



PRACTICE ALERT: UPCOMING ELIMINATION OF MEANS-TESTED BENEFITS AS BASIS FOR FEE WAIVER REQUESTS

By Ariel Brown

On September 28, 2018, the Department of Homeland Security (DHS) proposed dramatically changing the fee waiver process, most notably by eliminating receipt of means-tested benefits as a possible basis for a fee waiver.¹ Despite concerns raised by immigration and healthcare advocates and others about the detrimental effect of the proposed changes on working class people, low-wage workers, and vulnerable groups, DHS announced on April 5, 2019 that it intends to proceed with these changes.² Other changes include new required evidence that must be submitted with the fee waiver request and exclusive use of the Form I-912 to request the waiver of an immigration filing fee.

This practice alert provides a brief overview of some of the main changes practitioners can expect with the rule change. We do not know exactly when the revised Form I-912 and fee waiver process will take effect, but anticipate it may be shortly after the latest comment period closes on May 6, 2019.³ Given that these significant changes to the fee waiver process will make it more difficult and time-intensive to establish inability to pay an immigration filing fee, we urge practitioners to advise clients who are eligible for a fee waiver based on receipt of means-tested benefits to apply as soon as possible, before this option is eliminated.

I. Background on Fee Waiver Requests

Fee waivers are available for many—but not all—immigration applications and processes,⁴ and are an important tool for allowing access to immigration benefits that might otherwise be out of reach for many people, for no other reason than their lack of financial resources.⁵ Practitioners who routinely file fee waiver requests, for instance those who primarily

¹ See 83 FR 49120 (Sept. 28, 2018).

² See 84 FR 13687 (Apr. 5, 2019). The April 5, 2019 notice provides for an additional 30-day comment period, but advocates are not optimistic at this point that DHS will reverse course.

³ The ILRC will monitor the implementation timeline and track advocacy efforts including potential litigation that could delay implementation of this rule change. For updates, go to <https://www.ilrc.org/>.

⁴ Fee waiver requests are available for all naturalization applications, all green card renewals, all employment authorization applications—initial or renewal—except for those for Deferred Action for Childhood Arrivals (DACA) cases, and all biometrics fees (with the exception of the biometrics fee associated with the provisional waiver process). In addition, fee waiver requests are accepted in association with adjustment and waiver applications, but only for certain immigrants including U and T nonimmigrants, VAWA self-petitioners, TPS grantees, special immigrant juveniles, asylees, and others exempt from public charge inadmissibility. Thus, a large group of applicants—anyone applying for permanent residency through a family member or employer petition—is ineligible for a fee waiver, but fee waivers still are critical for many applicants for immigration benefits. See 8 CFR § 103.7(c)(3) and USCIS Adjudicator’s Field Manual (AFM), Chapter 10.9, for a detailed list of applications for which a fee waiver may be available. Despite the fact that fee waivers are not available for all applications or all applicants, they are, however, an essential access tool: more than half a million fee waiver requests are filed each year.

⁵ Immigration application filing fees can range from a few hundred dollars to over a thousand dollars. See USCIS Fee Schedule, available at <https://www.uscis.gov/g-1055>. USCIS last increased fees in December 2016. See <https://www.uscis.gov/forms/our-fees>.

serve immigrant survivors who are eligible for fee waivers for all forms, may not pay as much attention to immigration filing fees. As a reminder of what is at stake, we have attached a chart at the end of this alert with current filing fees for some of the most common immigration applications.⁶

According to the regulations, fee waivers are available for certain applications at DHS' discretion, as long as the fee waiver request is not inconsistent with the underlying benefit (requesting a fee waiver for an application for permanent residency would be inconsistent for any applicant who is subject to the public charge ground of inadmissibility at INA § 212(a)(4)).⁷ When a fee waiver is available for an application, the legal standard in the regulation is that the applicant must establish they are "unable to pay the prescribed fee."⁸

The current fee waiver process provides three different ways an individual requesting a fee waiver can prove their inability to pay, based on:

- 1) Receipt of means-tested benefits;
- 2) Household income at or below 150% of federal poverty guidelines;⁹ or
- 3) Other financial hardship, such as costly medical bills or homelessness.

Receipt of means-tested benefits has traditionally been the easiest and most straightforward way both for applicants to prove they qualify for a fee waiver and for adjudicators to assess inability to pay,¹⁰ because a government agency has already screened the financial resources of a person who has been found to qualify for a means-tested benefit.

II. Summary of Fee Waiver Changes

- **Required Use of Form I-912; Each Person Requesting a Fee Waiver Must Complete Their Own Form I-912.** Under the proposed revised fee waiver process, all individuals requesting a fee waiver must submit their request using Form I-912; USCIS will no longer accept informal, "applicant-generated" fee waiver requests.¹¹ By making use of Form I-912 mandatory and simultaneously narrowing the type of information the applicant may submit to show their inability to pay (see next sections), USCIS seeks, through a form change, to substantially limit the scope of the regulation.¹² Additionally, each individual will have to submit their own fee waiver request, as the changes will not allow multiple applicants to be included on the same I-912 request.
- **No More Means-Tested Benefits Basis.** Most significantly, receipt of means-tested benefits will no longer be a basis for requesting a fee waiver. The other two bases for proving inability to pay, having a household income at or below 150% of the Federal Poverty Guidelines (FPG) or other unspecified "financial hardship," will become the only options. As before, an individual requesting a fee waiver can base their request on one or more of these

⁶ For a complete list, see USCIS Fee Schedule, available at <https://www.uscis.gov/g-1055>.

⁷ See 8 CFR § 103.7(c)(1)(ii).

⁸ 8 CFR § 103.7(c)(1)(i).

⁹ For the Federal Poverty Guidelines used as part of the fee waiver process, see <https://www.uscis.gov/i-912p>.

¹⁰ See USCIS, *Policy Memorandum: Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule*, (Mar. 13, 2011), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf (explains a "step-wise" approach to reviewing fee waiver requests that starts with the means-tested benefit basis and instructs adjudicators that "If the individual provides sufficient proof of the means-tested benefit, the fee waiver will normally be approved, and no further information will be required."). Note USCIS intends to rescind this policy memo and replace it with new guidance as part of the rule change, but the memo is instructive for understanding how adjudicators under existing fee waiver policy are directed to approach evaluating fee waiver requests, with means-tested benefits as one of the criteria.

¹¹ Notwithstanding the fact that use of a specific USCIS-published fee waiver request form is not mandated by regulation. See 8 CFR § 103.7(c)(2).

¹² The regulation requires that a person requesting a fee waiver for an immigration benefit "submit a written request for permission to have their request processed without payment of a fee with their benefit request. The request must state the person's belief that he or she is entitled to or deserving of the benefit requested, the reasons for his or her inability to pay, and evidence to support the reasons indicated." 8 CFR § 103.7(c)(2).

reasons; depending on which grounds they select, the requester must fill out different parts of the Form I-912 and submit different supporting evidence.

- New Required Supporting Evidence, Including Tax Transcripts Instead of Copies of Tax Returns, Pay Stubs Alone No Longer Enough.** The types of required supporting evidence to establish household income and/or financial hardship is also changing. Once the final rule change takes effect, an applicant requesting a fee waiver based on household income at or below 150% FPG will have to provide an IRS transcript of their most recent tax return as well as tax transcripts for any household members who also contribute financial support. Requiring transcripts instead of photocopies of tax returns, which applicants often submitted in the past, means people will now have to download their tax transcripts from the IRS website, or have them mailed to their home address on file with the IRS.¹³ For both household income and other financial hardship, if the applicant did not file tax returns for the most recent tax year because they did not have any income, USCIS will require documentation from the IRS confirming no W-2s and no tax transcripts in order to prove no income, unless they are an applicant for, or have been granted, SIJS, VAWA, U nonimmigrant status, or T nonimmigrant status (see next section). Other proof of income, besides tax transcripts, is restricted under the proposed fee waiver revisions. Pay stubs will only be accepted, *in addition to a tax transcript*, for those who have experienced a salary or employment change since they filed their income taxes, or for those who are unable to provide other evidence due to their victimization (see next section).
- Some Limited Exceptions to Fee Waiver Required Information and Evidence for Survivors (SIJS, VAWA, U, and T).** In response to comments USICS received after the initial notice of proposed rulemaking, the agency made some modifications to the proposed fee waiver changes, easing evidentiary requirements and information collection for pending or approved special immigrant juveniles and VAWA self-petitioners as well as U and T nonimmigrants. For instance, pending or approved VAWA self-petitioners or U or T nonimmigrants will not have to provide information about a spouse or other abuser or trafficker's income, even if the individual is also a household member. Additionally, if these applicants cannot provide required proof of income, they may explain their situation and why they are unable to submit the required documentation. Pending or approved special immigrant juveniles do not have to provide proof of income or list household income for a fee waiver request.
- No Change to the List of Applications and Services for Which Fee Waivers Are Available.** The types of applications for which a fee waiver may be available—all naturalization applications, all green card renewals, almost all biometrics fees, adjustment and waiver applications but only for certain immigrants including U and T nonimmigrants, VAWA self-petitioners, TPS grantees, special immigrant juveniles, asylees, and others exempt from public charge inadmissibility—has *not* changed. Refer to the I-912 Form Instructions for a complete list of which application fees are presently eligible for a fee waiver.¹⁴ However, the ILRC expects that USCIS will raise fees and limit the applications and petitions for which fee waivers are available in its biennial fee review, expected to be published this summer.

III. What to Do Now

- Screen clients who will be filing applications for which a fee waiver is available to see if they currently receive means-tested benefits. Examples of means-tested benefits that have been used in support of fee waiver requests include, but are not limited to, Medicaid, SNAP (Supplemental Nutrition Assistance Program, formerly referred to as Food Stamps), Supplemental Security Income (SSI), and Temporary Assistance for Needy Families

¹³ For more information, see <https://www.irs.gov/individuals/get-transcript>. The IRS website appears to allow only individuals with a Social Security Number to download their tax transcript online, and all other individuals (i.e. those who filed their tax returns using an ITIN, Individual Tax Identification Number) must request delivery of their tax transcript by mail.

¹⁴ Available at <https://www.uscis.gov/i-912>. Note this page will be updated once the revised form and instructions replace the current versions.

(TANF, also referred to as “welfare”).¹⁵ A letter, notice, or other official document issued by the government agency granting the benefit is acceptable proof that the fee waiver requester receives a means-tested benefit.

- If your client would be eligible for a fee waiver now based on means-tested benefits, consider trying to submit the immigration application before this rule change takes effect. However, make sure to balance urgency of filing before the fee waiver change with USCIS’ new policy allowing adjudicators to deny immigration applications that lack all required initial evidence.¹⁶ The new policy empowers adjudicators to deny an application without giving the applicant an opportunity to supplement the missing documents.¹⁷ Therefore, even if you are trying to file an immigration application with a fee waiver request before the fee waiver changes are finalized, do not neglect including all required documentation for the underlying immigration application, as the fee waiver might be accepted but later, when the underlying application is being adjudicated, the application or petition could be denied if found to be missing necessary supporting documentation. Further, USCIS’ revised policy under new guidance regarding Notices to Appear (NTAs) and referrals to ICE makes the consequences of a denied immigration application more serious and especially risky for applicants who do not have other immigration status.¹⁸
- After the form changes go into effect, if your client cannot qualify using the new fee waiver request form, consider challenging the new requirements by submitting a fee waiver request in accordance with the regulatory language at 8 CFR § 103.7(c)(2); in other words, submit a written request, stating the reasons for your client’s inability to pay, with the evidence to support the reasons indicated. You should only do this with your client’s consent and their understanding that the request may be rejected for failure to use the form, and that this could lead to delays for the underlying application or petition. This approach may be most appropriate for advocates who are prepared to engage in strenuous advocacy (or even litigate) a fee waiver rejection.
- Submit a public comment, and encourage others to do so as well, registering your opposition to this rule change. To submit a comment regarding the proposed fee waiver changes during the current comment period, which runs through May 6, 2019, go to:

<https://www.federalregister.gov/documents/2019/04/05/2019-06657/agency-information-collection-activities-revision-of-a-currently-approved-collection-request-for-fee>.

The ILRC has created a template that can also be used to submit a comment, available at:

<https://www.ilrc.org/fee-waiver-template-comment>.

See also template comments created by [CLINIC Legal](#) and [Asian Americans Advancing Justice-Los Angeles](#).

Note that some templates pre-populate the comment language, but we urge anyone submitting a comment to customize the language because only unique comments are recognized.

¹⁵ For more information about means-tested benefits that can support a fee waiver application, go to <https://www.uscis.gov/feewaiver#meanstested>.

¹⁶ USCIS, *Policy Memorandum: Issuance of Certain RFEs and NOIDs*, (July 13, 2018), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

¹⁷ See *id.*

¹⁸ See USCIS, *Policy Memorandum: Updated Guidance for the Referral of Cases and Issuances of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens*, (June 28, 2018), available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>. Among other instances, the new policy directs adjudicators to issue an NTA where an immigration application or petition is denied and the applicant is not lawfully present in the United States.

IV. Related Resources¹⁹

- Naturalization Fee Waiver Packet: <https://www.ilrc.org/naturalization-fee-waiver-packet>
- Naturalization Reduced Fee Option and Fee Waiver Practice Advisory:²⁰ <https://www.ilrc.org/naturalization-reduced-fee-option-and-fee-waiver>

V. Chart of Common Immigration Filing Fees²¹

Application or Petition <small>(*see G-1055 Fee Schedule or Form I-912 Instructions for limited circumstances where fee waiver may be accepted for the application)</small>	Filing Fee <small>(*see G-1055 Fee Schedule or Form Instructions for some exceptions to fees and fee amounts based on age or other classification)</small>
Form I-90, Application to Replace Permanent Resident Card	\$455 + \$85 biometrics fee*
Form I-131, Application for Travel Document	\$575 for advance parole request + \$85 biometrics fee for all applicants age 14 through 79, but no fee if filed concurrently with I-485 application*
Form I-192, Application for Advance Permission to Enter as a Nonimmigrant**	\$930 if filing with USCIS
Form I-290B, Notice of Appeal or Motion**	\$675 unless appealing denial of petition for special immigrant visa for special immigrant Iraqi or Afghan national
Form I-485, Application to Register Permanent Residence or Adjust Status**	\$1,140 + \$85 biometrics fee for applicants age 14-78*
Form I-601, Application for Waiver of Grounds of Inadmissibility**	\$930
Form I-751, Petition to Remove Conditions on Residence	\$595 + \$85 biometrics fee
Form I-765, Application for Employment Authorization**	\$410 + \$85 biometrics fee for applicants between age 14 and 79*
Form N-400, Application for Naturalization	\$640 + \$85 biometrics fee for all applicants under age 75
Form N-600, Application for Certificate of Citizenship	\$1,170

¹⁹ Once the fee waiver changes are finalized, these resources will be updated to reflect the new changes. However, we include them with this practice alert to assist practitioners filing fee waivers now, before the new changes go into effect.

²⁰ Note that the reduced fee option is only available for naturalization applications.

²¹ For a complete list, see USCIS Fee Schedule, available at <https://www.uscis.gov/g-1055>.



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