

**From:** Dorian Needham <dneedham@immigrationequality.org>  
**Sent:** Wednesday, May 18, 2016 10:27 AM  
**To:** USCIS FR Comment  
**Subject:** OMB Control Number 1615-0023 / Docket ID USCIS-2009-0020

Dear Sir/Madam:

Attached please find Immigration Equality's Comments on the U.S. Citizenship and Immigration Services (USCIS) draft revisions to Form I-485 and associated documents. Please do not hesitate to contact me with any questions or concerns.

Respectfully,

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May 18, 2016

**RE: Comments on the U.S. Citizenship and Immigration Services (USCIS) draft revisions to Form I-485 and associated documents**

Submitted via: [USCISFRComment@uscis.dhs.gov](mailto:USCISFRComment@uscis.dhs.gov)

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Dear Colleagues:

Immigration Equality submits these comments in response to USCIS's draft amendments to Application to Register Permanent Residence or Adjust Status, Form I-485, and Adjustment of Status Under Section 245(i), Supplement A to Form I-485.

Immigration Equality is the nation's largest legal services provider for immigrants who are lesbian, gay, bisexual, transgender, or queer (LGBTQ), and/or persons living with HIV. We represent more than 550 LGBT and HIV-affected immigrants each year, and give advice to an additional 5,000 LGBT individuals and their families from around the world. Immigration Equality is proud of its contribution to the USCIS Training Module "Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims" (2012) as well as its regular training of U.S. Asylum Officers on LGBTQ issues.

We appreciate USCIS's efforts to update Form I-485 and associated documents. We offer the following comments and recommendations to highlight some concerns regarding these amendments that are particularly relevant for LGBTQ individuals generally, and LGBTQ asylees in particular.

**I. COMMENTS TO DRAFT AMENDED FORM I-485**

Part 1

- 5. "Sex" should be replaced with "Gender" here, in line with other USCIS forms (*e.g.*, I-589, I-130).<sup>1</sup> In particular, given that a Form I-485 is often parasitic upon a Form I-130, it makes little sense to change terminology from "gender" to "sex" when moving from one to the other. USCIS itself has recognized that "gender" is the appropriate term by, for example, issuing a guidance document on "Adjudication of Benefits for Transgender Individuals" (emphasis added), in which "gender" is the preferred term.<sup>2</sup>

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<sup>1</sup> See, *e.g.*, Form I-589 (<https://www.uscis.gov/sites/default/files/files/form/i-589.pdf>); Form I-130 (<https://www.uscis.gov/sites/default/files/files/form/i-130.pdf>).

<sup>2</sup> See [https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender\\_FINAL.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf).

- 14–18. “Passport Number Used at Last Entry” and “Travel Document Number Used at Last Entry,” as well as related questions (Expiration Date, Country of Issuance, NIV number) should be prefaced by a phrase similar to “If you last entered the United States using a passport or travel document, provide the information below,” in line with the “(if any)” caveat used in other questions (*e.g.*, “U.S. Social Security Number (if any)”) (Part 1, Question 11). This change would make it clearer that not all applicants are expected to be adjusting after entry with inspection (a possibility obliquely referred to in the draft Instructions, but easily effected on the draft Form itself).
- 19–20. After using only “Entry” in prior questions (*e.g.*, Part 1, Questions 14 and 15), Questions 19 and 20 suddenly shift to “Arrival or Entry.” If there is to be no clarification in the Instructions or Form as to the distinction between “Arrival” and “Entry,” consider using only “Entry” here so as not to create confusion (particularly for *pro se* applicants). The draft Instructions provide no guidance as to this distinction.
- 23. Restore “without inspection” as one of the example answers for the question “In what status did you last enter?” This restoration would render the form more sensitive to the likelihood that asylees may have entered without inspection.

### Part 3

- 1–4. These questions (on prior immigrant visa applications) seem redundant in light of the new Part 8, Question 15 on whether the applicant has “EVER been denied a visa to the United States.” Given that Part 8, Question 15 presumably includes nonimmigrant visa applications, can the two questions not be consolidated, if they are needed at all (in light of USCIS’s access to the applicant’s visa history)?

### Part 4

- Consider either writing “(if known)” after the header (or before the questions on the applicant’s parents), or indicating in the draft Instructions that USCIS understands that not all applicants will necessarily know their parents’ biographical details. Also clarify which parents should be listed by applicants whose birth certificate may not align with their familial experience (*e.g.*, applicants raised by nonbiological parents).
- 4, 12. Replace “Sex” with “Gender” (see comments to Part 1, Question 5 above).

### Part 5

- 1. Explain in the draft Instructions what “Legally Separated” means—because many couples who separate do not initiate a legal process to do so, and may not understand whether this category applies to them. This also interacts unclearly with Questions 14-15 in this same Part, where the applicant must indicate the “Date” and “Place” at which a prior marriage “Legally Ended.” Would legal

separation count as “legally ending” a prior marriage? Likely not—but the liberal use of “legal” in this Part may create confusion, and the draft Instructions at “Initial Evidence” #6 do not provide much clarification.

#### Part 7

- All this newly collected biodata (ethnicity, race, height, weight, eye color, hair color) seems unnecessary and unduly invasive. This detail is better deleted, as it appears ripe for confusion. For example, where does “Hazel eye color” end and “Brown eye color” begin—particularly for a non-native English speaker? How much gray hair means someone’s hair color is “Sandy”? Does someone who shaves their head choose “Bald” or a specific hair color? How does hair dye affect an answer?

#### Part 8

- 1. It is unclear whether a religious group or trade union would count as an “organization, association, fund, foundation, party, club, society, or similar group”; greater specification would be helpful. It is likewise unclear what level of activity constitutes “be[ing] a member of, involved in, or in any way associated with” a group. Would baptism render someone “associated with” a church that they did not subsequently attend (and in such case, what would be the end-date of involvement or membership)? Would union dues automatically deducted from a paycheck render someone a “member” of a trade union irrespective of activity or consensual membership? Would automatic tithing, as in the Nordic countries, render someone “in any way associated with” a Protestant denomination?
- 17. “Have you EVER violated the terms or conditions of your nonimmigrant status?” seems like an overbroad question that most applicants would not understand as encompassing the full array of answers that should, strictly speaking, drive a “Yes” answer (*e.g.*, entering with immigrant intent on a non-immigrant visa, overstaying a visa, working without authorization). Insofar as the question does include working without authorization, it is then duplicative of the new Part 8, Question 16 (“Have you EVER worked in the United States without permission?”). Also, Question 17 does not account for those who did not have nonimmigrant status prior to applying for adjustment (*e.g.*, asylees), so should include “(if any)” before the question mark.
- 26–46. Clarify whether these questions on criminal history apply to acts inside the United States, or both inside and outside the United States. Also, include in the Instructions—and ideally, in the Form, an indication that arrests or criminal history do not necessarily bar adjustment. Many asylees, for example, had negative interactions with law enforcement officials in their countries that would, strictly speaking, require reporting here—but that formed part of their asylum claim and thus should not be made to appear as a potential barrier to adjustment (in so doing, encouraging underreporting or perhaps even a hesitation to apply for adjustment).

- 27. Strictly speaking, this question (“Have you EVER committed a crime of any kind?”) would include jaywalking. Consider explicitly excluding traffic violations or minor offenses; the draft Instructions exempt applicants from providing documentation of such violations, but not from answering Question 27 in the affirmative.
- 32. It is unclear what a “purely political offense” is, such that this type of offense would not require reporting on the form; consider providing examples or guidance in the Instructions. Also, the larger question (“Have you EVER been convicted of two or more offenses ... for which the combined sentences to confinement were five years or more?”) is already captured by other questions on criminal history (*e.g.*, Part 8, Questions 28–30)—and in light of Part 8, Question 29, which frames “conditions ... that restrained your liberty” to include “a prison sentence, suspended sentence, house arrest, parole, ... probation, or community service,” it is unclear whether “confinement” as used at Question 32 would include this wide array of “restraints on liberty” or only prison (or something in-between, such as house arrest).
- 41. It is unclear what “violations of religious freedoms” would require that an applicant report having “been responsible for or directly carr[ying] out” while “serving as a foreign government official.”
- 47c. It is unclear why the catch-all residual question (“Do you intend to ... [e]ngage in any other unlawful activity”) comes in the middle, rather than at the end, of the specific list of unlawful activities that the Form inquires after.
- 48. It is unclear what “activity that could have potentially serious adverse foreign policy consequences” would require reporting here as things that the applicant “engage[s], or intend[s] to engage upon ... entry to the United States.” Many unremarkable activities could have unintended but still “potentially serious adverse foreign policy consequences” (*e.g.*, inviting the Dalai Lama to a conference), and it would be inappropriate for an LPR to be punished for material misrepresentation in light of an unforeseen externality of otherwise lawful expression after adjustment.
- 49b–f. Rather than consistently referencing all the terrorist activities listed at 49a as “the above” (which is unclear, and arguably could in each case refer to the question immediately prior, rather than back to Question 49a), consider listing the activities at a redrafted Question 49, and then having Subquestions (a)–(f) refer to “Question 49” specifically.
- 49–50. The “NOTE” under Question 50, which applies to Questions 49 and 50, makes no sense when applied to Question 50—because it asks about past activities in the past tense, whereas Question 50 is about future intentions.
- 51b–f. See comments to Questions 49b–f above.

- 58d. Consider clarifying, in this question about sexual assault and rape, that persons under 18 are among those “unable to consent.”
- 70. This question (“Have you EVER obtained a student nonimmigrant visa and violated the terms or conditions of your student nonimmigrant visa?”) is entirely duplicative of Part 8, Question 17 (“Have you EVER violated the terms or conditions of your nonimmigrant status?”). Consider deleting.
- 71. This question (“Have you EVER been excluded, deported, or removed from the United States...?”) replicates and expands upon Part 8, Questions 18 (“Are you presently or have you EVER been in removal, exclusion, rescission, or deportation proceedings?”), 19 (on prior removal, exclusion, or deportation orders), and 20 (on reinstatement of such orders). Consider consolidating.
- 73. This question (on unlawful presence for 180–364 or 365+ days) is unclear as to whether it is asking about cumulative unlawful presence or single stretches of unlawful presence.
- 74. These questions (on reentry after accumulation of unlawful presence, and after deportation, exclusion, or removal) are duplicative of Part 8, Questions 73 (which asks about the prior unlawful presence of an adjustment applicant who is inside the United States) and 71 (which asks about the prior deportation, exclusion, or removal of an adjustment applicant who is inside the United States).

## II. COMMENTS TO DRAFT AMENDED INSTRUCTIONS

### Initial Evidence

- 2. The draft Instructions indicate how an applicant can address a name change subsequent to the issuance of the photo ID that they provide in support of their application—by submitting a court-ordered or similarly authoritative name change. Consider adding to this a reference to the documentation required to support the selection of a gender marker different from that on supporting photo ID.<sup>3</sup>
- 4. The draft Instructions provide that certain categories of applicants need not necessarily have entered the United States with inspection—but does not list asylees among these categories. Asylees should be listed (also see the comments to the draft Form’s Part 2, Questions 14–18, 23, above).
- 9. Asylees should be specifically mentioned as not subject to the public charge requirement; at present, the draft Instructions indicate that some persons are exempt but provide no examples.

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<sup>3</sup> See *supra* note 2 and surrounding text.

- 11. This question (asking for certified police and court records of criminal charges, arrests, or convictions) makes no allowance for the possibility that, in some countries, such law enforcement activity is not well documented—particularly where individuals are detained without charge. It would be preferable to specify that such documentation need only be submitted where reasonably available—and to exempt asylees from seeking such documentation where acquiring it would demand that they interact with law enforcement officials in their home country (both because such interaction could be traumatic, and because it could undermine asylum status if interpreted as the applicant “availing him/herself of the protection of his/her government”).

Please do not hesitate to contact us with any questions or concerns.

Respectfully,

/s/

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