IRLI IMMIGRATION REFORM LAW INSTITUTE

25 Massachusetts Avenue, NW
Suite 335
Washington, DC 20001
202.232.5590 | 202.464.3590(fax)
www.irli.org

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VIA Federal eRulemaking Portal

Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike
Suite 2600
Falls Church, VA 22041

EOIR Docket No. 18-0101: Fee Review

Dear Director Reid:

The Immigration Reform Law Institute (IRLI) respectfully submits this public comment to the Executive Office for Immigration Review (EOIR), in response to the agency's notice of proposed rulemaking (NPRM) published in the Federal Register. 85 Fed. Reg. 11866 (February 28, 2019).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to ensure the efficacy of America's comprehensive immigration laws and regulations and the integrity of our nation's enforcement programs. IRLI serves the public interest by monitoring and holding accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws.

IRLI has provided expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public since 1986.

A. In general.

The Immigration Reform Law Institute (IRLI) supports the Department's determination that current fees are set below the level necessary to recover the full costs of operating the immigration courts and the Board of Immigration Appeals (BIA). It reflects badly on EOIR that, with the knowledge and acquiescence of successive Attorney Generals, the agency has knowingly underfunded these critical government functions for more than three decades, despite express congressional authorization to ensure that the historic growth in EOIR case-loads are supported by sufficient personnel and resources.

Office of Management and Budget (OMB) directives expressly call for fee reviews to be conducted on a biennial basis. *See* 31 U.S.C. §902(a)(8), OMB Circular A-25 § 8. The summary in the NPRM inexplicably fails to provide any explanation of why EOIR did not conduct *sixteen* required biennial fee reviews over the past 32 years. This failure is an outrageous example of what political scientists call "agency capture," a phenomenon where the conflicting interests of the parties whom Congress has directed the agency to regulate over time come to dominate the policies and practices of the agency, to the chronic detriment of the public interest and citizenry.

IRLI commends the initiative of the current EOIR Director and Attorney General to restore EOIR's squandered revenue streams through this NPRM. At the same time IRLI and our parent organization, the Federation for American Immigration Reform, remain deeply concerned that the current plan not to recover the full authorized costs of adjudicating the six EOIR applications (and their related motions to reopen and reconsider) will further imbed a culture of triage in agency operations. The NPRM represents an opportunity for EOIR/DOJ to move decisively to collect user fees at rates needed to reduce the chronic back-logs in processing these filings, backlogs that are very harmful to citizen, alien, and immigration personnel alike.

B. The fee review process was compliant and accurate, but the decision not to impose full-cost user fees will harm the public interest and agency operations.

IRLI finds that the methodology used for the FY 2019-2020 comprehensive "biennial" fee review, as described in the February 28, 2020, Federal Register Notice, appears to be accurate and largely compliant with the statutory requirements of 8 U.S.C. §§ 1356(m) (Immigration

examinations fee account) and 1356(n) (Reimbursement of administrative expenses), as well as applicable Office of Management & Budget (OMB) and Federal Accounting Standards Advisory Board (FASB) standards for budgeting and financial management. *See* 85 Fed. Reg. at 11866-67 (congressional mandate for user fees), 11868-11870 (conduct of the current fee review), and 11872-11874 (analysis of compliance with Executive Orders 12866, 13563 and 13771).

In IRLI's opinion, however, the agency's explanation of why and how it is setting proposed user fees at substantially less than legally authorized levels is confusing and arbitrary. *See* 85 Fed. Reg. 11870-11872. As a general policy, IRLI believes that immigration agencies conducting fee and user charge reviews are mandated to determine and assess the "*full* costs of providing all such services, *including the costs of similar services* provided without charge to asylum applicants or other immigrants." 8 U.S.C. § 1356(m) (emphasis added). Setting user fees for applicants or petitioners for immigration benefits and relief on less than a full actual cost recovery basis should be disfavored, in particular where permanent partial cost recovery for a given service or thing of value would be justified only by a vague and typically subjective "public interest" determinations.

The NPRM states that EOIR has decided to balance "the public interest in ensuring that the immigration courts are accessible to aliens seeking relief and the public interest in ensuring that taxpayers do not bear a disproportionate burden in funding the immigration system." 85 Fed. Reg. 11870. EOIR provides absolutely no support or explanation for its assertion of an apparent "public interest" that no alien or "practitioner" should be deterred from applying for cancellation of removal, or reopening of an order for removal or professional discipline, or appeal of such adverse adjudications to the BIA, due to the cost that the agency incurs in processing such cases. IRLI notes that, with the narrow exception of applications for withholding of removal (WOR) and Convention Against Torture (CAT) relief, for which the United States is obligated to recognize the alien's right to *nonrefoulement*, the various applications for which user fees are mandated are forms of relief subject to the discretion of the Attorney General or Secretary of Homeland Security. EOIR has properly exempted applications for WOR and CAT relief and motions and appeals based on these non-discretionary protections from the imposition of user fees. *See* proposed 8 C.F.R. § 1103.7(b)(4)(ii).

While the public interest that "U.S. taxpayers do not bear a disproportionate burden in funding the immigration system," 85 Fed. Reg. at 11870, is a predominant one, it is not paramount. An indicator of disproportionate taxpayer burden is the hindrance or restriction on enforcement of U.S. immigration laws due to caseload backlogs that result from underfunding of agency adjudicatory personnel and institutions. The paramount public interest for EOIR is that applications for relief are processed so effectively that caseload backlogs are minimized. That goal best serves citizens and qualified alien applicants alike.

Congress has mandated that interest through at least three enactments: 8 U.S.C. § 1103(g)(2) (requiring the Attorney General to exercise discretion to issue regulations to enforce adjudicatory provisions of the INA assigned to DOJ); 8 U.S.C. §§ 1356(m) (authorizing full cost recovery of user fees, similar services provided without charge, and additional costs associated with administration of fees collected) and 1356(n) (mandating appropriation of user fees collected for the expenses of immigration adjudications); and 8 U.S.C. § 1601(2)(A)("it continues to be the immigration policy of the United States that… aliens within the Nation's borders do not depend on public resources to meet their needs….").

Imposition of true full-cost user fees will have a collateral screening effect that likely will reduce the number of applications filed purely to provide aliens with defective or frivolous cases for relief the additional benefit of delay, by months or even years, of their ultimate removal or departure under a final order. Among federal benefits agency adjudications, immigration relief is notorious for an applicant's perverse incentive to seek delay in processing their case, in sharp contrast to the adjudication of typical government benefits, for example social security, veterans, Medicaid or naturalization, where the applicant and the tribunal share the common objective of efficient and prompt case adjudication.

C. The important function of the fee waiver application for EOIR case processing.

A more equitable, consistent, and reasoned approach would be to establish EOIR user fees at the full cost level, inclusive of pro rata of immigration court and BIA overhead expenses, adjudicatory personnel benefits, and costs for similar services provided to immigrants exempted from fees, but allow for a fee waiver application to be filed concurrently with the relevant

application. The most appropriate general policy is to mitigate the impact of full actual cost user fees on alien applicants through the existing system of fee waivers.

As IRLI explained in its recent public comment to DHS regarding that agency's current immigration fee review, the use of a written fee waiver application form would have multiple administrative and adjudicative advantages over the current fee exemption scheme. For example, many if not most applicants are not indigent and fully capable of paying the actual cost to adjudicate their request for relief. The fee waiver application also provides additional opportunities to screen for fraud. Information in a fee waiver application can be cross-checked with statements and documentation in the principal application form or motion. If the applicant makes false statements on a fee waiver application, the application can be rejected as incomplete. The function of a fee waiver application as an ongoing sworn statement of personal financial status means that it can function administratively as an attestation, and not require verification that would consume agency resources.

An approvable fee waiver application, moreover, can provide corroborative information that supports a bona fide claim. Any theoretical concerns about conflict between a fee requirement and the United States's *nonrefoulement* obligations would be alleviated by a waiver procedure, which is designed to waive the fee requirement for an alien applicant for whom payment at the time of application might in practice constitute an improper fiscal impediment.

Existing regulations will continue to insure alien access to immigration tribunals; for example, the authority of immigration judges independently to waive fees for an application or motion for relief would continue in force. *See* 8 C.F.R. § 1003.24(d).

D. Recommendation.

IRLI respectfully urges EOIR to revise the proposed fee regulations to impose a full-cost fee for all of the six relevant EOIR applications and related motions to reconsider and reopen, unless the application is accompanied by a complete fee waiver request.

Respectfully submitted,

Immigration Reform Law Institute

By Michael M. Hethmon, Senior Counsel