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Department of Homeland Security
111 Massachusetts Avenue, NW, 3rd Floor
Washington, DC 20529

RE: USCIS-2007-0045-0006
OMB Control Number: 1615-0013

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) hereby submits comments to the proposal of the Department of Homeland Security (DHS) to propose changes for the Form I-131 (Application for Travel Document), including institution of a biometrics collection requirement and fee.

We appreciate the opportunity to comment on the proposed rule and believe that we are particularly well qualified to do so. AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of law pertaining to the immigration and naturalization, and the facilitation of justice in the field. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status, and are familiar with the ever-changing complexities of immigration.

AILA is opposed to the proposed revisions to Form I-131. The existing application process, which requires either ink or electronic signature, provides for sufficient collection of information. The proposed additional information collection imposes financial burden, delay, and inconvenience to the affected classes of applicants, without improving the utility of the application process.

The rule subjects affected foreign nationals, which include applicants for adjustment of status to permanent resident, permanent residents, refugees, and asylees, to the additional biometrics fee, an unpredictable and potentially

lengthy security check process, no assurance that they will have a travel document within a specific period of time, and the possibility of inability to travel due to lengthier processing. The inability to travel also burdens employers, which require their foreign national employees to engage in business travel.

Compliance with Administrative Procedures Act

The imposition of a biometrics requirement for Form I-131 represents a change of policy, and is therefore subject to the Administrative Procedure Act (APA),¹ and requires the agency to publish the substantive rule not less than 30 days prior to its effective date.² In addition, USCIS has not provided a reasoned analysis of the basis for its change in policy, nor has it clearly stated in the actual notice in the Federal Register that it is imposing a biometrics collection requirement for Form I-131. AILA suggests that USCIS issue a corrected notice, in the format of a proposed rule, with a reasoned analysis for the basis of its change in policy, as well as a clear statement regarding its proposed Form I-131 processing requirements.

Purpose of Biometrics Requirement Increased Biometrics Collection is Not Necessary or Useful

USCIS requests evaluations of “whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.” Form I-131 has not been modified, and only significant change to the information collection is the institution of biometrics collection. USCIS has recently outlined as the purposes of capturing biometric data, which typically include fingerprint or photographs, as follows: “(1) Conducting fingerprint-based background checks; (2) verifying an applicant's identity; and (3) producing benefit cards/documents.”³

Previously, the Immigration & Naturalization Service (INS) allowed applicants to provide their fingerprints on Form FD-258, and did not require a filing fee to process background checks. Beginning on March 29, 1998, INS required submission of fingerprints at designated fingerprinting services, and began to impose a biometrics filing fee, which was initially \$25.⁴ Most recently, USCIS increased the biometrics application fee from \$70 to \$80 on July 30, 2007.⁵

USCIS has been expanding the number of applications it subjects to biometrics; for example, Form I-751⁶ was recently revised to add this requirement. While our national security is clearly a priority, this trend towards imposing a background check for every application type is questionable. In some cases, multiple applications that are typically filed together are subject to the biometrics requirement, resulting in double biometrics fees (e.g., Forms I-485 and I-601). Instituting this requirement is especially questionable when the applicant has already provided not only signature and photos, but also fingerprints to USCIS.

Requiring biometrics for a travel authorization subsequent to these applications is duplicative. It is unclear what reasons USCIS might have in instituting a biometrics requirement for all applicants submitting Form I-131. This form must be submitted by several different classes of

¹ 5 USC § 551.

² 5 USC § 553(d).

³ 72 Fed. Reg. 17172, 17173 (April 6, 2007).

⁴ 63 Fed. Reg. 12979 (March 17, 1998).

⁵ 72 Fed. Reg. 29851 (May 3, 2007).

⁶ 71 Fed. Reg. 15469 (March 28, 2006).

applicants to apply for a travel document. Form I-131 is submitted by applicants for adjustment of status or outside the U.S. applying for advance parole, as well as various other classes of applicants for parole. In addition, Form I-31 is submitted by asylees and refugees applying for refugee travel documents, and by permanent residents applying for reentry permits. Applicants for adjustment of status, permanent residents, asylees and refugees have all already undergone submission of biometrics as part of submitting their applications.

Biometrics collection is neither necessary nor useful in the context of travel authorization applications submitted on Form I-131. According to USCIS's statement in support of its notice of information collection, the biometrics collection is "required to verify the status" of foreign nationals applying for certain travel documents.⁷ This statement is vague and does not explain why USCIS now believes it is necessary to subject applicants to biometrics collection. Information on loss of permanent resident status, or refugee or asylee status, or denial of an adjustment of status application is easily accessible by reference to the foreign national's record in agency databases, and does not require submission of biometrics. Foreign nationals applying for parole who are outside the United States either have previously submitted their biometrics (e.g., refugee abroad who did not apply for an advance parole), or have not previously been in the United States and thus have no status for USCIS to verify.

In a April 6, 2007, notice, USCIS announced a new system of records called the Biometric Storage System of Records; in doing so, USCIS stated in its preliminary information that:

Currently, USCIS does not have a centralized, long-term storage program for fingerprint biometrics. Accordingly, applicants are sometimes required to return to an USCIS Application Support Center (ASC) to provide fingerprints again during the case adjudication process. BSS will store the biometric information, thereby *decreasing the burden on applicants by negating the need to provide multiple sets of biometric data.*⁸ (Emphasis added).

Despite the stated improved capabilities of its storage capabilities, USCIS is in fact increasing the burden on applicants, and expanding the number of application types for which applicants must provide multiple sets of biometric data. This is especially the case given that the travel documents issued to the various classes of applicants typically expire within one to two years.

Advance Parole

Since passage of IIRAIRA in 1996, parole is to be issued on a case-by-case basis, and the standard for issuance of parole is "urgent humanitarian reasons" or "significant public benefit."⁹ Notably, as parole is not considered an "admission" to the United States,¹⁰ and as there are several types of parole which do not require submission of Form I-131 and are simply issued on a Form I-94,¹¹ imposition of a biometrics requirement is all the less reasonable. There are numerous classes of applicants for parole; this comment summarizes the effect of the USCIS rule revising Form I-131 processing upon only a few classes of applicants.

Applicants for Adjustment to Permanent Resident Status

⁷ USCIS Docket ID# 2007-0045-0003, at <http://www.regulations.gov>.

⁸ 72 Fed. Reg. 17172, 17173 (April 6, 2007).

⁹ INA § 212(d)(5), as amended by IIRAIRA § 602(a).

¹⁰ INA § 103(a)(13)(B).

¹¹ 8 CFR § 235.1(f)(2).

Applicants for adjustment to permanent resident status (Form I-485) often concurrently apply for the advance parole travel document.¹² For all adjustment applicants other than those holding H-1B, L-1, K-2, or V-2 (and dependent) status, advance parole is the only permissible means of traveling subsequent to filing the adjustment application. For these adjustment applicants, departure from the United States without advance parole while their applications are pending constitutes abandonment of the adjustment applications, and constitutes grounds for denial.¹³

USCIS will not issue advance paroles for a validity period of more than one year.¹⁴ Many adjustment applications take over one year to be processed, either due to background check delays subsequent to biometrics collection, or unavailability of immigrant visa numbers. USCIS currently will not accept applications for a new advance parole until the current advance parole validity is within 120 days of expiration. Advance parole processing time is variable but is currently about six months. Due to lengthy adjustment application and advance parole processing times, many adjustment applicants must apply for advance parole travel documents several times.

Adjustment applicants already go through submission of biometrics as part of USCIS processing of Form I-485. Requiring submission of biometrics for the advance parole as well is duplicative and burdensome. In addition, as the notice will add a second biometrics fee, this effectively increases the filing fee for adjustment applications (and ancillary “included” applications) from \$1010 to an additional \$80 per year. Finally, the addition of the biometrics collection to processing is likely to lengthen processing times further, to the extent that adjustment applicants who cannot continue to travel using their nonimmigrant visas (all but certain H, L, K, and V nonimmigrants) may have significant periods during which they cannot travel.

In its recent final rule regarding the effect of departure from the United States without advance parole authorization on pending adjustment of status applications by aliens in H-1 or L-1 status that removes the requirement that the H-1 or L-1 alien possess an I-797 receipt for the adjustment of status application to prevent the adjustment of status application from being treated as having been abandoned, the USCIS acknowledged that due to its varying workload, it is not always able to process applications timely, and that delays in processing result in hardship for adjustment applicants needing to travel.¹⁵

¹² The general instructions to the revised Form I-131 state confusingly that “advance parole is an extraordinary measure used sparingly to bring an otherwise inadmissible alien into the United States for a temporary period of time during a compelling emergency.” Often, adjustment applicants are typically granted advance parole for “emergent personal or bona fide business reasons,” as stated elsewhere in the instructions.

¹³ 8 CFR § 245.2(a)(4)(ii).

¹⁴ Since 1996, long-term paroles have been counted against the worldwide family-based immigrant visa numbers. INA § 201(c)(1)(A)(ii) and (c) (4), as amended by IIRAIRA § 603. USCIS and legacy INS both have interpreted IIRAIRA § 603 to bar grant of advance parole for a validity period of more than one year. See INS Memorandum, Paul W. Virtue, Acting Executive Associate Commissioner, INS, “Implementation of Parole Provisions: IIRAIRA Section 602 and 603,” 74 Int. Rel. 1260-64 (08/18/97).

¹⁵ “Because of its varying workload, USCIS recognizes that it is not always able to ensure immediate issuance and mailing of Form I-797 receipt notices upon receipt of an adjustment of status application. At times, USCIS therefore may experience delays in processing and issuing the receipt. This situation places H-1B/H-4 or L-1/L-2 nonimmigrants who are awaiting a Form I-797 receipt notice, but wish to travel outside the United States while their adjustment of status application is pending, in the difficult position of having to decide whether to cancel a planned trip or risk denial of the adjustment application as a result of the departure. *Either option would result in hardship to the alien and his or her dependents that the Department of Homeland Security (DHS) finds is unduly burdensome and unnecessary.* This is because it renders otherwise qualifying adjustment applications abandoned notwithstanding the fact that the information provided by presentation of the receipt (evidence of filing of an adjustment application) is

Ironically, while USCIS recognizes such hardship for adjustment applicants holding H/L status, it is increasing similar hardship for all other adjustment applicants (who are not permitted to continue traveling using their nonimmigrant visas), who already must forgo travel for months after filing their adjustment applications. These adjustment applicants will experience additional hardship due to imposition of a biometrics requirement. Such a requirement will most likely lengthen USCIS processing time for production of advance paroles, and increase the period during which these adjustment applicants cannot travel without risking abandonment of their applications.

Especially for application types, such as advance parole, which currently require resubmission of biometrics on an annual basis, USCIS should not require resubmission of biometrics, nor should USCIS charge a biometrics application fee. USCIS stated in its preliminary comments to its recent fee increase rule that:

USCIS is developing the Biometrics Storage System (BSS) which will allow the re-use of fingerprints and, if an application or petition has not been adjudicated within the fifteen month validity period, USCIS will be able to *simply re-submit the stored fingerprints to the FBI, without any involvement of the applicant or petitioner...* Also, as a matter of policy, when an application remains pending, *USCIS does not charge the applicant the biometric fee again because of a processing delay at USCIS...*[however,] an applicant will pay the biometric fee whenever he or she files another application that requires the collection, updating, or use of biometrics for background checks. (Emphasis added)¹⁶

As USCIS demonstrably has the capability to resubmit stored fingerprints without any involvement of the applicant, USCIS should do so not only for repeat biometrics for the same application, but also for related applications (e.g., Form I-485 and Form I-131). As adjustment applicants must continue to resubmit Form I-131 applications on an annual basis, they should benefit from USCIS's current policy of not requiring repeat biometrics if the previous collection occurred within a fifteen month period.

Advance Parole: Applicant Abroad

Individuals outside the U.S. needing to travel (or return) to the U.S. may apply for advance parole. In the case of applicants for humanitarian parole, the notice institutes a requirement that applicants abroad submit biometrics in the form of two fingerprint cards (FD-258), "prepared by a U.S. Embassy or U.S. Consulate, USCIS Office or U.S. Military Installation."¹⁷ Submission of biometrics through this more outdated paper process involves longer processing time, and is inefficient, given that U.S. consulates abroad have the capability to take ten-print fingerprints. As the need for travel is by definition urgent, institution of a biometrics requirement potentially eliminates the viability of humanitarian parole.

Reentry Permit: Permanent Residents

already available to DHS. An alien whose adjustment of status application is deemed abandoned for failing to present a Form I-797 receipt notice upon readmission to the United States resulting in a denial of the application would be forced to incur the time and expense involved in filing a new adjustment application." (Emphasis added.) 72 Fed. Reg. 61791 (Nov. 1, 2007).

¹⁶ 72 Fed. Reg. 29851, 29857 (May 30, 2007).

¹⁷ USCIS Docket ID# 2007-0045-0002, Form I-131 Instructions pg. 4, at <http://www.regulations.gov>.

Lawful permanent residents are considered applicants for admission if they have been absent from the United States for over 180 days.¹⁸ Also, the Permanent Resident Card (Form I-551) is not valid as a travel document for absences from the United States of over one year.¹⁹ Permanent residents desiring to state their intention to maintain their U.S. permanent residence prior to departure, or anticipating an absence from the United States for over one year, must apply for reentry permits.

Currently, a permanent resident must be in the United States on filing, but does not have to remain in the U.S. while USCIS processes the reentry permit application. USCIS's notice does not indicate what changes in information collection are being implemented, but the instructions to the revised form state that "After filing your application for Reentry Permit, USCIS will inform you in writing when to go to your local Application Support Center (ASC) for your biometrics appointment.... Departure from [sic] the United States should not occur before your biometrics have been cancelled [sic]."²⁰

This information collection imposes a substantive new requirement that permanent residents must either remain in the U.S., or must return to the U.S., to submit biometrics at an Application Support Center (ASC). Processing times for issuance of an ASC appointment notice are variable and can range anywhere between a few weeks to many months. USCIS's estimate of the burden involved with compliance of the revised Form I-131 application process simply outlines the expected time to review and complete the form, and greatly underestimates the burden, which can extend to requiring that applicants make international travel plans upon short notice, simply to submit biometrics at an ASC. USCIS should not impose a biometrics requirement on this application type. Failing this, USCIS should at the least allow for immediate issuance of a receipt for an application, and submission of biometrics without appointment or additional fee at an ASC, or at a USCIS office or U.S. consulate abroad.

Refugee Travel Document: Refugees/Asylees

Asylees and refugees desiring to travel generally apply for a refugee travel document prior to departure. Similar to permanent residents, asylees and refugees currently must be in the United States on filing, but do not have to remain in the U.S. while USCIS processes the refugee travel document application. Similar to the revised instructions for the reentry permit, the revised instructions for the refugee travel document state, "After filing your application for Refugee Travel Document, USCIS will inform you in writing when to go to your local USCIS Application Support Center (ASC) for your biometrics appointment."²¹

Notably, the burden placed upon asylees and refugees is even greater than that placed on permanent residents, who can forgo applying for a reentry permit, and simply travel using their Permanent Resident Cards and a valid passport. Rather, refugees and asylees typically do not have any alternate travel authorization documentation, other than the advance parole under certain limited circumstances. Advance parole processing time is variable but is currently about six months, and this processing time is highly likely to increase with institution of a biometrics requirement.

¹⁸ INA § 101(a)(13)(C)(ii).

¹⁹ 8 CFR § 211.1(a)(2).

²⁰ USCIS Docket ID 2007-0045-0002, Form I-131 Instructions pg. 1, at <http://www.regulations.gov>.

²¹ USCIS Docket ID 2007-0045-0002, Form I-131 Instructions pg. 2, at <http://www.regulations.gov>.

USCIS should not impose a biometrics requirement on this application type. Failing this, USCIS should at the least allow for immediate issuance of a receipt for an application, and submission of biometrics without appointment or additional fee at an ASC, or at a USCIS office or U.S. consulate abroad.

Filing Fees and Other Burdens

AILA is opposed to the imposition of the additional biometrics fees for the processing of Form I-131. Undergoing the biometrics submission process provides no benefit to the foreign national and is being instituted exclusively to further USCIS's goal of verifying the status of applicants.

Notably, the U.S. Department of State does not charge foreign nationals a filing fee for biometrics collection in the context of a visa stamp application. Also, other Department of Homeland Security agencies, specifically Customs & Border Protection and Immigration & Customs Enforcement (ICE) do not charge foreign nationals a filing fee for biometrics collection in the context of NSEERS or US-VISIT entry-exit registration. By contrast, USCIS has been charging a steadily increasing filing fee, as if biometrics submission is a separate application for benefits.

While USCIS has stated that it does not charge applicants a biometric fee again because of processing delays,²² adding the biometrics process and fee to additional ancillary applications is effectively charging the biometrics fee again, and ultimately imposes a much higher total expense to applicants than represented by USCIS. The fee associated with biometrics submission is now \$80, and the fee for the I-131 application is \$305, and each was recently increased from \$70 and \$190 respectively, effective July 30, 2007.²³ The filing fees imposed can be a substantial sum of money, especially in situations of long-pending applications and larger families. In addition to the financial burden, affected applicants will be subject to other costs and inconvenience, such as arranging for transportation to and from an ASC, and taking time off school or work.

Notably, the initial notice relating to this rule published in 2005 states that DHS "has for some time collected photographs, signature specimens and fingerprints of applicants for various immigration benefits. Such information, commonly referred to as biometric information, has usually been collected and stored manually. Technological improvements have now made it possible to reliably and efficiently collect, store, retrieve and compare such data electronically...[However, electronic] biometric data, other than fingerprints, may not be of record."²⁴ The biometric data which USCIS and its predecessor, the INS, collected with all applications consists of fingerprints, a photograph, and a signature. Applicants for adjustment of status to permanent resident would have submitted photographs and signatures with their applications, thus such photographs were in the Service's files at some point. If the proposed rule is being issued due to the fact that USCIS has misplaced biometric data such as photographs and signatures, affected permanent residents should not be penalized by the imposition of filing fees.

We submit that Form I-131 applications submitted pursuant to the requirements of this proposed rule should be granted a blanket fee waiver. The affected population would be greatly inconvenienced and would receive no benefit. In the interest of justness and fairness, we suggest that USCIS waive all fees associated with the process. Furthermore, providing a blanket fee

²² 72 Fed. Reg. 29851, 29857 (May 30, 2007).

²³ 72 Fed. Reg. 29851 (May 30, 2007).

²⁴ 70 Fed. Reg. 64630, 64652 (October 31, 2005).

waiver may provide the public with faith that USCIS is instituting a biometrics requirement for legitimate government interests, rather than as a revenue raising vehicle.

Undoubtedly, if USCIS does not issue a blanket fee waiver, many applicants will submit applications for individual fee waivers. This is a burdensome application process which requires applicant provision and USCIS review of financial documentation such as tax returns, bank statements, public benefits statements, documentation of expenses, etc. If USCIS' focus is on issuing more secure, technologically advanced travel documents rather than generation of fees, issuance of a blanket fee waiver would not only demonstrate good faith, but would also have the advantage of administrative efficiency for the USCIS.

If this is not possible, AILA requests that filing fee waivers requested in accordance with the regulations²⁵ be adjudicated expeditiously and liberally by the USCIS. Currently, USCIS does not grant waivers of the biometric fees.²⁶ However, we believe USCIS should grant waivers of the biometric filing fee as well.

Notably, in its recent proposed rule to invalidate indefinite Form I-551s and require applications for renewal greencards (involving biometrics submission), USCIS indicated that one reason it desires to institute a repeat biometrics submission requirement is to “electronically store applicants' biometric information that can be used for biometric comparison and authentication purposes...”²⁷ As stated previously, USCIS already has biometric data for permanent residents, adjustment applicants, asylees and refugees. If the biometric data is not already in electronic format, USCIS has the capability to convert that biometric data into electronic format. This rationale indicates that the tendency to require repeat submission of biometrics is proposed more as an administrative convenience, as well as a means of passing the cost of the technological upgrade to individual applicants.

USCIS already has biometric data for all affected applicants but for first-time applicants for humanitarian parole. USCIS also has the capability to convert and technologically upgrade that biometric data into electronic format. The addition of a biometrics requirement has been initiated for the administrative convenience and maintenance of funding levels, and significantly burdens the affected applicants with the requirement of submitting repeat biometrics and fees.

Conclusion

In conclusion, AILA is opposed to imposition of a biometrics requirement for Form I-131. The notice is mis-categorized as a revised information collection and subjects affected classes of applicants to substantial financial costs, an unpredictable and potentially lengthy security check process, further delays in obtaining travel authorization, and longer periods during which travel is barred.

USCIS should expend its own resources to revise application process so that repeat submission of biometrics is not necessary. USCIS should provide for a blanket filing fee waiver given the fact that the vast majority of affected applicants have already provided their biometrics to USCIS.

²⁵ 8 CFR § 103.7(c).

²⁶ In increasing various application fees including a \$20 increase in the biometrics fee, USCIS stated in preliminary comments to the rule that while applicants can submit fee waivers, “it should be noted that the biometric fee cannot be waived.” 69 Fed. Reg. 20528, 20529 (April 15, 2004);

²⁷ 72 Fed. Reg. 42922 at 46922 (August 22, 2007).

AILA appreciates the opportunity to comment on the proposed rule, and is hopeful that our feedback will inform USCIS' decisions on this matter.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION