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**IIUSA Member Perspective:**

## **Analysis of Forthcoming Changes to EB-5 Fees**

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The filing fees for EB-5 forms have remained unchanged since 2016, and overdue for adjustment. But how and when will EB-5 form fees will change? And will EB-5 fee increases result in better service or shorter processing times? The answers are critically important and complicated. This article provides analysis and resources to support informed stakeholder feedback for the fee-setting process.

### **When and how will EB-5 form filing fees change?**

The DHS fee rule process provides one possible path to EB-5 fee changes. On January 4, 2023, the Federal Register published a [Notice of Proposed Rulemaking](#) (“22/23 NPRM”), which proposes to adjust filing fees based on changes to USCIS costs and the incoming benefit request workload. The 22/23 NPRM fee review covers all benefits handled by USCIS, including EB-5 forms I-526/I-526E, I-829, I-956, and I-956G.

The 22/23 NPRM fee review is currently in the public comment stage. USCIS held a listening session on January 11 to record live comments, and USCIS invites submission of written comments on the [NPRM page](#) until March 6, 2023. (The listening session offered no significant input from USCIS, but featured USCIS leadership expressing their personal commitment and attention to the public comment process.)

The new filing fees in the 22/23 NPRM are only proposals at this stage: not finalized yet, and still subject to change based on public input. The period from NPRM to filing fee change has historically been 6-12 months. The last successful USCIS fee change was [proposed in an NPRM in May 2016](#) and [published as a final rule in October 2016](#), and the new fees took effect in December 2016. In the following fee review, USCIS published a proposed rule in [November 2019](#) that become a final rule [in August 2020](#), but that rule was [blocked by litigation](#) before the fee changes had a chance to take effect.

In addition the agency-wide NPRM fee rule, EB-5 fees are also subject to revision in connection with a special EB-5 fee study mandated the EB-5 Reform and Integrity Act of 2022 (Integrity Act). As the NPRM [Proposed Rule FAQ](#) says “Notwithstanding the EB-5 program fees that DHS has proposed, DHS is also gathering the information necessary to evaluate the EB-5 fees to meet the additional fee guidelines and processing time requirements provided in the EB-5 Reform and Integrity Act of 2022. The law requires DHS to conduct a fee study no later than one year after the date of its enactment (i.e. March 15, 2023),

and then, no later than 60 days after completing the study, to set fees for EB-5 program-related immigration benefit requests at a level sufficient to recover the costs of providing such services and completing the adjudications within certain time frames.”

The 22/23 NPRM fee study and the forthcoming Integrity Act-mandated fee study are different processes with different objectives. NPRM does not consider adjudication time frames. NPRM follows a cost recovery model that only accounts for USCIS costs and incoming workload; the Integrity Act study will have to use a different method to address the timely processing objective. The 22/23 NPRM fee study notes that the Integrity Act does not preclude DHS from adjusting fees in the interim via its traditional cost recovery model. USCIS will continue to collect fees for the EB-5 program “including as may be effected by a final rule for this proposed rule, until the fees established under section 106(a) of the EB-5 Reform and Integrity Act of 2022 take effect.” (NPRM pg. 9) Although yet to commence, the Integrity Act fee process could finish earlier than the NPRM process if USCIS meets the ambitious deadlines in the Integrity Act. But this remains to be seen.

**How does USCIS propose to change EB-5 fees in the 22/23 Proposed Rule, and what is the thinking behind the proposed changes?**

The 22/23 NPRM proposes new form filing fees and offers exhaustive detail regarding the objectives, methodology, assumptions, inputs, and formulas used to arrive at the fee proposals. Discussion of methods and inputs can be found in the 201-page [Proposed Rule](#), in the [USCIS Proposed Rule FAQ](#), and among the [Supporting and Related Materials](#), particularly in the 66-page [Fee Review Supporting Documentation](#), the 50-page [Fee Review Model Documentation](#), and the 28-page [Fee Schedule Documentation](#). Of the complaints justified by the fee process, “the fees weren’t explained” is not one. The challenge is patience to read the explanation. The following sections highlight and analyze content relevant for EB-5 stakeholders extracted from the voluminous USCIS material.

In short, the 22/23 NPRM proposes to increase EB-5 form filing fees by 150% to 300%, but it does not anticipate significant additional resources or staff for EB-5. The proposed EB-5 fee increase is driven by the assumption that EB-5 costs will remain fairly constant while volume of fee-paying receipts will drop going forward. The following tables show the NPRM calculation for proposed fees, followed by a discussion of each variable. (See [this Excel file](#) for the tables and additional detail extracted from the NPRM and supporting documents.)

**Summary of Proposed EB-5 filing fee changes in the FY 2022/2023 fee review**

<i>Benefit Request</i>	<i>Current Fee</i>	<i>Proposed Fee</i>
I-526/I-526E	\$3,675	\$11,160
I-829	\$3,750	\$9,525
I-956	\$17,795	\$47,695
I-956G	\$3,035	\$4,470

**Formula and inputs for calculating proposed fees in the FY 2022/2023 fee review**

	A	B	C=A/B	D	E=C+D	F=B*E	G=B*D
		Average Annual Projected Workload	Model Output	Cost Reallocation	Proposed Fee	Average Annual Revenue Forecast with Proposed Fees	Average annual reallocation forecast from EB-5
Benefit Request	Total Cost	Receipts					
I-526/I-526E	\$32,058,488	3,900	8,220	\$2,940	\$11,160	\$43,524,000	\$11,465,512
I-829	\$22,793,302	3,250	7,013	\$2,512	\$9,525	\$30,956,250	\$8,162,948
I-956	\$2,177,846	62	35,127	\$12,568	\$47,695	\$2,957,090	\$779,244
I-956G	\$2,395,284	728	3,290	\$1,180	\$4,470	\$3,254,160	\$858,876
	\$59,424,920	7,940				\$80,691,500	\$21,266,580

**Compare formula and inputs for calculating proposed fees in the FY 2016/2017 fee review**

	A	B	C=A/B	D	E=C+D+	F=B*E	G=B*D
		Average Annual Projected Workload	Model Output	Cost Reallocation	Proposed Fee	Average Annual Revenue Forecast with Proposed Fees	Average annual reallocation forecast from EB-5
Benefit Request	Total Cost	Receipts					
I-526	\$38,722,047	14,673	2,639	\$1,036	\$3,675	\$53,923,275	\$15,201,228
I-829	\$8,381,386	3,562	2,353	\$0	\$3,750	\$13,357,500	\$0
I-924	\$5,112,400	400	12,781	\$5,016	\$17,797	\$7,118,800	\$2,006,400
I-924A	\$1,921,878	882	2,179	\$855	\$3,034	\$2,675,988	\$754,110
	\$54,137,711	19,517				\$77,075,563	\$17,961,738

Sources: "Proposed Rule" and "Immigration Examinations Fee Account: Fee Review Supporting Documentation" for FY2022-2023 and FY2016-2017

**Additional Information**

**Completion Rates (Average hours per adjudication)**

	Completion Rate in FY2016/17 Review	Completion Rate in FY2022/23 Review
I-526/I-526E	6.5	20.69
I-829	5.5	15.86
I-924/I-956	40	108.5
I-924A/I-956G	5	4.6

(Completion rates are stated/estimated in the fee review, but are not included as a variable in the fee-setting formula)

**Cost Assumption**

The first input to the NPRM fee formula is a cost baseline, which means “the resources necessary for individual USCIS offices to sustain operations and deliver services.” USCIS takes its 2021 budget as a starting point for the cost baseline input, and then makes adjustments to account for any anticipated payroll and cost increases in future years. (For further discussion, see [Model Documentation](#), p. 6)

The 22/23 NPRM calculation uses a cost baseline of \$59.4 million for EB-5 forms ([Supporting Documentation](#), Appendix Table 3), which is only 10% higher than the cost baseline of \$54.1 million used to calculate EB-5 fees in the [2016 fee review](#). By assuming little change to the cost baseline, USCIS apparently assumes that the Investor Program Office will continue to be given about the same authorized staff and resources that it has had since 2016/2017. Indeed, the 22/23 NPRM specifies that it “estimates an annual average requirement of 245 positions in IPO” ([NPRM](#) p. 108). This is not technically an increase. IPO had an authorized staffing level of 247 positions as early as 2017 ([Colucci](#) p. 11). IPO managed to actually employ 236 staff by 2020 ([FAQ #13](#)), and was temporarily down to 216 staff but actively hiring back to its already-authorized level as of October 2022 ([Emmel](#) p. 2).

The 22/23 NPRM acknowledges that changes from the Integrity Act “could greatly increase the program workload,” but it does not budget for increased EB-5 workload. “Despite the changes in the law and program, DHS has proposed fees in this rule based on the currently projected staffing needs to meet the adjudicative and administrative burden of the Immigrant Investor Program Office pending the fee study required by section 106(a) of the EB-5 Reform and Integrity Act of 2022.” ([NPRM](#) p. 107)

Should EB-5 stakeholders point out in NPRM comments that the fee review severely underestimates the future costs and staffing requirements that IPO will require to provide adequate service? We can cite the small number of I-526, I-829 and I-924 decisions in 2020, when IPO already had 236 staff, as evidence that backlogs will likely grow if authorized staff remains capped at 245. We could point out the increased workload from the Integrity Act: it introduces two new no-fee forms with a likely large number of receipts, while also increasing the workload per regional center application and annual report. We could quote IPO Chief Alissa Emmel complaining of processing problems that have already resulted because “we have needed to implement the legislation without additional staff, reassigning staff from other priorities to accomplish the goals of form production, receipting, training, review, and adjudication of the new forms” ([Emmel](#) p. 2).

Staff and resources come with a cost, and USCIS is a fee-funded agency. If USCIS adjusts the EB-5 cost variable in the NPRM fee formula based on realizing that IPO indeed needs more resources for the future, what will result? (1) USCIS may actually authorize more resources for IPO, which are desperately needed for future performance. (2) The NPRM fee formula will calculate the need for yet higher EB-5 filing fees to cover the higher anticipated costs. Under the fee review terms, it’s not possible to argue that USCIS should provide better EB-5 service without raising prices on EB-5 forms (or expecting increased receipt volume). USCIS agrees with the need for efficiency improvements, but the fee review cannot practically force or count on efficiency gains. The budgeting process only has power to affect performance by planning on increased staffing and resources – something the Proposed Rule does for many USCIS form categories but unfortunately has not done for EB-5.

### **Volume Assumptions**

Having estimated future operating costs, the 22/23 NPRM goes on to estimate the future volume of receipts over which to spread those costs. For EB-5, this step required USCIS to (1) identify EB-5 forms, and (2) estimate how many of those forms will be filed going forward. Public comments should point out that the NPRM both misidentifies EB-5 forms and miscalculates receipts. The proposed EB-5 fees in NPRM are so high primarily because NPRM forecasts such a small number of incoming EB-5 receipts to cover the cost.

- The NPRM analysis puts I-526 and I-526E in a single row with a single fee, assuming that they are essentially the same form and have identical workload. In fact, the new I-526E has half the content of the new I-526, and neither form is identical to the old I-526. Public comments can point out the differences and explain why I-526 and I-526E should be listed and assessed separately for fee-setting.
- NPRM treats I-956F as an uncounted subset of I-956, assuming that they are essentially the same form and have identical workload. In fact I-956 and I-956F have entirely different content and workload, and neither has content identical to the predecessor I-924. Public comments can

point out the differences and explain why I-956 and I-956F should have their costs, receipts, and fees listed and assessed separately.

- NPRM uses the number of I-924 receipts in 2021 as the basis to estimate the number of I-956 and I-956F receipts going forward. This is based on the erroneous assumption that I-956 and I-956F are the same as I-924, and that filing motivations are the same in 2023 as in 2021. Not realizing who is required to file the new I-956 and I-956F and for what purpose, NPRM guesses that there will only be 62 I-956 and I-956F receipts on average per year. This fee model accordingly calculates a huge filing fee for I-956 and I-956F. Public comments can offer USCIS a more realistic volume estimate for regional center filings. As the number of receipts entered in the fee formula go up, the calculated fee per receipt comes down.
- NPRM assumes, without explanation, that the future will see fewer investors reaching the I-829 stage than in recent years, as well as fewer regional center annual report filings.
- NPRM does not include Form I-956H or Form I-956K in the fee analysis. These forms currently have no filing fee and are not considered as a revenue source. EB-5 stakeholders may comment about whether these forms ought to help share the burden of covering the significant costs they create for USCIS.

The 22/23 NPRM apparently realizes problems with the EB-5 calculation and invites correction from the public. “The annual filing volume projections in this rule are based on historical volumes and trends because the EB-5 Reform and Integrity Act of 2022 is too new for DHS to accurately estimate its impacts on filing volumes. DHS welcomes comments from the public on the number of forms for the EB-5 program that will be submitted annually and how that number will be changed by the recent legislation. DHS may adjust the estimated filing volumes in the final rule based on additional analysis and comments on this rule.” ([NPRM](#) PDF p. 156)

### **Fee Formula and Cost Reallocation**

Customers naturally consider pricing in terms of value, but the fee rule does not. Questions like “What fee does this form/service deserve?” or “What fee will the market accept?” were not on the table in the USCIS pricing analysis. The fee review simply asks, “Where does USCIS need to set fees to cover costs?” and then calculates proposed fees by dividing “Projected Total Cost by Immigration Benefit Request” by “Average Annual Projected Workload Receipts.”

The fee formula has a final step of “cost reallocation,” which involves value judgements. The proposed form filing fee is equal to the cost-per-unit calculation plus a per-unit cost reallocation that “proportionally assigns costs incurred to provide services for which USCIS does not receive revenue (for example, workloads without fees) and from forms for which the fees are held below projected cost.”

The NPRM does not reallocate costs evenly among fee-paying forms: the reallocation amount is two to three times higher for EB-5 forms than for other forms. ([Supporting Documentation](#) Appendix Table 4) USCIS reasons that “under the ability-to-pay principle, those who are more capable of bearing the burden of fees should pay more for a service than those with less ability to pay” and “The requirements of immigrant investor program indicate that immigrant investors and regional centers have the ability-to-pay more than most USCIS customers” ([NPRM](#) PDF p. 109)

EB-5 stakeholders may wish to comment on the statement that “In addition, compared to the amount of capital required and the required investment levels for an immigrant investor, the amount of the USCIS fees are an insignificant amount” ([NPRM](#) PDF p. 109)

The amount of “cost reallocation” baked into the proposed fees for incoming EB-5 forms means that USCIS plans for EB-5 receipts to raise \$21.27 million annually for USCIS to help cover costs outside of EB-5 (calculated by multiplying the proposed per-form cost reallocation figure by the projected receipts). This is rich, considering that the unadjudicated backlog of EB-5 forms add up to an outstanding liability to USCIS of nearly \$100 million dollars (calculated by taking the number of -526, I-829, I-924, and I-924A reported [still-pending as of September 2022](#), multiplied by the filing fees for those forms).

With almost \$100 million in deferred revenue from EB-5 fees already banked by USCIS without EB-5 performance, how can USCIS plan to divert more incoming EB-5 fee revenue away from EB-5 adjudications? The Investor Program Office already has an in-house burden to provide services for which it does not receive revenue – i.e. processing over 24,000 pending EB-5 forms from previous years – and can hardly afford to see incoming fee revenue reallocated outside EB-5. (See [NPRM Supporting Documentation](#), pg. 22, which states, “For accounting purposes, USCIS cannot recognize revenue as earned until work is completed. ...Deferred revenue is revenue that USCIS has received for work that has not been completed and constitutes an outstanding liability for the agency. Deferred revenue and pending caseloads do not impact fee adjustments.”)

Unfortunately, the USCIS fee review method cannot account for pending petitions, only incoming receipts. The fee review is therefore prevented from realistic workload assessment or from planning to reduce backlogs. NPRM is limited by method to the modest objective of “keeping pace with incoming benefit request workload” so that at least backlogs don’t get worse and USCIS stays solvent. But processing time improvement needs much more: we need backlogs to shrink and customers to get service. Therefore, we must not only comment to USCIS on fees and plans for incoming receipts, but also to advocate with Congress for help to get resources to deal with pending petitions overlooked by the fee review process. IIUSA and other advocacy organizations are working on these efforts.