

Immigration Emergency Fund

The \$20 million that the Immigration and Naturalization Act makes available, in the Immigration Emergency Fund, for reimbursement of states and localities for certain immigration-related assistance is available annually, not just one time during the life of the IEF.

January 26, 1996

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

You have asked us whether the \$20 million in the Immigration Emergency Fund for reimbursement of states and localities for certain immigration-related assistance is available annually or whether a total of \$20 million is available from the account for such expenses. We conclude that the \$20 million is available annually.

Section 404(b) of the Immigration and Nationality Act, *see* 8 U.S.C. §§ 1101–1537, created an Immigration Emergency Fund (“IEF” or “fund”) that could be drawn upon to increase the Immigration and Naturalization Service’s (“INS”) enforcement activities, and to reimburse states and localities in providing assistance, as requested by the Attorney General in meeting an immigration emergency declared by the President. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 113, 100 Stat. 3359, 3383 (codified as amended at 8 U.S.C. § 1101 note). A 1990 amendment expanded the use of the IEF by providing in sections 404(b)(2)(A)–(B) that up to \$20 million in the IEF shall be available for the reimbursement of states and localities¹ “providing assistance as required by the Attorney General” when asylum applications in any INS district increase by at least 1000, when the lives, property, safety, or welfare of state or local residents are endangered, or “in any other circumstances as determined by the Attorney General.” Immigration Act of 1990, Pub. L. No. 101–649, § 705, 104 Stat. 4978, 5087. The Attorney General may make such expenditures without a presidential determination that an immigration emergency exists. § 404(b)(2)(C).

Congress created the IEF as a “no-year fund.”² As such, the appropriations to the IEF are not limited to use in any specific fiscal year and the funds within the IEF remain available for its purposes until expended. In stating that there “are authorized to be appropriated (for fiscal year 1991 and any subsequent fiscal year) to an immigration emergency fund . . . an amount sufficient to provide

¹ The specific reference to “all localities” in section 404(b)(2)(B), given the additional reference to section 404(b)(2)(A), must be read to encompass both states and localities.

² The standard language used to make a “no-year” appropriation is “to remain available until expended.” Office of General Counsel, General Accounting Office, 1 *Principles of Federal Appropriations Law* 5–6 (2d ed. 1991). When the IEF was first funded, in 1989, Congress appropriated \$35 million “[f]or necessary expenses of the immigration emergency fund . . . to remain available until expended.” Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101–162, 103 Stat. 988, 1000 (1989).

for a balance of \$35,000,000” in the IEF, Congress appears to have contemplated that it would appropriate money from time to time in subsequent fiscal years to replenish the fund to provide for a balance of \$35 million. § 404(b)(1). Indeed, in subsequent years, Congress has appropriated monies that have totalled far more than \$35 million. Congress appropriated \$35 million to the IEF in 1989;³ \$6 million in 1993;⁴ and \$75 million in 1994.⁵

Section 404(b)(2)(B) states that “[n]ot more than \$20,000,000 shall be made available for all localities under this paragraph.” “This paragraph” refers to section 404(b)(2)(A), which states that “[f]unds which are authorized to be appropriated by paragraph (1), subject to the dollar limitation contained in subparagraph (B), shall be available” for the three purposes for which reimbursement to states and localities is permitted. The reference in that provision to “paragraph (1),” in turn, refers back to section 404(b)(1), the provision that anticipates appropriations in an unlimited number of subsequent fiscal years. Moreover, section 404(b)(1), by its terms, provides that the monies appropriated to the IEF are “to be used to carry out paragraph (2),” (for state and local assistance to the Attorney General) in addition to the specified uses in the case of an emergency declared by the President.

Because sections 404(b)(1), 404(b)(2)(A), and 404(b)(2)(B) are so intertwined, they must be read together as part of Congress’s overall plan to establish an on-going fund into which it would appropriate monies from time to time in any fiscal year it deems appropriate, to be used by the President and Attorney General for specified purposes. *See SEC v. Sloan*, 436 U.S. 103, 121–23 (1978). We believe that the language of section 404 is properly interpreted to provide that the \$20 million is available in any fiscal year when the IEF’s balance permits, and not just one time during the life of the IEF.⁶

Although we conclude that this construction is the most sensible reading of these provisions of section 404, we acknowledge that the question is not free from doubt because the provisions are less than explicit. Congress tied sections 404(b)(2)(A) and (B) to section 404(b)(1), thus indicating its intent that the \$20 million be available for fiscal year 1991 and in any number of subsequent fiscal years. But it did not expressly state that the availability of the \$20 million for states and localities is annual. Viewed in isolation, the phrase in section

³ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, 103 Stat. at 1000.

⁴ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103–121, 107 Stat. 1153, 1161 (1993).

⁵ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103–317, 108 Stat. 1724, 1732 (1994). In 1995, Congress rescinded \$45 million of that \$75 million appropriation. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104–6, 109 Stat. 73, 83.

⁶ We note that the Office of the General Counsel, Office of Management and Budget, also interprets section 404 to make the \$20 million for state and local assistance available on an annual basis. Telephone conversation between Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, and Rosalyn Rettman, Associate General Counsel, Office of Management and Budget (Jan. 19, 1996).

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404(b)(2)(B) that “[n]ot more than \$20,000,000 shall be made available for all localities” might be read to put an overall limit on the amount of monies going to states and localities. However, as we explain above, when the statutory limitation is viewed in its entirety—“under this paragraph”—and in context with the necessary references to other pertinent parts of section 404, it is most reasonably interpreted to provide for annual availability.

To the extent some ambiguity in the statute exists, the issue is resolved by the legislative history on the establishment and functioning of the fund. A report accompanying H.R. 4300, 101st Cong. (1990), the enabling legislation for the IEF, states that:

Under current law, the President must declare that an immigration emergency exists before any amounts in the fund can be spent. H.R. 4300 would require that amounts in the fund up to \$20 million *annually* be used to reimburse state and local governments if the number of asylum applicants has increased by 1,000 during any calendar quarter after January 1, 1989.

H.R. Rep. No. 101-723, pt. 1, at 86 (1990) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6766. This language demonstrates that Congress intended the \$20 million for states and localities to be available annually, not just one time during the life of the IEF. Thus, it supports our conclusion that under the most reasonable reading of the statute, the \$20 million available for states and localities under section 404(b)(2)(B) of the Immigration and Naturalization Act is available on an annual basis.

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