



ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

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July 5, 2019

SUBMITTED VIA E-MAIL

OMB USCIS Desk Officer
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Re: Agency USCIS, OMB Control Number 1615-0116 - Public Comment Opposing Changes to Fee Waiver Eligibility Criteria, Agency Information Collection Activities: Revision of a Currently Approved Collection: Request for Fee Waiver: FR Doc. 2019-11744, Filed 6-5-19; 84 FR 26137

Dear Sir/Madam:

On behalf of the Asian American Legal Defense and Education Fund (AALDEF), I am writing in opposition to the Department of Homeland Security (DHS) U.S. Citizenship and Immigration Services' (USCIS) proposed changes to fee waiver eligibility criteria, published in the Federal Register on June 5, 2019. We are filing these comments by the deadline of July 5, 2019.

Founded in 1974, AALDEF is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF advocates for fair immigration policies that recognize the human rights of undocumented immigrants in the United States, promote family reunification, enforce worker protections for all, eliminate racial and ethnic profiling, and end other discriminatory practices that violate due process. We represent Asian survivors of trafficking and crime who qualify for T and U visas and assist these individuals with filing their applications for nonimmigrant and immigrant status with the U.S. Citizenship and Immigration Services (USCIS). AALDEF primarily serves low-income Asian immigrants—both documented and undocumented—and U.S. citizens of Asian descent. Most of the fee waiver requests that we submit on behalf of our clients are based on the eligibility criteria of receipt of public benefits and/ or income of 150% or less of the federal poverty guidelines.

Current Revisions to Fee Waiver Guidance

On September 28, 2018, DHS published in the Federal Register a notice of Agency Collection Activities; Revision of a Currently Approved Collection: Request for a Fee Waiver; Exemptions under the Paperwork Reduction Act (PRA), allowing for a 60-day comment period. The notice stated that USCIS intended to eliminate receipt of a public benefit for determining eligibility for the fee waiver and to alter the Form I-912, Request for Fee Waiver, but would continue to allow eligibility based on financial hardship or income of 150% or less of the federal poverty income guidelines. The agency stated that as various income levels were used in different states to determine means-tested benefits, using this standard has resulted in inconsistent adjudications. However, no documentation or analysis was offered in support of this claim. The notice stated that USCIS would require that all fee waiver requests be submitted using the I-912 form. The notice further stated that if USCIS finalized this change, it would eliminate and replace the current USCIS fee waiver guidance. No new proposed guidance was published for public comment. A total of 1,198 comments were submitted in response.

On April 5, 2019, the notice was re-published in the Federal Register, allowing for a 30-day comment period. The notice stated that USCIS had decided to go forward with the proposed change and attendant I-912 form revision to eliminate public benefits receipt as an eligibility criterion for the fee waiver. This notice reiterated USCIS's view, without evidence to support it, that fee waivers should not be based on means-tested benefits due to inconsistent adjudication. It should be noted that the agency provided no evidence that individuals with the ability to pay fees are routinely granted waivers.

On June 5, 2019, the current notice was published without substantive change, with a 30-day period for public comment. USCIS now states that in addition to its rationale for proposing the change as for the sake of "consistency," the agency is also making the change to reduce the availability of fee waivers for the purpose of raising fee revenue. These rationales are contradictory and not sufficiently supported by evidence. Further, the criteria for fee waivers is based on an individual's ability to pay and should not be based on the revenue goals of a federal agency.

The Paperwork Reduction Act Process is Inappropriate for Substantive Rule and Guidance Changes

USCIS has undertaken this process with a notice and comment under the Paperwork Reduction Act (PRA) of 1995 as though it were proposing a merely technical collection of information change. The PRA requires the agency to explain the purpose of the form being produced and its paperwork burden on the public. However, since much more than a form or collection of information is involved, use of the streamlined PRA process is inappropriate.

The proposed changes are not simply a matter of information collection but are at the core of substantive eligibility requirements for the fee waiver. These changes to the fee waiver

eligibility criteria and acceptable forms of evidence constitute a fundamental change in the law that is being finalized without meaningful public notice and comment. We note that the current notice has not responded to the comments that were collected from the second publication.

The Revised USCIS Rationale for the Proposed Change Reveals the Real Reasons for this Change: To Reduce the Amount of Fee Waivers That Are Granted

By only accepting fee waiver requests based on income at or below 150% of the poverty income guidelines and financial hardship, USCIS will effectively deny the ability of large numbers of applicants to qualify for fee waivers. USCIS is aware of this, and the latest notice now admits this is a motivation for the change. While USCIS continues to maintain that the agency is also trying to make the process more consistent and efficient, USCIS's primary motivation is clear: the current notice adds to its reasons for the change a discussion of "lost revenue" from granting fee waivers, which it wants to curtail. This change has nothing to do with consistency and everything to do with denying access to immigration benefits, including naturalization, for vulnerable populations.

The modified USCIS rationale for elimination of means-tested benefit as an eligibility ground in the current notice is that fee waivers are excessive and must be reduced. The claim by USCIS that the proposed changes will improve fee waivers—by eliminating the main basis on which most people qualify for a fee waiver—is clearly only an improvement to USCIS in terms of its revenue, without regard for access to immigration benefits and naturalization for individuals who should be able to apply for these benefits even if they cannot afford to pay. It is not meant to be an improvement for either applicants or adjudicators, as previously claimed by USCIS.

In the notice, USCIS cites to the FY 2016-2017 proposed fee schedule rule as authority. While the authority of a proposed rule is doubtful at best, we note that the overall theme of the cited fee rule was to increase access to citizenship for all income levels—not diminish it.

The USCIS's proposed FY 2016-2017 fee rule added a new provision to increase access to U.S. citizenship for eligible applicants, creating a reduced fee (sometimes referred to as a "partial fee waiver") for certain naturalization applicants if they had income in excess of 150% and up to 200% of the federal poverty guidelines; the fee rule preserved the existing full waiver for individuals receiving a means-tested benefit, with income at or below 150% of the poverty guidelines, or who had financial hardship. The proposed fee rule highlighted the importance of access to naturalization for low-income individuals. USCIS stated that its goal was to increase access to as many eligible naturalization applicants as possible due to the importance of citizenship and the significant public benefit to this country, and the nation's proud tradition of welcoming new citizens, a rationale stated in the 2010 fee rule and reiterated in the 2016-2017 rule.

While the proposed fee rule that USCIS cites does refer to overall agency revenues being lost due to fee waivers and exemptions, it refers to them collectively. When exemptions are included together with fee waivers in any statistic, the number reported is meaningless for purposes of determining the impact of fee waivers. Exemptions are not subject to the I-912 and its current fee waiver standards. By regulation, limited types of humanitarian applications are fee-exempt. The revenues estimated to be lost, even if correct in the aggregate, are misleading because they do not specify the specific impact of fee waivers. Additionally, as USCIS continues to increase application fees, its calculations of “forgone revenue” from granting fee waivers will consequently increase as well, without having any connection to whether fee waivers are being improperly granted.

Most importantly, the fee waiver exists to ensure that all eligible applicants have access to immigration benefits and naturalization, even if they are unable to pay the application fees. It is improper to eliminate fee waivers to justify agency revenue from individuals who are unable to afford the fees.

Additional Burdens Created by the Revisions

Eliminating eligibility for means-tested benefits will place a significant burden on individuals applying for immigration benefits while doing nothing to improve “consistency.”

As contained in the prior notices and reiterated in the current one, the revision eliminates an individual’s ability to use proof of receipt of means-tested public benefits to demonstrate inability to pay the required fee. Receipt of a means-tested benefit is sufficient evidence of inability to pay, which is in accordance with 8 C.F.R. § 103.7(c). Months after the original comment period closed, USCIS has still failed to provide any evidence that accepting proof of receipt of a means-tested benefit has led the agency to grant fee waivers to individuals who were able to pay the fee. This documentation is the most common and straightforward way to demonstrate fee waiver eligibility, as applicants can demonstrate current receipt of benefits by providing a copy of the official eligibility letter, or notice of action, from the federal agency administering the benefit. In proposing these changes, USCIS determined that the various income levels used by states to grant a means-tested benefit result in inconsistent income levels being used to determine fee waiver eligibility. Thus, a fee waiver may be granted for one individual who has a certain level of income in one state but denied to an individual with the same income who lives in another state.

The current procedure recognizes, however, that ability to pay is the legal standard. Ability to pay clearly is not the same for two individuals with the same income who live in two different states with different costs of living. If people with the same income living in rural Mississippi and in New York City need to have the same income to qualify for a fee waiver—as they would

if the federal poverty guidelines are used as the principal measure of ability to pay—this is arbitrary and cannot be a fair measure of ability to pay.

In other contexts, the federal government has recognized the inadequacy of the federal poverty income guidelines as a measure of poverty across different jurisdictions. For instance, the Department of Housing and Urban Development uses a poverty measure that is keyed to median income on a state- or municipality-basis to establish access to its subsidized housing program. Even in programs, such as SNAP, that primarily rely on the federal poverty guidelines to determine eligibility, the federal government has allowed states to diverge from those guidelines through programs that use broad-based categorical eligibility. This allows high cost-of-living states to open their SNAP programs to individuals and families with incomes in excess of 100% of applicable poverty guidelines and to take account of a family's higher-than-usual expenses in determining eligibility.

Individuals who have already passed a thorough income eligibility screening by federal agencies should not have to demonstrate their eligibility to USCIS all over again. By eliminating receipt of a means-tested benefit to prove eligibility, the government is adding an additional burden on immigrants who already are facing the challenge of paying for continually increasing application fees. USCIS is taking the position that it cannot discern which public benefit programs are means-tested and which ones are not. Given that the largest means-tested programs are such federal programs as Medicaid and SNAP, this position is clearly a pretext for an action that has no real basis in fact.

These proposed changes will discourage eligible individuals from filing for fee waivers and immigration benefits and will place heavy burdens in terms of time and resources on individuals applying for fee waivers.

The revision will place a time and resource burden on individuals applying for fee waivers.

By only accepting fee waiver requests submitted based on financial hardship or income at or below 150% of the poverty income guidelines, USCIS will effectively deny the ability of large numbers of applicants to qualify.

Under the proposed changes, the applicant must obtain additional new documents, including a federal tax transcript from the Internal Revenue Service (IRS) to show household income at or below 150% of the federal poverty guidelines. Currently, applicants can submit a copy of their most recent federal tax returns to meet this requirement. The government does not provide any reason as to why it prefers a transcript over a copy of an individual's federal tax return. Federal tax returns are uniform documents and most individuals keep copies on hand. The proposed requirement will place an additional burden on individuals for more documents and does not account for those individuals who might need assistance obtaining a transcript due to lack of access to a computer or for delays involving mail delivery.

USCIS is taking the position that the changes to the I-912 form are not an “excessive burden,” asserting that the estimated time burden per response is 1.17 hours. However, our experience assisting applicants for T and U visa status, as well as adjustment of status to permanent residency, file fee waivers, has shown us that documenting annual income takes significantly more time than proving receipt of means-tested benefits.

It should be noted that AALDEF has worked with elderly clients and individuals with disabilities in applying for naturalization for whom this process would be even more time-consuming than it already is. Thus, we have real life examples of how the proposed changes to the form would be an “excessive burden” to our clients as well as to our staff and volunteers.

This revision will negatively impact the ability of individuals, especially those who are vulnerable, to apply for immigration benefits for which they are eligible.

The filing fee for various immigration benefits can be an insurmountable challenge for seeking an immigration benefit or naturalization. Any opportunity to mitigate the costs associated with filing should be used to ease, rather than exacerbate, these obstacles.

Increasing the burden of applying for a fee waiver will further restrict access to naturalization for otherwise eligible lawful permanent residents. The naturalization fee has gone up 600% over the last 20 years, prohibiting many qualified green card holders from applying for U.S. citizenship. USCIS claims, without any supporting evidence, that individuals can apply at a later date if they lack the funds to apply now. This fails to consider the harm to individuals resulting from the delay in applying for immigration benefits.

The proposed changes would have a harmful impact on the most vulnerable populations, including survivors of domestic violence, human trafficking, and other crimes, who are unable to meet the stricter evidentiary requirements, as well as people with disabilities.

As previously stated, AALDEF primarily serves low-income Asian immigrants and U.S. citizens of Asian descent. The filing fees associated with seeking immigration relief and naturalization are cost-prohibitive for most of the individuals we work with. Currently, we are representing a trafficking survivor with a pending T visa application who worked as an aide for two elderly individuals. After one of our client’s employers passed away last year, she has been struggling to earn enough to live on. The fee waiver application that she filed in conjunction with her request for deferred action and employment authorization was denied by USCIS. Our client would have been unable to move forward with her deferred action request had the law firm that represents her in her civil action against her former traffickers not paid the filing fee.

AALDEF has several low-income clients, including survivors of human trafficking and people with disabilities, who would be economically and physically harmed if they were forced to try to save funds for the filing fee and apply in the future.

The changes will increase the inefficiencies in processing fee waiver requests and further burden government agencies.

USCIS claims that the proposed changes will standardize, streamline, and speed up the process of requesting a fee waiver by clearly setting forth the most salient data and evidence needed to make the decision. Instead, these proposed changes will slow down an already overburdened system, delaying and denying access to immigration benefits or naturalization for otherwise eligible immigrants. USCIS adjudicators will be forced to engage in a time-consuming analysis of voluminous financial records, instead of relying on the expertise of social services agencies that determine eligibility for means-tested benefits.

This revision also places an unnecessary burden on the IRS and fails to address whether the IRS is prepared to handle a sudden increase in requests for transcripts. Under the changes, almost every person who applies for a fee waiver based on their annual income must request the required documentation from the IRS in order to prove their eligibility.

The changes will place a burden on legal service providers and reduce access to legal services, especially in under-resourced locations or populations.

The revisions will increase the burden on non-profit legal service providers and limit access to immigration legal services for low-income individuals. In addition, they will make it harder for legal service providers to help immigrants who cannot afford the fee to apply for immigration benefits and naturalization.

Preparation of fee waivers for low-income immigrants demands hours of work from the staff of legal services providers. The means-tested benefit fee waiver is efficient in that the provider knows which document will satisfy USCIS. The other eligibility criteria for a fee waiver, financial hardship and meeting a threshold of the poverty income guidelines, are much less clear and require significantly more time to gather needed documentation.

Based on the amount of time it takes to prepare a successful waiver based on 150% of the federal poverty guidelines or financial hardship, as opposed to a waiver based on receipt of a public benefit, the proposed changes would increase AALDEF's workload. This would negatively impact our ability to serve members of the AAPI community in need.

Currently, nonprofit immigration legal services providers like AALDEF organize one-day group workshops as the most efficient model to help eligible individuals apply for immigration benefits and naturalization. With the proposed changes to the fee waiver form, it will become more difficult or impossible for nonprofit legal services providers to complete applications in the workshop setting. If organizations were to stop providing assistance with fee waivers in the workshop setting, this would cut off access to legal support and immigration relief for vulnerable populations, particularly for those in remote or hard-to-reach areas.

Conclusion

For all the reasons outlined above, the Asian American Legal Defense and Education Fund urges that USCIS conduct public outreach to gather information, rather than implement the proposed revisions. The agency can then participate in the full notice and comment process on all substantive changes proposed in order to ensure the fair and efficient adjudication of applications for immigration benefits and for naturalization.

Respectfully submitted,

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