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These comments address U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements (84 FR 62280), a Proposed Rule by DHS on 11/14/2019.

The Fee Rule summary identifies the following objectives for fee adjustments:

- to ensure that USCIS has the resources it needs to provide adequate service to applicants and petitioners
- to recover the full operating costs associated with administering the nation's immigration benefits system, safeguarding its integrity, and efficiently and fairly adjudicating immigration benefit requests, while protecting Americans, securing the homeland, and honoring our country's values

The fee review for EB-5 forms (I-526, I-829, I-924, and I-924A) fails these objectives. The miscalculation is particularly serious for Form I-526, which accounts for a majority of the workload and revenue for the Immigrant Investor Program Office (IPO).

Form I-526 Immigrant Petition by Alien Entrepreneur

Proposed Fees (Free Rule, Table 19)

The fee rule proposes a modest 9% increase to the I-526 filing fee, from the $3,675 set in 2016 to $4,015.

The proposed fee would be reasonable if:

1. The fee change were proportional to the change in workload per form
2. The fee change would generate sufficient revenue to allow USCIS to provide adequate service for I-526
3. The fee change would generate sufficient revenue to recover operating costs, considering total I-526 workload
4. The fee change offers petitioners a reasonable tradeoff between time and money (processing resources/time vs. filing fee expense)

The proposed I-526 fee fails each of these conditions. The fee increase is too low to balance the per-form workload increase reported by USCIS, too low to reverse the current status quo of critically inadequate service for I-526, too low to cover costs in an environment with falling receipts and heavy backlog, and needlessly low considering that the fee is paid by high-net worth immigrant investors who value time.

Completion Rates (Table 6)

Comparing Table 6 in the Proposed Fee Rules from May 2016[1] and November 2019, the I-526 completion rate ("touch time" for adjudicating the form) increased 33% (from 6.5 hours in 2016 to 8.65 hours in 2019).

[1] https://www.federalregister.gov/documents/2016/05/04/2016-10297/us-citizenship-and-immigration-services-fee-schedule

Meanwhile, the volume of I-526 petitions processed has fallen from nearly 10,000 in FY2016 to just over 4,000 in FY2019 Q1-Q3[2]. The I-526 processing time was reported at 16.6 months in May 2016, and now reported at 31.5 to 52 months according to the USCIS Processing Times Report. [3]

Data for completion rates and processing times indicate that the actual workload for I-526 is at least a third higher and possibly double what it was in 2016, and that USCIS's current resources are inadequate to the workload.

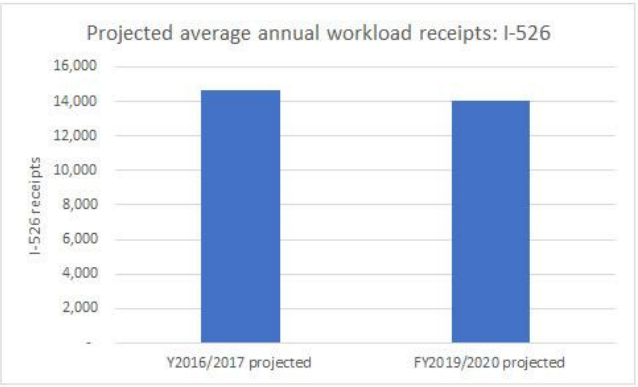
And the time spent per I-526 is likely to increase from FY2020, thanks to the EB-5 Modernization Regulation effective November 21, 2019. The regulation makes changes that will at best be workload-neutral but more likely to add to touch time. The regulation adds a new adjudicative responsibility to I-526 -- designating Targeted Employment Areas – and creates a situation in which adjudicators will be juggling two sets of policies that apply to petitions filed at different times.

And yet, the Fee Rule only proposes to increase the I-526 fee by 9% between 2016 and 2019. A 9% fee increase clearly does not give USCIS resources to handle an existing 33% increase in the work per form, and promise of additional touch time. A 9% fee increase clearly does not give USCIS resources to reverse a 100% increase in processing times. In fact a 9% fee increase implies an assumption that the status quo of 3-4 year processing times is acceptable, and could be allowed to get even worse.

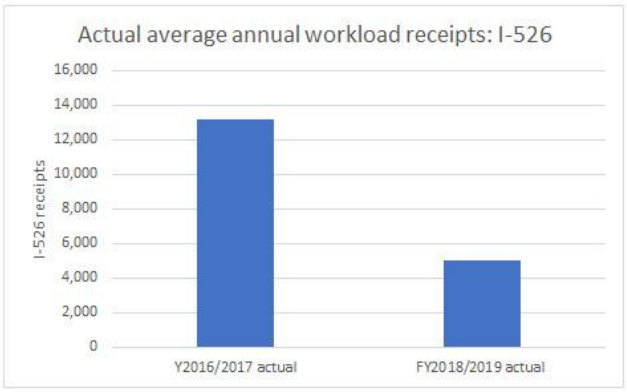
Workload Volume (Table 4)

The Fee Rule massively overestimates I-526 workload volume – the total number of immigration benefit requests that USCIS will receive in a fiscal year.

According to OMB Circular A-25, fees should be set "based upon the best available records of the agency." But the Fee Rule uses unrealistic "projected workload receipts" instead of consulting data for actual workload receipts as published on the USCIS Citizenship & Immigration Data page.



Source: Proposed Fee Rule Table 4 -- Workload Volume Comparison



Source: http://www.uscis.gov/tools/reports-studies/immigration-forms-data

Figure 1. Comparison of projected I-526 workload (in the Proposed Rule) and actual I-526 workload (based on data published on the USCIS Citizenship & Immigration Data page

[2] http://www.uscis.gov/tools/reports-studies/immigration-forms-data

[3] https://egov.uscis.gov/processing-times/ (Reports accessed on May 31, 2016 and November 25, 2019)

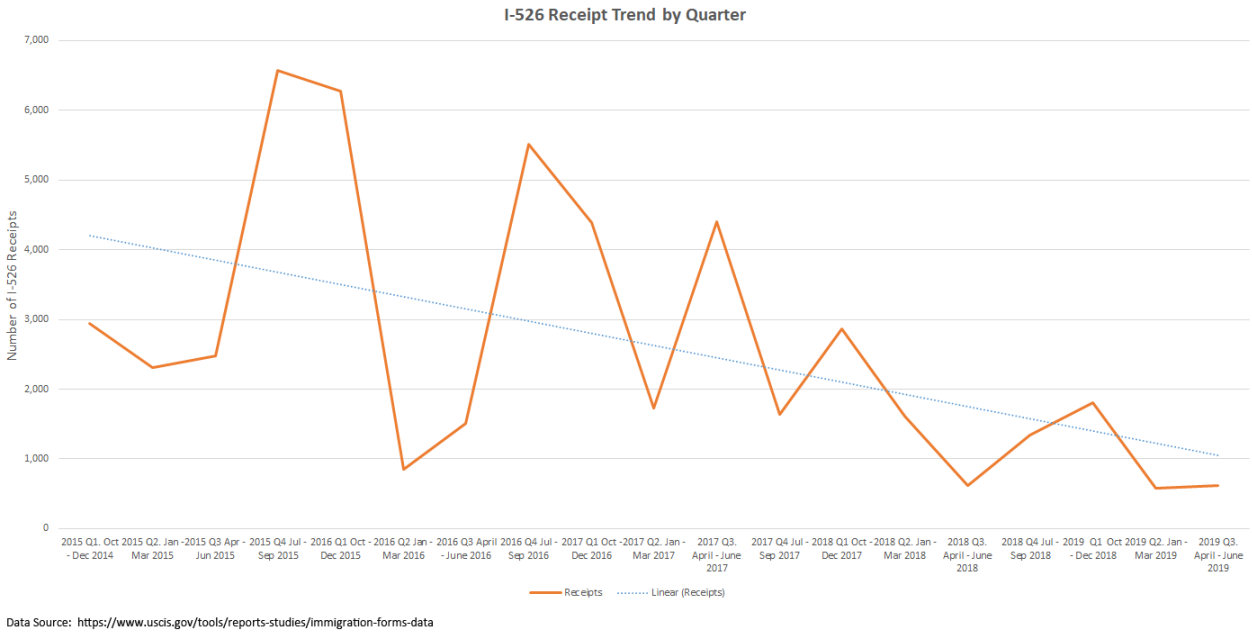


Figure 2. Actual I-526 Receipt Trend from FY 2015 Q1 to FY2019 Q3

According to USCIS data, actual average I-526 annual receipts were 13,156 for FY2016/2017 and barely over 5,000 for FY2018/2019[4]. The Fee Rule's projection of 14,000 average annual I-526 receipts for FY2019/2020 looks three times too high, just considering actual data for the FY2018/2019 period.

The fee rule's projected I-526 receipts are not only unrealistic given recent history, but implausible given known factors influencing future EB-5 usage. The EB-5 Modernization Regulation effective November 21, 2019 at least doubles the EB-5 investment amount. The law of demand states that as the price of a good increases, quantity demanded decreases. This demand-dampening factor will be in play for the foreseeable future. It comes on top of another depressive factor already at work behind the 2018/2019 decrease in I-526 receipts: the increasingly well-publicized constraint of the about-10,000 annual visa EB-5 quota, which means that the program can only practically accommodate fewer than 4,000 investors (i.e. I-526 receipts) plus family per year on average before resulting in visa waits for high-volume countries. The law of demand suggests that average annual receipts from FY2020 will at least be less than 5,000 – the level prior to the investment price increase – while the EB-5 visa quota constraint would tend to push annual receipts under 4,000.

Projected Average Annual Revenue with Proposed Fees (Table 22)

By overestimating I-526 receipts, the fee analysis overestimates revenue and underestimates the receipt fees needed to cover costs. The fee rule assumes that the Immigrant Investor Program Office could expect 14,000 receipts * $4,015 fee = $56 million revenue from I-526 (67% of the annual revenue expected from all EB-5 forms). If the reality is closer to 4,000 receipts, then IPO will only have $16 million in revenue from I-526 – a quarter of the budget anticipated in the fee rule. That reduced budget will not provide the resources that IPO needs to cover costs and provide adequate service, considering that IPO still – according to processing times reports – faces a heavy workload from form I-526 filed in the high-volume years since 2015.

[4] 14,147 in FY2016, 12,165 in FY2017, 6,424 in FY2018, and 3,003 in FY2019 Q1-Q3 according to reports posted at https://www.uscis.gov/tools/reports-studies/immigration-forms-data

Fee-Paying Projection (Table 6)

The Fee Rule errs further in equating workload volume and feepaying volume for Form I-526 (Table 4 = Table 6). True, every Form I-526 is submitted with a fee. However, the purpose of the workload/feepaying volume distinction in a fee review is to identify volume that will in fact create costs for USCIS, despite not being associated with revenue. The Fee Rule fails to consider a major category of future workload with no future revenue attached: the thousands of Form I-526 still pending from previous years.

According to USCIS data, there were 13,070 Form I-526 still pending as of the end of Q3 2019. USCIS's actual I-526 workload for FY2020 is not only fee-paying new receipts in FY2020, but also those 13,000 Form I-526 left unadjudicated from previous years. For example, if there are 4,00 new I-526 receipts in FY2020, then USCIS will have fee revenue from 4,000 receipts but will face costs associated with 4,000 + 13,000 = 17,00 adjudications. In that situation, (1) the filing fee for new receipts could be increased to include the cost of adjudicating the backlog, as well as new receipts, to allow for efficient processing with cost recovery, or (2) USCIS could adjust I-526 adjudication volume to equal filing volume, balancing cost and revenue at the cost of astronomical processing times (e.g. 17,000 petitions would take over four years to adjudicate, if processing volume were reduced to 4,000 to match revenue).

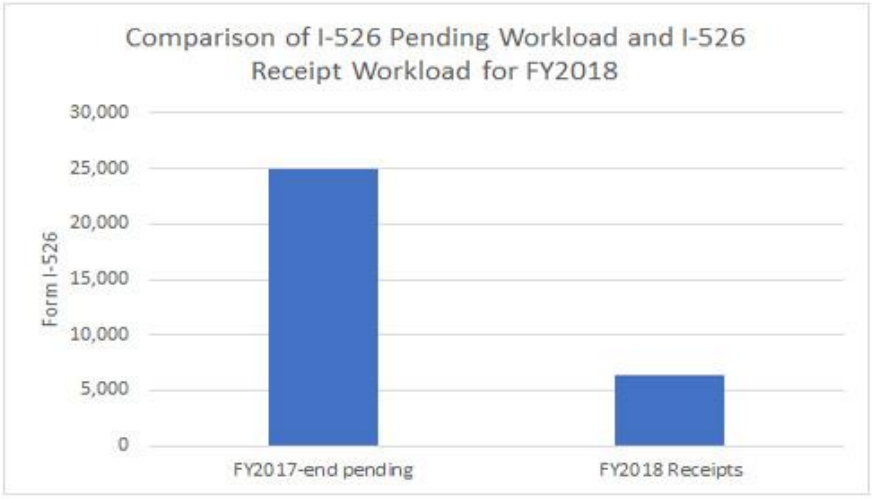


Figure 3. USCIS data for I-526 in FY2018

USCIS will not recover its full operating costs or provide efficient processing for I-526 unless it accounts for an environment of long backlogs and falling receipts – an environment in which resources needed to process pending benefit requests have exceeded and will continue to exceed resources provided by incoming benefit requests.

Adequate Service

According to the current USCIS Processing Times page, I-526 has an "estimated time range" of 31.5 to 52 months, and is only considered "outside normal processing" after 1,547 days.[5] This status quo does not represent "adequate service."

- A three-plus year processing time is obviously not efficient. Such long queue-time is particularly problematic for Form I-526, which are filed with time-sensitive business documents such as business

[5] https://egov.uscis.gov/processing-times/

plans that have expired by the time USCIS reviews the petition, thus necessitating time-wasting RFEs to request refreshed documents

- Three-plus year processing times create integrity and national security risks. USCIS efforts to improve vetting for fraud and security problems are moot if that vetting is long-delayed. A published queue time of 30+ months communicates to bad actors a three-year free pass for fraud and abuse, before scrutiny can be expected. In the history of SEC actions against EB-5 projects and regional centers, most complaints were filed over three years after the wrongdoing took place, and in many cases too late for meaningful recovery.[6]
- A three-plus year processing time threatens the integrity of the EB-5 immigrant investor program by undermining its very purpose. EB-5 exists to create jobs through investment. In an environment of long processing times, most EB-5 capital – out of necessity -- goes to projects that need not rely on EB-5, that can proceed and create jobs regardless of when and if EB-5 investor petitions are ever approved. Projects whose success and jobs depend on EB-5 capital are discouraged; it's difficult to rely on capital from investors whose petitions may take years to adjudicate. Congress did not create the EB-5 program simply to be a low-cost capital source. USCIS neuters the program's potential as an engine for new job creation if makes EB-5 investment unreliable for job creation that would depend on EB-5.

The currently-active EB-5 Reform and Integrity Act of 2019 (S.2540) proposes that USCIS should set fees at a sufficient level to ensure full recovery of costs for providing I-526 adjudication within 240 days. This definition from Senator Grassley and Senator Leahy of "adequate service" is six times shorter than the service USCIS is currently able to offer, at its current resource level. The currently-active "Immigrant Investor Program Reform Act" (S.2778) suggests an additional fee of $50,000 per I-526. While not proposed to improve processing, this suggestion reflects the kind of fee level that the industry believes I-526 petitioners would be willing to bear.

For immigrants investing upwards of a million dollars, a few thousand more or less on the filing fee is a minimal concern compared with the monetary cost, risk, damage, and deterrent associated with multi-year processing times. Any petitioner filing I-526 in FY2020 has already accepted a minimum EB-5 investment amount of $900,000 or $1.8 million under the new regulations – double or triple the $500,000 minimum investment that prevailed in 2016 when previous filing fees were set. Considering this context, USCIS and the market can and should afford to increase the I-526 fee in FY2020 to the level required to provide adequate service. (But note: a fee increase with no service improvements would simply further depress EB-5 usage, without accomplishing USCIS objectives.)

USCIS needs to revise its Staffing Allocation Model to budget for the staff necessary to achieve reasonable target processing times for Form I-526: for example, the 240-day target suggested this year in the Senate.

Form I-829 Petition by Entrepreneur to Remove Conditions on Permanent Residence Status

The fee rule proposes a modest 4% increase to the I-829 fee, from the $3,750 fee set in 2016 to a $3,900 fee. This increase is likewise clearly too low for adequate service, considering that USCIS reports a 48% increase to I-829 completion rates (from 5.5 hours in 2016 to 8.15 hours as of 2019, according to Table 6 of the May 2016 and November 2019 proposed rules). I-829 processing times provide further evidence that current resources are inadequate. While statute at INA 216A(c) mandates that I-829 be adjudicated within 90 days of filing, USCIS reports a current I-829 processing time of 22.5 to 45 months.

[6] EB-5 Securities: New Developments & Updated NYU Stern Database 2018 Edition (10/21/18) Available at https://www.stern.nyu.edu/experience-stern/about/departments-centers-initiatives/centers-of-research/center-real-estate-finance-research/research/eb-5-research