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IMMIGRATION  
LAWYERS  
ASSOCIATION

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Submitted via email: [USCISFRComment@uscis.dhs.gov](mailto:USCISFRComment@uscis.dhs.gov)  
DHS Docket No.: USCIS-2007-0013

**Re: OMB Control Number 1615-0043**  
**Agency Information Collection Activities: Application for Temporary Protected Status, Form I-821; Revision of a Currently Approved Collection**

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-day Notice and request for comments on the proposed revisions to Form I-821, Application for Temporary Protected Status and accompanying instructions published in the Federal Register on May 23, 2016.<sup>1</sup>

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the proposed revisions to Form I-821 and the accompanying instructions.

### **General Comments**

#### ***Changes to Substantive Requirements Should Go Through the Formal Rulemaking Process***

USCIS is proposing changes to the Form I-821 and instructions that broaden the evidentiary requirements and information previously requested for Temporary Protected Status (TPS). For example, the proposed Form I-821 spells out a new requirement of submitting “arrest reports, statements of charges, indictment information, or any other charging documents” for every arrest. Currently, Form I-821 requires dispositions only and USCIS’s proposed form changes

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<sup>1</sup> See 81 Fed. Reg. 32341 (May 23, 2016).

heighten the evidentiary requirements, requiring a set of documents that go beyond the record of conviction. Questions on Form I-821 should be limited in scope to the eligibility standards designated by Congress.

We note that under 8 C.F.R. §103.2(a)(1), “[e]very benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.” Thus, all of the new language that is included in the proposed instructions will be incorporated by reference into the Title 8 of the Code of Federal Regulations without the opportunity for full notice and comment. The proposed changes exceed DHS’s statutory authority, and should instead be promulgated by regulation in accordance with the Administrative Procedure Act (APA).

### **Proposed Changes to Form I-821**

In addition to the aforementioned general concerns, we offer the following comments to the proposed I-821.

#### ***Page 1, Part 1, Employment Authorization, Questions 3.a. – 3.b.***

AILA commends the proposed change to eliminate the need for a TPS applicant to complete Form I-765 where the applicant is not requesting work authorization.

#### ***Page 3, Part 2, Information About You (continued), Type of Proceedings, Option 28.c.***

The proposed form provides applicants that have ever been in immigration proceedings with three different options to identify the type of proceedings. Option 28.c. is confusing and should be removed from the form. It appears that USCIS added this option to capture federal appeals, but the wording is confusing as references are made to both DOJ and DHS proceedings. It is unclear, for example, how an applicant with an expedited removal order would accurately respond to question 28, as there is no initial option for DHS proceedings (presumably at the border). USCIS should replace option 28.c. with “Other” and provide space for applicants to explain the type of proceeding.

#### ***Page 4, Part 4, Information About Your Current Spouse (if any) (continued), Questions 9-10.f.; Pages 4-5: Part 5, Information About Your Former Spouses (if any), Questions 1.a.-20***

The proposed Form I-821 seeks detailed information concerning a TPS applicant’s spouse and former spouse. These questions are overly burdensome and irrelevant to the majority of TPS applicants and should be removed from the form. If USCIS is seeking information for the limited TPS applicants seeking initial registration under 8 CFR §224.2(f)(iv), it should request relevant information using a supplemental form.

#### ***Pages 5-6, Part 6, Information About Your Children (if any), Questions 1.a. – 14***

These new questions are beyond the scope of a TPS applicant’s eligibility and should be removed from this form.

#### ***Page 6, Part 7, Eligibility Standards; Basis for Eligibility, 1.c. – 2.d.***

These questions are particularly problematic for individuals that have been in the United States for numerous years and are subject to TPS re-registration. The proposed form would unnecessarily burden nonprofit organizations and agencies that would now be required to assist these applicants in

reviewing every country to which the applicant ever traveled, even if only in transit. The proposed form should not require TPS applicants to list dates of travel to other countries.

***Page 7, Part 7, Eligibility Standards, Criminal Offenses***

USCIS has expanded the list of required documentation, adding greatly to the applicant's burden of producing initial evidence. Currently, Form I-821 only requires that applicants provide USCIS with dispositions of all arrests. The proposed form would require applicants to provide court disposition records *and* copies of arrest reports, statements of charges, indictment information, or any other charging document issued against the applicant. If the applicant cannot provide the documentation, they are required to provide a signed statement as to why they cannot provide such documentation. This language is also included on checklist found on page 17 of the proposed instructions.

These changes ignore the practicalities and procedures of the criminal justice system in the United States and around the world. There are countless jurisdictions, all with different rules regarding the retention of arrest and court records. Many jurisdictions destroy records after a certain amount of time, making it impossible to retrieve the information USCIS would require under the proposed instructions. Some jurisdictions keep no records of convictions which have been expunged, thus the clerks cannot even see that there ever was a record, much less provide a copy of it. Moreover, information that is technically available to the applicant may be extremely difficult to obtain. For example, an applicant would be required to disclose an incident where he or she was detained by CBP at the airport. To document that incident, the applicant would have to file a FOIA request to obtain the records. CBP FOIA requests can often take a year or more to process, and when the request finally is processed, many times, the results are that no records were found. In addition, where court records are not available, court clerks often resist providing proof of their unavailability. Additionally, refugees and asylees who have been arrested or imprisoned as part of their persecution are often unable to obtain any documents. These burdens may be challenging for many applicants, but especially so for pro se applicants.

Moreover, TPS re-registration applicants would be required to submit these documents for the first time for very old arrests, even where no charges were filed. This requirement may also lead to RFEs and delays, subsequently increasing the number of applicants whose work permits expire without interim work authorization. We ask USCIS to remove this new language on the proposed form and proposed checklist.

***Page 7-9: Part 7, Eligibility Standards (continued), Criminal Offenses, Questions 3-41***

Please see general note above regarding request for criminal records. In addition, there are several questions in the current I-821 that have caused particular confusion to applicants which remain confusing in the proposed form and should be modified. In particular, Questions 3.4.a-c ask about felony and misdemeanor convictions and convictions for a "particularly serious crime." The latter is a legal term of art that most applicants do not understand and would ostensibly also qualify as either a misdemeanor or a felony. At the same time, Question 7.a. asks a very similar question which is not easily distinguished from the prior questions regarding crimes: whether the applicant has ever been convicted of OR committed acts which constitute the essential elements of a crime, other than a purely political offense. These questions should be simplified and clarified.

## **Comments on Proposed I-821 Instructions**

### ***Page 3, Copies, Note***

USCIS has added language which states that original documents not required or requested by USCIS will be “immediately destroyed upon receipt.” Applicants, and in particular, pro se applicants, may not realize that original documents should not be submitted and include them in their application package. It seems drastic to immediately destroy documents that the applicant may need later for another purpose. We suggest that USCIS consider other alternatives, such as mailing the documents back to the applicant, sending the applicant an RFE for a Form G-884 Return of Original Documents, or sending the documents to the National Records Center to combine with the A file so that the applicant can later retrieve the documents by filing a Form G-884.

### **Conclusion**

We appreciate the opportunity to comment on the proposed changes to Form I-821 and look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION