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July 21, 2016

Samantha Deshommes
Acting Chief, Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

RE: Agency Information Collection Activities: Form I-821, Revision of an Existing Information Collection; (May 23, 2016); Docket No. USCIS-2007-0013; OMB Control Number 1615-0043.

Dear Ms. Deshommes:

The Immigrant Legal Resource Center (ILRC) submits the following comment in response to the extension of Form I-821, *Application for Temporary Protected Status* and instructions. Founded in 1979, ILRC is a national resource center that provides training, consultations, publications, and advocacy support to individuals and groups assisting low-income persons with immigration matters. ILRC works with a broad array of individuals, agencies, and institutions, including immigration attorneys and advocates, criminal defense attorneys, civil rights advocates, social workers, law enforcement, judges, and local and state elected officials.

ILRC is uniquely qualified to provide comments regarding the proposed rulemaking in light of its extensive training of practitioners regarding Temporary Protected Status (TPS) and related issues. This extensive technical knowledge includes regular trainings, seminars, and advisories, including *Inadmissibility & Deportability*,¹ *Family & Immigration: A Practical Guide*,² and *Contesting Removal*,³ *Relief Not Raids: Temporary Protected Status for El Salvador*,

¹ ILRC Staff Attorneys, INADMISSIBILITY & DEPORTABILITY, (Immigrant Legal Resource Center) (3rd ed. 2013).

² Lourdes Martinez, et. al., FAMILIES & IMMIGRATION: A PRACTICAL GUIDE, (Immigrant Legal Resource Center) (4th ed. 2014).

³ Contesting Removal, *Trainings & Seminars*, IMMIGRANT LEGAL RESOURCE CENTER (Last accessed July 19, 2016), <http://www.ilrc.org/trainings-webinars/recorded-webinars/contesting-removal>.

Guatemala, & Honduras,⁴ and other guidance. In light of this deep reservoir of technical knowledge, we submit the below comment.⁵

I. Eliminate All Unnecessary Questions to Shorten Both Form I-821 and the Instructions

The length of the proposed form contravenes the intent of the Paperwork Reduction Act. The agency has shown through its use of prior, shorter versions Form I-821 that it can gather the information needed for TPS with a less burdensome form. The current form is overwhelmingly detailed, complex, and calls for extraneous information and legal conclusions that are not necessary for TPS eligibility. The time burden on an applicant to read and understand some of the complex questions and instructions, especially considering English is a second language to most applicants, will be well over the 1 hour and 55 minutes estimated by the agency. As written, some questions would require consultation with an attorney simply to comprehend the call of the question.

Recommendations: The following sections of Form I-821 should be deleted or amended because they request extraneous information that is not required for adjudication, create an additional burden on the applicant, and may confuse applicants:

1. Simplify Part 2, Question 17:

The proposed change adds additional legal categories to the list of possible marital statuses, including separated. Without providing legal definition to these terms, the question is more confusing and difficult to answer. USCIS should reduce the options available on Question 17 to: Single; Married; Divorced; Widowed; or Other.

2. Simplify Part 2, Question 28:

Question 28.c. indicates that this box should only be checked if the person was 1) previously in proceedings with an agency, and 2) they no longer are, and 3) they have also been or are in proceedings in federal court: “I am no longer in Department of Justice (DOJ) or Department of Homeland Security (DHS) immigration proceedings, but I am or was in Federal court proceedings regarding immigration issues.”

If this question is meant to indicate any federal court proceedings regarding immigration issues, it should simply say so: ~~“I am no longer in Department of Justice (DOJ) or Department of Homeland Security (DHS) immigration proceedings, but I am or was in Federal court~~ proceedings regarding immigration issues.”

⁴ Jose Magaña-Salgado, *Relief Not Raids: Temporary Protected Status for El Salvador, Guatemala, and Honduras*, IMMIGRANT LEGAL RESOURCE CENTER, Jan. 2016, available at <http://www.ilrc.org/resources/relief-not-raids-temporary-protected-status-for-el-salvador-guatemala-honduras>.

⁵ Underlined text indicates an insertion. Strikethrough indicates a deletion. For ease of formatting and readability, this comment does not use block quotes, but rather quotation marks in conjunction with indents.

3. Delete Part 3, Biographic Information

USCIS should strike the collection of ethnic information on the application form and collect it instead at subsequent biometrics appointment. Additionally, USCIS should provide additional guidance for applicants who may not fit into established categories.

Race and ethnicity categories continue to baffle applicants. While Hispanic or Latino is indicated as a possible ethnicity, for race categories there is no explanation of how to answer if the person does not identify with the categories on the form. This information collection pre-dates the new system of biometric collections and is wholly unnecessary. To the extent that this information is required for biometrics and background checks, USCIS could better collect this information at the biometrics appointment and, therefore, delete this prompt from the proposed form. If there is another purpose to asking for this information, USCIS should clarify its use and explain how to answer for those that do not fit the established categories. Without explanation, this information is extraneous to the purpose of this data collection and should be deleted in its entirety.

4. Reduce Information Requested Regarding Third Parties

Parts 4, 5 and 6 request information about third parties that is unnecessary to adjudicating TPS eligibility and violates the privacy of individuals who do not seek a benefit with USCIS (e.g. the children, prior spouses and spouses of TPS applicants).

By requesting the physical address, date of birth, country of birth, and alien number of children, USCIS forces applicants to choose between disclosing potentially private and sensitive third-party information—such as the location of an undocumented child—or else force the applicant to refrain from applying for TPS altogether. Additionally as the form indicates, applicants do not necessarily possess these details for all sons and daughters, and even if they do have access, these questions call for information pertaining to adult children who might not consent to the disclosure. The burden of finding this information is especially cumbersome for adult children living abroad and deters applicants from completing the form. If USCIS insists on collecting information regarding an applicant's children, it should only request the child's name; child's A-number (if known); and country where the child is living.

While these sections imply that some requested information might be optional, it does so only by adding to the prompt "if available to you." It does not indicate that the person should acquire knowing consent from the third party before disclosing information related to them on this information collection. Information should only be provided to the extent that it is integral to meeting the applicant's burden of proof for eligibility. Thus, this information is better requested in the list of possible evidence. For instance, if an applicant is indicating that they are eligible due to their marriage to a TPS recipient, they can be asked to provide proof of the marriage and TPS status of that person.

USCIS should delete large portions of part 4, 5 and 6. Information about prior spouse should clearly indicate that it is only required when the person is filing for late initial registration, **and eligibility relates to the prior marriage** (see Part 5 prompt, page 4). All requests for addresses of children should be deleted. All requests for USCIS Online Account Number and A number for

all third parties should be deleted. (See Part 4, Question 1 and 2; Part 6, Questions 2-7 and related for each child.)

5. Part 7, Question 2.f.-2.g.

These questions regarding an “offer” of immigration status should be deleted. Asking applicants to describe an “offer” of any immigration status by another country is legally technical and would require assistance of an attorney to provide the requested details, none of which goes to TPS eligibility. This creates an undue financial and time burden on the applicant who is applying for TPS, and is not relevant to TPS eligibility. The TPS application should not be used as a fishing expedition, especially one which requires a TPS applicant to supply information that calls for a legal conclusion beyond the scope of basic facts. These issues are better assessed through the fact collection of other countries to which the applicant has travelled. The legally conclusion of whether or not there was a sufficient offer of status confounds even our courts, and is not appropriate for a factual information collection of the applicant.

6. Part 7, Question 13: should be moved to be the first question, before Question 3. All of these questions relate to general questions about criminal history. Including a more general question much later and separate from the initial inquiry about criminal history is confusing.
7. Part 7, Question 8: should be deleted. The officer should make this determination based on the criminal records submitted. This questions is hard to decipher for an applicant, and complex in nature. The officer can more quickly make this legal determination based on the reported criminal history and documents.

II. Request for Criminal Records Should Comport with Legal Standards

- a. USCIS should not request applicants provide police reports that are not part of the record of conviction; and
- b. USCIS should not request applicants provide police reports where there was no conviction; and
- c. USCIS should not request applicants to disclose records in violation of confidentiality laws.

Part 7 prompt, page 7 and the Instructions on Page 10, #5, general requirements indicate that the applicant must provide all arrest reports, regardless of whether or not the person was in fact convicted at all, or convicted of the facts contained in the report. Additionally, the instructions indicate that an applicant should provide these records, even if they were “sealed.” The instructions require applicants to thus turn in records that 1) should not be considered as part of the adjudication because they do not form a factual basis to a conviction and 2) violate confidentiality provisions for juveniles in various states.

Police reports are often unsubstantiated and include alleged details of conduct that may not have resulted in charges being brought, let alone a conviction. Police records and even charging documents are considered not reliable. Arrest records and charging documents are by definition *allegations* of criminal conduct; they are not proof of such conduct. A conviction does not mean that the conviction was a result of the information contained in the arrest report or

charging document, or that information alleged in those documents is accurate. When the arrestee is an immigrant who may have limited English skills, police reports may involve dramatic miscommunications with the defendant that further undermines their reliability. Accordingly, in criminal court, arrest records (police reports) are excluded by rule as inherently untrustworthy hearsay. Consulting inherently unreliable police reports will only lead to inaccurate assessments of the offense.

An applicant that has sustained a conviction in relation to criminal conduct should only submit documents from the record of conviction, such as court-issued documents including the plea, plea colloquy, complaint, or documents that have been stipulated to by the defense. USCIS should not re-litigate criminal issues in a request for an immigration benefit and should only rely on the stipulated facts of a conviction.

Second, where no conviction resulted after an arrest, the fact that no prosecution resulted is paramount and casts doubt on alleged conduct contained in any corresponding police report; thus no report should be necessary in these circumstances. Requiring applicants provide a police report for an arrest that did not lead to conviction would lead USCIS adjudicators to re-adjudicate the underlying criminal case, without the benefit of due process for the applicant.

Third, it is inappropriate for USCIS to request state court records when it is aware that state confidentiality laws may, and often do, prevent disclosure of juvenile state court files without a court order. In the context of Special Immigrant Juvenile Status petitions, USCIS has recognized that state confidentiality laws may prevent disclosure of documents from the juvenile court file. Further, in a different context – that of Deferred Action for Childhood Arrivals (DACA) – USCIS has also officially recognized that state court files may be confidential, and disclosure may be prohibited under state law. The TPS instructions not only avoid discussion of juvenile records, but specifically indicate an applicant should turn over documents that have been “sealed” by the court, a direct ask to violate a court order.

Recommendations:

Form I-821 Instructions. Page 10. Make the following changes:

~~“Provide a certified copy of all arrest reports, court dispositions, sentencing documents, and any other relevant documents.”~~

Form I-821 Instructions. Page 11. Make the following changes:

“NOTE: Provide the conviction and disposition documentation even if your records were sealed, expunged or otherwise cleared, unless disclosure is prohibited under state law.”

Form I-821. Page 7, Part 8, “Criminal Offense.” Make the following changes:

“If you were arrested, charged, or convicted for an offense, you must provide certified court dispositions showing the court proceedings’ outcome wherever possible. You also

must provide ~~copies of arrest reports,~~ statements of charges, indictment information, or any other charging document ~~issued against you~~ that formed the basis of a conviction.
Do not submit any documents that are protected by state confidentiality laws."

III. Clarify Information Regarding Fees and Waivers

The instructions should provide clear guidance that those with a granted fee waiver do not need to include payment for fees. Currently, the fee waiver is only mentioned at the end of the section on fees and there is no guidance in the "What Is the Filing Fee?" section indicating that a fee waiver form may be submitted **instead** of the filing fee. As a result of this lack of clarity, many applicants express concern that their application will not be accepted if they pursue a fee waiver because waivers are not referenced in the instructions.

Recommendations:

Form I-821 Instructions. Page 12, "What is the Filing Fee?"

Insert an initial sentence, indicating that a fee waiver, Form I-912, may be submitted instead of fees where the person qualifies for a fee waiver.

Correct Misinformation:

- Form I-821 Instructions. Page 12. Bullet point #3. Provides misleading information about the appropriate fees for initial filers. #3 incorrectly indicates that those under 14 would must pay a biometrics fee.
- Point #2 and #3 are more correctly sub-points of B., for those seeking employment authorization. Indent those categories accordingly.
- Each of these categories of possible fees should indicate you must pay fee **or file a fee waiver form**, Form I-912.

Discussing fee information without indicating the possibility of a fee waiver is misleading. Additionally, even if applicants may be aware about the fee waiver option, they may doubt that USCIS will accept their application because both the guide and instructions are unclear that the fee waiver application is an acceptable alternative to including the fee.

IV. Signature of Preparer Required, stamp should be sufficient for Group Workshops Assisting TPS applicants

Form I-821 currently requires the signature of a preparer and does not explicitly allow for stamps/stickers from group processing events in lieu of this requirement. In other contexts, such as the naturalization context, USCIS does allow preparers to substitute the signature with a stamp/sticker from a group processing event. TPS, due to the form's relative straightforwardness for renewal, is uniquely suited for group processing events and is likely to be one of the forms that non-profits help large number of individuals complete at one time.

During workshops and community clinics, many volunteers may help an individual prepare their TPS form as that individual moves from one section of the clinic to another. At the end of the process, one or more attorneys may have reviewed an applicant's application. In these cases, there is not one single preparer that assisted an applicant in completing their application. When

there are multiple volunteers, it may not be appropriate for a single “preparer” to certify that they assisted in completing the entirety of the application, because that would be an inaccurate certification. Moreover, a single volunteer attorney or preparer may be unwilling to sign the preparer portion of a form because they may have only helped with a small portion of the form while others, who they did not supervise, may have assisted in completing other portions of the form.

Allowing stamps/stickers would better allow USCIS to track workshops and the applications they produce. Moreover, requiring volunteers at workshops to complete the preparer section may depress volunteer turnout at workshops. Importantly, at workshops, application packets are given to applicants to take home and mail. These applicants could change or add information that would not be reviewed by the preparer. Problematically, these volunteer preparers could end up providing their certification on applications that were later changed and may not reflect content that they would have originally certified. USCIS should—as it does in some other contexts—allow stamps/sticks in the preparer section for Form I-821.

Thank you for your consideration of ILRC’s views. Should you have any questions regarding these comments, please feel free to contact Jose Magana-Salgado at (202) 777-8999 or jmagana@ilrc.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Erin Quinn", with a long, sweeping horizontal line extending to the right.

Erin Quinn
Staff Attorney