

Testimony of

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on behalf of the

American Immigration Lawyers Association

on

Families and Business in Limbo: the Detrimental Impact of the Immigration Backlog

before the

Subcommittee on Immigration, Border Security and Claims

House Judiciary Committee

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Mr. Chairman and distinguished Members of the Subcommittee, I am Paul Zulkie, President of the American Immigration Lawyers Association (AILA). I am honored to be here today representing AILA to testify on “Families and Businesses in Limbo: the Detrimental Impact of the Immigration Backlog.”

AILA is the immigration bar association of more than 8,000 attorneys who practice immigration law. Founded in 1946, the association is a nonpartisan, nonprofit organization and is an affiliated organization of the American Bar Association (ABA). AILA takes a very broad view on immigration matters because our member attorneys represent tens of thousands of U.S. families who have applied for permanent residence for their spouses, children, and other close relatives to lawfully enter and reside in the United States. AILA members also represent thousands of U.S. businesses and industries that sponsor highly skilled foreign professionals seeking to enter the United States on a temporary basis or, having proved the unavailability of U.S. workers, on a permanent basis. Our members also represent asylum seekers, often on a pro bono basis, as well as athletes, entertainers, and foreign students.

Each day, AILA members confront the many problems that result from the backlogs. These problems are of major concern to families, businesses and communities nationwide. Through no fault of their own, families remain separated, businesses cannot acquire the workers they need, doctors with life saving skills are prevented from entering the country, skilled professionals who are sought by American business to create American jobs remain stranded abroad...and these examples could go on and on.

Backlogs not only harm the people directly caught in their web, they undermine public trust in the immigration system. AILA applauds this subcommittee’s interest in the effects of backlogs and its understanding of their importance.

I hope in my testimony to document the problem and propose solutions that require the commitment of both the United States Citizenship and Immigration Services (USCIS) and Congress.

### **What Is the Backlog?**

Before we discuss the impact of backlogs and lengthy processing times, or how to best address them, we need to define them. Director Aguirre of the USCIS has provided one definition, based on cycle times. That is a valid view from a government operations perspective. But we need to look at this issue from the user’s viewpoint. A processing time is the time from when the application arrives at the agency until a final decision is reached and the benefit is either granted or denied. For the sake of this discussion, we will treat multi-step processes as though they were separate applications.

For example, the current processing time for an adjustment of status application—the final step in the green card application process—is 26 to 29 months at the service centers. This does not mean that an adjudicator spends 26 months reviewing and considering a case. Indeed, that process is measured in minutes or hours. Instead, it means that the

case sits on a shelf for 26 months until an adjudicator picks it up and begins to consider it.

The time that that case spends on the shelf with no review by an adjudicator is what we would term the “primary backlog.”

However, the story does not end when the adjudicator picks up the case and begins to consider it. Security checks first must be performed.<sup>1</sup> Depending on the type of check, most can be cleared within 72 hours. However, in enough cases to be noticeable, a “hit” occurs or the security agency simply fails to get back to USCIS in a timely manner. Usually, the “hit” is caused by the person’s name being similar to the name of someone with a problem (this is a particular problem with some common names), and eventually will be cleared. These cases become part of a “secondary backlog,” which we also refer to as the “hidden backlog” because the agency usually does not account for this delay in its processing time reports.

A case also becomes part of the secondary or hidden backlog when the adjudicator requests additional evidence. If the adjudicator does not reach a decision when initially reviewing the case, but instead asks for more documentation, additional time is added to the process. Depending upon how much documentation is requested (a request asking for 45 different items of sometimes obscure documentation has not been uncommon), this exchange can add considerable time to the process.

The secondary backlog also includes the little-discussed but increasingly important Administrative Appeals Office (“AAO”). For reasons that I will detail later, an unintended consequence of one of USCIS’ initiatives may be to shift more cases to an already-bursting AAO. While the AAO’s backlog is rarely counted in evaluating USCIS performance, its increasing importance requires attention to its already critical backlog.

Any meaningful backlog reduction plan must address the secondary backlogs as well as the primary ones, or public confidence in the system will continue to erode.

### **What Is the Impact of the Backlogs?**

The U.S. immigration system allows long-term, work-authorized statuses in two situations: compassionate circumstances where we might be literally saving a person’s life by offering the protection of our borders, or circumstances in which an American citizen or permanent resident with a family or business interest in a person petitions on that person’s behalf. Examples abound of where the purposes underlying this system are undermined or even defeated by the backlogs. For instance:

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<sup>1</sup> AILA supports security checks as an important tool to enable our government to identify and pursue the tiny handful of intending immigrants and visitors who wish to do us harm, and separate them from the overwhelming majority who wish only to contribute to this country and build a better life for themselves and their families.

- A Rwandan woman who witnessed the torture and killing of her parents and siblings applied for asylum seven years ago, and has yet to be so much as scheduled for an interview. She suffers from post-traumatic stress disorder, and lives in constant fear of being sent back to Rwanda. She had been brought here from a refugee camp by a trafficker who attempted to enslave her into prostitution. But because she never received an interview and has been uncertain of her future here, she never went to the police with information about this sex trafficker. The evidence is now lost, and this perpetrator is still at large.
- A Sales & Marketing Vice President for a U.S. owned Fortune 500 company is in charge of Latin American accounts, and oversees multi-millions of dollars in exports from the United States to that region. He has had an application for adjustment of status to permanent residence pending since April 2002, and must regularly renew simple travel permissions in order to travel to perform his job. In 2003, when processing times for the travel permissions slipped to seven months, he had to cancel many trips, thus interfering with his company's export pipeline. For this year, he filed over five months ago, and still has six weeks left on his travel permit, but his company is worried that he may not receive his new permit in time. Between the backlog on the permanent residence application and the backlog on travel permissions while his permanent residence application is pending, his company is at constant risk of disruption of its international trade.
- One of the top ten U.S. medical centers had to lay off one of its best surgeons because the USCIS was taking 5 months to renew his work authorization card, even though USCIS' own regulations require that these cards be processed within 90 days. The hospital, the surgeon and his patients all suffered from his forced unavailability.
- More than two years ago, a specialty cook in Manhattan was granted permanent residence by an immigration judge. Even though the gentleman is, by law, a permanent resident, DHS has been unable—despite extensive efforts by his attorney—to provide him with a green card or other evidence of his status. He lost his job, and is unable to find another, because he does not have evidence of his status.
- A Brazilian married to a United States citizen had an approved immigrant petition (the first stage of the green card process), and filed an application to adjust status to permanent residence in New York some two years ago. Like so many Americans, she and her husband moved during this waiting period. She dutifully submitted a change of address to the official address for such changes, and also sent two confirming letters to the New York office of what was then INS. She inquired at the USCIS customer service 800 number, but on her third inquiry was told that she had “used up” her maximum allowance of two inquiries, and would not be able to inquire again. Unfortunately, while she was prohibited from inquiring, she received a notice denying her case due to failure to appear for an interview. Her failure resulted from the agency sending her appointment notice to

her old address, notwithstanding her efforts to notify the agency of her change of address. She is attempting to reopen her case, but now is in a position in which she would be barred from reentry if she were to travel, and she has a sick parent in Brazil.

- A Canadian applicant for permanent residence, after already waiting seven months for a simple travel permission, learned that his brother had fallen ill. Although, to their credit, the local USCIS office made every effort to persuade the service center to issue the permission, it did not come until 2-1/2 weeks later. Unfortunately, the brother had died in the meantime and this gentleman missed not only seeing his brother one last time, but also missed his funeral.
- A highly-rated nephrologist has been waiting outside the U.S. since December 2002 for a decision on his application for a waiver of a foreign residence requirement, notwithstanding his specialization--much-needed in the United States--in a field with unusually high mortality rates.
- A young nurse from Mexico works for a Massachusetts family with a severely handicapped child. The child's doctors have been amazed at the child's progress under this young woman's care. For example, she has made it her mission to teach the child to walk when doctors thought this never would be possible. The family sponsored the nurse's permanent residence in December 2000, and due to the length of waiting times at Department of Labor and USCIS, she has now fallen out of status. The family worries constantly that they will lose the caregiver who has become their child's salvation.
- Sometimes the problem involves simply getting a document into someone's hands. An employment-based immigrant petition was approved some months ago, but the approval notice was never received by the employer or employee. They are now being told that they must file an application for a replacement document. The processing time for applications for replacement documents is two years, which renders meaningless the approval of the initial petition.
- The backlogs have lead to still other negative consequences:
  - Many college scholarships are available only to permanent residents or U.S. citizens. A group of Kakuma "lost boys" from the Sudan currently residing in South Dakota have progressed rapidly in the United States. They could attend college, but for their lack of resources. They are unable to receive scholarships because of their current immigration status. They may lose the opportunity altogether to attend college because their permanent residence applications are trapped in the backlog.
  - Some states grant drivers licenses for only as long as a person's nonimmigrant status is valid. When a person applies to extend their nonimmigrant status, USCIS often goes beyond the expiration date of the

previous status in processing the extension. The result is that the applicant loses his ability to drive.

- Backlogs have negative impacts beyond the processing of applications. The Social Security Administration will not issue a social security number until the Department of Homeland Security (DHS) verifies an individual's immigration status. People have waited months for their verifications to come through. This delay complicates not only their ability to get on payroll, but also some states (like my own state of Illinois) will not give them a driver's license until they can show a social security number. Thus, everyday acts of living are barred by backlogs at DHS.

Clearly, the backlogs are having negative consequences for individuals, families and businesses throughout the country. No one supports these backlogs, but they now commonly occur and have grown exponentially over the years. The pressing issue is what efforts has the USCIS undertaken to eliminate these backlogs, and what can Congress do to facilitate their elimination.

### **Improving Policies and Processes**

Steps in the Right Direction: USCIS recently has made some changes that are distinct steps in the right direction, and that we anticipate will help to decrease the backlogs. However, taken alone, or even together, they will not "get us there" but they certainly get us headed down the right road. These steps include:

- ***No readjudication of established facts.*** Recent guidance to adjudicators instructed that, in extensions of status where no facts or law have changed and there was not a material error or fraud in the previous adjudication, deference should be given to the prior adjudication. This is an important step forward, as it complies with existing regulations that do not require review of extensive documentation in these circumstances and prevents adjudicators from slowing the process by demanding additional documentation where none is needed. It is an effective form of risk management.
- ***Storage of biometrics.*** For too long, every time a card needed a biometric, the alien would have to return to the agency to provide it, thus requiring the alien to travel often long distances and using up agency resources that would be unnecessary if the biometrics could have been kept on file. The agency now has the capability to keep these biometrics on file. This is particularly important for naturalization and permanent residence applications. In order to have the necessary security checks performed, the alien must provide fingerprints of all ten fingers, which are then run through the FBI database. These checks are valid only for 15 months. In all too many instances, the fingerprints must be taken and re-taken two or three times while the naturalization or permanent residence application is pending. If these fingerprints

are stored, then the alien will not have to return to be re-printed every time, thus saving resources on both sides. While the elimination of the need for re-fingerprinting is not in effect yet, we look forward to the day in the near future when it does take effect.

- ***Infopass.*** We congratulate Director Aguirre on looking to his field for ideas to improve service. Some of the best innovations come from the USCIS staff in the field who face the everyday challenges of moving volumes of applications through the system, and often come up with practical ideas to work around the problems that they encounter. Infopass was one such innovation. Already implemented in three of USCIS' busiest districts, this on-line appointment system has, after a few of the inevitable start-up glitches, proven to be almost revolutionary in getting lines and appointments under control. We look forward to its rollout to other offices in the coming months.
- ***Case status on-line.*** One of the best innovations USCIS has implemented has been the feature that allows applicants to check the status of their cases using the internet. This has undoubtedly cut the number of calls and inquiries to USCIS exponentially, freeing staff for other duties.
- ***Employment authorization documents.*** We understand that, very shortly, the USCIS will publish a regulation that will allow the agency to issue work authorization cards for validity periods that are more in line with the actual time needed, rather than the current lock-step one-year period. This change will significantly reduce the number of applications that must be processed, freeing personnel to process other application types.

We urge USCIS to take this initiative one step further, and apply the extended validity period to travel permissions, generally known as advance paroles. Ideally, the requirement of an advance parole should be eliminated for persons holding valid nonimmigrant visas. For those who otherwise would require such permission, the permission document should be valid for as long as is necessary to see the individual through the underlying adjustment of status process and, better yet, should be on the employment authorization card, thus necessitating only one document and being contained on a more tamper-resistant document.

- ***Pilot programs.*** USCIS has, in conjunction with its Ombudsman, initiated some pilot programs that could elicit information about processes that would be particularly useful in keeping further backlogs from developing. We look forward to learning the results of these programs and to the implementation of the ideas that could emerge from them.

Changes that Have Not Helped or that Have Hurt Backlog Reduction Efforts:  
Unfortunately, not all of USCIS' initiatives have helped decrease the backlogs. In fact, some have been setbacks. While we congratulate the agency for experimenting with a variety of initiatives, we hope that it will recognize when a reform has failed or when one

needs further work, and either abandon the idea or make the necessary changes. Some initiatives that need revisiting include:

- ***Electronic filing.*** The movement to e-government is admirable, but care must be taken to ensure that it is not an empty shell that provides no meaningful improvements. Unfortunately, most aspects of the USCIS e-filing initiative have had a negligible impact on the backlog and, and, with one exception, show little prospect of enhancing efficiency in the two-year time period in which this agency strives to bring its backlogs under control. Under e-filing, forms are filed electronically, but the required supporting documentation must be mailed in separately and then matched with the file, itself creating an additional piece of work. And, more importantly, the process is just e-filing, not e-adjudication: the adjudication process is manual, providing no efficiencies on the processing end where it is most needed.

The one possible exception lies in a pilot project in California.. The agency here is experimenting with green card replacement applications filed electronically serving as a conduit for direct production of the new card. We urge USCIS to find other similar ways in which the electronic filing can be used meaningfully, such as capturing data for the adjudicator's use.

- ***Decision at first review.*** Here is a prime example of a good idea gone bad. AILA and other stakeholders have long urged USCIS and its predecessor to get under control its ever-proliferating volume of Requests for Evidence (RFEs), which are too often multi-page, multi-item demands for documentation that often were either already provided, were not relevant to the application at hand, or were necessitated by the sheer length of time the application had sat on the shelf. The volume of RFEs has grown in recent years as adjudicators, nervous about whether they might be criticized for a decision, became increasingly paralyzed and chose to make a show of demanding further documentation before they would approve an approvable case.

USCIS finally addressed these RFEs in a recent guidance to the field. However, this guidance unfortunately may make the situation worse instead of better. Failing to tell adjudicators that they can go ahead and approve a case if the documentation is complete, the memo instructs adjudicators to deny cases that previously would have received an RFE. While this instruction will make cases move faster initially, it really does no more than shift parts of the primary backlog to a part of the secondary backlog: the AAO. The AAO already has a backlog measurable in years for some case types, and USCIS is not including AAO in its backlog reduction initiative. Thus, the effect of the "decision at first review" initiative is to simply shift some of the backlog from where it is counted to an office where it will not be counted. That is not backlog reduction: that is hiding the backlog.

- ***National Customer Service Center.*** This 800 number for customer service must have seemed like a good idea at the time. Give people a toll-free number that they can actually get through on, and improved customer service will result. Unfortunately, it has not worked out that way, particularly with respect to solving problems on

applications already on file and with respect to providing misguided and ultimately harmful advice to members of the public. To its credit, USCIS has acknowledged that the 800 number is not a workable means to resolve problems on cases already on file, and has indicated that they are working on a solution that would put the problem-solving process back in the hands of the USCIS-employed Immigration Information Officers who have access to the files and knowledge of the system. We eagerly await this solution.

- ***Outsourcing the Immigration Information Officer Function***

But, a current Administration initiative may serve to undermine this planned solution. It is important to note that the 800 number is answered by an outside contractor, and that many of the problems that have developed are inherent in the fact that an outside contractor is not fully trained in immigration, is not fully accountable for performance, and does not have access to case files. We understand that the agency is soliciting bids from contractors to privatize the Immigration Information Officer function. If this initiative is successful, the reform of the 800 number may be rendered meaningless, as these functions will again be placed in the hands of contractors who lack the knowledge and information to provide the service on a fully-informed basis. AILA believes that both the 800 number system and the IIO function are inherently governmental activities and should not be contracted out.

We also urge USCIS to replicate what it did with respect to Infopass by looking to its own field for innovative solutions. In order to provide effective problem-solving on already-filed applications, the California Service Center of USCIS put in place an additional operational division, known as Division XII, designed solely to address problems raised by people with applications and petitions pending at that office. It contains the right mix of people, expertise and systems to deliver one of the most effective customer service solutions in the field. We urge Director Aguirre to look at implementing a similar approach in other offices.

Policies that Punish Applicants for the Backlogs: Immigration statutes are complex and often leave areas open to agency interpretation. USCIS has been interpreting some statutes restrictively when a broad interpretation was equally possible or even the better interpretation. While USCIS is working toward its backlog reduction goals, it needs to re-think these policies so that the public is not punished for its own slowness. At the risk of oversimplification, here are three examples where other reasonable readings of the law would ameliorate the impact of the agency's own delays:

- It is too often the case that an individual will apply for a change or extension of a nonimmigrant status, and the initial status expires while she is awaiting action on the application. After the status expires, but before the application is processed, life happens, and the person, for instance, gets another job offer or decides to start school, requiring yet another application. But, because her initial status expired, through no fault of her own, the USCIS has been taking the position since April 2003 that the second application can be denied because the first application was not approved

before it was filed. This punishes the applicant for the agency's own slowness in processing the first application.

- The USCIS has recently changed its view and taken the position that if, during the years that it takes for an adjustment of status to permanent residence application to be adjudicated, the applicant's work authorization lapses, the applicant is no longer eligible for adjustment to permanent residence if he works during the lapse. This despite the fact that the lapse is usually due to the USCIS' slowness in processing the work authorization application.
- In October 2000, Congress enacted the American Competitiveness in the Twenty-First Century Act ("AC21") in order to ameliorate some of the effects of the backlogs that existed even then. As no regulations have been issued, USCIS offices have been interpreting this legislation on their own. Some offices have followed policies that essentially eviscerate the ameliorative provisions of this legislation, essentially rendering them useless in the face of backlogs that have only worsened since the statute's enactment.

### *Other Problems and Solutions*

In addition to the initiatives that have been announced, AILA suggests that USCIS look at some other areas that have contributed to the problems and implement some additional reforms.

Guidance and Training: We have discussed elsewhere the problem of adjudicator paralysis. There has been a similar paralysis with respect to providing adjudicators with adequate guidance and training. Not a single regulation on a substantive issue has been promulgated since the advent of the Department of Homeland Security. Yet, legislation dating back to 1996 and 2000 have yet to be the subject of even a proposed regulation. There have been some guidances to field, but they do not begin to touch on all of the issues involved in the body of immigration law that adjudicators must apply.

Because of this lack of guidance, adjudicators are forced to come up with their own interpretations that they often develop in a vacuum. Because of their uncertainty about the law, Requests for Evidence have proliferated and cases are being put aside while further guidance is sought. The USCIS needs to overcome its policymaking paralysis, and issue regulations and guidance, to help its adjudicators overcome their decision-making paralysis.

Secondary backlogs: USCIS *must* integrate into its backlog reduction efforts a plan to address the secondary backlogs previously addressed. As long as innocent applicants see their applications delayed for months or years beyond even the regular backlogged processing times, as long as RFE waits are not counted in the overall processing times, and as long as policies send more and more cases into a badly backlogged AAO, the public will view any claims of success in backlog reduction as disingenuous or misleading.

All of these secondary backlogs are important, but the delays in the security checks are probably the most important. As Director Aguirre demonstrated last week, the then-INS was making progress in backlog reduction until September 11 brought home the utter necessity of implementing a strict regimen of background checks. Now that the checks are in place, it is vital that the agencies through which the checks are processed appreciate the importance of a prompt and thorough response. This is critical not only to ensure a timely and legitimate immigration process, but to enable security and law enforcement agencies to act immediately when a person is identified who could be a danger to our security. These lengthy delays are beneficial to no one: not to the impacted individuals, not to the agency, and not to our nation's security interests.

Improve coordination: Since the formation of DHS, a number of issues have arisen that straddle the lines between USCIS and its sister bureaus, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). We have seen in recent months some improvement in selected areas, such as the development of processes by USCIS and CBP to correct erroneous entry documents. We urge the bureaus to continue and intensify these efforts.

## **Resources**

There is an 800-pound gorilla sitting in this room. Let's talk about it. No matter how many initiatives and innovations USCIS undertakes, in the end it's all about resources. Immigration petitions and applications are individual cases that require a thoughtful human being to consider the merits and reach a decision. No amount of management systems can, in the end, eliminate that factor. And the fact is, there simply are not enough of those human beings in place to accomplish the job. AILA has watched as INS Commissioner after INS Commissioner has been harshly criticized over the backlogs (and, indeed, we have done more than our fair share of the criticizing). We now see a USCIS Director undergo the same experience. Surely not all, or even a majority of, these smart, well-meaning people have been incompetent. Indeed, AILA has seen the opposite—competence and even brilliance—in these offices. But, somehow the backlogs continue.

Perhaps it is time to see, as Julius Caesar pointed out to Brutus, that the fault lies not in the stars, but in ourselves. Or, as a more modern hero, Pogo, said, "we have seen the enemy and he is us." We have long pretended that with a little more ingenuity and a little better management, the backlogs can be brought under control. Let's end the pretence here and now: This agency needs more money to do its job. And this funding needs to come from direct Congressional appropriations, not increased user fees.

Over the past couple of decades, the myth has developed that immigration processing should be entirely funded by filing fees. The truth is, fee-based funding is nothing more than a giant, government-endorsed pyramid scheme, always on the brink of collapsing

under its own weight. Let me give just a few examples of the weaknesses inherent in relying on user fees to fund the USCIS.

- Because of the backlogs, the agency is in the constant situation of using new filing fees to pay for adjudication of applications filed in previous years. Essentially, the agency is using new sales to purchase old inventory, with no visible means to pay for the new inventory that continues to come in.
- The Administration has requested a backlog reduction budget of \$140 million for the next fiscal year, ostensibly to pay for this old inventory. However, this budget request is illusory. In previous years, directly appropriated funds paid for USCIS' overhead (fixed expenses such as file maintenance, payroll functions, etc.). This amount, which this fiscal year totals \$155 million, is now to be paid out of the fee account. Thus, far from getting an appropriations "shot in the arm" to help the backlogs, USCIS will be losing at least \$15 million if the budget is passed as proposed.
- Paying overhead out of the fee account is a particularly dangerous action and could be the factor that finally causes the pyramid to fall. Overhead does not rise and fall with the number of applications: it remains fixed whether the agency gets one application or one million. But if, as has happened in the first part of this year, the volume of applications decreases,<sup>2</sup> so does the income generated from fees. And there is no reliable stream of income to continue to maintain the fixed expenses. Overhead is an amount that must come from directly appropriated funds.

Other resource issues also plague USCIS. DHS currently is reportedly under a hiring freeze. Thus USCIS cannot bring in the new personnel needed to address the backlog. It takes considerably longer to bring a new agency employee on board than would be conceivable in the private sector or even in Congress, so the substantial lead time needed is being lost. And we cannot look to getting extra help from existing personnel, as overtime within USCIS has been severely capped for the year.

Some offices of USCIS also face an imminent personnel crisis. Many of the adjudication positions within the agency are "term" positions—in other words, temporary positions, generally available only for four years. Many of these terms are now expiring—with the backlog no further in hand—and these experienced and trained personnel are departing at a rapid rate as they find steadier employment. Congress needs to act immediately to extend these terms or, better yet, convert the jobs to permanent.

Finally, we cannot ignore another false solution that has been proposed: the outsourcing of the Immigration Information Officer ("IIO") function. One need only look at the deeply flawed, contractor operated, National Customer Service Center to see that outside contractors do not have the knowledge, training or accountability necessary to deliver

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<sup>2</sup> There was an increase in filing volume in April, but this was due to applicants rushing to get their filings in before a large fee increase took effect at the beginning of May.

effective information on the complexities of immigration to the public. Also, the outsourcing proposal ignores an important role of the IIOs in many offices: they act as junior adjudicators, reviewing and deciding on cases. To outsource this function would be to further starve an already resource-deprived operation.

It is well past time that Congress and the Administration gave this agency the resources it needs to do its job. AILA urges that a second look be taken at what resources are really needed, and the money be once and for all authorized and appropriated to do the job right.

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