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20 Massachusetts Avenue NW
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Via Federal eRulemaking Portal: <https://www.regulations.gov>

**Re: USCIS Docket ID USCIS-2010-0008, OMB Control # 1615-0116, Revision of a
Currently Approved Collection: Request for Fee Waiver**

On behalf of the New York City Bar Association (City Bar), this comment is submitted in opposition to the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS) proposed changes to the fee waiver eligibility criteria, USCIS Docket ID USCIS-2010-0008, OMB Control Number 1615-0116, published in the Federal Register on September 28, 2018 (the "Proposed Rule").

I. BACKGROUND

a. The New York City Bar Association

With 24,000 members, the mission of the City Bar is to equip and mobilize the legal profession to practice with excellence, promote reform of the law, and advocate for access to justice in support of a fair society. The Immigration and Nationality Law Committee addresses diverse issues pertaining to immigration law and policy, including the prolonged detention of non-citizens, the administration of justice in the U.S. immigration system, constitutional issues impacting immigration legislation, and questions arising from claims for international human rights protection such as political asylum. Last month, the City Bar issued a statement opposing the proposed changes by USCIS to broaden the public charge rule.¹ The Proposed Rule, which

¹ Statement Opposing Proposed Changes to Broaden "Public Charge" Rule, Oct. 24, 2018,

will make it more difficult for low income noncitizens to have application fees waived, likewise penalizes noncitizens who are not wealthy and will make it more difficult for them to successfully file applications to improve their immigration status.

b. Current Rules Governing Fee Waivers

The government processing fees associated with USCIS applications can run from a few hundred to more than a thousand dollars for a single immigration application.² This can be prohibitive for some otherwise eligible applicants.

Therefore, current regulations permit certain applicants to request a fee waiver if they are “unable to pay the prescribed fee.” Under current rules, there are three ways for applicants to demonstrate an inability to pay the prescribed fee: (1) presenting documentation that they receive a means-tested benefit; (2) presenting documentation that their income is below 150% of the Federal Poverty Level (FPL); or (3) presenting documentation that the fee would constitute a financial hardship.³ The head of household submits an application on Form I-912 on behalf of each member of the household who requires a fee waiver. Beneficiaries of petitions filed by others can submit a fee waiver on their own behalf, without having to depend on the petitioner to do it for them.

Generally, only certain categories of non-citizens approved by Congress in connection with welfare reform in 1996 are eligible for the means-tested benefits that would qualify a person for a fee waiver. These same categories of non-citizens—including humanitarian entrants such as asylees, refugees, persons who helped the U.S. military, victims of crime and long-time workers who have amassed 40 qualifying quarters of FICA taxes—are similarly not subject to “public charge” rules that impose adverse immigration consequences on non-citizens who use means-tested benefits.

c. Proposed Rule Changes

USCIS's Proposed Rule would change the current scheme in significant ways by: (1) eliminating the receipt of a means-tested benefit as a basis for qualifying for a fee waiver; (2) requiring each household member to submit an individual application; and (3) requiring petitioners to submit applications for fee waivers for the beneficiaries instead of allowing beneficiaries to submit the fee waivers themselves.

<https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/statement-opposing-proposed-changes-to-broaden-public-charge-rule>. (All websites cited in this comment letter were last visited on November 27, 2018).

² Form G-1055, USCIS Fee Schedule, https://www.uscis.gov/system/files_force/files/form/g-1055.pdf.

³ 8 C.F.R. § 103.7(c); U.S. Citizenship & Immigration Servs., Dep’t of Homeland Sec., *Policy Memorandum, Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator's Field Manual* (AFM) Chapter 10.9 (AFM Update AD11-26) (Mar. 13, 2011), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/March/FeeWaiverGuidelines_Established_by_the_Final%20Rule_USCISFeeSchedule.pdf.

The Proposed Rule does not offer any concrete rationale for the changes proposed other than pointing to inconsistencies in the income ceilings used to determine financial eligibility by different government entities administering means-tested benefits around the country.⁴ However, this misconstrues the purpose of the means-tested benefit category. Rather than being just another way to document income, receipt of a means-tested benefit is a separate way to demonstrate an individual's need. Presently, immigrants who have already gone through a comprehensive eligibility screening for means-tested benefits before a government entity charged with administering those benefits can show proof of their eligibility for—or receipt of—the means-tested benefit to qualify for a fee waiver. For example, an applicant in New York State who receives a means-tested benefit such as Medicaid or Supplemental Nutrition Assistance Program (SNAP or Food Stamps) benefits, and receives no other household income, would qualify for a fee waiver under the 150% FPL category based solely on the amount in means-tested benefits received per month. Not only is reliance on receipt of means-tested benefits an efficient use of government resources, it also allows a federal agency to benefit from local knowledge of its population and cost of living. USCIS provides no explanation regarding why variation in state income guidelines for means-tested benefits is problematic nor has it provided evidence that accepting the determination of government entities administering means-tested benefit eligibility criteria has led the agency to waive fees to individuals who otherwise had the ability to pay.

II. COMMENTS ON PROPOSED RULE

These changes (a) will restrict access to fee waivers; (b) will disproportionately impact society's most vulnerable immigrants; and (c) are unsupported by evidence that the changes are needed.

a. The Proposed Rule Restricts Access to Fee Waivers

Each of the changes in the Proposed Rule serves to restrict access to fee waivers by making the application process more burdensome for applicants. Without the ability to submit proof of receipt of means-tested benefits, fee waiver applicants will need to submit requests under the categories of “income” and “financial hardship” both of which require significantly more documentation.⁵

Proving income is often difficult for people seeking fee waivers exactly because they often have no income or their taxable income is so low that they are not required to file tax returns.⁶ Meanwhile, USCIS's criteria for the financial hardship category are not clearly defined and appear to involve a much more subjective analysis by a USCIS officer of an applicant's income and expenses. Requiring applicants to provide additional financial information that could easily be demonstrated through statements provided by government entities that administer means-tested benefits unnecessarily shifts the burden to individual applicants to organize and compile additional income, resources, and expense information that may be difficult to obtain from unwilling third-

⁴ 83 FR 49121.

⁵ USCIS, I-912, Request for Fee Waiver instructions, <https://www.uscis.gov/i-912>.

⁶ Internal Revenue Service, Taxable and Nontaxable Income, https://www.irs.gov/publications/p525#en_US_2017_publink1000229477

parties such as employers, landlords, or financial institutions. This burden also may be greater for specific applicants, such as minor children, individuals with disabilities, the elderly, or the homeless.

In addition, those who rely on means-tested benefits are precisely those most likely to be unable to afford an attorney to help them meet these new requirements. Although some of these applicants may be able to obtain the help of non-profit legal services organizations or pro bono attorneys, these services are already overburdened and do not exist in many parts of the country. Some free legal service providers have been able to assist immigrants to complete fee waiver applications in large-scale clinic settings where the immigrant can show proof of receipt of a means-tested benefit. These clinics provide invaluable assistance in allowing immigrants to seek naturalization or renew their green cards. The onerous documentation requirements for fee waivers under the Proposed Rule will likely make it impossible for non-profit organizations to offer large-scale clinics to those least likely to be able to afford lawyers.

The other Proposed Rule changes—requiring applications from each household member and prohibiting beneficiaries from filing their own fee waivers—compound the problems of assembling documentation that would be caused by the elimination of a ground of fee waiver eligibility. In many cases, families would be submitting multiple sets of duplicate information that would have to be individually assessed by USCIS instead of filing together as a household in a streamlined single application.

Finally, these concerns in compiling documentation will also adversely impact USCIS. For an agency already burdened with high backlogs and delayed processing times, there will be more applications to deal with requiring more careful consideration of proof permitted, instead of the more efficient method of relying on a government administered eligibility process for determining eligibility for means-tested benefits and in turn fee waivers.

b. The Proposed Rule Disproportionately Impacts Vulnerable Categories of Immigrants: Applicants/Beneficiaries of Humanitarian Relief and Low-Wage Workers

Reducing the paths available to obtain a fee waiver is particularly concerning because these waivers are commonly used by specific groups of vulnerable immigrants as well as longtime legal residents among the working poor who are eligible for public benefits in limited circumstances.

Humanitarian applications to USCIS are generally fee-exempt or waivable, and collateral applications for these individuals such as employment authorization, adjustment to lawful permanent resident status, and waiver of any of the grounds of inadmissibility⁷ typically allow for

⁷ For example, some humanitarian forms of immigration relief waive certain grounds of inadmissibility under INA §212(a), such as entry without inspection or parole, however, to be eligible to seek adjustment of status to lawful permanent residence, the individual would need to submit a separate waiver form to USCIS either with a fee or an application to waive the fee. The fee for the waiver is currently \$980. <https://www.uscis.gov/i-601>.

fee waivers.⁸ In particular, the Proposed Rule will affect applicants who have won or are seeking asylum, U nonimmigrant status, T nonimmigrant status, Violence Against Women Act self-petitions, Temporary Protected Status, or Special Immigrant Juvenile Status and who may legally qualify for means-tested benefits.⁹ Among the people most in need of fee waivers who also may qualify for means-tested benefits are children, victims of crime, survivors of human trafficking, and certain people fleeing persecution, natural disasters, and armed conflict.¹⁰

Congress prescribed eligibility for federal means-tested benefits for many humanitarian immigrants recognizing that they are vulnerable and may need help to establish a foothold in the U.S., including through supplements to their income in the form of government benefits. Unlike other categories of immigrants, these groups often have access to means-tested benefits and are purposefully exempt as a matter of statute from the public charge ground of inadmissibility. Thus, the Proposed Rule would most negatively impact the very groups of immigrants Congress sought to protect.

Low-wage workers will also likely be disproportionately affected. Congress retained eligibility for government benefits for long-term, low-wage workers so they are more likely to receive means-tested benefits which, in turn, could provide a basis for obtaining a fee-waiver. Like humanitarian entrants, they are not generally subject to public charge rules. Although many people in the United States use means-tested benefits to supplement work income, only low-wage workers are eligible, and there are overall income caps such that eligibility for the benefits is a fair proxy for fee waiver eligibility.

Although these individuals could still seek fee waivers under the Proposed Rule, it would become increasingly difficult for them to do so with the elimination of means-tested benefits as a way of demonstrating eligibility.

Finally, the City Bar is concerned that the Proposed Rule could disproportionately affect immigrants based on their race or nationality. Research suggests that income-related barriers most heavily affect immigrants from Asia, Latin America, and Africa, while immigrants from Europe, Canada, and Oceania are the least affected.¹¹ For example, when the United States previously

⁸ USCIS may waive fees associated with several types of humanitarian applications. U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., Adjudicator's Field Manual, Ch. 10.9. *See also* ASISTA, *Practice Advisory: Fee Waivers for VAWA self-petitions, U and T visa applications* (Aug. 2018), http://www.asistahelp.org/documents/filelibrary/advisories/ASISTA_Practice_AdvisoryFee_Waivers_254C37648D963.pdf.

⁹ *Id.*

¹⁰ Indeed, the Proposed Rule would be felt doubly hard by survivors of human trafficking, domestic violence, and other crimes. Until recently, these individuals were able to submit a brief affidavit outlining their financial situation and requesting a fee waiver in lieu of a formal Form I-912, Request for Fee Waiver. ASISTA, *Practice Advisory: Fee Waivers for VAWA self-petitions, U and T visa applications* (Aug. 2018), http://www.asistahelp.org/documents/filelibrary/advisories/ASISTA_Practice_AdvisoryFee_Waivers_254C37648D963.pdf. This prior policy took into account how difficult it is for people in crisis to thoroughly document their income. *Id.* However, USCIS began rejecting these requests over the summer of 2018.

¹¹ Jeanne Batalova, Michael Fix, and Mark Greenberg, Migration Policy Institute, *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, (Aug. 2018),

increased fees for naturalization, the share of Mexican lawful permanent residents who applied for naturalization dropped from 19.8 percent in 2008 to 12.7 percent in 2010.¹² Immigration policies that only benefit wealthy applicants of certain races are inconsistent with the United States' commitments to equality and humanitarian protection.

A likely result of the Proposed Rule will be that vulnerable noncitizens will simply forego submitting immigration applications required to further stabilize their immigration status. For example, if an asylee cannot afford the application fee to adjust to lawful permanent residence, and cannot compile the evidence needed to demonstrate financial hardship or income below the poverty level, he or she may simply not apply for lawful permanent residence, thus remaining more vulnerable to potential removal and not fully integrating into the fabric of the United States by being on a path to citizenship. Likewise, lawful permanent residents may be unable to apply to naturalize, thus never being able to assume all the rights and responsibilities of U.S. citizenship, including voting.

c. The Proposed Rule Changes Are Not Supported by Evidence That the Changes Are Needed

USCIS does not provide any meaningful rationale for the Proposed Rule changes, let alone evidence that the changes are needed. This alone is a reason for USCIS to decide to maintain the status quo when it comes to the process of granting fee waivers.

III. CONCLUSION

In conclusion, the Proposed Rule eliminating the means-tested benefit category on the Form I-912 would significantly burden applicants, legal service providers, USCIS, and other government agencies while hurting many of society's most vulnerable immigrants. The City Bar urges the Department of Homeland Security not to replace a sensible analysis of need with an unnecessarily complex analysis that is less efficient and less standardized than the means-tested benefit category.

Respectfully,

Immigration & Nationality Law Committee
Victoria F. Neilson, Chair

<https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule>

¹²*High Fees Limiting U.S. Citizenship to Wealthy, Non-Mexicans*, NBC, (Jan. 11, 2015), <https://www.nbcnews.com/news/latino/high-fees-limiting-u-s-citizenship-wealthy-non-mexicans-n283061>.