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Re: EOIR Docket No. 18-0002, Agency Information Collection Activities: Application for Asylum and for Withholding of Removal, Form I-589, Revision of a Currently Approved Collection OMB Control Number 1615-0067

I. INTRODUCTION

The Catholic Legal Immigration Network, Inc. (CLINIC)¹ submits these comments in strong opposition to the proposed revisions to Form I-589, Application for Asylum and for Withholding of Removal [hereinafter Proposed I-589] and the accompanying instructions published in the Federal Register on June 15, 2020.² This revised form and instructions set forth starkly the damage that the June 15, 2020, proposed rules would do to the U.S. asylum system. CLINIC submitted comments on the June 15, 2020, rule, strongly opposing the proposed changes,³ and will incorporate some of those comments into this comment on the information collection. CLINIC acknowledges that the NPRM states, “NOTE: Comments received on the information collection that are intended as comments on the proposed rulemaking rather than those specific to the collection of information will be rejected.”⁴ However, it is impossible to comment on a form

¹ These comments were primarily authored by Victoria Neilson, Managing Attorney of CLINIC’s Defending Vulnerable Populations (DVP) Program.

² See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. R. 36264, 36290 (June 15, 2020).

³ CLINIC, *CLINIC Submits Comments on Proposed Rule that Would Gut Asylum Protections*, (Jul. 15, 2020), <https://cliniclegal.org/resources/asylum-and-refugee-law/clinic-submits-comments-proposed-rule-would-gut-asylum-protections>. [Hereinafter CLINIC Asylum Comment].

⁴ 85 Fed. R. 36264.

the purpose of which is to implement newly proposed regulations, without discussing those proposed regulations. It would be arbitrary and capricious for the agencies to reject comments on this ground.

For the past three years, the agencies have taken steps to make it more and more difficult for those fleeing harm to obtain protection in the United States.⁵ The proposed I-589 and instructions would implement many of the changes, and through those changes, make it difficult for many asylum seekers, especially those who are unrepresented, to complete their applications.

CLINIC embraces the core Gospel value of welcoming the stranger. CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs. CLINIC is the largest nationwide network of nonprofit immigration programs, with approximately 375 affiliates in 49 states and the District of Columbia. Through its affiliates, CLINIC advocates for the just and humane treatment of asylum seekers through direct representation, pro bono referrals, and engagement with policy makers.

CLINIC submits this comment urging the Department of Justice (DOJ) and Department of Homeland Security (DHS) to withdraw the proposed I-589 as well as the accompanying instructions. The form and instructions to file for asylum and related relief, should be simple enough for unrepresented applicants to complete the form and have a day in court before the immigration judge or an interview before an asylum officer. CLINIC is concerned that this form will lead to confusion and many asylum seekers being unjustly barred from asylum.

Furthermore, even though the information collection allotted the required 60 days for comment submission, the first 30 days were effectively nullified. The first half of the 60-day information collection ran concurrently with the 30-day comment period for the 161-page Notice of Proposed Rulemaking (NPRM), RIN 1125-AA94 or EOIR Docket No. 18-0002, which, if published as proposed would radically alter asylum eligibility in the United States. CLINIC submitted a 101-page comment on that proposed rule and still did not have time to adequately address every concern that the proposed rule raised.⁶ Since CLINIC had to divert substantial resources to that comment, it was not possible to focus on the information collection during that time period. Then, while this information collection was pending, DHS and DOJ issued another 30-day rulemaking on which comments were due on August 10, 2020. That rulemaking would result in most applicants for asylum, withholding of removal, and protection under the Convention against Torture (CAT) being denied under purported public health grounds.⁷ Writing that comment also required substantial resources from CLINIC legal staff. As a result, with so many complex, far-reaching rulemakings on the same topic at the same time, the public did not really have a full 60 days to respond to the substantial changes in the proposed I-589 and accompanying instructions. For this reason, CLINIC asks that the information collection be rescinded and reissued with a new 60-day comment period.

⁵ See National Immigrant Justice Center, A Timeline of The Trump Administration's Efforts To End Asylum, (Jul. 2020), <https://immigrantjustice.org/issues/asylum-seekers-refugees>. [Hereinafter NIJC Asylum Timeline].

⁶ See CLINIC Asylum Comment, *supra* note 3.

⁷ See CLINIC, *CLINIC Submits Comments on Proposed Rule That Would Use COVID-19 to Bar Virtually All Asylum Seekers*, (Aug. 11, 2020), <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-proposed-rule-would-use-covid-19>.

CLINIC has significant substantive concerns about the new form and instructions and submits the following comments in opposition to the proposed changes.

II. CLINIC OBJECTS TO THE PROPOSED REVISIONS TO FORM I-589 AND INSTRUCTIONS

A. The NPRM Does Not Accurately Calculate the Cost of the Revisions to the Form

The proposed I-589 substantially changes the existing form. The form would go from 12 pages,⁸ to 16 pages. As discussed in more detail below, many of the new questions require the applicant to understand complex legal concepts and may result in the applicant inadvertently completing a question incorrectly or leaving it blank. The NPRM itself states that the estimated time burden for completing the form is 18 hours.⁹ It further estimates the cost associated with this burden at \$46,968,000.¹⁰ Yet the NPRM does not explain how it arrived at this figure or how such a high cost is justified.

The Office of Information and Regulatory Affairs (OIRA) website has information on a previous Information Collection issued in May 2019.¹¹ The agency Supporting Statement issued in conjunction with that proposed change demonstrates how little coordination there is within the agencies as they rush to rewrite the asylum laws and forms that implement them. According to that Supporting Statement, the time it takes to complete an I-589 is 12 hours.¹² Thus, under the current NPRM, with the newly proposed version of the I-589, the average time estimated to complete the I-589 form is a full 50 percent higher than what was calculated in May 2019 (18 hours as opposed to 12 hours.) The other numbers in the May 2019 Supporting Statement are almost identical to those set forth in the current NPRM. The May 2019 Supporting Statement estimated there would be 114,000 respondents for a total cost of \$48,618,720.¹³ The current NPRM likewise estimates 114,000 respondents but alters the total cost slightly to \$46,968,000.¹⁴ Yet, there is no explanation in the current NPRM as to why the cost for the information collection would decrease by over \$1.5 million at the same time the estimated hours to complete the form would rise by 6 hours.

The May 2019 Supporting Statement reaches its figure for the cost of the form based on the average hourly wage of \$35.54¹⁵ but it does not explain what the connection is between the average hourly wage in the United States and the cost of completing the form. While the agency may be making this calculation based on the time that an individual would be unable to work because they would be burdened with completing the form, that calculation makes little sense

⁸ See USCIS, Form I-589, Rev. 9/10/19, <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>.

⁹ 85 Fed. R. 36290

¹⁰ *Id.*

¹¹ OIRA, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201905-1615-002.

¹² Supporting Statement, [I-589 EXT SS .docx](#), at 7 (May 6, 2019)

https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201905-1615-002.

¹³ *Id.*

¹⁴ 85 Fed. R. 36290.

¹⁵ Supporting Statement, [I-589 EXT SS .docx](#), at 7 (May 6, 2019)

https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201905-1615-002.

when the primary cost of completing an I-589 would be paying for an attorney. The May 2019 Supporting Statement does later mention the cost of attorneys' fees, but it vastly underestimates these fees, stating:

Costs may include payments for document translation and preparation services, attorney and legal fees, postage, and costs associated with gathering documentation. USCIS estimates the average cost of this information collection may vary widely, from as little as \$20 to \$1,000 per respondent. USCIS estimates that the average cost for these activities is \$515 and that approximately 80 percent of the total respondent population may incur this cost.¹⁶

While the reasoning in the May 2019 Supporting Statement is not clearly spelled out, presumably, USCIS reaches the 80 percent number based on the number of represented asylum seekers. However, the cost of attorneys' fees would be much greater under the new information collection and the numbers in the NPRM therefore cannot be accurate. The NPRM fails to take into account the additional four pages of substantive questions on the new proposed form. With the proposed form, attorneys who prepare the I-589 would no longer be able to file a basic form with the intention of filling in the details of the claim later, after weeks or months of working closely with their client prior to an interview or hearing. Instead, attorneys would need to understand every detail of the case, from the exact delineation of the applicant's particular social group, to whether a public official who acquiesced in torture was acting in an official capacity, and how that official became aware of the harm that the applicant suffered.¹⁷ Attorneys cannot generally elicit this level of detail about a case in the first few meetings.

In addition to the time that an attorney must spend with a client to reach a level of trust to elicit this level of factual detail, the NPRM does not take into account the fact that the June 15, 2020, asylum rule radically changes how asylum applications would be adjudicated. As a result, even an experienced asylum attorney would have to spend more hours on every case researching how the new rules intersect with existing law, what injunctions are currently in effect against rules that have been successfully challenged, and would need to speak with colleagues about how the new rules are being interpreted. The notion that the cost to a client for this level of attorney work would run from \$20 to \$1000 is absurd and the Supporting Statement that set the highest possible cost for attorneys' fees in completing the I-589 is likely a vast underestimate.

In addition to the cost of attorneys' fees, there would be additional out of pocket costs for asylum seekers who would, for the first time, have to prove that they have paid income taxes. As a result of newly promulgated rules governing initial employment authorization documents for asylum seekers,¹⁸ the vast majority of asylum seekers who file an I-589 after August 25, 2020, will likely not be able to obtain an employment authorization document (EAD) before their asylum application is adjudicated.¹⁹ The unfortunate result of the new EAD rule will likely be that many

¹⁶ *Id.* at 8.

¹⁷ Proposed I-589 at 7.

¹⁸ See 8 CFR § 274a.12(c)(8).

¹⁹ See CLINIC, *CLINIC Comment Asylum Employment Authorization Document (EAD)*, (Jan. 22, 2020), <https://cliniclegal.org/resources/removal-proceedings/defensive-asylum/clinic-comment-asylum-employment-authorization>.

asylum seekers will be unable to work lawfully and will therefore have to spend time and money with a tax professional in order to file taxes prior to applying for asylum. The new EAD rule will also put pressure on counsel and asylum seekers to file the I-589 as quickly as possible to get the much longer, 365-day clock started. There is a significant tension between the new EAD rule and the information collection, which may require many weeks and multiple meetings with counsel to prepare.

CLINIC urges the agencies to rescind this data collection, at least until they are able to accurately assess the cost of the changes in the form and provide the public with accurate data to assess.

B. The New Proposed I-589 Is Not Based on the Most Recent Version of the I-589

The date on the I-589 form on which changes are written in red is September 10, 2019. That is the version of the form that currently appears on the USCIS website.²⁰ However, following the promulgation of the new asylum EAD rules, which are set to go into effect on August 25, 2020, United States Citizenship and Immigration Services (USCIS) updated the Form I-589. That version of the form contains a watermark stating, “DRAFT NOT FOR PRODUCTION 6/01/20,” and is 12 pages long, the same length as the form currently on the USCIS website. That version of the form includes cross-references to new instructions that are not included in the form that is under consideration in the current information collection, and the June 1 version includes new questions regarding arrest records which are not included in the currently proposed form. Presumably, the June 1 version of the I-589 would go into effect after the August 25 effective date of the EAD regulations, however, the current information collection does not incorporate the June 1 changes to the form.

CLINIC is concerned that there are conflicting new versions of the I-589 and does not understand how our comments on the current proposed version of the I-589 will affect the final form when there is apparently a more recent version than the one on which the information collection is based. For this reason alone, CLINIC urges the agencies to rescind this information collection and reissue it at a later date using a version of the I-589 form that integrates the newest version of the existing I-589.

C. The Proposed I-589 Does Not Mention Deferral of Removal under CAT

The proposed I-589 specifically states on page 1 and page 5 that it is to be used for both statutory withholding of removal and withholding under CAT. But neither the form nor the accompanying instructions clarify that this form is also the one that applicants for deferral of removal under CAT must use to apply for protection. CLINIC acknowledges that the existing version of the I-589 also does not mention CAT deferral but is concerned that this form spells out for the first time that it is to be used for CAT withholding while leaving off any mention of CAT deferral. It is confusing to specify one use of the form under the CAT regulations and to leave out the other use. The form and instructions should be rewritten to clarify that the I-589 is the correct form to seek CAT deferral.

²⁰ See USCIS, Form I-589, Rev. 9/10/19, <https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf>.

D. CLINIC Is Very Concerned that the Additional Four Pages of Complex Questions on the Proposed I-589 Will Make it Impossible for *Pro Se* Applicants to Have Their Cases Heard at All

The additional questions that the proposed I-589 adds include complex questions combining facts and law. CLINIC is very concerned that it will be impossible for *pro se* applicants to complete some of these questions, and, that under recently imposed policies under which USCIS rejects any I-589 with any blank space, they may be unable to have their applications accepted and adjudicated at all.²¹ In the alternative, *pro se* applicants face the real risk of answering these questions incorrectly and then facing adverse credibility decisions when an adjudicator faults them for testifying inconsistently with the responses on their I-589 form.

Even more troubling is the effect the proposed I-589 would have on *pro se* applicants in conjunction with the June 15 proposed rule that would allow immigration judges to pretermite proceedings if they do not believe that applicant has adequately stated a claim. The new form includes four new pages of dense legal questions requiring applicants, many of whom will be *pro se*, to analyze complex legal issues. Some of these issues include articulating a particular social group that meets the requirements of 8 CFR § 208.1 and 8 CFR § 1208.1²² and answering complex questions about whether government agents were acting in “official capacity” to make out a CAT protection claim. CLINIC is very concerned that the additional questions on the new I-589 will lead to immigration judges’ premitting protection claims.

Allowing an immigration judge to pretermite asylum claims without holding a hearing violates INA § 240(b)(1) and INA § 240(b)(4)(B), controlling Board of Immigration Appeals precedent, the U.S. Constitution, and international law.²³ Creating a form that is so complex that it would be virtually impossible for an unrepresented asylum seeker to complete, while simultaneously instructing adjudicators to pretermite cases for an applicant’s failure to state a claim in completing the form subverts existing law that requires adjudicators to develop the record and will result in many bona fide asylum seekers never having a full day in court.²⁴

²¹ See Catherine Rampell, *The Trump Administration’s No-Blanks Policy Is the Latest Kafkaesque Plan Designed to Curb Immigration*, THE WASHINGTON POST, Aug. 6, 2020, https://www.washingtonpost.com/opinions/the-trump-administration-imposes-yet-another-arbitrary-absurd-modification-to-the-immigration-system/2020/08/06/42de75ca-d811-11ea-930e-d88518c57dcc_story.html.

²² See Proposed instructions, at 3. The fact that the instructions reference the Code of Federal Regulations without otherwise explaining for *pro se* asylum seekers what they would need to show to demonstrate that their proposed particular social group is cognizable is, in itself, deeply troubling given that the vast majority of unrepresented asylum seekers would have no understanding of how to look up a regulation.

²³ See CLINIC Asylum Comment at 10-18, *supra* note 3.

²⁴ *Id.*

E. CLINIC Opposes the Proposed I-589’s Requirement that an Asylum Seeker Fully Articulate the Particular Social Group

CLINIC is very concerned that asylum seekers must articulate their specific particular social group in the proposed I-589. Under *Matter of W-Y-C & H-O-B-*, an asylum seeker is required to articulate the particular social group at the individual hearing and cannot raise a new particular social group for the first time on appeal.²⁵ However, nothing in that case requires an asylum seeker to articulate a particular social group at the time they first submit an I-589. There are many reasons that the exact delineation of an asylum seeker’s particular social group may change over time. Often, counsel must meet with an asylum seeker many times over the course of months or years to fully understand why the asylum seeker fled their country. Other asylum seekers are unable to locate counsel and must file their I-589 *pro se* or after meeting with a volunteer lawyer once simply to submit the form and not miss the one year filing deadline. Immigration lawyers are specifically permitted by court stipulation to prepare I-589s for otherwise unrepresented asylum seekers,²⁶ but in many instances it would be impossible in the context of a single meeting with an asylum seeker to determine the exact contours of a particular social group and whether the possible particular social groups meet all of the elements of the three-prong test.²⁷

Furthermore, legal analysis surrounding particular social group is in constant flux and what may be a widely accepted particular social group at the time an asylum seeker files for asylum, might no longer be considered viable in the months or years it takes for the applicant to be scheduled for an individual hearing. CLINIC strongly opposes the new form’s requirement that asylum seekers whose claims are based on membership in a particular social group have to fully articulate those claims in the I-589 and urges the agencies to remove this question.²⁸

F. CLINIC Opposes the Proposed I-589’s Requirement that an Asylum Seeker Fully Explain the Nexus to Harm

The proposed I-589 would require asylum seekers to articulate the nexus in their asylum application form. Specifically, the form requires the asylum applicant to explain why they “believe the harm, mistreatment, or threats you experienced were on account of one or more of the protected grounds.”²⁹ Establishing nexus is often the most difficult part of prevailing on an asylum claim.³⁰ It would be impossible for many asylum seekers, especially those who are unrepresented to fully comprehend what they must demonstrate to prove that harm is “on account of” their protected

²⁵ *Matter of W-Y-C & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).

²⁶ See *NWIRP v. Sessions* settlement, (Apr. 17, 2019), <https://www.nwirp.org/wp-content/uploads/2019/04/dkt-109-Notice-of-Settlement.pdf>.

²⁷ See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014).

²⁸ See CLINIC Asylum Comment at 18-24, *supra* note 3.

²⁹ See Proposed I-589 at 6,

³⁰ See *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018) (“The nexus requirement is critically important in determining whether an alien established an asylum claim. That requirement is ‘where the rubber meets the road’ because the ‘importance of the “on account of” language must not be overlooked.’ *Cece*, 733 F.3d at 673. ‘Although the category of protected persons [within a particular group] may be large, the number of those who can demonstrate the required nexus likely is not.’ *Id.*”)

characteristic at the outset of their case when completing Form I-589. Moreover, the June 15 proposed rules 8 CFR § 208.1(f) and 8 CFR § 1208.1(f) subject all asylum seekers to a laundry list of measures designed to deny asylum to most applicants on nexus grounds, while failing to require adjudicators to engage in a mixed motive analysis.³¹ The nexus question on the proposed I-589 therefore lays a trap for asylum seekers—if they do not explain why they believe they were harmed, the case could face pretermission, however, if they state a reason from the laundry list of automatic denials, such as anything related to “personal animus” or “gender” the adjudicator may deny the case without having to determine whether this was only one reason among others.³² CLINIC strongly opposes the inclusion of this question, which will lead to many applicants’ claims being unfairly denied.

G. CLINIC Opposes the Proposed I-589’s Requirement that Applicants Seeking CAT Protection Explain the Exact Role of Government Officials

The questions on the proposed I-589 regarding CAT protection will be impossible for most *pro se* applicants to answer. An individual who has fled torture will generally not know whether or not a government official was acting in their “official capacity.” Even if the applicant may ultimately be able to retain an expert witness and/or do further investigation about conditions in their country to support their claim before an individual hearing, it is absurd to require this level of detail at the beginning of a case when an asylum seeker is submitting their application form.

Furthermore, the questions it asks about torture by a non-government actors are confusing at best and misleading at worst. The first is confusing, contains a typographical error, and does not mention acquiescence or willful blindness:

If the entity or the person(s) who caused the harm was not the government or a public official acting in an official capacity or other person acting in an official capacity, explain whether there is a connection between the government or a public official acting in an official capacity or other person acting in an official capacity and the entity or person(s) who caused the harm, and if so, describe the how [sic] they are connected.³³

However, the regulations do not require a “connection” between the government and those who torture an applicant for protection; they require that the government “acquiesce” in the torture.³⁴

The form then goes on to ask the following question:

If the entity or the person(s) who caused the harm was not the government or a public official acting in an official capacity or other person acting in an official capacity, explain whether the government or a public official acting in an official capacity or other person acting in an official capacity would become aware of the torture, how the government or a public official acting in an official capacity or

³¹ See CLINIC Asylum Comment at 38-43, *supra* note 3.

³² *Id.*

³³ Proposed I-589 at 7.

³⁴ See 8 CFR § 208.18(a)(1); 8 CFR § 1208.18(a)(1).

other person acting in an official capacity would become aware of the torture, and how the government or a public official acting in an official capacity or other person acting in an official capacity would respond.³⁵

This question uses the word “official” 12 times, and the phrase “official capacity” eight times. If an applicant for CAT protection does not understand the legal term of art “official capacity,” as defined by case law, it would be impossible to answer this question. Moreover, the question would require a CAT protection applicant to guess how a government official “would respond” if they were made aware of the torture. Applicants for protection from torture should not be required to guess about what their government might do. Case law has defined the contours of a government’s “willful blindness” and “acquiescence.”³⁶ Applicants for CAT have never had to guess about how a particular government official might respond to the applicant’s torture. CLINIC strongly opposes the proposed rules’ redefinition and narrowing of CAT protection³⁷ and opposes the questions on the proposed I-589 that would implement the new rule.

CLINIC further strongly opposes the addition of the question that instructs applicants to explain, “Why you believe the torture occurred.”³⁸ Unlike asylum and statutory withholding of removal, there is no nexus requirement for CAT claims. An applicant seeking CAT protection may be confused by this question and assume that if they do not know why they were targeted for torture they would not be eligible for protection. Indeed, many individuals who prevail on CAT claims rather than asylum claims win those cases precisely because there is not a nexus to a protected characteristic. The agencies should remove this question, which is not legally relevant and may confuse applicants.

H. CLINIC Opposes the Proposed I-589’s Requirement that Applicants Describe Whether They or Their Family Members “Could Have” Applied for Lawful Status in Other Countries

The proposed I-589 would ask detailed questions about whether the asylum seeker or their family members “could have” applied for lawful status in other countries. CLINIC strongly objects to the changes in the proposed rule that would allow the government to conclude that an asylum seeker is “firmly resettled” based on the possibility of applying for an indefinite, but not permanent status in another country³⁹ and strongly objects to the proposed rule implementing the unlawful “Asylum Transit Ban”⁴⁰ through discretionary denials.⁴¹ We therefore strongly oppose the questions on the new I-589 that would implement these new rules.

As with many of the new questions on the proposed I-589, these questions require asylum seekers to have a sophisticated understanding of legal terms of art such as “any permanent legal

³⁵ Proposed I-589 at 7.

³⁶ See, for example, *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015) (“Evidence that Mexican police participate as well as acquiesce in torture is found in abundance in this case”).

³⁷ See CLINIC Asylum Comment at 79-84, *supra* note 3.

³⁸ Proposed I-589 at 7.

³⁹ See CLINIC Asylum Comment at 74-76, *supra* note 3.

⁴⁰ See *E. Bay Sanctuary Covenant v. Barr*, No. 19-16487, 2020 WL 3637585 (9th Cir. July 6, 2020).

⁴¹ *Id.* at 54-59.

immigration status or any non-permanent, potentially indefinitely renewable legal immigration status”⁴² that it is highly unlikely an unrepresented person would possess. Even those who are represented would have to pay increased fees as attorneys will have to perform legal research on international laws, which will likely be written in a foreign language, to determine whether the applicant may have had an “opportunity” to seek some kind of status in a third country. The cost of this legal research by an attorney could easily exceed the maximum \$1,000 the agency Supporting Statement estimated attorneys’ fees for completing the I-589 would be.⁴³

CLINIC is also concerned that the proposed I-589 form requires applicants to include information that is not legally relevant about siblings’ applications for status in the United States or potential for application for status abroad. Siblings are not eligible for derivative asylum under U.S. law so it is not legally relevant to the applicant’s claim whether a sibling has applied for asylum. Moreover, given the sensitive nature of information disclosed in asylum applications, it may not be appropriate for an asylum seeker to have to discuss their application with a sibling.

I. CLINIC Strongly Opposes the Proposed I-589’s Questions on the Newly Proposed “Discretionary” Factors that Would Result in the Vast Majority of Asylum Applications Being Denied

The proposed I-589 would add over a dozen questions that elicit information regarding the newly proposed discretionary factors that would result in the denial of most asylum applications. As discussed at length in CLINIC’s comments on the June 15, 2020, proposed regulations, these discretionary factors contravene the INA, case law, international law, the U.S. Constitution, and our country’s moral obligations to provide protection to the most vulnerable.⁴⁴ Several of these questions concern issues that federal courts have found cannot be bars to asylum.⁴⁵ Seeing each of these questions laid out on the I-589 form makes the intention of the June 15 proposed rule to ensure that most asylum applications are denied abundantly clear.

In addition to objecting strongly to the substance of these questions, as with many of the newly added questions on the proposed form, CLINIC has grave concerns that *pro se* applicants will not be able to understand the questions and therefore risk answering incorrectly. These questions concern complex legal terms of art such as accrual of unlawful presence, outstanding tax obligations, or whether a conviction was expunged.⁴⁶ It is difficult to imagine how an unrepresented asylum seeker could understand any of these terms.

Furthermore, CLINIC is extremely concerned that *pro se* applicants, or those represented by attorneys who are not asylum specialists may not be able to answer the complex new questions sufficiently to even get a hearing before an immigration judge. As just one example, the new form I-589 requires the applicant to state whether they have been unlawfully present for more than one year. A *pro se* applicant would likely be uncertain how to answer this question.⁴⁷ The concept of

⁴² Proposed I-589 at 10.

⁴³ See Section II. A. above.

⁴⁴ See CLINIC Asylum Comment at 50-72, *supra* note 3.

⁴⁵ *Id.*

⁴⁶ Proposed I-589 at 11-12.

⁴⁷ Proposed I-589 at 11.

lawful presence versus unlawful presence is so complicated that it confounded Chief Justice Roberts during oral argument in *United States v. Texas*:

CHIEF JUSTICE ROBERTS: Lawfully present does not mean you're legally present in the United States.

GENERAL VERRILLI: Right. Tolerated --

CHIEF JUSTICE ROBERTS: I'm sorry, that -- just so I get that right.

GENERAL VERRILLI: Yes.

CHIEF JUSTICE ROBERTS: Lawfully present does not mean you're legally present.

GENERAL VERRILLI: Correct.

JUSTICE ALITO: But they are -- the DAPA beneficiaries are -- may lawfully work in the United States; isn't that correct?

GENERAL VERRILLI: That's right.

JUSTICE ALITO: And how is it possible to lawfully work in the United States without lawfully being in the United States?

GENERAL VERRILLI: There are millions of people, millions of people other than the DAPA recipients about whom this is true right now.⁴⁸

This question is just one of innumerable examples throughout the new proposed I-589 where an unrepresented asylum seeker simply could not be expected to understand how to properly answer the question. If the concept of unlawful presence confounded two Supreme Court justices, it is irrational to expect an asylum seeker to understand and answer the question accurately. The result could be that the applicant leaves the question blank, and has the I-589 form rejected, or the applicant could guess at the answer and potentially face an adverse credibility finding if they guessed incorrectly.

Furthermore, the boxes on page 12 of the proposed I-589 do not clearly indicate what exceptions might apply to what discretionary bars. Thus an asylum seeker would likely be very confused in trying to complete a box where the instructions state, "If you answered 'Yes' to any of the questions in Item Numbers 10.A. - 10.I., do any of the corresponding exceptions (for example, applying for protection from persecution or torture in another country or satisfying the definition of a severe form of trafficking in persons) apply to you or any member of your family included in the application?"⁴⁹ An applicant who, for example, never filed income taxes in the United States might be very confused about how not paying taxes would relate to potentially being tortured in another country.

J. CLINIC Strongly Opposes the Additional References to Filing a Frivolous Application Without Any Explanation of How the Proposed Rule Would Expand this Definition

While the new proposed I-589 and new proposed instructions include information about the proposed change that would allow asylum officers to find an application frivolous, neither the

⁴⁸ See *United States v. Texas*, Oral Argument Transcript, at 27-28, Apr. 18, 2016,

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-674_b97d.pdf.

⁴⁹ *Id.* at 12.

form nor the instructions provides any information about how the proposed rule would significantly expand the definition of “frivolous.” Instead, the instructions simply reference 8 CFR § 208.20 and §1208.20.⁵⁰ It is unreasonable to expect asylum seekers, especially *pro se* asylum seekers, to have the wherewithal to access the code of regulations to understand how this definition has expanded. While the I-589 has included a frivolous warning since the frivolous concept was introduced into asylum law, this warning is meaningless if the asylum seeker is not apprised of the fact that if an adjudicator determines that the application lacks merit, the asylum seeker may be forever barred from any immigration benefit. CLINIC strongly opposes the expansion of the definition of “frivolous” as explained in our comment on the June 15, 2020, proposed asylum rule.⁵¹ We are especially concerned that the proposed I-589 form and instructions would implement this radically expanded definition without giving asylum seekers fair notice of the change.

III. CONCLUSION

The proposed changes to the I-589 would create new obstacles for asylum seekers. Instead of taking steps to make it more difficult for those fleeing harm to seek protection in the United States, the agencies should be ensuring that everyone who needs protection has full access to our asylum, withholding and CAT adjudication systems. As Pope Francis has said, “we cannot remain insensitive, our hearts deadened, before the misery of so many innocent people. We must not fail to weep. We must not fail to respond.”⁵² The response of the United States should be to keep its forms and instructions simple, and its rules flexible enough to allow those fleeing harm to find safety in the United States. These proposed revisions will make it more difficult for asylum seekers and should be withdrawn.

Thank you for your consideration of these comments. Please do not hesitate to contact Jill Marie Bussey, Director of Advocacy, at jbussey@cliniclegal.org, with any questions or concerns about our recommendations.

Sincerely,



Anna Gallagher
Executive Director

⁵⁰ Proposed Instructions at 9.

⁵¹ See CLINIC Asylum Comment at 84-92, *supra* note 3.

⁵² Gerard O’Connell, *Pope Francis Reminds Christians that Migrants and Refugees Should Be Welcomed Around The World*, AMERICA THE JESUIT REVIEW, Sep. 29, 2019, <https://www.americamagazine.org/faith/2019/09/29/pope-francis-reminds-christians-migrants-and-refugees-should-be-welcomed-around>.