS”) withdrew a proposed rule that would have required a fee for a Form I-730, Refugee/Asylee Relative Petition, on the basis that “[u]nlike some benefits sought by asylees, a relative petition may be filed at a time when the asylee has recently arrived

³⁰ DHS has subsequently published both of these rules as final. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications, 85 FR 37502 (June 22, 2020); *see also* Asylum Application, Interview, and Employment Authorization for Applicants, 85 FR 38532 (June 26, 2020).

in the United States and is most unlikely to be financially self-sufficient.” Fees for Processing Certain Asylee/Refugee Related Applications, 58 FR 12146, 12147 (Mar. 3, 1993). Commenters asserted that such difficulties would be exacerbated with respect to children, who would be less likely to have the knowledge and capacity to fill out a fee waiver request.

Commenters stated that USCIS had, in its 2019 proposed rule regarding its fees, considered a distinction between affirmative and defensive asylum applications. For example, commenters noted that USCIS declined to impose a filing fee for asylum applications by unaccompanied children whose cases originated in immigration court, noting that it did not wish to create any delays for children in removal proceedings; however, USCIS did propose a \$50 fee for unaccompanied minors who filed affirmatively and are not in removal proceedings. *See* 84 FR at 62319. Commenters asserted that the Department could not justify imposing a filing fee for defensive asylum applications solely by relying on USCIS’s decision to charge a filing fee for affirmative asylum applications. Commenters stated that the Department did not engage in independent analysis, such as an activity-based analysis, to justify setting such a fee.

Commenters asserted that it was difficult to assume that the Department would be acting in good faith in implementing a fee for asylum applications in light of recent administrative actions that commenters purport were taken to limit asylum seekers from succeeding on their claims. Specifically, commenters referenced “metering,” the MPP, Asylum Cooperative Agreements, and DHS’s Prompt Asylum Claim Review and Humanitarian Asylum Claim Review Process, among other things.

Commenters expressed concern about the impact that imposing such a fee would have on motions to reopen and appeals based on applications for asylum. Specifically, commenters expressed concerns that the \$50 filing fee would trigger other fees related to their asylum claims. Commenters stated that existing regulations only charge fees for motions to reopen if they are based exclusively on an application for relief that in turn requires a fee. Commenters stated that while motions to reopen based on an asylum application would not have previously carried an associated fee, under the NPRM, motions to reopen based on asylum applications could potentially require movants to pay the full, proposed filing fee of \$145 for motions to reopen before an immigration judge and \$895 for motions to reopen filed before the BIA. Commenters asserted that such fees would be unaffordable and undermine an alien's statutory right to a motion to reopen.

Additionally, commenters stated that an asylum seeker might have to pay up to \$975 to file an appeal if his or her application is denied by the immigration judge. Commenters stated that it would be unreasonable to expect asylum seekers to pay such fees. Commenters noted the Supreme Court's statement that that "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). Commenters stated that the Department did not adequately consider the cumulative effect of these fees on asylum applications. Commenters expressed concern that DHS's proposed rules, which could increase the amount of time that it would take for asylum seekers to obtain work authorization, in conjunction with EOIR's policies to expedite asylum adjudications before the court, could result in asylum seekers being

required to pay the proposed \$975 filing fee to appeal their asylum decision to the BIA before having received employment authorization that would allow them to do so.

Commenters stated that detained individuals would be particularly impacted by the NPRM because of their limitations on earning money while in detention. Commenters recommended that detained individuals be exempted from paying the \$50 asylum filing fee.

Commenters stated that imposing a fee on asylum seekers would place an undue burden on nonprofit organizations and faith-based organizations that serve asylum seekers because in situations where asylum seekers could not afford the proposed filing fee or have their fee waiver rejected, such organizations might feel compelled to pay the fee themselves. Commenters stated that if this becomes common practice, legal service providers would have fewer resources to expend on their core missions of providing legal representation, which would ultimately lead to decreased representation rates. Commenters stated that pro se applicants, children, LGBTQ individuals (who commenters stated are often ostracized and isolated by their families), and detained individuals would be disproportionately impacted by the rule. Commenters noted that there is no right to appointed counsel in asylum proceedings.

A commenter asserted that the Department did not properly consider “extraordinary public comments against charging for asylum.” For example, commenters stated, Congress had previously admonished USCIS to refrain from charging a fee for humanitarian applications, such as asylum, directed that it should consult with the USCIS Ombudsman’s office before imposing such fees, and required it to brief Congress on the possible impact that such fees might have. *See* 165 Cong. Rec. H11021 (2019).

Commenters stated that the NRPM would not comply with international law and that the continued availability of statutory withholding of removal or protection under the CAT regulations for those who are deemed ineligible for failure to pay the filing fee or be granted a fee waiver would not be a sufficient alternative. Specifically, commenters asserted that statutory withholding of removal or protection under the CAT regulations are lesser forms of relief, as they still result in a final order of removal that can be executed at a later date, do not provide a path to lawful permanent residence or citizenship, do not allow for derivative relief for family members, and do not confer a form of relief that would permit recipients to petition for family members to join them in the United States or to travel to visit family members abroad. Additionally, commenters stated that it is more difficult to demonstrate eligibility for statutory withholding of removal or protection under the CAT regulations. Commenters stated that the NPRM would lead to at least some individuals who could meet the lower threshold for asylum having to forgo protection because they could not afford the filing fee, would not receive a fee waiver, and would not be able to meet the higher threshold of statutory withholding of removal or protection under the CAT regulations.

Commenters further asserted that the Department did not adequately explain why it imposed a filing fee for asylum applications but not for the adjudication of statutory withholding of removal or protection under the CAT regulations. Commenters opined that to do so would be irrational and appeared to be punitive. Commenters stated that, in particular, the Department did not adequately justify why it should charge a fee for one application for relief where the immigration judge would be required to consider identical evidence regardless of whether the alien's application is for asylum or for statutory

withholding of removal. Commenters also noted that when an individual applies for asylum, statutory withholding of removal, and protection under the CAT regulations, the immigration judge considers the claims simultaneously. Commenters further asserted that, while immigration judges would not have to adjudicate filing-deadline issues in statutory withholding of removal claims, asylum and statutory withholding of removal require consideration of otherwise identical evidence of persecution on account of a protected ground. Other commenters stated that very few applicants would apply statutory withholding of removal or protection under the CAT regulations to the exclusion of asylum.

Some commenters suggested that EOIR create its own form to be used for asylum applications, statutory withholding of removal applications, and applications for protection under the CAT regulations, and not use DHS's form. Commenters also recommended that, if the Department does not rescind the NPRM, it should clarify that an asylum seeker need only pay the fee one time, and not upon filing a new Form I-589 that might correct erroneous information or more fully explain the basis for their claim.

Response: The Department notes that USCIS is a component of DHS, which is a separate agency from the Department, of which EOIR is a component. *See Operational and Support Components*, Department of Homeland Security, <https://www.dhs.gov/operational-and-support-components> (last updated Nov. 17, 2018). Further, this rulemaking specifically involves EOIR fees, and the USCIS fees and applications referenced by the commenters pertain to a separate USCIS-specific rulemaking. *See* 85 FR at 11866; 84 FR at 62280.

Because DHS determines the fee for DHS applications, including those that are also adjudicated by the Department, and because Form I-589 is a DHS application, most of the comments regarding DHS's \$50 fee for an asylum application are beyond the scope of this rulemaking. The Department's NPRM did not purport to propose changes to the well-established regulatory provisions distinguishing between fees for DHS forms and fees for EOIR forms, and fees for DHS forms adjudicated by EOIR, including the Form I-589, continue to be set by DHS.³¹ *See* 8 CFR 1103.7(b)(4)(ii); *see also* Exec. Office for Immigration Rev.; Definitions; Fees; Powers and Authority of DHS Officers and Employees in Removal Proceedings, 69 FR 44903, 44904 (July 28, 2004) (stating that provisions related to charging the same fees as DHS for DHS-managed forms "reflect current practice and reduce that practice to regulatory form.").

DHS collects the fees for all forms submitted in EOIR proceedings, *see* 8 CFR 1003.24(a) ("All fees for the filing of motions and applications in connection with proceedings before the immigration judges are paid to the Department of Homeland Security."), and the Department believes that creating a new system that would require different fees for the Form I-589 application depending on the agency that will adjudicate the application would create unnecessary confusion for parties.³² Further, the bases

³¹ The Department notes that DHS proposed a fee for the Form I-589 asylum application for such applications filed with DHS. *See* 84 FR at 62318. DHS noted that whether such fee would apply to asylum applications filed with the Department would be "subject to the laws and regulations governing the fees charged in EOIR immigration proceedings." *Id.* As indicated in the NPRM, the regulation governing fees in EOIR proceedings for application forms published by DHS, 8 CFR 1103.7(b)(4)(ii), relies on the fees established by DHS for those applications. Consequently, because the Form I-589 is a DHS form, the DHS regulation setting the fee for that form determines the fee charged for it in EOIR immigration proceedings, and neither the NPRM nor the final rule purports to change that structure.

³² The Department acknowledges that the Form I-881 has had a separate fee depending on where the form is filed for over 20 years. *See* Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, 64 FR 27856, 27867–68 (May 21, 1999) (establishing a fee of up to \$430 if the application was filed with the INS or \$100 if filed before EOIR). Current DHS regulations set the fee differently for a Form I-881 filed by an individual with

highlighted by DHS as the reason to impose a fee for Form I-589 applications, including increased volume of applications that represent a significant increase in their adjudicatory caseload, apply similarly to EOIR's adjudications. *See* 84 FR at 62318; *Exec. Office for Immigration Rev. Adjudication Statistics: Total Asylum Applications*, Exec. Office for Immigration Rev., July 14, 2020, available at <https://www.justice.gov/eoir/page/file/1106366/download> (showing a significant increase in asylum applications filed with EOIR in recent fiscal years, from a low of 32,888 in Fiscal Year 2010 to a record high of 211,794 in Fiscal Year 2019). Moreover, section 208(d)(3) of the Act (8 U.S.C. 1158(d)(3)) authorizes the imposition of a fee on applications for asylum. In addition, because DHS sets the fee for the Form I-589, as a DHS form, DHS's regulations would control whether or not the fee applies if an alien submits a new or updated Form I-589 for some reason.

For the same reasons, the Department declines to implement commenters' recommendations for EOIR to create its own form for asylum, statutory withholding of removal, and protection under the CAT regulations.³³ DHS's and EOIR's adjudications of such claims are so intertwined that the current one-form system is the most efficient procedure, and the joint form is also easier for applicants as it reduces the number of

DHS than for one filed with EOIR; if DHS refers the Form I-881, there is no additional fee. 8 CFR 106.2(a)(41) (replacing 8 CFR 103.7(b)(1)(i)(QQ) if the injunctions against the DHS fee rule are lifted). Given both the anomalous nature of the Form I-881 as the only application, out of several, jointly adjudicated by the Department and DHS with separate fees and the declining frequency with which it is filed due to the declining pool of eligible applicants—each of whom must have taken some relevant action in the United States in either 1990 or 1991, *see* 8 CFR 1240.61(a)—the Department does not believe that a system of two separate fees for the Form I-589 could similarly be accomplished without increased confusion. Moreover, the separate fee structure for the Form I-881 is contained within regulations pertaining to DHS, not EOIR, and DHS has not chosen to alter that structure.

³³ In addition, the Department notes that even if the Department creates a DOJ version of the Form I-589, such an application could have a fee imposed in the same manner as DHS has proposed. *See, e.g.*, 8 CFR 1103.7(b)(4)(i) (setting fees for DOJ-controlled forms for applications for relief).

forms that an applicant would have to complete and submit for the same asylum claim.³⁴ The same asylum claim may be considered and adjudicated before both USCIS and EOIR. *See, e.g.*, 8 CFR 208.14(c)(1) (directing asylum officers to refer applications to EOIR if the asylum officer does not grant the affirmative application of an inadmissible or deportable alien). With respect to unaccompanied alien children (“UACs”), following the TVPRA, USCIS asylum officers have original jurisdiction over an asylum application submitted by individuals who are otherwise in removal proceedings before EOIR. *See* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (“An asylum officer . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child . . .”). If the asylum officer does not grant the UAC’s asylum application, the UAC may raise the same claim again during removal proceedings before EOIR. *See* INA 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C) (establishing “*initial* jurisdiction” with USCIS (emphasis added)); *see also* 8 CFR 208.14.

The Department notes that the filing fees associated with DHS-issued applications are set by DHS and will continue to be set by DHS, as neither the NPRM nor this final rule purports to change that longstanding practice. Thus, the Department disagrees with comments stating that the NPRM misstated that the rule would not add any new fees. *See* 85 FR at 11866. Although the NPRM did not reference the \$50 asylum fee in charts illustrating changes to EOIR-controlled fees—or any other proposed fee increases by DHS for DHS-issued forms, e.g., Form I-485, Form I-601, Form I-751, Form I-821, or

³⁴ The Department notes that there are multiple forms adjudicated by both it and DHS, in addition to the Form I-589—e.g., Form I-485, Form I-601, Form I-751, Form I-821, and Form I-881. The current one-form system for all of these applications has served both agencies well, and the Department sees no reason to create a carve-out solely for the Form I-589. Moreover, creating separate forms for some applications adjudicated by both agencies but not for all such forms would increase the likelihood of confusion by aliens regarding the appropriate form to file.

Form I-881, that are adjudicated by both DHS and the Department—the Department explicitly discussed DHS’s proposed rule to implement a \$50 fee for asylum applications on the Form I-589, as well as the Department’s reasoning for charging the DHS-set fee for DHS-issued forms. *See* 85 FR at 11871. Thus, the NPRM provided notice about any potential fee increases occasioned by DHS’s proposed rulemaking, including for asylum applications.³⁵

The Department disagrees with commenters’ concerns that a \$50 filing fee would be unaffordable, thus discouraging or preventing individuals from filing meritorious asylum claims. *Cf. Ayuda I*, 661 F. Supp. at 35 (rejecting concern that increased fees would limit access to courts). The Department agrees with DHS’s position that \$50 is a fee that could be paid in one payment, would not take an unreasonable amount of time to save, and would not be so high as to be unaffordable, even to indigent aliens. 84 FR at 62320. The Department notes that generalized statements and anecdotal reports about asylum seekers’ financial status do not provide information about actual hardship. To the extent that commenters are concerned that an asylum fee could lead to additional, higher fees for appeals or motions to reopen associated with an asylum claim, the Department notes that fee waivers will continue to be available for EOIR-prescribed fees pursuant to 8 CFR 1103.7(c), which remains unchanged by the rule. *See* 8 CFR 1103.7(c) (“For provisions relating to the authority of the Board or the immigration judges to waive any of the fees prescribed in paragraph (b) of this section, see 8 CFR 1003.8 and 1003.24.”); *Ayuda I*, 661 F. Supp. at 35 (“Moreover, these concerns [about deterrent effect of increased fees] are wholly overstated inasmuch as INS regulations excuse the

³⁵ The Department further notes that DHS has not assessed a \$50 fee for asylum applications filed by a UAC in removal proceedings. 85 FR at 46809.

requirement to pay in the event the alien certifies inability to pay.”). This includes a motion to reopen based on an asylum application and appeals to the BIA.

The Department recognizes commenters’ concerns that asylum seekers may face unique challenges that would make raising a substantial sum of money difficult, including, for example, the costs expended on travel to the United States, the one-year filing deadline, indigent status, and waiting periods for employment authorization.³⁶ The Department also acknowledges that those seeking services from non-profit providers, by the nature of the very services they provide, would have clients with incomes that would make any fee challenging. The Department, however, believes that such challenges have been properly considered in DHS’s proposal to establish a \$50 fee, which falls well below an amount that would recuperate the full cost of consideration of asylum applications, as permitted by section 208(d)(3) of the Act (8 U.S.C. 1158(d)(3)). *See* 84 FR at 62319–20. The Department disagrees that a \$50 filing fee would provide traffickers and smugglers with additional opportunities to exploit asylum seekers and commenters have not presented evidence to support their position.

The Department disagrees with comments that a \$50 fee for asylum applications would violate human rights or U.S. treaty obligations. The USCIS rule is consistent with the United States’ obligations as a signatory to the 1967 Protocol, which incorporates Articles 2 through 34 of the Refugee Convention.³⁷ The rule is also consistent with U.S.

³⁶ The Department notes that some of these factors, including an alien’s ability to pay hundreds or thousands of dollars for travel to the United States, actually undermine the commenters’ concerns that aliens with valid asylum claims will be unable to pay the proposed fee.

³⁷ The Department also notes that neither of these treaties is self-executing and therefore they are not directly enforceable in U.S. law unless implemented under domestic law. *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (“Article 34 merely called on nations to facilitate the admission of refugees to the extent possible; the language of Article 34 was precatory and not self-executing.”); *Al-Fara v. Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (“The 1967 Protocol is not self-executing, nor does it confer any rights beyond

obligations under Article 3 of the CAT, as codified in the regulations. *See* 8 CFR 1208.16–18.

Specifically, to the extent that the asylum application fee is considered a “fiscal charge” for purposes of Article 29(1) of the Refugee Convention—as incorporated by reference in the 1967 Protocol—the proposed \$50 fee would be in accord with that provision, which limits fiscal charges charged to refugees to an amount not higher than those charged by the United States to U.S. nationals in similar situations. And Congress, as evidenced by the express authority conferred in section 208(d)(3) of the Act (8 U.S.C. 1158(d)(3)), has clearly indicated that charging a fee for asylum applications would not run contrary to U.S. obligations. *See* INA 208(d)(3), 8 U.S.C. 1158(d)(3) (“The Attorney General may impose fees for the consideration of an application for asylum”).

Because the USCIS rule does not impose a fee for statutory withholding of removal or protection under the CAT regulations, the rule would still be consistent with the 1951 Refugee Convention’s, 1967 Protocol’s, and the CAT’s non-refoulement provisions. *See R-S-C- v Sessions*, 869 F.3d 1176, 1188 n.11 (10th Cir. 2017) (explaining that “the Refugee Convention’s nonrefoulement principle—which prohibits the deportation of aliens to countries where the alien will experience persecution—is given full effect by the Attorney General’s withholding-only rule”); *Cazun v. Att’y Gen. U.S.*, 856 F.3d 249, 257 & n.16 (3d Cir. 2017); *Ramirez-Mejia v. Lynch*, 813 F.3d 240, 241 (5th Cir. 2016); *Maldonado v. Lynch*, 786 F.3d 1155, 1162 (9th Cir. 2015) (en banc) (explaining that Article 3 of the CAT, which sets out the non-refoulement obligations of signatories, was

those granted by implementing domestic legislation.”); *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005) (CAT “was not self-executing”); *see also INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (describing provisions of the Convention and Protocol as “precatory and not self-executing”).

implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. 105–277, sec. 2242(b), 112 Stat. 2681, 2631–822) and its implementing regulations); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 429, 441 (1987) (“[Withholding of removal] corresponds to Article 33.1 of the Convention [Asylum], by contrast, is a discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees. As such, it does not correspond to Article 33 of the Convention, but instead corresponds to Article 34.” (emphasis in original)).

Commenters’ assertions that statutory withholding of removal and protection under the CAT regulations essentially trap individuals in the United States are beyond the scope of this rulemaking, as nothing in the NPRM purported to propose changes to the regulations governing eligibility for those forms of protection or the restrictions attendant to them. Similarly, the NPRM did not purport to overrule *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008), which requires the entry of an order of removal for aliens granted statutory withholding of removal or protection under the CAT regulations. Thus, although an individual who has been granted these forms of protection is not guaranteed return to the United States if he or she leaves the country, these forms of protection do not prevent individuals from traveling outside the United States. *See Cazun*, 856 F.3d at 257 n.16. To the extent commenters raised concerns that recipients of statutory withholding or CAT protection must apply annually for work authorization, the Department does not adjudicate applications for employment authorization, and such concerns are far beyond the scope of this rule.

In response to comments regarding previous rulemakings by the former INS, which decided not to implement a fee requirement for the Form I-730, Refugee/Asylee Relative Petition because aliens generally filed such petitions shortly after their arrival to the United States, the Department notes that the cited rulemaking was published in the *Federal Register* on March 3, 1993, 58 FR 12146, several years prior to Congress's express grant of authority to the Department to charge fees for asylum applications, employment authorizations, and asylum-related adjustment of status. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, div. C, tit. V, 110 Stat. 3009, 3009–693 (Sep. 30, 1996); INA 208(d)(3), 8 U.S.C. 1158(d)(3). The Department further notes that adjudication of the Form I-730 is not comparable to the significantly lengthier and more in-depth adjudication required for a Form I-589. At the same time, the increased volume of applications for asylum represents a significant increase in the Department's adjudicatory workload. *See Exec. Office for Immigration Rev. Adjudication Statistics: Total Asylum Applications*, Exec. Office for Immigration Rev., July 14, 2020, <https://www.justice.gov/eoir/page/file/1106366/download> (showing a significant increase in asylum applications filed with EOIR in recent fiscal years, from a low of 32,888 in Fiscal Year 2010 to a record high of 211,794 in Fiscal Year 2019). Thus, the Department does not believe that the former INS's articulated reasons for not implementing a fee are persuasive when applied to current considerations regarding the Form I-589. Regardless, whether to charge a fee for a Form I-730 does not necessarily dictate whether a fee for the Form I-589 is warranted, and although DHS has promulgated a \$50 fee for the latter, it maintains no fee—nor even a proposed fee—for the former.

The Department disagrees with comments that it would be irrational to charge a filing fee for an asylum claim filed on a Form I-589, but not for statutory withholding of removal or CAT claims filed on the same form. The Department reiterates that DHS is acting within its express statutory authority to implement such fees for asylum claims for the reasons articulated above. *See* INA 208(d)(3), 8 U.S.C. 1158(d)(3).

The Department also disagrees with commenters' assertions that asylum and withholding of removal demand identical considerations. As discussed above, asylum is a discretionary form of relief, while statutory withholding of removal is not. Accordingly, for asylum claims, adjudicators must consider additional evidence with respect to whether an alien merits a favorable exercise of discretion in granting asylum relief. As a discretionary form of relief, asylum is also subject to numerous additional statutory and regulatory requirements that statutory withholding of removal is not. For example, asylum seekers are subject to filing deadline requirements, limitations on multiple applications for relief, numerous criminal exceptions to eligibility, the firm-resettlement bar, and the safe-third country bar. *See* INA 208(a)(2), 8 U.S.C. 1158(a)(2); INA 208(b)(2), 8 U.S.C. 1158(b)(2). Additionally, the Attorney General has the express authority to impose additional limitations and conditions on asylum eligibility. INA 208(b)(2)(C), 8 U.S.C. 1158(b)(2)(C).

9. Violates the Administrative Procedure Act

Comment: Commenters stated generally that the Department should withdraw the NPRM for procedural deficiencies, including that the Department did not adequately justify the rule, the rule was arbitrary and capricious, and the rule was outside of the scope of the Department's delegated authority. Specifically, commenters stated that the

Department did not give adequate time for comments. Commenters objected to the Department's choice to allow for a 30-day comment period in lieu of a 60-day comment period and stated that the Department did not explain the basis for this decision.

Commenters stated that the Department acknowledged that the proposed rule was a "significant regulatory action" pursuant to Executive Order 12866, but it failed to discuss or provide a rational basis for departing from the mandated 60-day comment period for such actions. Some commenters suggested that a 30-day comment period deviated from the Department's "usual" comment period of 60 days.

Commenters expressed confusion over the urgency of having a shorter comment period after the Department waited over thirty years to adjust fees. Commenters noted that, because EOIR had not changed its fees in over three decades, it was even more important for the public to have sufficient notice and, before commenting, time to understand EOIR's reasons and methodology behind the proposed increases, as well as how EOIR plans to ensure that vulnerable, low-income individuals will have access to proceedings. Commenters suggested that, on this basis, the Department should withdraw the NPRM and suggested that, if it were to reissue the rule in the future, the Department should allow for a longer comment period.

Commenters stated that they did not have sufficient notice because the NPRM did not adequately explain a DHS proposed rule that is cross-referenced in the regulatory language and that proposed rule's potential impact on an asylum applicant's ability to apply for fee waivers for appeals. Commenters asserted that the NPRM's stated purpose of balancing accessibility of the EOIR applications and motions for which the Department imposes a fee against saving taxpayer money was inadequate because EOIR

has not taken other less expensive, burdensome, or prejudicial procedural improvements that would speed up the resolution of cases and potentially reduce costs associated with adjudications. Commenters stated that the Department did not present sufficient facts showing that it fully considered the public policy interest in accessibility to EOIR proceedings and that the Department instead relies on conclusory statements.

Commenters stated that, rather than reducing the costs of adjudications, the proposed rule limited access to adjudications.

Commenters noted that numerous immigration and legal service providers requested an extension of the 30-day comment period. The commenters noted that USCIS had previously complied with a similar request in response to its own proposed rule to raise USCIS application fees, *see* 84 FR 67243 (Dec. 9, 2019), but the Department neither extended the comment deadline nor responded to the request. Commenters also stated that the Department should withdraw the NPRM or extend the comment period due to the novel coronavirus (“COVID-19”) pandemic. Specifically, commenters stated that it was unreasonable to expect the public to submit comments by March 30 on the changes proposed as they adjusted to new challenges, such as learning to perform their jobs remotely, not having access to hard copies of resources and background materials, and having to provide childcare. A commenter also stated that, in response to the pandemic, “immigration procedures have been changing on a daily basis, forcing immigration practitioners to keep up and inform clients of this ever-changing landscape.”

Commenters asserted that numerous organizations submitted a letter requesting that the comment period be delayed due to the disruptions caused by the COVID-19 pandemic, and the Department has not responded to this request. Commenters stated that an

additional 30-day comment period would ensure that individuals who are sick or caring for somebody who is sick would still have the opportunity to submit a public comment. Commenters also expressed a belief that the Department should not implement the proposed fee increases at this time due to the economic effects of the COVID-19 pandemic. At least one commenter acknowledged that while the Department could implement the rule despite public comments, it would need to read all comments received and show that they were considered, and that such consideration might slow down efforts for the Department to move forward with the rulemaking process. Commenters also objected to the NPRM because it did not include any of the underlying data that the public would need to assess whether the Department's fee calculation was accurate or reasonable. Commenters acknowledged that the Department explained the process that it employed when polling its staff about work flow concerning particular types of applications, but stated that the Department only provided the conclusions, and not the underlying data, as part of the rulemaking record. Commenters stated that they had requested this data and the underlying study from OMB but that they had not received the information by the date of their comment submission. Commenters also stated that the Department did not state the amount of time expended by each person involved in an application for relief. Commenters asserted that this lack of information rendered it impossible for the public to assess whether the proposed fee structure is arbitrary and that the Department should withdraw the NPRM because it did not make this data, including the 2018 study, publicly available. Commenters also stated that they had submitted FOIA requests to the Department, seeking data on the number of fee waivers that had been filed, granted, and denied and additional information regarding the underlying cost

study that was the basis for the NPRM. Commenters explained that if the Department raises EOIR fees, it would be crucial to make fee waivers broadly available and that such information was important to providing comprehensive responses to the NPRM. Commenters stated that, as of the date of their comment submission, they had not received a response to the FOIA request, and that DOJ should withdraw the NPRM based on its failure to provide this information. Several commenters qualified their comment responses, stating that their responses were as complete as possible given the lack of data provided by the Department but that their responses could not be complete without such data. Commenters stated that the Department had not given an explanation for why it had not increased EOIR fees for 33 years. Due to the lack of an explanation, commenters presumed that it was a policy choice designed to keep fees affordable to allow access to justice in the immigration system. Commenters stated that the Department erroneously interpreted the statutory term “fair” as it related to the fee determinations. Commenters stated that it was irrational for the Department to suggest that the proposed fees were intended to significantly increase revenue for the Federal Government but was also not an economically significant rule under Executive Order 12866, i.e., a rule that would increase revenue by \$100 million or more. Other commenters noted that the proposed rule would not comply with Executive Orders 12866 and 13563 because the Department did not accurately assess the costs and benefits, determine that the benefits outweigh the costs, maximize the net benefits, or tailor the proposed rule to impose the least burden on society. Commenters stated that the Department failed to consider the costs that deterring individuals from pursuing meritorious claims would have on individuals, families, employers, State and local governments, the economy, and society as a whole.

Response: The Department disagrees with comments suggesting that the NPRM, rule, or rulemaking process violates the APA. The fees are based on a cost study, and the Department is acting within its statutory authority to reflect the costs associated with present-day costs after more than 30 years without adjusting fees. As stated above, the Department is releasing the underlying data from its 2018 fee study in response to multiple requests for it. The Department is also including its updated dataset for full transparency.

Regarding commenters' further statements that the Department has not responded to commenters' FOIA request(s), the Department will continue to respond to any FOIA requests in accordance with FOIA and the relevant regulations. Specific concerns regarding EOIR's FOIA responses should be directed to the EOIR Office of General Counsel:

U.S. Department of Justice
Executive Office for Immigration Review
Office of General Counsel – FOIA Service Center
5107 Leesburg Pike, Suite 2150
Falls Church, VA 22041
E-mail address: EOIR.FOIARequests@usdoj.gov
FOIA Public Liaison: Crystal Souza
Telephone: 703-605-1297

The Department believes the 30-day comment period was sufficient to allow for a meaningful public input, as evidenced by the significant number of public comments received, including 157 detailed comments from interested organizations. Further, commenters did not suggest or indicate what additional issues the comment period precluded them from addressing; to the contrary, the comments received reflect both a breadth and a level of detail that suggest that the period was more than sufficient. Additionally, to the extent that commenters referred to other proposed rulemakings as a

basis for asserting the comment period should have been longer, their comparisons are inapposite. No other proposed rulemaking cited by commenters addressed a small, discrete number of applications that are well established and with which aliens and practitioners have been quite familiar with for decades. In short, the Department acknowledges and has reviewed commenters' concerns about the 30-day comment period, but those comments are unavailing for all of the reasons given herein.

The APA does not require a specific comment period length. *See generally* 5 U.S.C. 553(b)–(c). Similarly, although Executive Orders 12866 and 13563 provide that the comment period should generally be at least 60 days, it is not required. Federal courts have presumed 30 days to be a reasonable comment period length. For example, the D.C. Circuit recently stated that “[w]hen substantial rule changes are proposed, a 30-day comment period is generally the shortest time period sufficient for interested persons to meaningfully review a proposed rule and provide informed comment,” even when “substantial rule changes” are proposed. *Nat’l Lifeline Ass’n v. FCC*, 921 F.3d 1102, 1117 (D.C. Cir. 2019) (citing *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984)). Litigation has mainly focused on the reasonableness of comment periods shorter than 30 days, often in the face of exigent circumstances. *See, e.g., N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012) (analyzing the sufficiency of a 10-day comment period); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629–30 (D.C. Cir. 1996) (7-day comment period); *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (7-day comment period).

The Department is not obligated to extend the notice and comment period at the public’s request. Regarding DHS’s extension of the comment period for its fee rule, the

Department notes that, at the time DHS extended the comment period, DHS provided supplemental information that changed some of the calculations underlying the proposed rule. 84 FR at 67243. The Department finds the circumstances of DHS's extension distinguishable from the Department's proposed rule, which does not involve any relevant changed information. The Department believes that the COVID-19 pandemic has no effect on the sufficiency of the 30-day comment period. Employers around the country have adopted telework flexibilities to the greatest extent possible, and the Department believes that interested parties can use the available technological tools to prepare their comments and submit them electronically. Indeed, nearly every comment was received in this manner. Further, some of the issues identified by commenters—e.g., childcare—would apply regardless of the length of the comment period and would effectively preclude rulemaking by the Department for the duration of the COVID-19 pandemic. The Department finds no basis to suspend all rulemaking while the COVID-19 pandemic is ongoing. Overall, the Department believes that the COVID-19 pandemic has not limited the public's ability to meaningfully engage in the notice and comment period.

In addition, regarding commenters' concerns that the Department should delay implementation of this rule due to the economic effects of the COVID-19 pandemic, the Department again emphasizes that an alien who is unable to pay the fee may, consistent with current practice, apply for a fee waiver.

The Department gave the public sufficient notice of the rule's impact as it cross-references DHS's proposed rule. *See* 84 FR at 62280. The Department notes that this rulemaking does not alter EOIR's long-standing procedures with respect to how DHS-

issued forms are treated in EOIR proceedings, and thus the public has had adequate notice that any changes that DHS makes to its fees through its own rulemaking would affect fees for DHS-issued forms filed with EOIR. *See* 8 CFR 1103.7(b)(4)(ii). While this rule updates cross-references to match DHS's proposed changes to DHS's regulations, the practices remain the same. To the extent that commenters believe they should have additional time for notice and comment to understand the Department's plans to ensure that low-income individuals will continue to have access to proceedings, the Department notes that its procedures with respect to fee waivers remain the same, including fee waivers associated with DHS-issued forms. 8 CFR 1103.7(c).

In response to commenters' concerns that this rulemaking does not fully accomplish balancing costs to the taxpayer against accessibility to the immigration courts, the Department notes, as discussed in part I.B, *supra*, that it fully considered the public interest, including access to the immigration courts, balanced against the cost to taxpayers in electing to not recoup the full costs of adjudications in assessing fees. The Department's policy has not changed since the last time it assessed fees. As when the Department last updated EOIR's fees, the proposed changes in the NPRM "are necessary to place the financial burden of providing special services and benefits, which do not accrue to the public at large, on the recipients." Powers and Duties of Service Offices; Availability of Service Records, 51 FR 39993, 39993 (Nov. 4, 1986). Thus, fees "have been adjusted to more nearly reflect the current cost of providing the benefits and services, taking into account public policy and other pertinent facts." *Id.* In short, as it did previously, the Department fully considered public interest when reviewing and updating its fees for the first time in over 30 years.

Moreover, as the Department discussed in the NPRM, it intentionally did not include a variety of costs in its fee analysis to more fully ensure the fees remained at a level reflected by the public interest. 85 FR at 11869 (“EOIR’s decision not to include overhead and non-salary benefits in the calculation of actual costs also accounts for the public interest in having non-parties bear some of the cost burden for filing documents associated with proper application of the law as it pertains to the statutory right to appeal or apply for certain forms of relief.”). Factoring in additional costs would almost inevitably have led to even higher proposed fees, which is a result commenters would have opposed even though, paradoxically, some of those same commenters criticized the Department for not conducting further analyses that would have likely required including such costs. In short, the Department recognizes that most commenters, as a matter of policy preference, oppose any fee increase at all because fees have remained artificially and inappropriately low for over three decades. Nevertheless, commenters did not persuasively explain why the Department should maintain that posture, especially when it conflicts with longstanding law and policy, nor identify shortcomings in the Department’s analysis that, if remedied, would not have actually increased fees to a greater degree.

The Department disagrees with comments suggesting that this rule would deter individuals from pursuing meritorious claims, though it acknowledges that it may have some deterrent effect on individuals pursuing non-meritorious or otherwise dilatory claims. Nevertheless, such speculative deterrent effects are not supported by any evidence presented to the Department.

In response to commenters' statements that the Department had not adequately explained why it has not increased fees for 33 years, the Department notes that such a lack of action was a shortcoming by the agency that it is currently remedying, as stated in the NPRM. *See* 85 FR at 11869 ("EOIR is now proposing this rule to remedy the failure to update the fees in past years."). Regardless of the reason for this lapse in reassessment, the Department is presently acting within its authority to charge fees, as discussed in the NPRM. 85 FR at 11872; *see* 31 U.S.C. 9701(a)–(b); Circular No. A-25 Revised at sec. 8(e); INA 286(m), 8 U.S.C. 1356(m).

The Department believes that the newly established fees are fair. The Department has set the new fees based upon data gathered from an activity-based cost analysis. As stated in the NPRM, EOIR's calculation of fees has factored in both "the public interest in ensuring that the immigration courts are accessible to aliens seeking relief and the public interest in ensuring that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system." 85 FR 11870; *see Ayuda I*, 661 F. Supp. at 36 (dismissing position that fees were "arbitrarily and capriciously unreasonable" where former INS-implemented fees that were "no greater than the rough actual cost of providing the services").

Regarding commenters' allegations that the Department's analysis under Executive Order 12866 is inadequate, the Department disagrees. The Department has properly considered the rule's economic effects and determined, in coordination with OMB, that the rule is not likely to have a significant economic effect. Moreover, as the difference in fee collections illustrates, the impact on the economy is clearly less than \$100 million.

10. Violates due process

Comment: Commenters argued that immigration proceedings must not infringe on aliens' due process rights, citing *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended) ("Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process."), and *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."). Similarly, relying on *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), commenters asserted that the increased fees act as barriers to appeal orders of removal, thus violating immigrants' constitutionally protected due process rights.

Commenters asserted that the proposed fee increases would make it impossible for many noncitizens to pursue their statutory rights to seek many of the specific applications, appeals, and motions at issue in the NPRM. *See, e.g.*, INA 240A, 8 U.S.C. 1229b (cancellation of removal); INA 240(c)(5), 8 U.S.C. 1229a(c)(5) (appeals of immigration judge decisions); INA 101(a)(47)(B), 8 U.S.C. 1101(a)(47)(B) (same); INA 240(c)(6), 8 U.S.C. 1229a(c)(6) (motions to reconsider); INA 240(c)(7), 8 U.S.C. 1229a(c)(7) (motions to reopen); INA 244(a), 8 U.S.C. 1254(a) (1995) (suspension of deportation). Commenters stated that the rule even appears to have been designed in order to yield such outcomes and that "[w]here fees have an impact on individuals' ability to exercise their statutory and regulatory rights, agencies necessarily must consider ability to pay to avoid infringing upon those rights."

Relatedly, commenters stated that the cost of pursuing relief could violate due process if it forecloses a party's opportunity to be heard, citing *Boddie*, 401 U.S. at 380 ("Just as a generally valid notice procedure may fail to satisfy due process because of the

circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard.”). Commenters disagreed with the NPRM's reasoning that unmet costs justified fee increases, explaining that the U.S. Supreme Court rejected that reasoning as a sufficient basis for denying indigent individuals access to the courts. *See id.* at 381 (rejecting justification of fees based on allocating scarce resources and deterring frivolous litigation and finding that “none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages.”).

Commenters expressed concerns that the proposed rule continues administrative trends to speed up removals without providing noncitizens with fair opportunities to present their cases in court. Commenters opined that the current administration was taking steps to emphasize deporting aliens over due process in EOIR proceedings and stated that it had taken similar steps to turn USCIS, a benefits-granting agency, into an enforcement agency.

Commenters alleged that EOIR must ensure that fees remain “accessible” and “affordable” in order to ensure due process is extended to all individuals, regardless of income. The proposed fees, commenters alleged, are neither accessible nor affordable, especially in the context of appeals, given that aliens would have only 30 days from the immigration judge decision to file an appeal and pay the increased fee.

Response: The rule does not infringe upon due process rights. Aliens continue to receive a “full and fair hearing,” *see Gutierrez*, 662 F.3d at 1091, before an immigration judge to present their case. *Gutierrez* further explained that the hearing must not be “so

fundamentally unfair that the alien was prevented from reasonably presenting his case.”
Id. at 1091 (quoting *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 620 (9th Cir. 2006)).

“Where an alien is given a full and fair opportunity to be represented by counsel, prepare an application for . . . relief, and to present testimony and other evidence in support of the application, he or she has been provided with due process.” *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007). The rule does not alter proceedings before an immigration judge; further, statutory provisions cited by commenters remain unchanged. Appeals, motions, and other forms of relief remain available; the rule only updates the fees to file applications for such relief while at the same time keeping fee waivers as an available option for aliens who cannot pay the fee. Accordingly, allegations that the rule proposed to change proceedings in a way that deprives aliens of due process is unfounded.³⁸

Likewise, the rule is distinct from *Zadvydas*, 533 U.S. 678, which was relied upon by commenters. *Zadvydas* examined liberty interests in the context of detention that was indefinite and possibly permanent. *Id.* at 696. In fact, the Court explicitly provided that “the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.” *Id.* at 695. The rule at hand, however, involves updating fees in accordance with section 286(m) of the Act (8 U.S.C. 1356(m)) and the agency’s authorities for certain appeals,

³⁸ Due process does not require a right to appeal at all, even in the criminal context. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (“The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.” (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894)); accord *Guentchev v. INS*, 77 F.3d 1036, 1037–38 (7th Cir. 1996) (“The Constitution does not entitle aliens to administrative appeals. Even litigants in the federal courts are not constitutionally entitled to multiple layers of review. The Attorney General could dispense with the Board and delegate her powers to the immigration judges, or could give the Board discretion to choose which cases to review (a la the Appeals Council of the Social Security Administration, or the Supreme Court exercising its certiorari power).”).

applications, and motions filed with EOIR. *See generally* 85 FR 11866. Updating fees to recover costs for providing services, in accordance with statutory authority, does not mandate or implicate detention in a way that *Zadvydas* would directly apply, and not all processes provided by law and regulation are constitutionally required. Nevertheless, the rule comports with foundational principles of due process, outlined in *Zadvydas* and numerous cases preceding and subsequent to that decision, because it does not alter regulations providing notice to aliens (8 CFR 1003.18(a), (b)), the alien’s opportunity to present his or her case (8 CFR 1240.10), the option to be represented by counsel (8 CFR 1003.16(b), 1240.3), the ability to file an application for relief (8 CFR 1240.1(a), 1240.11), or the opportunity to provide evidence or testimony in support of the application (8 CFR 1240.7).

As Section II.C.4 of this preamble extensively explains, the rule preserves the ability to submit fee waiver requests. Contrary to commenters’ assertions, the Department considered aliens’ ability to pay in updating the fees and subsequently retaining the fee waiver process, as reflected in the NPRM. The Department explained that “[w]hile EOIR recognizes that the new fees will be more burdensome, fee waivers are still possible for those who seek them” and, accordingly, that EOIR would continue to “entertain requests for fee waivers . . . and waive a fee for an application or motion upon a showing that the filing party is unable to pay.” 85 FR at 11871, 11874.

The Department disagrees with commenters’ assertions that Supreme Court precedent undermines the NPRM’s reasoning that because EOIR’s processing costs “consistently exceed the assessed fees,” updating fees is necessary to “recoup some of [the Government’s] costs when possible.” 85 FR at 11870. In *Boddie*, 401 U.S. 371, one

case cited by the commenters, the Court considered a state's required \$60 fee to file for divorce. Because payment of the fee determined "access to the judicial process in the first instance" and the appellants had proven their inability to afford such fee, the Court found that the fee barred individuals "from the only forum effectively empowered to settle their disputes," thus depriving them of their due process rights. *Id.* at 375–76. However, *Boddie*'s holding was based on the fact that plaintiffs were prevented *altogether* from accessing the judicial process required to end their marriages unless they paid the \$60 fee. In contrast, separate and apart from this rule, aliens are provided an opportunity, at no charge, to present their case in a hearing before an immigration judge, and a fee waiver remains available to aliens who are unable to pay for the application or motion, including an appeal, they wish to pursue. Further, the updated fees apply to certain applications for discretionary forms of relief, in which aliens have no due process rights,³⁹ and applications for appeals and motions, which are filed after an immigration judge issues a final decision. Accordingly, the rule does not wholly preclude aliens from their opportunity to be heard, and so the holding in *Boddie* is distinguishable.

The cases cited by commenters are also distinguishable because they involve, as commenters note, discrimination based on poverty, but the rule does not discriminate on any basis. Fees apply equally to all applicants regardless of financial status, and fees may be waived upon a showing of the filing party's inability to pay. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c). The rule does not discriminate on its face or in its application—it

³⁹ "[B]ecause discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief." *United States v. Torres*, 383 F.3d 92, 104 (3d Cir. 2004); *see also Ticoalu v. Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006); *Smith v. Ashcroft*, 295 F.3d 425, 429-30 (4th Cir. 2002); *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002); *Oguejiofor v. Att'y Gen.*, 277 F.3d 1305, 1309 (11th Cir. 2002).

does not act as a blanket prohibition on people without financial means from submitting the applications, appeals, and motions at issue. Rather, the fees apply equally to all aliens unless an alien's fee waiver request is granted by an immigration judge or the BIA, based upon a showing of the alien's inability to pay. *See* 85 FR at 11871.

The Department disagrees that the rule acts to "speed up removals" without providing opportunities for aliens to present their cases. The rule only increases fees for certain applications, appeals, and motions due to the rising adjudication costs that greatly exceed current fees. The rule does not alter proceedings in any way. Contrary to commenters' claims, the Department does not emphasize deporting aliens over due process: immigration judges and the BIA continue to exercise independent judgment and discretion in applying the immigration laws to each unique case before them. 8 CFR 1003.1(d)(1)(ii), 1003.10(b). Further, commenters' claims alleging USCIS's enforcement-related activities impeding due process are unrelated to EOIR's rule. As part of DOJ, EOIR is a separate agency from USCIS, which is part of DHS. *See Operational and Support Components*, Department of Homeland Security, <https://www.dhs.gov/operational-and-support-components> (last updated Nov. 17, 2018).

By retaining the current fee waiver process, the Department ensures that aliens who aver that they are unable to pay have an avenue to request consideration of an appropriate application, appeal, or motion. The Board has possessed explicit, discretionary authority to waive an appeal or motion fee since 1953, 18 FR 3526, 3527 (Jun. 11, 1953), and there is no evidence that the Department's longstanding fee waiver process is inadequate or ineffective to address situations in which an alien is genuinely unable to pay a relevant fee. Regarding the commenters' concerns with the 30-day period from an immigration

judge decision to file an appeal and pay the fee, the Department again notes that the public will be on notice about the new fee amount as of this rule's publication. An alien who is concerned that he or she may wish to appeal the immigration judge's decision should, accordingly, use that time between the initiation of the proceeding and the immigration judge's issuance of a final decision to begin arranging funds for the future payment of the appeal.

11. Fee increases will have negative effects on EOIR/immigration system

Comment: Commenters indicated a wide range of disparate concerns that the NPRM will have potential negative effects on the functioning of EOIR and the U.S. immigration system.

Commenters stated that it would exacerbate the "already strenuous situation on our southern border," the "dismal . . . asylum system," and aliens' access to courts. Relatedly, commenters stated there was no reason to believe that updated fees would improve the BIA's case completion rate, which they noted has continuously decreased. Another commenter explained that the NPRM would discourage even those with meritorious claims from pursuing them in EOIR proceedings.

Commenters explained that the rule diminished the institutional integrity of EOIR and would have cumulative negative, and in some cases irreversible, effects on aliens who would be unable to afford the fees, those aliens' families, and their communities. One commenter anticipated increased crime in these communities because aliens would lack options for relief. One commenter expressed concern that the NPRM would cause predatory lenders to prey on aliens.

Several commenters opined that the increased fees would incentivize unlawful immigration, which would also lead to more undocumented workers in the United States. Another commenter further explained that unlawful immigration would lead to a shift in costs from adjudication (EOIR) to enforcement (ICE). One commenter stated that no evidence exists to demonstrate that possible difficulties with processing upon entry has any deterrent effect on aliens' decisions to enter the United States.

Many commenters opposed the NPRM because they alleged that it would negatively affect representation rates. Some commenters expressed concern that the increased fees would place aliens in a position of choosing between paying the fee or obtaining counsel. Commenters explained that aliens who choose to pay the fee and have nothing left to obtain counsel would then appear pro se for their hearings. One commenter stated that this would "interfere with the statutorily granted right to counsel for alien respondents," while another commenter stated that this violated the "American principle of legal representation for all." One commenter stated that "substantial evidence [shows] that having counsel makes a critical difference in the outcome of one's case."

Numerous commenters expressed concerns that the rule would negatively affect legal service providers. For example, commenters emphasized that legal aid organizations, small firms, and attorneys providing pro bono services would be unable to routinely pay the fees for their clients. According to commenters, they would be forced to assist fewer aliens, especially indigent aliens and children, which would also preclude law students from gaining valuable experience and reduce the availability of pro bono counsel generally. Commenters further suggested that, overall, this would cause the

courts additional costs and delays. Other commenters expressed concerns that the funds used to pay their clients' fees would come at the expense of other programmatic elements of their budget; thus, they would be less able to provide comprehensive services to aliens. Some commenters stated that the higher fees and resulting fee waivers would increase the time that an attorney spends on a case, which would compound the burden on both legal aid organizations and firms, such that they would be more hesitant to take these cases. Several commenters noted that attorneys would be forced to spend more time on fee waiver applications rather than substantive issues, which could relatedly cause them to turn away clients for lack of time and resources to represent them. Further, one commenter expressed concern that the increased fees would make aliens susceptible to fraud by notarios because aliens would be forced to seek the services of fraudulent notarios in place of licensed counsel.⁴⁰

Some commenters expressed concern that an increase in fee waivers would further “backlog” the immigration courts. A commenter explained that immigration judges make “bad decisions” when under such pressure. Other commenters explained that more aliens would file fee waiver requests, thereby increasing the caseload in immigration courts and at the BIA and diverting resources from substantive claims to fee waiver adjudication.

Commenters alleged that the NPRM failed to consider this inevitable burden. One

⁴⁰ “The term ‘notario publico’ is particularly problematic in that it creates a unique opportunity for deception. The literal translation of ‘notario publico’ is ‘notary public.’ While a notary public in the United States is authorized only to witness the signature of forms, a notary public in many Latin American (and European) countries refers to an individual who has received the equivalent of a law license and who is authorized to represent others before the government. The problem arises when individuals obtain a notary public license in the United States, and use that license to substantiate representations that they are a ‘notario publico’ to immigrant populations that ascribe a vastly different meaning to the term,” and may not realize that, in the United States, a notary public is not authorized to provide representation or legal assistance to individuals in immigration proceedings. *About Notario Fraud*, American Bar Association, July 19, 2018, https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fight-notario-fraud/about_notario_fraud/ (last visited Oct. 30, 2020).

commenter explained that increasing the caseload would further extend proceedings, forcing derivative family members to file separate applications that would also increase the caseload.

Commenters stated that the burden on immigration judges to implement the \$50 asylum fee would exceed the monetary gain from charging the fee. One commenter stated that increased fees on H-1B visas and temporary guest worker visas would hurt American businesses. Another commenter explained that USCIS almost always issues Requests for Evidence (USCIS Form I-797), requiring additional filing fees, to support USCIS fee waiver requests (USCIS Form I-912).

Response: Overall, the Department finds these general concerns about possible negative effects too speculative to warrant changes to the NPRM, and the Department disagrees with commenters' concerns about the rule's extensive negative impact. Nevertheless, the Department responds to the different concerns below.

The Department disagrees with allegations that the rule would have a definitive impact at the border because the rule makes no amendments to various policies related to the border or border enforcement, only to applications and motions submitted during immigration proceedings before EOIR. Similarly, because the rule makes no substantive amendments to EOIR's asylum regulations in 8 CFR part 1208, the Department disagrees it would have an impact on the "dismal . . . asylum system," as characterized by commenters.

Commenters are correct that the BIA's case completions have decreased or remained stagnant in recent years. *See* Exec. Office for Immigration Rev. Adjudication Statistics: Case Appeals Filed, Completed, and Pending, Exec. Office for Immigration

Rev., July 14, 2020, <https://www.justice.gov/eoir/page/file/1248501/download>. However, this rule is not designed to improve BIA completion rates. Instead, the purpose is to better align the fees charged for EOIR applications and motions with the costs of the agency to provide immigration adjudication and naturalization services. *See generally* 85 FR 11866.

Further, the Department disagrees with allegations of the widespread effects on families, communities, crime rates, and predatory lending tactics. The Department continues to offer the same options for relief, including fee waivers for aliens who cannot pay a fee imposed by EOIR, and such concerns are extremely attenuated.

The Department declines to respond to commenters' speculative concerns regarding an increase in unlawful immigration and aliens' ability to obtain counsel, including effects on legal service providers. As previously explained, the rule updates EOIR fees to recover costs of the agency in providing particular services. Unlawful immigration and access to counsel are affected by a number of factors beyond the cost of applications and appeals, and commenters provided no factual or policy bases for the Department to consider. Further, the rule was not proposed to curb unlawful immigration, deter aliens from entry, or increase aliens' access to counsel. Accordingly, the Department finds such concerns to be mere speculation and is thus unable to provide a response. *See Home Box Office*, 567 F.2d at 35 n.58.⁴¹ Additionally, the Department reiterates the continued availability of fee waivers available to aliens who are unable to afford the cost of an application or appeal. The Department also notes that, contrary to some commenters' assertions, aliens have a right to representation at their own expense, but the Government

⁴¹ *See also* footnote 18 *supra* for further discussion.

is not required to provide such representation. Accordingly, the Government is also not required to subsidize representation through artificially low fees or by ignoring OMB and statutory directives for over three decades.

The Department disagrees that the burden placed on aliens due to the increased fees is excessive or undue. When calculating the fee increase pursuant to its statutory authority, the Department carefully balanced the public policy interest of maintaining accessibility of the immigration courts for aliens and the public interest in ensuring that U.S. taxpayers do not bear a disproportionate burden in funding the immigration system. 85 FR at 11870.

Additionally, commenters' assertions concerning the burden of increased fees on organizations and the private bar falls outside the limited scope of this rulemaking.

While the Department is likewise concerned about notario fraud, *see, e.g.*, Exec. Office for Immigration Rev., Notario Notice (July 22, 2009), <https://www.justice.gov/eoir/notarionoticenational072209>, the commenter's statement is both speculative and outside of the scope of this rulemaking.

As to the various comments regarding the increasing pending caseload, the Department recognizes that an increase in fee waiver requests is possible; yet, it is the Department's view that the increase alone will not substantially increase the burden on either the immigration courts or the BIA. Moreover, immigration judges and Board members have extensive experience dealing with fee waivers and would not be expected to have any difficulty adjusting to any increase in fee waiver requests.

Commenters' concerns related to H-1B visas, temporary guest worker visas, and the Form I-797 are outside the scope of this rulemaking. EOIR is a separate agency from

USCIS, which is part of DHS. Relatedly, the rule makes no substantive amendments to DHS's fees schedule, and the Department continues to apply USCIS fees in accordance with the regulation at 8 CFR 1103.7(b)(4)(ii).

Comment: Commenters also asserted that the proposed fees will result in an imbalance between DHS and aliens because DHS is exempted from paying a fee and that this imbalance may influence the future development of the law by further exacerbating an “asymmetry of resources and skew outcomes in favor of removal.” Commenters stated that such inequity would be contrary to both Supreme Court and agency precedent, both of which caution against allowing one party to unilaterally control adversarial proceedings. Commenters cited *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), in which the Supreme Court rejected an argument that would allow “the political branches to govern without legal constraint.” Commenters also cited BIA precedent in *Matter of Diaz-Garcia*, 25 I&N Dec. 794, 796 (BIA 2012), in which the BIA held that the unlawful removal of an alien during the pendency of a direct appeal does not deprive the BIA of jurisdiction over the case. Specifically, the BIA rejected DHS's interpretation because it would allow DHS “to unilaterally deprive the [BIA] of further jurisdiction” over a case. *Id.*

Commenters suggested that ICE should also be required to pay for its appeals to the BIA, asserting that EOIR could collect a substantial amount of fees without overburdening aliens who are defending their rights before the courts. Commenters also suggested that DHS be required to pay a filing fee for each Notice to Appear (“NTA”) in addition to each Notice of Appeal. Commenters remarked that, under the NPRM, DHS unfairly bears no costs for initiating proceedings while aliens must pay the updated fees

to appeal. Commenters relatedly explained that if EOIR was concerned about the increased caseload, it should charge DHS—the entity responsible for the growing caseload due to its changed enforcement priorities—for filing NTAs and Notices of Appeal, rather than charge aliens defending themselves with applications they are statutorily entitled to file. Similarly, one organization suggested that, in accordance with the IOAA’s mandated consideration of fairness in charging fees, EOIR charge an “intergovernmental user fee on federal agency filings that is equivalent to fees imposed on noncitizen users.” The organization explained that such fees were “not uncommon or rare.”

Response: Commenters’ concerns that the fees will create an imbalance between DHS and aliens and that such imbalance will in turn affect the development of case law are entirely speculative. As discussed above, to the extent that an alien is unable to pay the new fees, a fee waiver remains available. 8 CFR 1003.8(a)(3), 1003.24(d). Accordingly, aliens who are unable to pay the fee may continue to file appeals of unfavorable immigration judge decisions should they so choose.

In no way is the decision to better align the fees for these EOIR applications and motions with the Government’s adjudication costs akin to the argument in *Boumediene* that the aliens in Guantanamo Bay, Cuba did not have described rights because the Suspension Clause of the U.S. Constitution does not apply to an area where the United States does not claim sovereignty. *Boumediene*, 553 U.S. at 753–71. Here, for example, even where DHS files the appeal with the BIA, the BIA reviews all questions of law, discretion, and judgment de novo. *See* 8 CFR 1003.1(d)(3)(ii).

The Department declines to adopt commenters' suggestions to charge new intra-governmental fees for DHS-initiated filings, such as for NTAs. The NTA is the initial document that initiates most immigration court proceedings. *See* INA 239(a), 8 U.S.C. 1229(a). Such a suggestion is beyond the scope of the NPRM and would require contemplation and analysis of filing fees for other government case-initiation documents for cases adjudicated by EOIR, such as the amount of a fee for a complaint filed with the Office of the Chief Administrative Hearing Officer pursuant to INA 274A, 8 U.S.C. 1324a; INA 274B, 8 U.S.C. 1324b; and INA 274C, 8 U.S.C. 1324c. Moreover, the Department declines to impose a fee for the receipt and processing of NTAs at this time. The Department finds that NTAs serve the purpose of ensuring that aliens in removal proceedings are provided with written notice of important information regarding their removal proceedings. *See* INA 239(a), 8 U.S.C. 1229(a). The Department similarly does not collect fees for other notices that DHS serves upon parties for the purpose of ensuring that parties are provided with important information that may affect their proceedings, even where service of such notice also incurs responsibilities on the immigration court. *See, e.g.*, 8 CFR 1003.47(d) ("DHS . . . shall provide a biometrics notice and instructions to the respondent for such procedures. The immigration judge shall specify for the record when the respondent receives the biometrics notice and instructions and the consequences for failing to comply with the requirements of this section."). Moreover, no provision of the INA or any other statute authorizes the Department to impose a fee for the issuance of an NTA, and the Department is unaware of any authority it possesses to do so. *See Authority of the Nuclear Regulatory Commission to Collect Annual Charges from Federal Agencies*, 15 Op. O.L.C. 74, 75 (1991) ("It is settled law that

federal agencies may not charge other federal agencies user fees under [title 31] section 9701[.]”).

12. Discussion of how funds raised will be used

Comment: Other commenters stated that the cost calculations improperly included costs that EOIR incurred for actions that only helped DHS, and commenters disagreed that fee proceeds resulting from a fee increase in accordance with such calculations should fund those actions. For example, commenters suggested that the Department should not consider the following costs to the agency: wired network access for ICE in immigration court; spending additional time scrutinizing respondent filings; maintaining databases that immediately notify ICE, but not respondents, of EOIR rulings; establishing and maintaining VTC; new immigration judge training; EOIR trainings; and cases that circuit courts have found to be improper. Some commenters suggested that EOIR was seeking to profit off of aliens who appear before the court. Commenters stated that the Department’s reliance on the IOAA, section 286(m) of the Act (8 U.S.C. 1356(m)), and *Ayuda II*, 848 F.2d at 1301, as current sources of authority was misguided because those sources of authority predate the Homeland Security Act of 2002 (“HSA”), Pub. L. 107-296, 116 Stat. 2135. Commenters also generally disagreed with the Department’s discussion of *Ayuda I*, *Ayuda II*, and *National Cable Television Ass’n*, 554 F.2d 1094, in the NPRM.

One commenter stated that despite the Department’s position that it is permitted to charge “user fees” to recipients who receive “special benefits,” 85 FR at 11866–67, aliens in removal proceedings are not voluntarily accessing a benefit system, unlike aliens affirmatively seeking benefits from USCIS. Instead, they are being “prosecuted” by

DHS for immigration violations. Commenters acknowledged that immigration court proceedings are civil, but nonetheless asserted that aspects of the system are more akin to criminal proceedings, and equated charging cost-prohibitive fees for cancellation of removal, suspension of deportation, or asylum to charging criminal defendants for making affirmative defenses in cases in which they face prosecution.

One commenter also expressed concerns that the proposed fees that would be collected might be transferred to ICE, “the very agency prosecuting and appealing these cases, and in some instances holding the noncitizens in detention,” and would not be used for immigration adjudications. Specifically, commenters stated that the rulemaking did not make clear that the proposed fees, if collected, would be used to fund the immigration court system, citing the Board of Immigration Appeals Practice Manual and the Immigration Court Practice Manual, which state that EOIR fees for immigration court applications are paid to DHS, not the Department. *See Board of Immigration Appeals Practice Manual* ch. 3.4(i), Board of Immigration Appeals, <https://www.justice.gov/eoir/page/file/1250701/download> (last updated Feb. 20, 2020); *Immigration Court Practice Manual* ch. 3.4(a), Office of the Chief Immigration Judge, <https://www.justice.gov/eoir/page/file/1258536/download> (last updated July 2, 2020). Commenters also asserted that the NPRM did not state that the Department needed the fees collected to meet its costs or that it had a funding shortfall.

Commenters opposed funding numerous immigration-related measures, including funding for private prisons, maintaining ICE detention facilities, hiring Border Patrol Agents, building a border wall, and developing immigrant detention policies.

Commenters suggested that cutting costs by reducing such activities could prevent the need for increasing fees.

Response: Commenters observed that the IOAA, section 286(m) of the Act (8 U.S.C. 1356(m)), and the *Ayuda* decision predate the HSA. However, contrary to the commenters' statements, this does not undermine the Department's reliance on such sources of authority and judicial guidance. Following the creation of DHS by the HSA, Congress explicitly affirmed that "[t]he Attorney General [retained the same] authorities and functions under [the INA] and all other laws relating to the immigration and naturalization of aliens as were exercised by [EOIR], or by the Attorney General with respect to [EOIR]," prior to the effective date of the HSA. INA 103(g)(1), 8 U.S.C. 1103(g)(1). These authorities and functions include the authority to promulgate regulations; prescribe bonds, reports, entries, and other papers; issue instructions; review administrative determinations in immigration proceedings; delegate authority; and perform other acts as the Attorney General determines are necessary to carry out the Attorney General's authorities under the immigration laws. INA 103(g)(2), 8 U.S.C. 1103(g)(2). In sum, the Attorney General retained the same authority to implement fees after passage of the HSA as before passage of the HSA, just as the Attorney General may continue to take actions related to other INA provisions that predate the HSA, such as asylum under section 208 of the Act (8 U.S.C. 1158). The Attorney General continues to operate under his express statutory authority to carry out the provisions of section 286 of the Act (8 U.S.C. 1356). INA 286(j), 8 U.S.C. 1356(j) ("The Attorney General may prescribe such rules and regulations as may be necessary to carry out the provisions of

this section.”). Commenters have not pointed to any language in the HSA that would suggest otherwise.

Commenters are incorrect that the Department included costs that EOIR incurs for actions that only help DHS when determining the new fee. As stated in the NPRM, EOIR conducted a cost study that considered the direct salary costs required for each step in the processing and adjudications of those applications, appeals, and motions for which EOIR levies a fee. 85 FR at 11869. The Department did not include any other costs, such as the cost of network access, maintenance of EOIR databases, EOIR adjudicator training, or other non-direct salary costs, although those costs could have been included in accordance with the law. *Id.*

In response to commenters’ assertions that fees associated with “adjudication and naturalization services” do not include adjudications before EOIR, the Department notes that no such limitation is included in the statutory language. INA 286(m), 8 U.S.C. 1356(m). At the time that Congress enacted section 286(m) of the Act (8 U.S.C. 1356(m)), the Department adjudicated both benefits applications (through the former INS) that would now be adjudicated before USCIS as well as applications submitted for purposes of removal defense. Therefore, the term “adjudication,” as used in section 286(m) of the Act (8 U.S.C. 1356(m)), can be reasonably read to include EOIR adjudications. Further, prior to the enactment of section 286(m), the Department had implemented a number of fees pertaining to adjudications before EOIR, such as filing an application for a stay of deportation, filing an application for suspension of deportation, filing an appeal before the BIA, and filing a motion to reopen or reconsider. *See* 51 FR at 39993–94; *Ayuda II*, 848 F.2d at 1298 n.2. Nothing in the language of section 286(m) of

the Act (8 U.S.C. 1356(m)) suggests that Congress intended to limit or deviate from the Department's existing practice to charge fees for adjudications associated with EOIR, and this rule builds on this history of charging EOIR fees.

Additionally, the Department believes that both *National Cable Television Ass'n* and *Ayuda* highlight that existing case law supports the Department's position that the IOAA gives the Attorney General broad authority to set fees. The Department notes that the commenters have not cited any case law that would limit the Department's authority to set or increase existing fees for applications and motions filed before EOIR, so long as the fee amounts do not exceed the cost of providing the required service, including similar services that may be provided without charge to certain categories of aliens, and any additional administrative costs associated with the fees collected, and otherwise comply with the IOAA (31 U.S.C. 9701). Accordingly, the Department disagrees with commenters' suggestions that its citations to these cases are misguided.

The Department notes that even assuming *arguendo*, as commenters asserted, that the fees described in *National Cable Television Ass'n* are distinguishable from those in this rulemaking, the IOAA confers broad authority upon agency heads, including the Attorney General, to establish fees, as is "unmistakably" supported by case law. *Ayuda II*, 848 F.2d at 1300 (citing *Nat'l Cable Television Ass'n*, 554 F.2d at 1101). Accordingly, the Department has properly relied on *National Cable Television Ass'n* as a source of interpretive guidance.

The Department also believes that commenters' objections to the Department's reliance on *Ayuda II* as interpretive authority are unfounded. Specifically, commenters attempted to distinguish between *Ayuda II* and the proposed rule because *Ayuda II* was

filed prior to the enactment of section 286(m) of the Act (8 U.S.C. 1356(m)). *Compare Ayuda II*, 848 F.2d 1297 (decided June 10, 1988), *with* Pub. L. 100–459, sec. 209(a), 102 Stat. 2609 (Oct. 1, 1988) (adding subsections (m)-(p) to section 286 of the Act (8 U.S.C. 1356)). The commenters did not specify how a subsequent express grant of the authority that *Ayuda II* determined that EOIR had, to charge fees associated with proceedings, would undermine *Ayuda II*'s reasoning, rather than strengthening it. *See Ayuda II*, 848 F.2d at 1301 (“In light of settled law, we are constrained to conclude that the INS fees at issue are for a ‘service or thing of value’ which provides the recipients with a special benefit.”); INA 286(m), 8 U.S.C. 1356(m) (authorizing DOJ to charge fees for immigration adjudication and naturalization services at a level to “ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants”). Accordingly, the Department believes that this rulemaking is well supported by *Ayuda II*, 848 F.2d at 1301, as well as the statutory sources of authority. *See* 31 U.S.C. 9701; INA 286(m), 8 U.S.C. 1356(m).

With respect to commenters’ concerns that fees associated with EOIR proceedings are not charges for “special benefits” pursuant to the IOAA and Circular No. A-25 Revised, the Department notes that the term “special benefits” has been interpreted broadly to include fees associated with applications and motions included in the rulemaking. *See Ayuda II*, 848 F.2d at 1301 (determining that “the breadth of the [IOAA’s] language and the courts’ generous reading of the provision in question” require a finding that “the INS fees at issue are for a ‘service or thing of value’ which provides

the recipients with a special benefit”).⁴² The Department also notes that it is not adding any new fees for EOIR-issued forms, and that it has been charging fees for these applications and motions since at least 1986. *See* 85 FR at 11866; 51 FR at 39993. To date, no authority has directed that these fees are not “special benefits” pursuant to the IOAA.

Additionally, as commenters acknowledged, immigration proceedings are civil in nature, not criminal. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038–39 (1984); *Guti v. INS*, 908 F.2d 495, 496 (9th Cir. 1992) (per curiam) (holding Bail Reform Act inapplicable to immigration proceedings). Thus, applications and motions in immigration proceedings are not precisely analogous to affirmative defenses raised in criminal proceedings. Moreover, even if they were akin to affirmative defenses, Congress has not directed courts to recoup adjudication costs the way it has administrative agencies through the IOAA.

In response to commenters’ concerns that they are unsure about how the fees collected would be allocated, the Department reiterates that the fees will be deposited into the IEFA pursuant to section 286(m) of the Act (8 U.S.C. 1356(m)). 85 FR at 11867. The Department rejects any allegations that it would profit off of any fees that it would collect pursuant to this rulemaking. All adjudication fees that are designated in regulations are deposited in the IEFA in the Treasury of the United States. *Id.* Although

⁴² The fees at issue included: (1) a decrease from \$50 to \$35 in the fee for filing a petition to classify preference status of an alien on the basis of profession or occupation; (2) an increase from \$70 to \$125 in the fee for filing an application for a stay of deportation; (3) an increase from \$75 to \$100 in the fee for filing an application for suspension of deportation; (4) an increase from \$50 to \$110 in the fee for filing an appeal from any decision under the immigration laws in any proceeding (except a bond decision) over which the BIA has appellate jurisdiction; (5) an increase from \$50 to \$110 in the fee for filing a motion to reopen or reconsider any decision under the immigration laws, with certain exceptions; and (6) elimination of the \$50 fee for filing a request for temporary withholding of deportation. *See Ayuda II*, 848 F.2d at 1298 n.2.

the fees for EOIR applications and motions are paid to DHS, as noted by commenters, DHS does not retain the fee amounts as an addition to DHS's budget. Deposits into the IEFA "remain available until expended to the Attorney General [or the Secretary] to reimburse any appropriation the amount paid out of such appropriation for expenses in providing immigration adjudication and naturalization services and the collection, safeguarding and accounting for fees deposited in and funds reimbursed from the [IEFA]." INA 286(n), 8 U.S.C. 1356(n).

Except as noted in consideration of the public interest, the Department included all operational costs in evaluating fee levels as described in the NPRM. 85 FR at 11869. The Department notes that such costs are associated with maintaining well-functioning immigration proceedings that balance due process and efficiency interests, which is of interest to both DHS and respondents, as well as the general public, and that the Attorney General may charge fees for adjudication and naturalization services at a rate that would ensure recovery of both the full cost of providing all such services, including similar services that may be provided without charge to certain categories of aliens, and any additional administrative costs. INA 286(m), 8 U.S.C. 1356(m).

Commenters' suggestions regarding immigration detention and non-EOIR programs are outside the scope of this rulemaking and, more generally, outside the purview of the Department. ICE, which is responsible in part for immigrant detention policies and facilities, and U.S. Customs and Border Protection, of which Border Patrol agents are a part, are components within DHS. *See Operational and Support Components*, Department of Homeland Security, <https://www.dhs.gov/operational-and-support-components> (last updated Nov. 17, 2018). The Department does not have authority over

how DHS implements its authority on these topics, and the budgetary choices made by DHS could not in turn be altered to support EOIR's adjudications without congressional action.

13. Policy disagreements and concerns

Comment: Commenters expressed multiple objections to the NPRM related to policy decisions surrounding family separation and harm to discrete populations.

Commenters opposed the NPRM, stating that it would separate families.⁴³ Commenters explained that aliens would be unable to afford the proposed increased application fees for all family members. Further, commenters were concerned that aliens unable to afford to appeal immigration judge decisions would face deportations, thus separating families of mixed legal status. Commenters feared that such separation would subsequently result in children raised without both parents, removal to countries where aliens have little to no ties, family members burdened to assist separated family members, aliens remaining in the United States needing and seeking public assistance, furthered emotional and mental harm, and numerous other hardships related to financial and physical wellbeing. For these reasons, commenters asserted that the rule would destroy family unity, which they alleged is a bedrock principle of immigration law.

Commenters were also concerned that the rule would harm discrete groups of aliens, specifically UACs, detainees, women, and victims of trafficking and domestic violence, thereby inflicting or furthering mental health consequences. One commenter explained that “[a]ll immigrants, by virtue of being away from their home country, are

⁴³ This section responds to comments regarding family separation, except in the context of statutory withholding of removal and protection under the CAT. For comments concerning family separation in that context, see Section II.C.8 of this preamble.

considered vulnerable. For those who do not have the financial resources to support themselves in a new country, poverty creates additional vulnerability.” Accordingly, commenters were concerned that the rule would have significant consequences, in addition to its effects on mental health, for specific populations.

For UACs, commenters emphasized they are by definition in an already vulnerable state and typically lack financial resources, which results in a significant need for pro bono counsel. Commenters stated that because UACs would be unable to afford increased fees, the new fees would be passed on to organizations and counsel and ultimately result in fewer pro bono organizations and attorneys who will be both willing and able to provide pro bono services to UACs. Further, commenters alleged that, in their experience, fee waivers for UACs have been consistently denied by DHS and are, therefore, an insufficient remedy for this population. In this way, commenters opposed the NPRM as a violation of UAC rights to access to the legal system and protection from deportation, which commenters asserted are protected by domestic and international law. Relatedly, one commenter opposed the rule based on its effect on applicants for SIJ classification. Stating that those children need “unfettered access to BIA appellate review and motions to reopen or reconsider,” the commenter asserted that the NPRM’s increased fees will place an unnecessary burden on applicants for SIJ classification to demonstrate financial inability in requesting a fee waiver, which they have already demonstrated because “SIJ[] petitioners and recipients, by definition, have already lost the financial and emotional support of one parent, if not both.”

With regard to detainees, commenters expressed the same concerns regarding their vulnerability, financial hardship, and difficulty securing representation. Commenters

were concerned that detainees would either lack the necessary money to pay fees, encounter difficulty securing representation who could pay the increased fees, or be unable to navigate the fee waiver process on their own based on lacking resources in detention facilities.

Commenters also explained that the rule would negatively impact women and girls because they typically earn less than their male counterparts and are therefore less likely to be able to pay increased fees. Further, commenters explained that women and girls are more likely to have experienced gender-based domestic violence and related harms, upon which their applications for relief are based.

Commenters alleged that victims of domestic violence and transgender individuals are also significantly impacted by the rule because they lack adequate finances, have increased vulnerabilities, and may have suffered specific previous trauma.

Several commenters emphasized the consequences to trafficking victims imposed by the rule. Commenters stated that trafficking victims were especially vulnerable, given the harm imposed by their traffickers. Commenters explained that because trafficking victims are financially dependent on their traffickers, the increased fees will likely preclude them from pursuing review before the BIA and the Federal courts. In addition, commenters explained that trafficking victims lack both the funds to pay the increased fees and the documentation required to apply for a fee waiver, and, further, that immigration judges oftentimes lack understanding of the issues involved in human trafficking. Without access to courts, commenters stated, trafficking victims would be deprived of congressionally authorized forms of relief and may be subject to further exploitation and abuse.

Response: The Department disagrees that the rule will separate families and harm discrete populations.

First, with regard to family separation, the commenters' concerns are entirely speculative and neglect the availability of a fee waiver. The rule does not require removal of particular family members or parents, nor does it preclude family members or parents from applying for such forms of relief. Rather, the rule simply increases fees for various applications for relief. *See generally* 85 FR 11866. The Department disagrees with the commenters' reasoning because multiple intervening factors must subsequently occur before family separation would result, and commenters' assertions that each intervening event will necessarily occur as alleged are speculative. Moreover, the merits of a case determine whether a removal order is entered, and the rule has no bearing on the relative merits of any applications filed in immigration proceedings.

Nevertheless, the Department reiterates the availability of a fee waiver for any alien, including children, parents, and family members, who is unable to pay the assigned fee for the applications or motions implicated by the rule. *See* 85 FR at 11868. Aliens may apply for a fee waiver, upon which the immigration judge or the BIA may exercise discretionary authority to waive the fee for the application. *See* 8 CFR 1003.8(a)(3), 1003.24(d), and 1103.7(c). The fee waiver process was established to assist aliens who are unable to pay.

As noted in the NPRM, EOIR estimated that 36 percent of fee-related filings did not result in a collection of fees due to fee waivers. Out of 19,874 completed case appeals or motions decided by the Board in FY 2019, it granted, either tacitly or explicitly, approximately 5,499 fee waivers and recorded no fee waiver requested for approximately

14,322 cases. Although the Board does not track fee waiver denials separately, the data suggest that, at most, the Board denied 53 fee waiver requests in FY 2019.⁴⁴

Consequently, concerns about the inability of respondents to obtain fee waivers are unfounded.⁴⁵

In addition, the Department reiterates that respondents may access the List of Pro Bono Legal Service Providers, maintained by the Department's Office of Legal Access Programs. *See* 8 CFR 1003.61. This list contains contact information for pro bono legal service providers and referral services that refer aliens to pro bono counsel. *See List of Pro Bono Legal Service Providers*, Exec. Office for Immigration Rev., <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers> (last updated Apr. 14, 2020).

Second, the Department disagrees that the rule harms the specified populations—UACs, detainees, women, transgender individuals, and victims of trafficking and domestic violence.⁴⁶ With the continued availability of fee waivers, in addition to the List of Pro Bono Legal Service Providers previously described, the rule provides a mechanism for aliens who are unable to pay to seek a waiver of the fees. Moreover, many of these populations have paid EOIR filing fees for years—e.g., for motions to

⁴⁴ Depending on the nature of the denial of the fee waiver request (e.g., a denial based on the submission of an unsigned or incomplete Fee Waiver Request Form, Form EOIR-26A), some fee waiver requests that are initially denied may subsequently be granted if the request is corrected.

⁴⁵ Information on fee waiver grants and denials at the immigration court level is not tracked by the Department. Nevertheless, the denial of a fee waiver would lead to the immigration judge denying an application or motion, which is then appealable to the Board, including with a potential fee waiver request for the appeal. Consequently, a respondent whose fee waiver request is denied by an immigration judge has recourse to review that decision as part of an appeal to the Board.

⁴⁶ The Department reiterates that DHS has not assessed a \$50 fee for asylum applications filed by a UAC in removal proceedings. 84 FR at 62319.

reopen or Forms EOIR-42A or EOIR-42B—with no indication that the fees affect those populations any differently than the alien population as a whole.

The Department disagrees that fee waivers are not a viable option. Fee waiver determinations are based upon an immigration judge’s exercise of discretionary authority following a case-by-case analysis. *See* 8 CFR 1003.8(a)(3), 1003.24(d), and 1103.7(c). Despite commenters’ anecdotal and unsubstantiated allegations that fee waivers for any particular population are consistently denied, the Department has no data to indicate such a practice.⁴⁷ In regard to the effects cited by commenters that the rule would have on various populations, such effects are wholly speculative and depend most significantly on the merits of the particular case.

14. Bad motives

Comment: Some commenters who opposed the NPRM alleged that it was based on anti-immigrant sentiment to discourage appeals, reduce immigration judge authority, and curb access to courts by “pricing out” certain aliens. Numerous commenters expressed different versions of the sentiment that the NPRM was “cruel,” such as stating that the rule was “downright cruel,” “evidence[d] the agency’s lack of compassion,” or constituted a “cruelly excessive extra burden on those already burdened by the bureaucratic processes involved in immigration review.”

Other commenters opposed the NPRM for discriminating against non-white, low-income people. One commenter described it as a “race-based wealth test.” Some

⁴⁷ Indeed, because there was until recently no fee for an asylum application and because most other relevant applications for the populations identified—e.g., nonimmigrant visas for victims of human trafficking, special immigrant visas for certain categories of juveniles, or immigrant visas for certain victims of domestic violence—are adjudicated by DHS, it is implausible that EOIR has “consistently denied” fee waivers for these populations. Moreover, to the extent that some commenters allege that all aliens are “vulnerable,” EOIR’s fee waiver statistics noted above and previously, 85 FR at 11869, do not indicate that it consistently denies such waivers to all aliens.

commenters alleged that the rule targets the poor because it makes immigration available only to the wealthy who can afford the increased fees. Commenters explained that low-income aliens would be without redress, “simply because they are poor.” Commenters tried to illustrate their position by citing a Federal Reserve report stating that 40 percent of all Americans would struggle to pay an unexpected \$400 bill. *See Report on the Economic Well-Being of U.S. Households in 2018 - May 2019*, Federal Reserve, <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> (last visited Sept. 14, 2020). Commenters also asserted that many aliens’ struggle to retain representation in removal proceedings provided further evidence that aliens would likely struggle to pay the higher fees, but did not offer any evidence that aliens are unable to obtain counsel due to prohibitive cost.

Response: The Department disagrees that the rule is cruel or discriminatory, or that it targets the poor. The rule was not based on ill-conceived or anti-immigrant motives, and the NPRM was not meant to discourage appeals, reduce immigration judge authority, or curb access to courts.

Generally, the NPRM proposed to amend EOIR regulations involving fees. More specifically, and in accordance with EOIR’s fee review, it proposed to increase fees for EOIR applications, appeals, and motions; update cross-references to DHS regulations regarding fees; and make a technical change regarding FOIA requests. *See generally* 85 FR 11866. The rule does not amend EOIR’s regulations regarding fees established by DHS for DHS forms filed or submitted in EOIR proceedings, nor does the rule add new fees or affect an alien’s ability to apply for a fee waiver request. *See id.*

The changes in this final rule apply to any alien who files a relevant form under the rule, unless the alien applies for and receives a fee waiver. In this way, the rule does not discriminate, and it targets no particular group. The rule applies equally to all aliens, and fees charged are based on the application filed, contrary to commenters' assertions that the rule is discriminatory.

Further, the rule does not target the "poor" or low-income individuals in proceedings. As explained above, a fee waiver remains available for individuals who are unable to pay the fee. 8 CFR 1003.8(a)(3), 1003.24(d). Accordingly, the Department disagrees that an alien's access to the EOIR applications or motions for which EOIR imposes a fee is conditioned in any way on a wealth test or other financial status. With respect to the Federal Reserve report that was cited by commenters regarding Americans' ability to pay unexpected fees, the Department notes that publication of this rule provides notice to the public such that individuals who have a valid claim for relief will have time to prepare for filing any associated applications or motions, including filing fees. Accordingly, such fees are not necessarily unexpected. Additionally, the Department notes that the above-cited report by the Federal Reserve states that 39 percent of adults would have "more difficulty" paying an unexpected fee, with "more difficulty" defined as an individual being unable to pay with cash or a cash equivalent at the time of the bill. Only 12 percent of Americans would be unable to pay. Those aliens who fall into a similar category of the 12 percent of Americans who would be unable to pay at all might be eligible for a fee waiver pursuant to § 1103.7(c).

The Department also disagrees with commenters' assertions that the rule is "cruel." As explained in the NPRM, EOIR's processing costs currently exceed the assessed fees

for EOIR applications for relief, appeals, and motions, which have not changed since 1986. 85 FR at 11870. Accordingly, the rule updates EOIR's fees to more accurately reflect the processing costs incurred by the agency in providing such services. *See id.* The updated fees do not recover the full costs of the services; rather, the updates more accurately reflect the costs for the Department to provide such services. The Department recognizes that its services are significant procedural tools that serve the public interest and facilitate accurate administrative proceedings. *Id.* (citing *Ayuda II*, 848 F.2d at 1301). In this way, the Department preserves access to courts and the appeal process. Given this value, the Department was also careful to update its fees in accordance with the known, quantifiable costs of direct salaries, rather than variable costs such as overhead and non-salary benefits, thereby balancing the need to update fees with public policy interests. *See generally* 85 FR 11869. Consequently, the Department disagrees that the rulemaking updating the fees is "cruel."

15. Other suggestions

Comment: Commenters suggested that, rather than raising fees as proposed by the NPRM, EOIR could transfer \$8 million of unclaimed bond money to EOIR pursuant to section 286(r) of the Act (8 U.S.C. 1356(r)).

Response: Given the limitations of section 286(r)(3) of the Act (8 U.S.C. 1356(r)(3)) identified by the commenters, the Department reiterates its decision in the NPRM to raise fees in accordance with the authority in section 286(m) of the Act (8 U.S.C. 1356(m)). *See* 85 FR at 11866, 11870. Subsection (r)(3) limits refunds to the agency in the following scenarios: (1) expenses incurred to collect breached bonds and (2) expenses associated with the detention of aliens. INA 286(r), 8 U.S.C. 1356(r).

Therefore, recovery of processing costs through updating fees is proper and consistent with the agency's statutory authority in section 286(m) of the Act (8 U.S.C. 1356(m)) rather than section 286(r) of the Act (8 U.S.C. 1356(r)).

Comment: Commenters suggested that the Department should clarify that if an asylum seeker properly submits a fee waiver application that is rejected by the immigration judge, the asylum seeker's application would qualify for an extraordinary circumstances exception and the asylum seeker would not be denied asylum based on the one-year filing deadline. Commenters further explained that this clarification should be made notwithstanding the language of the Immigration Court Practice Manual, which states that "[i]f a filing is submitted without a required fee and the request for a fee waiver is denied, the filing will be deemed defectively filed and may be rejected or excluded from evidence." Immigration Court Practice Manual ch. 3.4(d), Office of the Chief Immigration Judge, <https://www.justice.gov/file/1250706/download> (last updated July 2, 2020).

Commenters urged the Department to adopt relaxed fee waiver rules for particular individuals including but not limited to those who are: detained, UACs, deemed mentally incompetent, or subject to the MPP. Commenters also recommended that such individuals be considered presumptively eligible for a fee waiver.

Response: The Department declines to adopt suggestions regarding fee waivers for asylum applications and the extraordinary circumstances exception. EOIR did not propose altering its longstanding fee waiver structure in the NPRM, and there is no supporting evidence that any such revisions are necessary. The NPRM addressed neither EOIR's longstanding regulations regarding fee waivers, 8 CFR 1103.7(c), nor the

provisions relating to extraordinary circumstance determinations, 8 CFR 1208.4(a)(5).⁴⁸ The Department also declines to adopt relaxed fee waiver rules for certain individuals, including commenters' suggestion regarding presumptive eligibility. Fee waiver determinations are based on an alien's financial situation, and an alien's presence or absence in any asserted group says little about that particular alien's financial status. For example, 87 percent of aliens who have an asylum application pending before EOIR have representation, suggesting that such aliens may possess financial resources—or the access to such resources—that would not support providing presumptive fee waiver eligibility for all such aliens. Similarly, many detained aliens are lawful permanent residents who possess employment authorization and may have significant financial resources, making a presumption that they are entitled to a fee waiver inappropriate. Finally, these groups have existed for years, and there is no evidence that the existing fee waiver procedure, which is unchanged, is inadequate to address individual circumstances in individual cases.

Comment: One commenter complained about the EOIR process for accepting fees, which requires filers to pay through USCIS. The filer recommended that EOIR accept fees electronically for all filings, whether at the immigration courts or the BIA. Another commenter argued that, rather than significantly increasing the fees, EOIR should focus on making filing processing more efficient, thereby reducing the costs needed to process filings requiring fees.

Response: The Department does not believe that any revisions to 8 CFR 1103.7(a) that would change the payment process are needed at this time; subsequently, payments

⁴⁸ The Department also notes that the one-year filing deadline for asylum applications does not apply to UACs. 8 U.S.C. 1158(a)(2)(E).

must continue to be made in accordance with the regulation. Nevertheless, while electronic payment methods are not currently available for EOIR fees, the Department continues to modernize its technological capabilities. *See Welcome to the EOIR Courts & Appeals System (ECAS) Information Page*, Exec. Office for Immigration Rev., <https://www.justice.gov/eoir/ECAS> (last updated Sept. 8, 2020); *see also* EOIR Electronic Filing Pilot Program, 83 FR 29575 (June 25, 2018) (establishing a pilot electronic system for filing and case management). As EOIR continues to move toward further electronic system developments, the Department expects EOIR to also move toward additional electronic payment capabilities, including reducing the need to use DHS as a payment intermediary for the immigration courts.

Further, the Department continues to evaluate ways in which it may increase the “productivity and timeliness of case processing by setting appropriate standards, streamlining procedures, and implementing staff-generated recommendations.” *See About the Office: Goals*, Exec. Office for Immigration Rev., <https://www.justice.gov/eoir/about-office> (last updated Aug. 14, 2018). To that end, the Department has already made various changes to improve efficiency at EOIR,⁴⁹ and the Department appreciates commenters’ suggestions on improving efficiency. Nevertheless,

⁴⁹ The Department has recently undertaken several initiatives to improve efficiency. The Department has prioritized immigration judge hiring, increasing the number of immigration judges from 245 in 2010 to 446 in the first quarter of 2020. *See Exec. Office for Immigration Rev. Adjudication Statistics: Immigration Judge (IJ) Hiring*, Oct. 2020, <https://www.justice.gov/eoir/page/file/1242156/download>. Further, the Department increased the number of appellate immigration judges authorized to serve on the BIA from 17 to 21 in 2018. *Expanding the Size of the Board of Immigration Appeals*, 83 FR 8321 (Feb. 27, 2018). Recently, the Department announced that it has further increased this number to 23. *Expanding the Size of the Board of Immigration Appeals*, 85 FR 18105 (Apr. 1, 2020); *EOIR Announces Three New Appellate Immigration Judges*, Exec. Office for Immigration Rev., Aug. 7, 2020, <https://www.justice.gov/eoir/page/file/1302796/download>. EOIR has also taken steps to ensure that courtrooms are utilized to the maximum extent during business hours. James R. McHenry III, *Policy Memorandum 19-11: No Dark Courtrooms*, Exec. Office for Immigration Rev., Mar. 29, 2019, <https://www.justice.gov/eoir/file/1149286/download> (memorializing policies to reduce and minimize the impact of unused courtrooms and docket time).

under statutory authority in section 286(m) of the Act (8 U.S.C. 1356(m)), the Department finds that updating fees properly allows the agency to recoup some of its processing costs, and thus declines to change the regulatory language of the NPRM with the publication of this final rule. *See* 85 FR at 11866, 11870.

Comment: One organization argued that the main driver of increased EOIR case receipts, which EOIR relies on as justification for these fee increases, are the actions of DHS and EOIR itself. For example, the organization explained that DHS has significantly increased its removal operations, which results in more relief applications being filed once aliens are placed into removal proceedings. Similarly, the organization stated that DHS and EOIR policies designed to limit asylum eligibility necessarily result in increases in applications for other forms of potential relief. The organization argued that these limitations, coupled with EOIR's case completion goals for immigration judges, result in increased denials of relief applications and lead to the increased filing of appeals and motions to reopen or reconsider.

Response:

Although the Department acknowledges that new case filings reached record levels in FY 2019, Executive Office for Immigration Review Workload and Adjudication Statistics, *New Cases and Total Completions-Historical* (Oct. 13, 2020), <https://www.justice.gov/eoir/page/file/1139176/download> (showing 545,729 new cases filed in FY 2019, the highest single-year total since EOIR was established in 1983), that number supports the Department's need to review and update its fee structure regardless of the cause. Moreover, the Department finds unpersuasive the commenter's tacit suggestion that if DHS declined to enforce the laws against illegal immigration, then it

would file fewer cases with EOIR, which would, in turn, have fewer cases to adjudicate and, thus, not need to raise fees. The Department recognizes the commenter’s policy disagreement with DHS’s immigration enforcement priorities, but that disagreement is beyond the scope of this rulemaking. Moreover, DHS, not EOIR, is statutorily tasked by Congress with “[e]stablishing national immigration enforcement policies and priorities,” Homeland Security Act of 2002, Pub. L. 107-296, sec. 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. 202(5)), and it is not appropriate for EOIR to review DHS’s decision to initiate proceedings to remove an alien from the United States. *See, e.g.,* Matter of Quintero, 18 I&N Dec. 348, 350 (BIA 1982) (“Once deportation proceedings have been initiated by the District Director, the immigration judge may not review the wisdom of the District Director’s action”); *see also* Lopez-Telles v. INS, 564 F.2d 1302, 1304 (9th Cir. 1977) (per curiam) (“The immigration judge is not empowered to review the wisdom of the [now DHS] in instituting the proceedings.”).

The Department disagrees with commenters’ allegations that Government policies necessarily result in increases in applications for other forms of potential relief. Individuals choose to file motions, appeals, and applications for relief or protection based on their own individual circumstances, none of which affect the Department’s authority under section 286(m) of the Act (8 U.S.C. 1356(m)) to charge fees. Moreover, all types of relief from removal have their own eligibility criteria—e.g., cancellation of removal for certain nonpermanent residents, INA 240A(b) (8 U.S.C. 1229b(b))—and there is no statutory link between eligibility for asylum and eligibility for some other form of relief. To the contrary, eligibility for most other forms of relief from removal require either some significant period of residence in the United States, e.g., INA 240A(b)(1)(A) (8

U.S.C. 1229b(b)(1)(A)) (requiring ten years of continuous physical presence in the United States), or some established connection to an employer or a relative who could petition on behalf of the alien, e.g., INA 203(a), (b) (8 U.S.C. 1153(a), (b)) (preference allocation system for immigrant visas based on familial relationships or employment). Consequently, rules restricting asylum eligibility for recent or future arrivals to the United States have little expected impact on applications for other types of relief. In short, there is no basis for the commenters' alleged link between Government asylum policies and increased applications for other types of relief from removal.

Commenters also did not substantiate their assertions that Government policies have led to increased appeals or motions to reopen or reconsider, and their allegations rest on the implicit premise that either immigration judges are unethical or incompetent—and, thus deny otherwise meritorious claims that then require appeals or motions to reopen—or aliens without meritorious claims should not be charged appropriate fees for filing appeals or motions to reopen. Neither assertion, however, is a persuasive reason for forgoing the fee review and increases proposed by the Department. Again, the appropriateness of filing a motion or appeal rests on the individual circumstances of the alien, not on any particular policy of the Government.⁵⁰

16. Miscellaneous

⁵⁰ The commenter provided no empirical substantiation for the assertion that performance measures implemented for immigration judges lead to increased denials of applications, nor is there any logical basis to support such an assertion. The immigration judge performance measure cited by commenters is based on completions, not outcomes, and whether an immigration judge grants or denies relief is wholly irrelevant to the measure. Rather, the commenter again appears to be asserting that immigration judges are either unethical or incompetent—and, thus, deny applications based on factors other than the record and applicable law—but that assertion is unfounded and not well taken by the Department. *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”).

Comment: Commenters stated that the proposed fees in the NPRM were unfair because of the disparity between EOIR’s adjudications budget and the DHS’s enforcement budget. Specifically, commenters asserted that it was unfair for the Department to pass the costs of adjudications on to aliens where the United States was willing to “pay billions of dollars” in enforcement operations.

Response: The Department disagrees that the fees are “unfair.” While the Department submits an annual budget request, Congress ultimately determines agency budget allocations through the appropriations process, and the Department does not have any control over the funds appropriated to DHS, a separate agency, for enforcement operations. At the same time, and independent of the appropriations process, Congress has authorized the Department to charge fees for immigration adjudication, and expressed its general sense that agencies should impose fees in order to be as self-sustaining as possible, 31 U.S.C. 9701(a). INA 286(m), 8 U.S.C. 1356(m). The Department exercises such statutory authority in updating the fees to more accurately reflect EOIR’s processing costs, and the Department finds that proper exercise of statutory authority is not “unfair.”

Comment: Regarding the Petition Clause of the First Amendment, which protects the right of individuals to appeal to courts for dispute resolution, *see Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011), commenters explained that “absent a uniform, accessible, rational fee-waiver process that allows indigent individuals to consistently have fees waived—and . . . there is no evidence that EOIR has such a process—the proposed changes violate that constitutional right.”

Response: The rule does not violate the Petition Clause of the First Amendment, which secures the right “to petition the Government for a redress of grievances.” U.S.

Const. amdt. I. Commenters cited *Borough of Duryea*, 564 U.S. 379, which states that “the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.” *Id.* at 387. The contours of the Petition Clause have not definitely been extended to include aliens⁵¹ implicated by the rule at hand; however, even assuming that aliens possess rights under the Petition Clause, the rule does not alter the longstanding ability of aliens to access the immigration courts and to appeal a decision by an immigration judge. INA 240(c)(5), 8 U.S.C. 1229a(c)(5); *see also* 8 CFR 1240.13(d). The rule only proposed changes to the fee that must be submitted with such application. Further, although the Department disagrees that the Petition Clause mandates a particular fee waiver process, the rule does not disturb the longstanding regulatory allowance for a fee waiver for aliens unable to afford the new fees. This process applies uniformly to all aliens in proceedings, and determinations whether to grant a fee waiver request are discretionary. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c). The Department believes this process is rational and accessible and allows for individuals to have fees waived upon a discretionary determination of inability to pay.

Comment: Commenters objected to the NPRM’s justification that raising fees would save taxpayer money. Specifically, commenters asserted that only a small portion of money collected from income taxes went toward EOIR’s operations. Specifically, the commenters stated that out of the average amount of money that each of the 143.3 million

⁵¹ Constitutional protections do not necessarily apply equally to U.S. residents and non-residents alike. For example, the Court has suggested that “‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Courts, however, have not definitively determined the extent and application to aliens of the Petition Clause of the First Amendment.

taxpayers paid in 2017, which amounted to approximately \$11,165, only \$2.79 went to fund EOIR, as compared with \$108.86 per taxpayer to CBP and \$69.08 per taxpayer to ICE.

Response: The Department presented a number of factors underlying the updated fees, including taxpayer subsidization. Based on recalculations to exclude DHS-only motions, the chart provided in the NPRM is updated below.

Form	Receipts FY 2009	Receipts FY 2018	FY 2018 Cost to Agency	FY 2018 Fees Charged⁵²	FY 2018 U.S. Taxpayer Subsidization
EOIR-26	16,839	29,123	\$28,396,381	\$3,203,530	\$25,192,851
EOIR-29	4,314	1,914	\$1,349,006	\$210,540	\$1,138,466
EOIR-40	206	158	\$48,566	\$15,800	\$32,766
EOIR-42A	5,272	3,426	\$1,053,084	\$342,600	\$710,484
EOIR-42B	16,327	30,421	\$10,954,602	\$3,042,100	\$7,912,502
Motion to Reconsider (OCIJ)	566	1,043	\$145,937	\$114,730	\$31,207
Motion to Reopen (OCIJ)	10,402	17,089	\$2,610,687	\$1,879,790	\$730,897
MTRs (BIA)⁵³	10,071	7,414	\$6,636,420	\$815,540	\$5,820,880
Total	63,997	90,588	\$51,194,683	\$9,624,630	\$41,570,053

85 FR at 11869.

⁵² Approximately 36 percent of these fees were not received due to fee waiver approvals. The impact of the waivers themselves is to provide a Government subsidy because the Government absorbs required costs on behalf of an individual who is subject to the fee. The taxpayer subsidization, therefore, is greater than the number provided in this chart.

⁵³ These numbers include both motions to reopen and motions to reconsider filed at the Board level.

To reiterate, in 2018 alone, U.S. taxpayers subsidized fee-based forms and motions by at least \$41.5 million. 85 FR at 11869. As previously mentioned, the congressional appropriations process determines the amount of funding each agency receives. Commenters may disagree with the amount of money EOIR receives in comparison to other agencies, but beyond submitting a budget request, EOIR plays no role in determining the amount of funding it ultimately receives or the overall allocation of funding among agencies. Moreover, the Department maintains that consideration of taxpayer subsidization is one of many significant factors underlying its decision to update fees. Even if the cost per taxpayer were minimal, \$41,570,053 in total is not an insignificant amount, and the Department disagrees with subsidizing fee-based forms to that extent using taxpayer dollars.

Comment: Commenters objected to the Department's description of its interests as purportedly being identical to those of DHS. Commenters explained that "EOIR itself should be representing the equally important 'Federal interest' of fairness and justice for all parties who appear before the immigration court and BIA." Further, commenters asserted that the Department did not conduct an independent analysis of its obligations in setting fees but instead simply adopted the analysis from USCIS.

Response: The Department disagrees with commenters that it ever purported to have identical interests to DHS when DHS is a party before the agency in immigration proceedings. At issue is the following statement from the NPRM: "As DHS is the party opposite the alien in these proceedings, EOIR's hearings provide value to both aliens seeking relief and the Federal interests that DHS represents." 85 FR at 11870. Through that statement, the Department sought to explain that revenue from updated fees would

advance the public interest of ensuring accurate administrative proceedings, which in turn benefits both the alien and DHS. EOIR's interests are not identical to DHS's interests in immigration proceedings. EOIR administers the Nation's immigration laws through adjudication of removal cases and claims to defend against such removal, while DHS represents the Government's interest in enforcing such laws. In this way, EOIR provides fair and just proceedings for all parties before the agency, and the updated fees ensure that EOIR continues to provide such services. *See* 85 FR at 11870.

The Department also disagrees with commenters' allegations that the agency failed to conduct an independent analysis from USCIS. Both agencies exercise authority to set fees pursuant to section 286(m) of the Act (8 U.S.C. 1356(m)). Further, both agencies follow non-statutory guidance from OMB in exercising such authority. Accordingly, the analysis contained in EOIR's NPRM (85 FR 11866) is reasonably similar to the analysis contained in USCIS's NPRM (84 FR 62280). Notwithstanding this same statutory conferral of authority, the Department reiterates that it conducts its own independent analyses throughout its rulemaking activities as a separate agency from DHS.⁵⁴

Comment: Commenters compared the NPRM to policies under prior administrations that established a streamlined appeal system whereby the BIA could affirm immigration judge decisions without opinion. Commenters asserted that under such procedures, litigants did not receive justice at the BIA and the number of Federal appeals increased. By contrast, commenters stated, when the BIA rescinded a number of the streamlining policies, Federal appeals dropped. The commenters opined that the NPRM would

⁵⁴ However, as stated elsewhere, the Department's analysis and fee-setting decisions only apply to those applications, appeals, or motions controlled by the Department and not to forms that are maintained by DHS, such as the Form I-589. Accordingly, the Department does not conduct analyses for fees set by DHS for DHS forms.

similarly burden the Federal courts by creating a new source of appeals: denial of the fee waiver and subsequent dismissal of the appeal for lack of timely filing. The commenters opined that such appeals would likely be remanded to the BIA, increasing the backlog there. The commenters asserted that any money taken in by the fees paid under the NPRM would likely be expended by the Federal courts and Department attorneys “in processing and likely remanding hundreds or thousands of cases in which fee waiver requests have been wrongly denied.”

Response: The Department disagrees with commenters’ assertions that the increase in fees would result in an undue burden on Federal courts. As stated in the NPRM, this rule does not foreclose or limit the ability of aliens to seek a fee waiver for the appeal fee before the BIA. *See* 8 CFR 1003.8(a)(3); 85 FR at 11871. An alien who is unable to pay for the increased fee of an appeal would file the EOIR-26A, Fee Waiver Request. The availability of the fee waiver ensures aliens’ continued access to the BIA, and in turn the Federal courts.

Moreover, the Department is unable to respond to commenters’ assertions that there will be an increase in appeals of denied fee waivers because these concerns are merely speculative and beyond the scope of this rulemaking. Nothing in this rule affects the adjudication process of fee waiver applications and therefore does not implicate the need for additional appeals of fee waiver denials.

Comment: Commenters also asserted that the proposed rule will operate as an unlawful tax for individuals who rely on the immigration court system for relief. Commenters cited Article 29 of the Refugee Convention, which bars imposing on refugees “duties, charges or taxes, of any description whatsoever, other or higher than

those which are or may be levied on [signatories'] nationals in similar situations.” One commenter asserted that the proposed rule violated Article 25 of the Convention because although “fees may be charged for the services mentioned [t]herein,” those “fees shall be moderate and commensurate with those charged to nationals for similar services.”

Response: As previously explained in Section II.C.8 of this preamble, the rule does not violate Article 29 of the Refugee Convention. That reasoning also applies to Article 25’s requirement that certain fees charged to refugees must be “moderate and commensurate with those charged to nationals for similar services.” Examples of such services are the Form I-130, Petition for Alien Relative, \$560, and Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant, \$450. *See* 8 CFR 106.2(a)(6), (16). Accordingly, the Department finds that fees charged to refugees under the rule are reasonably commensurate with fees charged to nationals, such that the rule upholds United States treaty obligations.

III. Provisions of the Final Rule

The Department has considered and responded to the comments received in response to the proposed rule. In accordance with the authorities discussed above in Section I.A of this preamble, the Department is now issuing this final rule to finalize the NPRM. The final rule adopts the fee amounts set out in the proposed rule as final for the reasons discussed above in Section II of this preamble in responses to the comments received. As a result, the fees for those forms, motions, and applications for which EOIR charges a fee will be as follows:

Form/ Motion	Old Fee	New Fee
EOIR-26	\$110	\$975
EOIR-29	\$110	\$705

EOIR-40	\$100	\$305
EOIR-42A	\$100	\$305
EOIR-42B	\$100	\$360
MTR OCIJ	\$110	\$145
MTR BIA	\$110	\$895
EOIR-45	\$110	\$675

Applying the same 36 percent fee waiver rate⁵⁵ that EOIR previously estimated, see 85 FR at 11869 n.11,⁵⁶ these new fees would be expected to result in the fee revenues for Fiscal Year 2021 that are reflected in the table below.⁵⁷ The table also presents the incremental fee revenue that would be paid⁵⁸ by applicants or by others assisting the applicants, including family, friends, or social agencies. Aggregating this incremental fee revenue across fee types gives an estimate of the transfer effects of the rule, which are estimated to be about \$45.2 million in FY 2021. This incremental fee revenue is estimated based on an assumption that the fee increases will not lead to a reduction in applications. The incremental fee revenue also represents an estimate of the expected transfer effects of the rule from applicants, and individuals or groups assisting those applicants, to the Federal Government. The table also provides the actual cost to the Government of providing the covered services based on the Government’s activity-based costing study for these services.

⁵⁵ The fee waiver rate was not applied to the EOIR-29 or the EOIR-45 due to the low number of filings projected. For the other forms, the impact of the waivers themselves is to provide a Government subsidy because the Government absorbs required costs on behalf of an individual who is subject to the fee. The taxpayer subsidization, therefore, is greater than contemplated by the incremental fee revenue alone.

⁵⁶ The Department notes that this rate may be low as more aliens may file for fee waivers and, thus, more waivers may be granted following the implementation of this rule. However, EOIR is unable to more specifically predict future fee waiver grant rates because each fee waiver request is an individual adjudication and because EOIR does not have data on the average income of aliens who file these forms and motions today or other data that would be required to increase this prediction’s accuracy.

⁵⁷ The Department notes that FY 2021 began prior to the publication of this final rule. The projections for FY 2021 presumed that the new fees would be in effect for the entire fiscal year.

⁵⁸ Incremental fee revenue was calculated by applying the FY 2021 projected filings to former and new fee amounts, including the 36% of forms with approved fee waivers.

Form/ Motion	FY 2021 Cost to Governmen t⁵⁹	New Fee	FY 2021 Projected⁶⁰ Fee Revenue (undiscounted)	FY 2021 Projected Fee Revenue (3% discount)	FY 2021 Projected Fee Revenue (7% discount)	FY 2021 Incremental Fee Revenue
EOIR-26	\$59,315,217	\$975	\$37,959,792	\$36,820,998	\$35,302,607	\$33,677,149
EOIR-29	\$0 ⁶¹	\$705	\$0	\$0	\$0	\$0
EOIR-40	\$71,927	\$305	\$45,677	\$44,306	\$42,479	\$30,701
EOIR-42A	\$830,233	\$305	\$527,235	\$511,418	\$490,329	\$354,371
EOIR-42B	\$16,148,160	\$360	\$10,334,822	\$10,024,778	\$9,611,385	\$7,464,038
MTR OCIJ	\$2,968,200	\$145	\$1,893,120	\$1,836,326	\$1,760,602	\$456,960
MTR BIA	\$5,531,842	\$895	\$3,636,134	\$3,527,050	\$3,381,605	\$3,189,235
EOIR-45	\$677.11	\$675	\$675	\$655	\$628	\$565
TOTAL	\$84,866.26	--	\$52,397,455	\$52,765,531	\$50,589,635	\$45,173,019

In addition, this final rule, like the NPRM, includes regulatory cross-reference changes and corrections for the reasons discussed above in Section II. However, because the USCIS final rule is currently enjoined as noted above, this final rule revises EOIR’s cross-references to direct the reader to both 8 CFR 103.7 and 8 CFR part 106 in order to prevent confusion and ensure consistency regardless of how the litigation over that rule is resolved. In addition, this final rule includes an additional correction to the cross-reference to 8 CFR 103.7(c) in 8 CFR 1245.13(g) that was inadvertently not included in the similar changes set out in the NPRM.

IV. Regulatory Requirements

A. Regulatory Flexibility Act

⁵⁹ The cost to the Government is the product of the projected number of filings and the cost calculated in the activity-based costing study.

⁶⁰ FY 2021 projections were calculated applying the average percent change over ten fiscal years to FY 2020 estimated receipts. EOIR calculated the FY 2020 estimated receipts as follows. First, EOIR added the first three quarters of FY 2020 receipts and divided by three to get an estimate for the last quarter of FY 2020. Second, EOIR added together the first three quarters along with the estimated last quarter to get the total. Next, the agency calculated the percent increase or decrease between each fiscal year and the average percent change.

⁶¹ Projections result in zero filings of Form EOIR-29. Each filing would cost the Government \$704.81 based on the activity-based costing study.

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, tit. II, 110 Stat. 847, and has determined that this rule would not have a significant economic impact on a substantial number of small entities. The rule would not regulate “small entities” as that term is defined in 5 U.S.C. 601(6). Only individuals, rather than entities, are responsible for paying the fees affected by this proposed rule. This position reflects the Department’s consistent view for decades regarding fees in EOIR proceedings. *See, e.g.*, Powers and Duties of Service Officers; Availability of Service Records, 51 FR 2895 (Jan. 22, 1986) (proposed rule for changes to EOIR’s fee schedule for appeals and motions) (“In accordance with 5 U.S.C. 605(b), the Attorney General certifies that the rule will not have a significant economic impact on a substantial number of small entities.”); 51 FR at 39994 (final rule adopting in pertinent part the proposed changes to the fee schedule) (maintaining the position that changes to the fee schedule will not have a significant impact on a substantial number of small entities). The Department is unaware of any challenge to this position and finds no reason to depart from that well-established position. The rule applies to aliens in immigration proceedings, who are individuals, not entities. *See* 5 U.S.C. 601(6). The rule does not limit in any way the ability of practitioners to accept cases, manage dockets, or assess fees. Indeed, nothing in the rule in any fashion regulates the legal representatives of such individuals or the organizations by which those representatives are employed, and the Department is unaware of cases in which the RFA’s requirements have been applied to legal representatives of entities subject to its provisions, in addition to or in lieu of the entities themselves. *See* 5 U.S.C.

603(b)(3) (requiring that an RFA analysis include a description of and, if feasible, an estimate of the number of “small entities” to which the rule “will apply”). To the contrary, case law indicates that indirect effects on entities not regulated by a proposed rule are not subject to an RFA analysis. *See, e.g., Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342–43 (D.C. Cir. 1985) (“[W]e conclude that an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule. . . . Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy. That is a very broad and ambitious agenda, and we think that Congress is unlikely to have embarked on such a course without airing the matter.”); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) (per curiam) (“Contrary to what [petitioner] supposes, application of the RFA does turn on whether particular entities are the ‘targets’ of a given rule. The statute requires that the agency conduct the relevant analysis or certify ‘no impact’ for those small businesses that are ‘subject to’ the regulation, that is, those to which the regulation ‘will apply.’ . . . The rule will doubtless have economic impacts in many sectors of the economy. But to require an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.” (citing *Mid-Tex*, 773 F.2d at 343)); *see also White Eagle Coop. Ass’n v. Conner*, 553 F.3d 467, 480 (7th Cir. 2009) (“The rule that emerges from this line of cases is that small entities directly regulated by the proposed [rulemaking]—whose conduct is circumscribed or

mandated—may bring a challenge to the RFA analysis or certification of an agency. . . . However, when the regulation reaches small entities only indirectly, they do not have standing to bring an RFA challenge.”).

Further, the Department has consistently maintained this position regarding immigration regulations aimed at aliens, rather than practitioners who represent aliens, including much broader and more sweeping rulemakings. *See, e.g.*, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 FR 444, 453 (Jan. 3, 1997) (certifying that the rule would not have a significant impact on a substantial number of small entities because it “affects only Federal government operations” by revising the procedures for the “examination, detention, and removal of aliens”). That conclusion was reiterated in the interim rule, 62 FR 10312, 10328 (Mar. 6, 1997), which was adopted with no noted challenge or dispute. This final rule is similar, in that it, too, affects only the operations of the Federal Government by amending certain discrete categories of fees related to immigration forms filed by aliens. The Department thus believes that the experience of implementing the prior rules cited above supports its conclusion that there is no evidence that this final rule will have a significant impact on small entities as contemplated by the RFA.

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Congressional Review Act

This rule is not a major rule as defined by the Congressional Review Act. 5 U.S.C. 804(2). This rule would not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of using the best available methods to quantify costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and, for all qualifying regulations, to identify at least two existing regulations for elimination.

This rule has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. The Department considers this rule to be a “significant regulatory action” under section 3(f)(3) of Executive Order 12866 because it materially alters user fees, but it is not an economically significant action because the annual effect on the economy is less than \$100 million annually. Accordingly, this rule has been submitted to OMB for review. This rule imposes transfer

payments between the public and the Government and does not impose any new cost burdens that will need to be offset under Executive Order 13771. Thus, this rule is not subject to the requirements of Executive Order 13771.

In the spring of 2018, EOIR conducted a comprehensive study using activity-based costing to determine the cost to EOIR for each type of application, appeal, and motion for which EOIR levies a fee under 8 CFR 1103.7(b). EOIR's methodology for conducting this comprehensive study was as follows:

First, in the survey-data phase, EOIR gathered survey data and consulted with OCIJ and BIA experts to determine the appropriate staff positions involved and the average time required to process and adjudicate each fee-based form or motion. EOIR also researched data from OPM and the GSA to determine the average salary rates for the applicable staff positions, including both Federal employees and EOIR contractors.

Second, in the process-mapping phase, EOIR developed step-by-step process maps, with assigned times and staff positions, for each fee-based form or motion processed in the OCIJ and the BIA. OCIJ and BIA experts validated any assumptions made during the process-mapping phase.

Third, in the activity-based-costing phase, EOIR allocated the salary costs from the GSA and OPM data to each step in the process, based on the amount of time the step takes, the average salary of the responsible staff, and the percentage of total cases in which the step occurs. As discussed above, EOIR did not include other costs, such as the overhead costs for EOIR space that is used for processing applications, fringe benefits received by EOIR staff and contractors, interpreter costs, Federal Records Center costs, non-EOIR government agency costs, or the costs and time to process any non-fee-based

application that is submitted in conjunction with a motion to reopen or reconsider. *See* 8 CFR 1003.23(b)(3) (“Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents.”). These costs were not included in the analysis because they represent costs that are incurred regardless of processing fee-based motions or forms or because they are not applicable in every adjudication of a fee-based motion or form, and DOJ did not employ a methodology to assign such costs equitably to various motion or form types.

EOIR used this methodology to calculate an estimated cost for processing each form or motion for which EOIR levies a fee. The results of the activity-based-costing analysis are as follows:

1. EOIR-40, Application for Suspension of Deportation

Staff Level	Total Cost, by Staff Level
Immigration Judge	\$277.51
Judicial Law Clerk	\$17.78
Legal Assistant	\$12.08
Interpreter	\$0.00
TOTAL	\$307.38

Process Category	Total Cost, by Process Category
Administrative	\$12.08
IJ Prep Time	\$77.66
In-Court Time	\$149.58
Written Decisions	\$68.06
TOTAL	\$307.38

2. EOIR-42A, Application for Cancellation of Removal for Certain Permanent Residents

Staff Level	Total Cost, by Staff Level
Immigration Judge	\$277.51
Judicial Law Clerk	\$17.78

Legal Assistant	\$12.07
Interpreter	\$0.00
TOTAL	\$307.38

Process Category	Total Cost, by Process Category
Administrative	\$12.08
IJ Prep Time	\$77.66
In-Court Time	\$149.58
Written Decisions	\$68.06
TOTAL	\$307.38

3. EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents

Staff Level	Total Cost, by Staff Level
Immigration Judge	\$315.74
Judicial Law Clerk	\$32.27
Legal Assistant	\$12.08
Interpreter	\$0.00
TOTAL	\$360.10

Process Category	Total Cost, by Process Category
Administrative	\$12.08
IJ Prep Time	\$74.91
In-Court Time	\$149.58
Written Decisions	\$123.52
TOTAL	\$360.10

4. Motion to Reopen (OCIJ)

Staff Level	Total Cost, by Staff Level
Immigration Judge	\$103.61
Judicial Law Clerk	\$41.17
Legal Assistant	\$7.99
TOTAL	\$152.77

Process Category	Total Cost, by Process Category
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Administrative	\$7.99
IJ Prep Time	\$38.95
Written Decisions	\$105.83
TOTAL	\$152.77

5. Motion to Reconsider (OCIJ)

Staff Level	Total Cost, by Staff Level
Immigration Judge	\$90.76
Judicial Law Clerk	\$41.17
Legal Assistant	\$7.99
TOTAL	\$139.92

Process Category	Total Cost, by Process Category
Administrative	\$7.99
IJ Prep Time	\$38.95
In-Court Time	\$0.00
Written Decisions	\$93.97
TOTAL	\$139.92

6. EOIR-26, Notice of Appeal from a Decision of an Immigration Judge

Staff Level	Total Cost, by Staff Level
Legal Assistant (GS-05/06/07)	\$5.42
Legal Assistant (GS-08/09)	\$66.64
Admin Staff (GS-08/09)	\$198.23
Paralegal	\$83.12
Attorney	\$537.52
Board Member	\$76.38
Digital Image Processor	\$7.75
TOTAL	\$975.05

Process Category	Total Cost, by Process Category
Initial Processing	\$140.68
Case Screening/Preparation	\$116.44
Decision and Adjudication	\$647.22
Final Processing	\$70.71
TOTAL	\$975.05

7. EOIR-29, Notice of Appeal to the Board of Immigration Appeals from a Decision of a DHS Officer

Staff Level	Total Cost, by Staff Level
Legal Assistant (GS-05/06/07)	\$5.42
Legal Assistant (GS-08/09)	\$66.64
Admin Staff (GS-08/09)	\$121.49
Paralegal	\$83.12
Attorney	\$344.01
Board Member	\$76.38
Digital Image Processor	\$7.75
TOTAL	\$704.81

Process Category	Total Cost, by Process Category
Initial Processing	\$63.94
Case Screening/Preparation	\$116.44
Decision and Adjudication	\$453.71
Final Processing	\$70.71
TOTAL	\$704.81

8. EOIR-45, Notice of Appeal from a Decision of an Adjudicating Official in a Practitioner Disciplinary Case

Staff Level	Total Cost, by Staff Level
Legal Assistant (GS-08/09)	\$33.32
Admin Staff (LIE, LA, or SA; GS-08/09)	\$172.65
Attorney	\$387.02
Board Member	\$76.38
Digital Image Processor	\$7.75
TOTAL	\$677.11

Process Category	Total Cost, by Process Category
Initial Processing	\$115.10
Decision and Adjudication	\$496.72
Final Processing	\$65.30

TOTAL	\$677.11
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9. Motion to Reopen/Reconsider (BIA)

Staff Level	Total Cost, by Staff Level
Legal Assistant (GS-05/06/07)	\$5.42
Legal Assistant (GS-08/09)	\$66.64
Admin Staff (LIE, LA, or SA; GS-08/09)	\$118.30
Paralegal	\$83.12
Attorney	\$537.52
Board Member	\$76.38
Digital Image Processor	\$7.75
TOTAL	\$895.12

Process Category	Total Cost, by Process Category
Initial Processing	\$60.75
Case Screening/Preparation	\$116.44
Decision and Adjudication	\$647.22
Final Processing	\$70.71
TOTAL	\$895.12

As discussed above, these estimated costs calculated from the study demonstrate that EOIR's processing costs exceed the currently assessed fees for every fee-based form or motion processed by EOIR. Accordingly, this rule raises the fees for these filings.

Form/ Motion	New Fee	Total Cost
EOIR-26	\$975	\$975
EOIR-29	\$705	\$705
EOIR-40	\$305	\$307
EOIR-42A	\$305	\$307
EOIR-42B	\$360	\$360
MTReconsider (OCIJ)	\$145	\$140
MTReopen (OCIJ)	\$145	\$153
Motion to Reopen/Reconsider	\$895	\$895

(BIA)		
EOIR-45	\$675	\$677

To determine the economic impact of this rule, EOIR compared current fee collection levels and the fee collections that would have been generated by the proposed fees, as applied to filings from FY 2018.⁶² In FY 2018, EOIR received more than 90,000 applications, appeals, and motions for which EOIR levies a fee. If fees had been collected for each of those filings at the current fee levels, EOIR would have collected \$9.6 million in revenue. If, instead, the aforementioned FY 2018 filings had been charged the fees established by this rule, fee revenue for that fiscal year would have been approximately \$51.1 million. In sum, the rule will cause applicants to pay approximately \$41.4 million in fee revenue beyond that which would be expected if the filing fees were not changed. Comparing current fee collection levels with fee collections that would have been generated by the new fees in inflation-adjusted dollars⁶³ shows that the total revenue would have been approximately \$22 million, or a difference of approximately

⁶² Data documenting the FY 2018 filings were obtained from the EOIR Database on July 16, 2020, applying a dataset from Aug. 7, 2019.

⁶³ This calculation was made by applying the consumer price index from January 1986 (109.6) to the real dollars calculation as compared to January 2019 (251.7). *Historical Consumer Price Index for All Urban Consumers*, Bureau of Labor Statistics, <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202009.pdf> (last accessed Nov. 12, 2020).

\$12.4 million. EOIR, however, does not require a fee in every circumstance when a party files one of the affected forms or motions. Instead, there are certain circumstances when the normal filing fee does not apply, and this rule does not impact immigration judges' and the BIA's discretionary authority to waive a fee upon a showing that the filing party is unable to pay. *See* 8 CFR 1003.8(a)(2)-(3), 1003.24(b)(2), (d), 1103.7(c). Therefore, the actual fee collection that results from this rule may in fact be lower than stated above, which would result in a lower cost to applicants than the collection projections outlined in this cost analysis.

Given the continued availability of fee waivers, the Department does not believe that these fees will have a material impact on the volume of filings received annually. Indeed, because these forms and applications are connected with immigration benefits and applications and must be filed as a precursor to an alien obtaining the desired relief or processes—which may determine whether the alien is able to remain lawfully in the United States or is removed to a country to which he or she has repeatedly demonstrated a desire not to return—the Department expects the demand for filing these forms and motions to be relatively inelastic, particularly due to the relatively modest nature of the increases (i.e. less than \$1000), their comparative similarity with fees imposed by USCIS, and the ability of many aliens to obtain access to financial resources which may be used to pay for them. Thus, the Department expects that aliens will continue to file the forms at roughly the same or similar rates as today following this rule's implementation.

Ultimately, EOIR estimates the following filing numbers for these forms and motions in FY 2021:⁶⁴

Form/ Motion	FY 2018 Receipts	FY 2021 Receipts (projected)
EOIR-26	29,123	60,833
EOIR-29	1,914	0
EOIR-40	158	234
EOIR-42A	3,426	2,701
EOIR-42B	30,421	44,856
MTR OCIJ⁶⁵	18,132	20,400
MTR BIA⁶⁶	7,414	6,180
EOIR-45	0	1

Transfers to EOIR from the actual

revenues flow from the individual applicants to the IEFA administered by DHS and then to EOIR in a fixed amount regardless of the decreased subsidy to filing aliens.⁶⁷ Though the fees may seem high as compared to the current fees, the agency has not increased its fees since 1986. Taken over the 33-year timespan from 1986 to 2019, the fee increases represent compound annual growth rates ranging from 0.84 percent to 6.84 percent.

While EOIR recognizes that the new fees will be more burdensome, individuals may still apply for a fee waiver for these fees pursuant to 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c).

Form/Motion	Old Fee	New Fee	Percent Increase	Compound Annual Growth Rate Since 1986
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⁶⁴ FY 2021 projections were calculated applying the average percent change over ten fiscal years to FY2020 estimated receipts. EOIR first calculated the FY 2020 estimated receipts by adding the first three quarters of FY2020 receipts, divided by three, to itself. Next, the agency calculated the percent increase or decrease between each fiscal year and the average percent change.

⁶⁵ These numbers include both motions to reopen and motions to reconsider filed at the immigration court level.

⁶⁶ These numbers include both motions to reopen and motions to reconsider filed at the BIA level.

⁶⁷ As also discussed above, the Department did not include in the NPRM projected costs related to adjudication of fee waivers resulting from the rule, nor did it include overhead costs, non-salary benefits, and costs associated with filing corollary documents that may be submitted with the application, appeal, or motion to which a fee applies. The inclusion of such costs would have likely led to greater fee increases and, thus, imposed greater costs on aliens.

EOIR-40	\$100	\$305	205%	3.44%
EOIR-42A	\$100	\$305	205%	3.44%
EOIR-42B	\$100	\$360	260%	3.96%
MTR OCIJ	\$110	\$145	32%	0.84%
EOIR-26	\$110	\$975	786%	6.84%
EOIR-29	\$110	\$705	541%	5.79%
EOIR-45	\$110	\$675	514%	5.65%
MTR BIA	\$110	\$895	714%	6.56%

The Department determined that it is appropriate to move forward with full implementation of these new fees with one effective date. The Department considered commenters' suggestions, discussed above, that the Department should phase in the new fees. However, the Department again notes the significant length of time since the Department has updated the fees for these forms, applications, and motions. In addition, members of the public, including aliens in immigration proceedings who would be required to pay the new fee amounts if they do not seek or are not granted a fee waiver, have been on notice of the possible new fee amounts since the proposed rule's publication in February 2020. And as stated above, the Department does not believe a phased implementation is needed to provide individuals additional time to prepare for the new fees as fee waivers remain available by regulation for individuals who are unable to afford the new fee amount. *See* 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c). Further, the Department notes that the closest comparable agency, USCIS, generally does not phase in fee increases even when they may be perceived as significant, and the Department is unaware of any difficulties that practice has created.

Finally, as the Department discussed, the increase in fees may constitute an additional cost to an individual alien in the amount of the relevant increase, depending on

the particular circumstances of each individual alien.⁶⁸ It is also possible—and perhaps even probable—that the increased fees may lead additional aliens to seek a fee waiver than would without this rule, though the precise size of that group of aliens, though likely small for the reasons given, *supra*, is not estimated. Otherwise, the rule will impose minimal additional costs to the Government, as the Department has adjudicated fee waivers for many decades, and both Board members and immigration judges are experienced in adjudicating such requests.

E. Executive Order 13132: Federalism

This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule would not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988: Criminal Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

This rule does not propose new “collection[s] of information” as that term is defined under the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163

⁶⁸ As also discussed above, the Department did not include in the NPRM projected costs related to adjudication of fee waivers resulting from the rule, nor did it include overhead costs, non-salary benefits, and costs associated with filing corollary documents that may be submitted with the application, appeal, or motion to which a fee applies. The inclusion of such costs would have likely led to greater fee increases and, thus, imposed a greater costs on aliens.

(codified at 44 U.S.C. 3501-3521) (“PRA”), and its implementing regulations, 5 CFR part 1320. There are no substantive changes to the forms as a result of this rulemaking; the only changes being proposed are revisions to the fee amounts for the existing forms for which EOIR sets the fees. The Department will be coordinating separately regarding updates to the existing forms under the PRA.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal Services, Organization and functions (Government agencies).

8 CFR Part 1103

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 1208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 1216

Administrative practice and procedure, Aliens.

8 CFR Part 1240

Administrative practice and procedure, Aliens.

8 CFR Part 1244

Administrative practice and procedure, Immigration.

8 CFR Part 1245

Aliens, Immigration, Reporting and recordkeeping requirements

Accordingly, for the reasons set forth in the preamble, the Attorney General amends title 8, chapter V of the Code of Federal Regulations as follows:

PART 1003 – EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

1. The authority for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949-1953 Comp., p. 1002; section 203 of Pub. L. 105-100, 111 Stat. 2196-200; sections 1506 and 1510 of Pub. L. 106-386, 114 Stat. 1527-29, 1531-32; section 1505 of Pub. L. 106-554, 114 Stat. 2763A-326 to -328.

§ 1003.8 [Amended]

2. Section 1003.8 is amended by removing the citation “8 CFR 103.7(a)” and adding, in its place, the citation “§ 1103.7(b)” in paragraph (a)(4)(ii).

§ 1003.24 [Amended]

3. Section 1003.24 is amended by removing the citation “8 CFR 103.7” and adding, in its place, the words “8 CFR 103.7 and 8 CFR part 106” in paragraphs (a) and (c)(1).

PART 1103 – APPEALS, RECORDS, AND FEES

4. The authority for part 1103 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 28 U.S.C. 509, 510.

5. Section 1103.7 is amended by:

- a. Removing the citation “8 CFR 103.7(a)(1)” and adding, in its place, the citation “8 CFR 103.7” in paragraph (a)(3);

- b. Removing the citation “8 CFR 103.7(a)(2)” and adding, in its place, the words “8 CFR 103.7 and 8 CFR part 106” in paragraph (a)(3);
- c. Removing the citation “8 CFR 103.7” and adding, in its place, the words “8 CFR 103.7 and 8 CFR part 106” in paragraph (b)(4)(ii); and
- d. Revising paragraphs (b)(1) and (2), (b)(4), and (d).

The revisions read as follows:

§ 1103.7 Fees.

* * * * *

(b) *Amounts of Fees—(1) Appeals.* For filing an appeal to the Board of Immigration Appeals, when a fee is required pursuant to 8 CFR 1003.8, as follows:

Form EOIR-26. For filing an appeal from a decision of an immigration judge—\$975.

Form EOIR-29. For filing an appeal from a decision of an officer of the Department of Homeland Security—\$705.

Form EOIR-45. For filing an appeal from a decision of an adjudicating official in a practitioner disciplinary case—\$675.

(2) *Motions.* For filing a motion to reopen or a motion to reconsider, when a fee is required pursuant to 8 CFR 1003.8 or 1003.24, as follows:

Motion to reopen or motion to reconsider before the immigration court—\$145.

Motion to reopen or motion to reconsider before the Board of Immigration Appeals—\$895.

* * * * *

(4) *Applications for Relief—(i) Forms published by the Executive Office for Immigration Review.* Fees for applications for relief shall be paid in accordance with 8 CFR 1003.8(b) and 1003.24(c) as follows:

Form EOIR-40. Application for Suspension of Deportation—\$305.

Form EOIR-42A. Application for Cancellation of Removal for Certain Permanent Residents—\$305.

Form EOIR-42B. Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents—\$360.

(ii) *Forms published by the Department of Homeland Security.* The fees for applications published by the Department of Homeland Security and used in immigration proceedings are governed by 8 CFR 103.7 and 8 CFR part 106. Consistent with 8 CFR 106.2, no fee shall apply to a Form I-589 filed with an immigration judge for the sole purpose of seeking withholding of removal under section 241(b)(3) of the Act or protection under the Convention Against Torture regulations.

* * * * *

(d) *Requests for records under the Freedom of Information Act.* Fees for production or disclosure of records under 5 U.S.C. 552 may be waived or reduced in accordance with 28 CFR 16.10.

PART 1208 – PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

6. The authority for part 1208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110-229.

§ 1208.7 [Amended]

7. Section 1208.7 is amended by removing the words “§ 103.7(c) of this chapter” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (c) introductory text.

PART 1216 – CONDITIONAL BASIS OF LAWFUL PERMANENT RESIDENCE STATUS

8. The authority for part 1216 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1154, 1184, 1186a, 1186b, and 8 CFR part 2.

§ 1216.4 [Amended]

9. Section 1216.4 is amended by removing the words “§ 103.7(b) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (a)(1).

§ 1216.5 [Amended]

10. Section 1216.5 is amended by removing the words “§ 103.7(b) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (b).

§ 1216.6 [Amended]

11. Section 1216.6 is amended by removing the words “§ 103.7(b)(1) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (a)(1).

**PART 1240 – PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS
IN THE UNITED STATES**

12. The authority for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1158, 1182, 1186a, 1186b, 1225, 1226, 1227, 1228, 1229a, 1229b, 1229c, 1252 note, 1361, 1362; secs. 202 and 203, Pub. L. 105-100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105-277 (112 Stat. 2681).

§ 1240.11 [Amended]

13. Section 1240.11 is amended by:

- a. Removing the words “§ 103.7(b)(1) of 8 CFR chapter I” and adding, in their place, the words “§ 1103.7(b)(1) of this chapter” in paragraph (f);
and
- b. Removing the citation “8 CFR 103.7(b)(1)” and adding, in its place, the words “§ 1103.7(b)(4) of this chapter” in paragraph (f).

§ 1240.20 [Amended]

14. Section 1240.20 is amended by removing the words “§ 103.7(b) of 8 CFR chapter I” and adding, in their place, the words “§ 1103.7(b) of this chapter” in paragraph (a).

PART 1244 – TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES

15. The authority for part 1244 continues to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1254a note, 8 CFR part 2.

§ 1244.6 [Amended]

16. Section 1244.6 is amended by removing the words “§ 103.7 of this chapter” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106”.

§ 1244.20 [Amended]

17. Section 1244.20 is amended by removing the citation “8 CFR 103.7(b)” and adding, in its place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (a).

PART 1245 – ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

18. The authority for part 1245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; section 202, Public Law 105-100, 111 Stat. 2160, 2193; section 902, Public Law 105-277, 112 Stat. 2681; Title VII of Public Law 110-229.

§ 1245.7 [Amended]

19. Section 1245.7 is amended by removing the words “§ 103.7 of this chapter” and adding, in their place, the words “8 CFR 103.7 and 8 CFR 103.17” in paragraph (a).

§ 1245.10 [Amended]

20. Section 1245.10 is amended by removing the words “§ 103.7(b)(1) of this chapter” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (c) introductory text.

§ 1245.13 [Amended]

21. Section 1245.13 is amended by:

- a. Removing the words “§ 103.7(b)(1) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraphs (e)(1), (g), (j)(1), and (k)(1);
- b. Removing the words “§ 103.7(b)(1) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7” in paragraph (e)(2); and
- c. Removing the words “§ 103.7(c) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (g).

§ 1245.15 [Amended]

22. Section 1245.15 is amended by:

- a. Removing the words “§ 103.7(b)(1) of this chapter” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (c)(2)(iv)(A);

- b. Removing words “§ 103.7(c) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (c)(2)(iv)(B); and
- c. Removing the words “§ 103.7(b)(1) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraphs (h)(1) and (2), (n)(1), and (t)(1).

§ 1245.20 [Amended]

23. Section 1245.20 is amended by removing the words “§ 103.7(b)(1) of 8 CFR chapter I” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraphs (d)(1), (f), and (g).

§ 1245.21 [Amended]

24. Section 1245.21 is amended by:

- a. Removing the words “§ 103.7(b)(1) of this chapter” and adding, in their place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraph (b)(2); and
- b. Removing the citation “8 CFR 103.7(b)(1)” and adding, in its place, the citation “8 CFR 103.7 and 8 CFR part 106” in paragraphs (h) and (i).

Dated: December 9, 2020.

William P. Barr,

Attorney General.

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