November 21, 2022

Samantha Deshommes, Chief,
Office of Policy and Strategy, Regulatory Coordination Division,
U.S. Citizenship and Immigration Services

Submitted via http://www.regulations.gov

Re: Legal Service Providers' Comment on Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application for Asylum and for Withholding of Removal; eDocket ID number USCIS–2007–0034; OMB Control Number 1615–0067

Dear Ms. Deshommes:

The 19 legal services providers and immigration advocacy organizations listed below submit this comment in response to the request for comments on the extension without change of Form I-589, Application for Asylum and Withholding of Removal (I-589). We are organizations that provide direct representation for asylum seekers and others seeking protection and/or who advocate for fairness and access to justice for those fleeing harm. We believe that all noncitizens should be afforded the right to fair adjudications of their claims to remain in the United States.

We appreciate the opportunity to submit comments on the I-589. We want to highlight several questions that seek information that is not legally required and/or may cause confusion for the applicant regarding criminal issues. It is critically important that the questions on this form be clear since asylum seekers are assessed on their credibility, and any misunderstanding of questions asylum seekers must answer can lead to inaccurate responses which can impact credibility findings. We further wish to highlight significant revisions to the form that the agency should make regarding Convention against Torture (CAT) protection.

I. Question C.6 Should Be Revised to Eliminate Requiring Legally Irrelevant and Confusing Information

Question 6.C on page 8 is as follows:

> **6.** Have you or any member of your family included in the application ever committed any crime and/or been arrested, charged, convicted, or sentenced for any crimes in the United States (including for an immigration law violation)?
>
> ☐ No ☐ Yes
>
> If "Yes," for each instance, specify in your response: what occurred and the circumstances, dates, length of sentence received, location, the duration of the detention or imprisonment, reason(s) for the detention or conviction, any formal charges that were lodged against you or your relatives included in your application, and the reason(s) for release. Attach documents referring to these incidents, if they are available, or an explanation of why documents are not available.

As written, this question requires the applicant to provide information that is not legally relevant to the adjudication of the application, that creates an onerous burden on the applicant, that may force the applicant to provide documents that are inherently lacking in indicia of reliability, and the question is needlessly confusing.

A. Applicants should not be required to submit information about potential criminal conduct if there is no conviction

This form requires applicants to disclose whether they have *committed* any crime within the United States, even if they have never been arrested, let alone charged or convicted, of the crime. It is unreasonable to ask those filing form I-589, most of whom will be filing within one year of arrival into the United States, to understand the American criminal justice system, and make a determination as to whether at any time they may have *committed* a crime. Forcing anyone to answer such a question, could violate an individual's constitutional right against self-incrimination. Moreover, the question is inherently unfair, creating a "damned if you do—damned if you don't" situation where a noncitizen who does not disclose a crime they may have committed, may later be accused of lying on an official government form, whereas if the noncitizen does disclose derogatory information, may incriminate themselves with no opportunity to avail themselves of the right against self-incrimination. *See Maslenjak v. United States*, 137 S. Ct. 1918, 1927 (2017) (questioning the propriety of criminal prosecution based on answering questions incorrectly on an N-400 application, including the question "Have you EVER committed ... a crime or offense for which you were NOT arrested?"). The question should remove the section requiring an applicant to disclose crimes they may have "committed."

B. Applicants should not be required to submit information about immigration law violations, which are not criminal in nature

This question confusingly requires disclosure of "immigration law violations" while simultaneously asking about criminal convictions. Grouping civil law violations with questions concerning criminal conduct is confusing and implies that violating civil immigration laws is the equivalent of violating criminal laws. Furthermore, Congress has recognized that asylum seekers are eligible to seek asylum even if they have violated the immigration law in their manner of entry. INA section 208(a) states that any noncitizen "who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival. . .), irrespective of such [noncitizen's] status, may apply for asylum. . ." Since manner of entry is irrelevant to eligibility for asylum, including this question is confusing and may lead some applicants to believe they are not eligible for relief.

Some applicants for asylum, withholding, or CAT protection will have been prosecuted under 8 USC § 1325 or § 1326. While prosecution under these provisions is criminal, such prosecution cannot be considered a particularly serious crime and therefore applicants should not be required to disclose this on the I-589. Moreover, the origins of these laws are rooted in racist, Nativist ideologies and should not form any basis in determining eligibility for protection from persecution or torture. *See* Amicus Brief for Professors, at 3-4, (Mar. 2021) *United States of America v. Palomar-Santiago*, https://www.supremecourt.gov/DocketPDF/20/20-437/173626/20210331173526991_20-437%20Amici%20Brief.pdf. (Detailing the "blatantly racist intentions of the legislators who drafted Sections 1325 and 1326" that was "was designed to further the Nativists' racist goal of preventing long-term Mexican immigration to the United States.") *See* also National Immigration Project, *Rooted in Racism, The Human Impact of Migrant Prosecutions*, at 4, (Dec. 2021),

https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2021_21Dec_Rooted-in-Racism-Report.pdf. ("In keeping with their racist origins and application, these laws cruelly punish immigrants and fuel the mass incarceration of Black and Brown people; waste government resources; destroy families; hurt communities; and deprive migrants seeking to come to the United States of vital protections.")

The question also requires "documents" regarding "detention," without clarifying whether the question is intended to include immigration detention. It is difficult to see what purpose would be served by a noncitizen having to submit documents concerning their immigration detention when the opposing party—Immigration and Customs Enforcement—is the agency responsible for that detention. But by lumping immigration violations into the same question as criminal convictions, it is not clear what the scope of required documents is, and may lead an applicant to believe that their immigration detention will affect their asylum eligibility.

Beyond manner of entry, it is not clear what is meant by the term "immigration law violation." With a statutory 180-day waiting period for employment authorization documents (EADs)[1], and backlogs in issuing I-589 receipts, as well as monthslong backlogs in adjudication of EADs, many asylum seekers are forced to work without authorization to survive. Read broadly, this question would require applicants to disclose their unauthorized work and provide "documents" referring to that work. It is unclear why such disclosures would be required on this application, especially in a question the primary focus of which appears to be application of the particularly serious crime bar. Since the term "immigration violation" does not have a clear meaning, noncitizens seeking protection from harm in the United States should not be required to answer this question.

C. Applicants should not be required to submit documents that are inherently unreliable

Under U.S. asylum law, an applicant for asylum or withholding of removal will be barred from those forms of relief if the applicant "having been *convicted by a final judgment* of a particularly serious crime, constitutes a danger to the community of the United States." INA § 208(b)(2)(A)(ii), [Emphasis added]. Pursuant to this section of the Immigration and Nationality Act, noncitizens may be barred from asylum and/or withholding of removal or CAT withholding, if an adjudicator finds, after analyzing the applicant's convictions that they have committed a particularly serious crime.

This question calls for the applicant to submit "documents referring to these incidents" referring back to committing a crime, being arrested, charged, convicted or sentenced, but the question does not specify what types of documents are required, and may lead applicants to submit documents that are not legally relevant and/or that are not reliable. While police reports containing hearsay are not inherently inadmissible in immigration court, the trier of fact must determine if the report is "reliable and that its use would not be fundamentally unfair." *Arias-*

[1] We acknowledge that the I-589 is filed before the commencement of the statutory waiting period, but the asylum seeker must update information on the I-589 before an asylum interview or hearing begins. The adjudication will generally take place more than 180 days after filing the application, and will sometimes not take place for many years thereafter.

Minaya v. Holder, 779 F.3d 49, 54 (1st Cir. 2015). On this form, the applicant is instructed to submit "documents," leaving wide open what documents may be required. As a result, the applicant may feel compelled to submit documents that contain erroneous information or information that is self-incriminatory out of fear of being deported to the country where they were harmed if they do not comply. This question should be simplified, only asking for legally relevant information.

II. The Form Should Be Amended to Be More Inclusive of Convention against Torture Claims

Although Form I-589 contains questions about Convention against Torture (CAT) claims, these aspects of the form are confusing. The title of the form itself does not mention CAT, and the various checkboxes on the form that are required for one form of CAT protection, and no other protection sought by submitting the form, are confusing and can lead to grave errors by the adjudicator.

A. The form should be renamed "Application for Asylum, Withholding of Removal, and Protection under the Convention against Torture"

While applicants for withholding of removal or deferral of removal under the CAT use form I-589 to seek protection, the title of the form does not reference CAT protection. This omission could lead individuals who fear torture in their countries, especially pro se individuals, to not understand that they should make a claim for CAT protection in addition to asylum and withholding, if they also fear torture. Changing the name of the form would clarify that those fearing torture must use this form to seek those additional forms of protection.

B. The I-589 should eliminate the Convention against Torture box on page 1 as well as the Convention against Torture box on page 5

There are currently three separate places on the I-589 form where an individual seeking CAT protection must indicate that they are seeking this form of protection. On the top of page one, there is a box that those seeking CAT must check:

NOTE: ☐ Check this box if you also want to apply for withholding of removal under the Convention Against Torture.

Significantly, while form I-589 is used both for seeking withholding of removal and for seeking deferral of removal under CAT, the box only references withholding. It is not clear whether an individual seeking deferral of removal under CAT should (or must) check this box. Moreover, it is possible for an applicant to miss the box entirely.

Again on page 5, under section B.1., there is a box to check titled "Torture Convention." This box is out of place in this list of six boxes because the other five boxes are the protected characteristics that an asylum or statutory withholding of removal applicant must possess. By way of contrast, a person fearing torture need not show a nexus to a protected characteristic. This "apples and oranges" list of protected characteristics (an element of asylum/statutory withholding) with a potential separate category of protection, is likely to cause confusion and

may lead to an applicant who fears torture not checking the box. Indeed the checkbox itself completes a sentence that begins "I am seeking asylum or withholding of removal based on:". An individual seeking CAT protection may not be seeking asylum or withholding of removal and in any event they are not seeking those forms of relief "based on" "Torture Convention." Furthermore, the question stated before these boxes again only references withholding of removal under CAT, not deferral.

1. Why are you applying for asylum or withholding of removal under section 241(b)(3) of the INA, or for withholding of removal under the Convention Against Torture? Check the appropriate box(es) below and then provide detailed answers to questions A and B below.

I am seeking asylum or withholding of removal based on:

☐ Race	☐ Political opinion
☐ Religion	☐ Membership in a particular social group
☐ Nationality	☐ Torture Convention

The I-589 then contains a third reference to CAT claims. On page 6, Part B. 4., the following question appears:

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

☐ No ☐ Yes

If "Yes," explain why you are afraid and describe the nature of torture you fear, by whom, and why it would be inflicted.

We strongly suggest that the agency eliminate the two boxes described above, and allow this question (Part B, Q. 4) to serve as the basis for the application for CAT protection. There is no requirement on the form for an applicant to indicate whether they are applying for statutory withholding of removal in addition to asylum; the form serves as an application for both. The application process should be simplified and the form should serve as an application for asylum, statutory withholding, withholding under CAT, and deferral under CAT without the applicant being required to affirmatively check a box to indicate their intent to seek CAT protection. The adjudicator will begin their inquiry into CAT protection based on the answer to this question. Further, we strongly recommended that you add the words "or killed" into this question so that it reads, "Are you afraid of being subjected to torture or killed in your home country of any other country to which you may be returned?" Imminent death threats have been found to constitute torture. *See Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004) ("An unlawful or extrajudicial threat of imminent death comes within the definition of torture if it is specifically intended to bring about prolonged mental pain or suffering.") But, as worded, the question does not include fear of being killed and pro se applicants may not understand that they should detail death threats they have received in response to this question.

In fact, the procedure for Asylum Merits Interviews under the Asylum Processing Rule includes the Asylum Officer asking the applicant questions about potential torture, even though those applicants do not submit a form I-589. *See* USCIS, "Asylum Merits Interview with USCIS: Processing After a Positive Credible Fear Determination," (Last reviewed/updated May 21, 2022) https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-merits-interview-with-uscis-processing-after-a-positive-credible-fear-determination. ("The asylum

officer will know that it may be difficult for you to talk about traumatic and painful experiences that caused you to leave your country. However, it is very important that you talk about your experiences so the asylum officer can determine whether you are eligible for asylum, withholding of removal, or protection under CAT.") Under this rule, asylum officers adjudicate CAT claims with no I-589 filed, and if the asylum officer determines the applicant eligible for CAT, an immigration judge must enter an order granting CAT protection unless DHS presents new information that was not available at the USCIS interview. *See* 8 CFR § 1240.17(i)(2). It would be illogical that noncitizens seeking protection from torture could pursue that relief without having to affirmatively check a box indicating their intent to do so, if they are processed under the Asylum Processing Rule, but not if they are placed directly into INA § 240 proceedings.

Failure to check a box should not lead to an individual who fears torture in their home country being denied a day in court on the issue. In a recent Fifth Circuit decision, the Court of Appeals found that an individual had waived her right to seek CAT protection, *inter alia*, because she did not check the boxes on the form. *Cordero-Chavez v. Garland*, 50 F.4th 492 (5th Cir. 2022).

> Cordero-Chavez then filed an asylum application (Form I-589), which is also deemed an application for withholding of removal. See 8 C.F.R. § 1208.3(b). On the form, Cordero-Chavez left blank a box asking whether she "also want[ed] to apply for withholding of removal under the Convention Against Torture." Elsewhere on the form, she checked a box indicating she sought asylum or withholding based on "Membership in a particular social group," while leaving blank a nearby box marked "Torture Convention." On the next page of her application, however, she answered "Yes" to a question asking whether she was "afraid of being subjected to torture" in her home country. Her explanation stated she feared being killed by her former boyfriend. *Id.* at 495.

Thus, the Board of Immigration Appeals held, and the Fifth Circuit upheld, at least in part because the applicant had not checked the appropriate box, that she had waived her ability to seek review of her CAT claim.

Rather than have two boxes (neither of which mentions CAT deferral) and one narrative question about fear of torture, the form should only include the question about torture. That question does not specifically reference withholding or deferral under CAT, and therefore there is no confusion about whether an applicant who fears torture should respond to the question. The response to that question can be used by the adjudicator as a starting point to assess either form of CAT protection, depending on whether or not there are any bars to CAT withholding.

In closing, we appreciate the ability to provide feedback on form I-589. We urge you to make the changes suggested above rather than renewing the form without any changes.
Please do not hesitate to contact Victoria Neilson at victoria@nipnlg.org if you have any questions or need any further information.

National Immigration Project of the National Lawyers Guild

The Advocates for Human Rights
Aldea—the People's Justice Center
American Immigration Lawyers Association (AILA)
Asylum Seeker Advocacy Project (ASAP)
Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Legal Immigration Network, Inc. (CLINIC)
Center for Gender and Refugee Studies (CGRS)
DC Volunteer Lawyers Project
Florence Immigrant & Refugee Rights Project (FIRRP)
Immigrant Defenders Law Center
Immigration Equality
Immigrant Legal Resource Center (ILRC)
Innovation Law Lab
International Refugee Assistance Project (IRAP)
National Immigrant Justice Center (NIJC)
Rocky Mountain Immigrant Advocacy Network
Sanctuary for Families
Tahirih Justice Center