

**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON IMMIGRATION**  
**COMMISSION ON DOMESTIC VIOLENCE**  
**CRIMINAL JUSTICE SECTION**  
**COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, that the American Bar Association urges Congress and the executive  
2 branch to ensure that:

3

4 (a) Fee levels for immigration and naturalization benefits are not so burdensome  
5 as to deter eligible applicants from applying for such benefits;

6

7 (b) A clearly defined fee waiver policy and procedures are in place to ensure that  
8 waivers are reasonably available to eligible applicants who demonstrate an  
9 inability to pay the fees associated with their applications;

10

11 (c) Fees are not charged for applications for humanitarian forms of immigration  
12 relief and associated benefits.

13

14 FURTHER RESOLVED, that the American Bar Association urges Congress and the  
15 executive branch to ensure that funds appropriated for U.S. Citizenship and Immigration  
16 Services are adequate to:

17

18 (a) ensure that applicants for immigration benefits do not bear the costs of  
19 activities not directly related to application processing that benefit the general  
20 public, such as national security and anti-fraud efforts

21 (b) cover all costs for application processing for humanitarian forms of  
22 immigration relief and associated benefits;

23 (c) avoid imposing prohibitively high filing fees for processing immigration  
24 benefits applications

25 (d) provide for fee waivers for eligible applicants who demonstrate an inability to  
26 pay the fees associated with their applications.

27

28

## REPORT

### **I. Introduction**

On May 30, 2007, U.S. Citizenship and Immigration Services (USCIS) published its final rule adjusting the immigration and naturalization benefit application and petition fee schedule, which took effect on July 30, 2007. Among other changes to the prior fee schedule, the final rule reflects a proposal to increase immigration and naturalization benefit application and petition fees by a weighted average of \$174, from an average fee of \$264 to \$438. Fifteen fees increased by amounts between \$65 and \$200; eight fees by amounts between \$200 and \$300; one fee by an amount in the \$300 to \$400 range; and six fees by more than \$400. These higher fees are intended to cover the full cost of USCIS operations, including activities that benefit the general public such as those related to national security and anti-fraud efforts.

The new fees may place naturalization and other immigration benefits out of reach of many low-income immigrants. Application fees should not be so excessive as to prevent otherwise eligible individuals from accessing benefits, and USCIS initiatives that benefit the public as a whole should be funded through federal appropriations rather than through application fees.

### **II. Background and Current ABA Policies**

Prior to 1988, all activities related to immigration case processing were funded by appropriations. Although some fees were charged for services, the fees were deposited in the general United States Treasury fund and were not available to the then Immigration and Naturalization Service (INS) for spending. In 1988, the Immigration Examinations Fee Account (IEFA) was created “to provide an alternative to appropriations.”<sup>1</sup> In the absence of appropriations for these activities, the only funding source for the IEFA is fee revenue.<sup>2</sup>

In 2004, the Government Accountability Office (GAO) reported that USCIS immigration and naturalization benefit application and petition fees had become insufficient to fund current USCIS operations. These fees are deposited into the IEFA, which is then used to fund the “full cost of processing immigration and naturalization benefit applications and petitions, biometric services, and associated support services,” as well as the cost of providing similar services to asylum seekers, refugees, and some others at no charge.<sup>3</sup> In response to this funding gap, USCIS undertook a comprehensive review of its application and petition fees to ensure full recovery of its operational costs. Although the fee schedule was updated to reflect cost increases due to inflation in 2005, such a comprehensive fee review of the IEFA had not been done since 1998, by the former INS. According to USCIS’ proposed rule, it has committed itself to updating its fees through a similar analysis at least once every two years.<sup>4</sup>

Section 286(m) of the Immigration and National Act (8 U.S.C. 1356(m)) states that “fees for providing adjudication and naturalization services may be set at a level that will ensure recovery of the full costs of providing all such services.” The Office of Management and Budget (OMB) Circular No. A-25, User Fees (Revised), further states that “activities that convey special benefits

---

<sup>1</sup> Final Rule, <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>, p. 59.

<sup>2</sup> *Id.*

<sup>3</sup> Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, p. 1

<sup>4</sup> Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, p. 29.

to recipients beyond those accruing to the general public” should be funded by user fees rather than funds appropriated by Congress in order to promote efficient allocation of resources and to ensure that government functions in a business-like manner.<sup>5</sup>

On February 1, 2007, USCIS published its proposed (now final) rule containing revisions to the fee structure, and allowed 60 days for public comment. The more than 3,900 public comments that followed from individuals and groups resulted in some changes to the proposed rule, in particular a reduction in adjustment of status filing fees for children under 14 years old, and an expansion of fee waivers and exemption eligibility.

Recognizing the severe consequences of the filing fee increase for many immigrants eligible for naturalization, in March 2007, Senator Barack Obama (IL) and Representative Luis Gutierrez (IL) introduced the Citizenship Promotion Act of 2007 (S. 795/H.R. 1379) (the “CPA”). The CPA would authorize appropriations to cover some of the costs of USCIS services, rather than having the agency rely solely on fees to fund its operations. The CPA has five cosponsors in the Senate and 14 in the House of Representatives.

Current ABA policies support an administrative agency structure that provides non-citizens with due process of law in the processing of their immigration applications and petitions. ABA policy also supports expanded efforts to prepare immigrants for citizenship and to integrate them into the U.S. The ABA also recommends that “federal agencies charged with administering the immigration and refugee laws ... be provided sufficient resources and organization to enforce and administer the laws effectively and fairly.”

### **III. The Need for Appropriations for USCIS**

The new fee schedule, as explained in the proposed rule, aims to increase immigration and naturalization benefit application and petition fees from an average of \$264 to \$438.<sup>6</sup> The new rule was designed to “provide sufficient funding for USCIS to meet national security, customer service, and processing time goals, and to sustain and improve service delivery.”<sup>7</sup> It also allows USCIS to devote premium processing revenues to “broader investments in a new technology and business process platform<sup>8</sup> and allocates costs for “surcharges” and other activities across all types of fees.<sup>9</sup>

These goals reflect the new mission of USCIS, which has expanded to include national security efforts in addition to its adjudication services. As Emilio Gonzalez, Director of USCIS, stated before the House Judiciary Committee Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, the fee structure as proposed would enable USCIS to “improve the integrity of our immigration system by increasing fraud prevention and detection efforts and expanding national security enhancements” as well as “upgrade facilities and provide

---

<sup>5</sup> Office of Management and Budget, Circular No. A-25, User Fees (Revised), <http://www.whitehouse.gov/omb/circulars/a025/a025.html>. Note that in the past, USCIS has received some appropriated funds for temporary programs such as backlog elimination. Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, p. 16.

<sup>6</sup> Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, p. 2.

<sup>7</sup> Final Rule, <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>, p. 2.

<sup>8</sup> Final Rule, <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>, p. 28.

<sup>9</sup> Final Rule, <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>, p. 31-2.

better training to ensure a skilled workforce.”<sup>10</sup> For example, in drafting the proposed rule, USCIS identified \$524.3 million in “additional resource requirements” that included enhancement of fraud prevention and detection efforts; enhancement of national security data systems and processes; increased costs for FBI fingerprint, name, and security checks which benefit national security; and funding for investigations into misconduct by Federal and contract USCIS employees.<sup>11</sup> The final rule as published in the Federal Register also “sets out fees to recover the full costs of USCIS operations,” including “fraud and national security issues.”<sup>12</sup> Unlike efforts to reduce immigration application processing times, which were also a goal of the new fee structure, the above operations do not convey special benefits beyond those accruing to the general public, and thus their associated costs should not be passed on via user fees even under the federal policy stated in OMB Circular No. A-25.

In response to many comments from the public recommending that USCIS pursue funding sources in addition to user fees—in particular, appropriated funds—USCIS expressed doubt that it would receive all of the funding it needs from an appropriation.<sup>13</sup> USCIS further asserts that relying on appropriated funds is risky “because the demand for immigration benefits may change rapidly with little notice.”<sup>14</sup> USCIS’ new fee schedule intends to avoid this problem by employing a “robust model that incorporates all costs relating to services.”<sup>15</sup> This does not address the question, however, of which costs incurred by the agency are related to specific services, and which, if any, are not. Appropriations should be used for both application processing when necessary to avoid prohibitively high immigration fees, and for applications for humanitarian forms of immigration relief and associated benefits, and also to cover costs that are not directly related to application processing but that benefit the general public, such as national security and anti-fraud efforts.

#### **IV. USCIS’ Mission and Immigrants’ Ability to Pay for Services**

To determine its proposed fee increases, USCIS applied the same average unit surcharge cost (\$174) for every application and petition type. This was a departure from the methodology used to determine the prior fees, since the prior surcharges were “based upon a flat percentage of each application/petition processing activity cost and therefore varied for each case type.”<sup>16</sup> USCIS determined that using the same average cost is a “better allocation method, since the surcharges are unrelated to the complexity of the application/petition, and this new allocation method also minimizes the dollar impact on the more complex applications and petitions” which already carry higher fees.<sup>17</sup> As explained above, the resulting fee schedule increases 15 fees by amounts between \$65 and \$200. However, eight fees increased by amounts between \$200 and \$300, including the fee to naturalize (\$265 increase); one fee increased by an amount in the \$300 to \$400 range; and six fees increased by more than \$400, including the fee to apply for permanent

---

<sup>10</sup> <http://judiciary.house.gov/media/pdfs/gonzalez070214.pdf>.

<sup>11</sup> Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, 42, 46-8.

<sup>12</sup> Final Rule, <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>.

<sup>13</sup> U.S. Citizenship and Immigration Services, “Questions and Answers: USCIS Sets Final Fee Schedule to Build an Immigration Service for the 21<sup>st</sup> Century,” May 29, 2007 (Revised May 30, 2007), <http://www.uscis.gov/files/pressrelease/FinalFeeRuleQsAs052907.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, p. 82.

<sup>17</sup> *Id.*

residence (\$605 increase).<sup>18</sup> By opposing overly burdensome fees, this recommendation favors the approach taken by USCIS to allocate costs among the various application and petition types, to avoid unnecessarily penalizing certain applicants and petitioners over others.

For those unable to pay the fees, USCIS offers a waiver which can be granted on a case-by-case basis.<sup>19</sup> However, the proposed rule also “clarifie[d] the fee waiver process by limiting fee waivers to certain situations,” specifically, applications for benefits that do not require the applicant to show that she can support herself.<sup>20</sup> According to USCIS, this clarification prevents fee waivers in situations where the premise of the fee waiver is “wholly or largely inconsistent with the status held or benefit or service sought.”<sup>21</sup> Even for those who demonstrate that they can support themselves, however, application fees such as those for adjustment of status, which increased from \$325 to \$930, may pose a significant financial burden. USCIS should therefore have a clearly defined fee waiver policy to ensure that fee levels are not functioning as a bar to accessing benefits.

If individual low-income applicants are unable to secure a fee waiver, they may decide to forgo naturalization or adjustment of status altogether. The Migration Policy Institute has suggested that the already high costs of naturalization (\$1,450 for a family of four):

may be one factor that discourages low-income immigrants from naturalizing at the same rates as higher-income immigrants. In 2000-2001, when the fee for adult naturalization was \$225, 41 percent of lawful permanent residents who were eligible but had not naturalized had incomes considered “low income” (below 200 percent of the poverty level). Those who had recently naturalized had considerably higher incomes—just 28 percent had low incomes. In 2002, there were about 8 million lawful permanent residents (LPRs) who were eligible but had not yet obtained citizenship. The large increase in naturalization fees may now further hamper the ability of millions of eligible LPRs to naturalize.<sup>22</sup>

Further increasing the cost of naturalization will effectively impose a means test on citizenship. Failing to naturalize hinders the ability of immigrants to participate fully in civic life, and results in less allegiance to and investment in the United States. These concerns must be balanced against the need for USCIS to maintain adequate capacity to process all applications and petitions efficiently and in a timely manner.<sup>23</sup>

The American Immigration Lawyers Association stated in its Comment to the Proposed Rule that USCIS should not increase fees without a “corresponding commitment to quality and

---

<sup>18</sup> See the Addendum to this report for a complete chart comparing the current fees with the proposed and final schedule.

<sup>19</sup> Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, p. 87; American Immigration Lawyers Association, Comment to Proposed Rule “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule,” April 1, 2007, p. 16.

<sup>20</sup> Proposed Rule, <http://www.uscis.gov/files/nativedocuments/ProposedRule.pdf>, pp. 90-91.

<sup>21</sup> *Id.*

<sup>22</sup> Migration Policy Institute, “Immigration Fee Increases in Context,” February 2007, [http://www.migrationpolicy.org/pubs/FS15\\_CitizenshipFees2007.pdf](http://www.migrationpolicy.org/pubs/FS15_CitizenshipFees2007.pdf).

<sup>23</sup> Final Rule, <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>, p. 1.

service.”<sup>24</sup> This commitment would require addressing problems such as inconsistent and inefficient adjudication of applications and fee waiver requests, ineffective communication with customers, and the perception that USCIS is hostile to its customers. Assuming that USCIS can make this commitment, and that an increased budget is necessary to the accomplishment of USCIS’ mission, the agency must find a way to maintain reasonable fees for immigrants who must use its services.

## **V. The Citizenship Promotion Act of 2007 and Appropriation of Federal Funds**

One way to prevent application fees from rising beyond the reach of many immigrants would be to limit costs that must be passed on to those costs directly associated with processing applications. Thus, for example, surcharges to cover applications with no fee, such as asylum applications, should not include costs associated with improving national security systems. This approach would “provide consistent funding to [USCIS] so it can afford its necessary upgrades without pricing any immigrants out of the American dream.”<sup>25</sup>

This approach is also consistent with the CPA which would assist legal immigrants in becoming U.S. citizens by permitting the Secretary of the Department of Homeland Security to raise fees for immigration services only up to the levels that will ensure full recovery of the cost of providing those services. The CPA also would require the Secretary to submit a report to the Senate and House Judiciary Committees that “identifies the direct and indirect costs associated with providing immigration services, and distinguishes such costs from immigration enforcement and national security costs.” The CPA expresses the sense of Congress that fees for immigration services should cover only the direct costs of those services, and that Congress should appropriate funds to cover indirect costs.

The CPA also would set standards for administration of naturalization tests, would require that electronic filing of applications be optional and that background checks be completed in a timely manner, and would create a national citizenship promotion program.

This recommendation expands upon the approach taken in the CPA. To ensure immigrants’ access to immigration benefits for which they are otherwise eligible, Congress should appropriate funds to enable USCIS to avoid imposing prohibitively high fees and to limit costs passed on to individuals through user fees to those costs directly associated with provision of immigration services.

## **VI. Fee Exemptions for Applications for Humanitarian Forms of Relief**

This recommendation also supports a clearly-defined fee waiver policy and procedures that ensure that waivers are reasonably available to eligible applicants who demonstrate an inability to pay the fees associated with their applications. It further supports exempting certain applications from fees altogether, such as asylum, T and U visas, Violence Against Women Act, and Special Immigrant Juvenile visa petitions and their accompanying employment authorization and green card applications. Applicants for these forms of relief often have no source of income

---

<sup>24</sup> American Immigration Lawyers Association, Comment to Proposed Rule “Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule,” April 1, 2007, p. 12.

<sup>25</sup> Editorial: June 4, 2007, . . . So Why the High Price? Fees increase by 66 percent, *Washington Post*, p. A14, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/03/AR2007060300906.html>.

as a result of the situation that gave rise to their eligibility for these humanitarian forms of relief. Asylum applicants are already exempted from filing fees, and the new regulation recognizes the hardships faced by these groups by extending the exemption to applicants for T, U, and Special Immigrant Juvenile visas, and VAWA self-petitions.<sup>26</sup> By exempting these applicants from paying filing fees at the outset, USCIS will conserve the funds it would have had to expend to adjudicate their corresponding fee waiver requests. Asylum applicants, T and U visa-holders, VAWA self-petitioners, and Special Immigrant Juvenile visa holders will also be able to request a fee waiver when applying for adjustment of status under the new regulation.<sup>27</sup>

## **VI. Conclusion**

The new immigration and naturalization benefit application and petition fee schedule unfairly passes costs related to activities that benefit the general public along to individual immigrants, and it may make naturalization, applications for humanitarian relief, and other immigration benefits unattainable for many low-income immigrants. The ABA therefore urges Congress to appropriate funds for USCIS activities that benefit the general public as opposed to requiring the agency to support these activities through filing fees. In addition, the ABA supports reasonable fees for immigration and naturalization benefits that ensure their general accessibility, a clearly defined waiver policy to ensure that waivers are reasonably available to those who are unable to pay the fees, and application fee exemptions for certain humanitarian forms of relief.

Respectfully Submitted,

Mark D. Agrast, Chair  
Commission on Immigration  
February 2008

---

<sup>26</sup> Final Rule, <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>.

<sup>27</sup> *Id.*

### Addendum

Below is a table summarizing the pre-July 2007) USCIS Immigration and Naturalization Benefit Application and Petition Fee Schedule, the fee schedule proposed in February 2007, and the final adopted schedule.<sup>28</sup>

Form No.	Description	Prior Fees	Proposed Fees	Final Fees
I-90	Application to Replace Permanent Resident Card	\$190	\$290	\$290
I-102	Application for Replacement/Initial Non-immigrant Arrival-Departure Record (I-94)	\$160	\$320	\$320
I-129	Petitions for a Nonimmigrant Worker	\$190	\$320	\$320
I-129F	Petition for Alien Fiancé(e)	\$170	\$455	\$455
I-130	Petition for Alien Relative	\$190	\$355	\$355
I-131	Application for Travel Document	\$170	\$305	\$305
I-140	Immigrant Petition for Alien Worker	\$195	\$475	\$475
I-191	Application for Advance Permission to Return to Unrelinquished Domicile	\$265	\$545	\$545
I-192	Application for Advance Permission to Enter As a Nonimmigrant	\$265	\$545	\$545
I-193	Application for Waiver of Passport and/or Visa	\$265	\$545	\$545
I-212	Application for Permission to Reapply for Admission into the United States After Deportation or Removal	\$265	\$545	\$545
I-360	Petition for Amerasian, Widow(er), or Special Immigrant	\$190	\$375	\$375
I-485	Application to Register Permanent Residence or Adjust Status	\$325	\$905	\$930
I-526	Immigrant Petition by Alien Entrepreneur	\$480	\$1,435	\$1,435
I-539	Application to Extend/Change Nonimmigrant Status	\$200	\$300	\$300
I-600/ I-600A	Petition to Classify Orphan as an Immediate Relative/Application for Advance Processing or Orphan Petition	\$545	\$670	\$670
I-601	Application for Waiver of Grounds of Inadmissibility	\$265	\$545	\$545
I-612	Application for Waiver of the Foreign Residence Requirement	\$265	\$545	\$545

<sup>28</sup> Table available at <http://www.uscis.gov/files/nativedocuments/FinalRule.pdf>, pp. 10-12.



I-687	For Filing Application for Status as a Temporary Resident	\$255	\$710	\$710
I-690	Application for Waiver of Excludability	\$95	\$185	\$185
I-694	Notice of Appeal of Decision	\$110	\$545	\$545
I-695	Application for Replacement Employment Authorization or Temporary Residence Card	\$65	\$130	\$130
I-698	Application to Adjust Status from Temporary to Permanent Resident	\$180	\$1,370	\$1,370
I-751	Petition to Remove Conditions on Residence	\$205	\$465	\$465
I-765	Application for Employment Authorization	\$180	\$340	\$340
I-817	Application for Family Unity Benefits	\$200	\$440	\$440
I-824	Application for Action on an Approved Application or Petition	\$200	\$340	\$340
I-829	Petition by Entrepreneur to Remove Conditions on Residence	\$475	\$2,850	\$2,850
I-881	NACARA – Suspension of Deportation or Application for Special Rule Cancellation of Removal	\$285	\$285	\$285
I-914	Application for T Nonimmigrant Status	\$270	\$0	\$0
N-300	Application to File Declaration of Intention	\$120	\$235	\$235
N-336	Request for Hearing on a Decision in Naturalization Procedures	\$265	\$605	\$605
N-400	Application for Naturalization	\$330	\$595	\$595
N-470	Application to Preserve Residence for Naturalization Purposes	\$155	\$305	\$305
N-565	Application for Replacement of Naturalization Citizenship Document	\$220	\$380	\$380
N-600	Application for Certification of Citizenship	\$255	\$460	\$460
N-600K	Application for Citizenship and Issuance of Certificate under Section 322	\$255	\$460	\$460
	Biometric Services	\$70	\$80	\$80

## **EXECUTIVE SUMMARY**

### **1. Summary of the Recommendation**

This recommendation supports the issuance of federal regulations that codify the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) National Detention Standards, and supports improvement, periodic review, and increased oversight of detention standards implementation in order to ensure that detained noncitizens and their families are treated humanely and have meaningful access to counsel and to the legal process. The recommendation supports enforcing the detention standards at all facilities where noncitizens are detained for immigration purposes. Further, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that immigration detainees not be housed with criminal inmates.

The recommendation supports specific improvements to the Detention Standards based on reports that the Commission on Immigration receives from detained noncitizens, attorneys, and advocates. Recommended improvements include: permitting independent observers to visit detention facilities; requiring legal reference materials in hard copy or assistance with materials on computers; permitting contact visits from family and friends; providing reasonable and equitable access to telephones; permitting indigent detainees to have prompt access to free stamps, envelopes, legal telephone calls and emergency calls; providing a continuum of prompt, quality medical and dental care; providing for filing of grievances with ICE officers directly, without first going through a facility's grievance process; and prohibiting involuntary transfer of immigration detainees to remote facilities if such transfer would impede an existing attorney-client relationship, or impede case preparation.

The recommendation also provides for two means of ensuring appropriate detention standards implementation: a DHS oversight office to review all ICE detention facility inspection reports and report to the public; and in-depth training for all individuals who come into regular contact with detainees.

### **2. Summary of the Issue that the Recommendation Addresses**

ICE detained more than 283,000 noncitizens in 2006, and the number is increasing. The ABA worked extensively with the Department of Justice and the former Immigration and Naturalization Service to draft the existing Detention Standards, which went into effect in 2001. However, the ABA has repeatedly expressed its concerns about poor conditions at detention facilities—conditions that persist despite the existence of the Detention Standards. Noncitizens, including families, continue to be detained in criminal settings, and housed with criminals, even though they are civil detainees.

### **3. Explanation of How the Proposed Policy Position Will Address the Issue**

Current ABA policy addresses only select Detention Standards pertaining to access to counsel and legal information. The proposed recommendation supports the issuance of federal regulations to codify all of the Detention Standards so that they will be legally enforceable, and

addresses specific improvements that are needed in the existing Detention Standards in areas including medical access and grievance procedures. The recommendation also provides for improved oversight, including DHS review of detention facility inspection reports and in-depth training for relevant officials. Finally, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that detainees not be housed with criminals.

4. Summary of Any Minority Views

None to date.

## GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Mark D. Agrast, Chair

1. Summary of Recommendation(s).

This recommendation supports the issuance of federal regulations that codify the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) National Detention Standards, and supports improvement, periodic review, and increased oversight of detention standards implementation in order to ensure that detained noncitizens and their families are treated humanely and have meaningful access to counsel and to the legal process. The recommendation supports enforcing the detention standards at all facilities where noncitizens are detained for immigration purposes. Further, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that immigration detainees not be housed with criminal inmates.

The recommendation supports specific improvements to the detention standards based on reports that the Commission on Immigration receives from detained noncitizens, attorneys and advocates, and the ABA's pro bono projects: the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, and Volunteer Advocates for Immigrant Justice (VAIJ) in Seattle, Washington. Recommended improvements include: permitting independent observers to visit detention facilities; requiring legal reference materials in hard copy or assistance with materials on computers; permitting contact visits from family and friends; providing reasonable and equitable access to telephones; permitting indigent detainees to have prompt access to free stamps, envelopes, legal telephone calls and emergency calls; providing a continuum of prompt, quality medical and dental care, which shall address all detainee health needs, at no cost to detainees; providing for filing of grievances with ICE officers directly, without first going through a facility's grievance process; and prohibiting involuntary transfer of immigration detainees to remote facilities if such transfer would impede an existing attorney-client relationship, or impede case preparation.

The recommendation also provides for two important means of ensuring appropriate implementation of the detention standards: a DHS oversight office to review all detention facility inspection reports produced by ICE and report to the public; and in-depth training for all individuals who come into regular contact with immigration detainees.

2. Approval by Submitting Entity.

On November 12, 2007, the Commission approved this recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The recommendation would build on existing Association policies and further the Association's commitment to providing legal protections and due process rights to noncitizens in detention.

- Detention by the INS: urges protection of the constitutional and statutory rights of detainees, and supports promulgating into regulation the four ICE detention standards relating to access to counsel and legal information and permitting independent organizations to visit detention facilities and meet privately with detainees to monitor compliance (02A115B).
- Detention: opposes detention of noncitizens in removal proceedings except in extraordinary circumstances. Supports use of humane alternatives to detention; the provision of prompt hearing for aliens denied release; mechanisms to ensure complete and accurate information for administrative review and judicial oversight; mechanisms to ensure full compliance with two Supreme Court decisions on indefinite detention (06M107E).
- Involuntary Transfer of Detained Immigrants and Asylum Seekers: opposes involuntary transfers of detained immigrants and asylum seekers to remote facilities if it would impede access to counsel (01M106B).
- Improving Asylum Process: asylum seekers should be detained only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings; encourages ICE to explore alternative means to ensure appearance at court proceedings, such as supervised pretrial release or bond (2/90).
- Alien Children: addresses the psychological, legal, medical, mental health, educational, and other basic needs of unaccompanied immigrant children in federal custody (04A117).

5. What urgency exists which requires action at this meeting of the House?

The rapidly expanding use of immigration detention, increasing reports of unduly harsh conditions at detention facilities, and the failure of government agencies to comply with existing custody review procedures, make this an urgently needed recommendation. DHS is currently revising the existing National Detention Standards and has created family detention standards. Without this policy recommendation, the ABA is only able to comment on, and urge a legally enforceable mechanism for select provisions of these new detention standards.

6. Status of Legislation. (If applicable.)

Senator Joseph Lieberman (I – CT) has expressed interest in re-introducing his Safe and Secure Detention and Asylum Act, which was amended to the Senate immigration bill in 2007. The bill contains several provisions related to detention conditions. Congresswoman Zoe Lofgren (D – CA) recently offered an amendment to the Death in Custody Reporting Act of 2007 to require state and local agencies to report deaths in detention to state attorneys general. Congressional hearings have recently been held on detention conditions and deaths in detention, including one in March 2007 that the ABA testified for.

On the regulatory front, in early 2007 several organizations filed a Petition for Rulemaking to have the ICE National Detention Standards promulgated into regulation. The ABA wrote a letter

to DHS Secretary Michael Chertoff in support of the petition, specifying our support for promulgation of the legal access standards into regulation; the petition is still pending. On all of these fronts, the ABA is currently only able to comment on a limited set of issues.

7. Cost to the Association. (Both direct and indirect costs.)

Existing Commission and Governmental Affairs staff will undertake the Association's promotion of this recommendation, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This recommendation is currently being circulated to Association entities and Affiliated Organizations including:

Section of Administrative Law and Regulatory Practice

Business Law Section

Criminal Justice Section

Commission on Domestic Violence

Section Family Law

Government and Public Sector Lawyers Division

Section of Individual Rights and Responsibilities

Section of International Law

Judicial Division

Section of Labor and Employment Law

Commission on Law and Aging

Commission on Law and National Security

Section of Litigation

Standing Committee on Legal Aid and Indigent Defendants (SCLAID)

Section of Science and Technology Law

Young Lawyers Division

American Immigration Lawyers Association (AILA)

National Legal Aid and Defender Association

10. Contact Person. (Prior to the meeting.)

Mark D. Agrast

Center for American Progress

1333 H Street, N.W., Tenth Floor

Washington, DC 20005

202-682-1611 (phone)

202-682-1867 (fax)

Irena Lieberman  
Director  
American Bar Association  
Commission on Immigration  
740 Fifteenth St., NW  
Washington, DC 20005-1022  
202-662-1008 (phone)  
202-662-1032 (fax)

11. Contact Person. (Who will present the report to the House.)

Mark D. Agrast  
Center for American Progress  
1333 H Street, N.W., Tenth Floor  
Washington, DC 20005  
202-682-1611 (phone)  
202-682-1867 (fax)