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July 3, 2019

Submitted via email

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 Desk Officer:

I am writing on behalf of the Michigan Immigrant Rights Center in opposition to the Department of Homeland Security (DHS), United States Citizenship and Immigration Services (USCIS) proposed changes to fee waiver eligibility criteria, OMB Control Number 1615-0116, published in the Federal Register on June 5, 2019. We are filing these comments by the deadline of July 5, 2019.

The Michigan Immigrant Rights Center (MIRC) is a legal resource center for Michigan's immigrant communities. MIRC works to build a thriving Michigan where immigrant communities experience equity and belonging. MIRC provides legal representation to indigent immigrants across the State of Michigan at no cost to them before the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR).

MIRC has provided legal representation to thousands of clients over the course of the past ten years. During these years we have assisted victims of domestic violence, human trafficking, unaccompanied minors, and other clients in filing form I-192 along with proof of clients receiving a means-tested benefit, eligibility grounds of financial hardship and 150% of the poverty income guidelines.

Background on Current Fee Waiver Guidance and Optional Form I-912, Request for Fee Waiver

There are only limited types of applications for which an individual can apply for a fee waiver under the regulations. Citizenship applicants are the most common requestors of USCIS fee waivers. Separately, some humanitarian applications such as Violence Against Women Act (VAWA) petitions have a fee exemption, not regulated by the fee waiver standards.

In 2010, after extensive collaboration and meetings with stakeholders, USCIS developed the Form I-912, Request for Fee Waiver, and then published the current fee waiver guidance. USCIS held public teleconferences and gathered extensive information from stakeholders before making these changes. The guidance replaced ten prior memos that contained contradictory instructions



on fee waivers, and the new form for the first time allowed applicants a uniform way of applying for a fee waiver.

The purpose of the form and the new three-step eligibility analysis was to bring clarity and consistency to the fee waiver process. The analysis for fee waiver eligibility is:

Step 1: the applicant is receiving a means-tested benefit; or

Step 2: the applicant's household income is at or below 150% of the Poverty Income Guidelines at the time of filing; or

Step 3: the applicant suffers a financial hardship.

If an applicant qualifies at the first step, the inquiry stops and USCIS grant the fee waiver. This is because the clearest eligibility ground for the fee waiver is the means-tested benefit, which requires evidence from the benefit-granting agency that the applicant is currently receiving a means-tested benefit. The other two eligibility grounds are subject to more arbitrary adjudication and often challenged by USCIS as containing insufficient documentation and credibility, applicants report.

The standard for fee waiver eligibility for limited types of USCIS forms is described in the underlying regulation as making fee waivers available when "the party requesting the benefit is unable to pay the prescribed fee."

Immigrant communities and their representatives report that the development of the I-912 form was an improvement on the pre-2011 system for fee waivers, which lacked any uniform guidance or a form on which to apply. Currently, stakeholders find that fee waiver applications, particularly on other bases than receipt of a means-tested benefit, still require substantial resources to prepare. Further, stakeholders find that adjudications by USCIS can be erratic with fee waivers based on the other two grounds for requesting a fee waiver, 150% of the poverty income guidelines or financial hardship, because USCIS lacks expertise in determining income, and the amount and type of documentation required to establish eligibility on these grounds can vary widely. Applicants report that these types of fee waivers are often rejected repeatedly or denied, with little clarity as to the deficiency.

The current fee waiver based on a means-tested benefit is imperfect as well, largely because social services programs provide different types of documentation with varying levels of information, for example benefit eligibility dates, and applicants may therefore need to supplement. Nonetheless, the standard at least is clear on these types of fee waivers, which was USCIS' intent in adopting it as one of the three standards for fee waiver eligibility. There is little subjective interpretation possible on which benefits are means-tested, thus applicants find that this is the most straightforward basis to apply for a fee waiver.

Current Revisions

On September 28, 2018, USCIS published in the Federal Register a notice of Agency Collection Activities; Revision of a Currently Approved Collection: Request for a Fee Waiver; Exemptions as a notice 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 as a basis for requesting the fee waiver, and alter the Form I-912 accordingly, but would continue to allow eligibility based on financial hardship or income of 150% or less of the poverty income guidelines, although with severely narrowed permissible documentation of income. The agency stated that since different income levels were used in different states to determine means-tested benefits, using that standard has resulted in inconsistent adjudications. No documentation, analysis, or further rationale was offered. The notice stated that USCIS would mandate all fee waiver requests be submitted using Form I-912. The notice also stated that if USCIS finalized this change, it would eliminate the current USCIS Fee Waiver Guidance and replace it. No new proposed guidance was published for public comment. A total of 1,198 comments were filed in response.

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

On June 5, 2019, the current notice was published without substantive change, but with additions to USCIS' rationale offered as justification for the changes. The June 5 notice provides a 30-day period for public comment. USCIS now states that in addition to making the change for "consistency," the agency is also making the change to reduce the availability of fee waivers because it wants to raise fee revenue. These rationales are contradictory and insufficiently supported by evidence. Moreover, the criteria for fee waivers are based on individual ability to pay and should not be based on the revenue goals of a federal agency.

The current notice gives a summary account of how the current fee waiver standards were developed and mischaracterizes the agency's practice on fee waivers prior to 2011 as engaging in holistic analysis. In fact, before the form and standards were adopted in 2011, the confusing fee waiver system was governed by 10 contradictory agency memos and no standardized fee waiver form, a process that was widely acknowledged as rife with inconsistencies, lacking standard procedures and clear guidance that stymied applicants and burdened adjudicators. See Message from USCIS Director, Proposed Fee Waiver Form (July 16, 2010), <https://www.uscis.gov/archive/archive-outreach/message-uscis-director-alejandra-mayorkas-proposed-fee-waiver-form> and USCIS, First Ever Fee Waiver Form Makes Its Debut (Nov. 23, 2010), <https://www.uscis.gov/archive/blog/2010/11/first-ever-fee-waiver-form-makes-its>.

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

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

The changes proposed here is not information collection. Instead, they go to the heart of substantive eligibility requirements for the fee waiver. The proposed changes to the fee waiver eligibility criteria and accepted forms of evidence represent a fundamental change in the law that is being finalized without meaningful public notice and comment. The comments that have been collected in the second publication have not been responded to in the current notice.

In the current notice, USCIS attempts to characterize the change as one that will not adversely affect applicants, and states that it has determined that, for those who applied based on receipt of a mean-tested benefit, there will be no harm based on applicants' reliance on the existing fee waiver standard. This appears to be a deliberately narrow reading of reliance. The experience of applicants belies that claim. If USCIS had engaged in any meaningful public engagement, and responded to the comments that were filed, the adverse effect would be clear.

USCIS also states that no applicant will be unduly burdened by the elimination of fee waiver eligibility based on receipt of a means-tested benefit and dismisses applicant reliance as insignificant. USCIS claims that its publication of three summary form change notices with no public engagement complies with the APA. The current notice does not address the comments filed in response to the prior notices, which USCIS states it is still in the process of reviewing. The current notice does not raise a thoughtful response to the many comments made previously, so we repeat them here.

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. USCIS is aware of this, and the latest notice now admits this is a motivation for the change. Although USCIS continues to maintain the agency is also trying to make the process more consistent and efficient, with the current notice USCIS' primary motivation is clear: the latest notice adds a discussion of "lost revenue" from granting fee waivers, which it wants to curtail, to its reasons for the change. This change has nothing to do with consistency, and everything to do with denying access to immigration benefits and naturalization for vulnerable populations.

The modified USCIS rationale for elimination of a means-tested benefit 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 in terms of USCIS revenue, without regard for access to immigration benefits and naturalization for deserving individuals who should be able to

apply even if they cannot afford to pay. It is not meant to be an improvement for either applicants or adjudicators as previously claimed.

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, and the references provided in this notice is out of context.

The USCIS FY 2016 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 over 150% and up to 200% of the federal poverty guidelines; the Fee Rule preserved the existing full waiver for persons receiving a means-tested benefit, with income at or below 150% of the poverty guidelines, or who had financial hardship. The proposed Fee Rule emphasized the importance of access to naturalization for low-income people. USCIS stated that its goal was to increase access to as many eligible naturalization applicants as possible because of the importance of citizenship and the significant public benefit to the Nation, 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 here 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 to determine 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 thoroughly 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 fee. It is improper and circular logic to eliminate fee waivers to justify agency revenue from individuals who are unable to afford the fees.

Additional Burdens Created by the Revision

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

As stated in the prior notices, and repeated 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 prescribed fees. Receipt of a means-tested benefit is sufficient evidence of inability to pay, which is what 8 C.F.R. § 103.7(c) requires. Months after the original comment period closed, USCIS has still not provided 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 proof is by far the most common and straightforward way to demonstrate fee waiver eligibility as applicants can show current receipt of benefits by providing a copy of the official eligibility letter, or Notice of Action, from the government agency administering the benefit.

USCIS determined, in making these revisions, that the various income levels used by states to grant a means-tested benefit result in inconsistent income levels being used to determine eligibility for a fee waiver. Consequently, a fee waiver may be granted for one person who has a certain level of income in one state but denied for a person with that same income who lives in another state.

The current procedure recognizes that ability to pay, which is the legal standard, is not the same for two people with the exact same income who live in two different states with entirely different costs of living. If people with the same income living in rural Mississippi and in New York City must have the same income to qualify for a fee waiver—as they would if the Federal Poverty Guidelines are used as the primary measure of ability to pay—that is arbitrary and cannot possibly be a fair measure of ability to pay.

According to the Michigan League for Public Policy a family would need to make the following to make ends meet:

- Single - \$21,570
- A single parent with two kids - \$44,164
- A two-parent family with two kids and you are both working - \$52,330
- A two-parent family with two kids and only one parent is working - \$26,720

The income listed above is clearly above the federal poverty guidelines.

In other contexts, the federal government has recognized the inadequacy of the Federal Poverty 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 set access to its subsidized housing program. Even in programs, such as SNAP, that primarily rely on the Federal Poverty Guidelines to set eligibility, the federal government has allowed states to diverge from those guidelines through programs like broad-based categorical eligibility. This allows high-cost-of-living states to open their SNAP programs to individuals and families with incomes over 100% of the 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 government agencies should not have to prove their eligibility all over again to USCIS. By eliminating receipt of a means-tested benefit to show eligibility, the government is adding an additional burden on immigrants who already are facing the economic challenge of paying for ever-increasing application fees. USCIS is taking the indefensible position that it cannot tell which public benefit programs are means-tested and which ones are not. Given that the largest means-tested programs are federal programs such as Medicaid or SNAP; this assertion is plainly a pretense for an action that has no real basis in fact.

These proposed changes will discourage eligible individuals from filing for both fee waivers and immigration benefits and place heavy time and resource burdens 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 based on income at or below 150% of the poverty income guidelines, or for financial hardship, USCIS will effectively deny the ability of large numbers of applicants to qualify.

Under the proposed changes, the applicant must procure additional new documents including a federal tax transcript from the Internal Revenue Service (IRS) to demonstrate household income less than or equal to 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 why a transcript is preferred 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 delivery of mail.

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 associated with various immigration benefits can be an insurmountable obstacle for an immigration benefit or naturalization application. Any opportunity to mitigate the costs associated with filing should be designed to ease, rather than exacerbate, these obstacles.

Increasing the burden of applying for a fee waiver will further limit access to naturalization for otherwise eligible lawful permanent residents. The naturalization fee has gone up 600% over the last 20 years, pricing many qualified green card holders out of U.S. citizenship. USCIS asserts, without any evidence to back up its claim, that individuals can merely "save funds" and apply later if they do not have the funds to apply today. This both fails to consider the harm to individuals resulting from the delay in applying and unjustifiably assumes individuals applying for fee waivers have disposable income that could be set aside.

The changes will increase the inefficiencies in processing fee waiver requests while further burdening government agencies.

USCIS claims the changes will standardize, streamline, and speed up requesting a fee waiver by clearly laying out the most salient data and evidence necessary 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, rather than relying on the professional expertise of social services agencies who 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 documents. Under the revision, almost every person who applies for a fee waiver based on their annual income must also request the required documentation from the IRS in order to prove their eligibility.

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

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

Fee waiver preparation for low-income immigrants demands hours of work from legal services providers. The means-tested benefit fee waiver is efficient in that the provider knows which document will be sufficiently probative for USCIS. The other grounds for a fee waiver, financial hardship and a threshold of the poverty income guidelines, are much less clear, and require far more time to gather sufficient documentation.

Currently, non-profit immigration legal service providers, including those in remote areas of the United States, organize one-day group processing workshops as the most efficient model to help eligible applicants apply for immigration benefits and naturalization. Workshops are helpful to both applicants and USCIS because it allows for a reduction in errors and minimizes the fraudulent provision of immigration services. With the proposed changes to the fee waiver form, it will become harder or even impossible for non-profit legal service providers to complete applications in the workshop setting. As a result, organizations may 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 other hard-to-reach areas.

Conclusion

In conclusion, The Michigan Immigrant Rights Center strongly opposes the proposed change to the fee waiver eligibility. The proposed changes to the eligibility would make the process for applying for a fee waiver more burdensome and dramatically affect the ability of low-income immigrants to gain lawful status or citizenship. In addition, it would discourage eligible individuals from filing for fee waivers and immigration benefits and place heavy time and resource burdens on those who do still apply for fee waivers.

The current notice, like the previous two notices, vastly underestimates the burden that this change will cause to applicants and the legal service providers who represent them. Eligible individuals will be foreclosed from applying for an immigration benefit. Naturalization applicants are the largest group of persons applying for these fee waivers, and the notice makes no acknowledgment of the impact this will have on persons seeking citizenship.

USCIS now provides a contradictory rationale that purports to improve adjudication consistency but simultaneously disqualify as many people as possible to raise more revenue. No reasonable basis is provided for such contradictory goals, and no thorough research of the impact of fee waivers and increases in USCIS fees is presented.

USCIS should review the development of the current fee waiver standards and engage in a reasoned analysis of how it arrived at its current proposal. Nothing in the current notice indicates an understanding of how and why the current form and guidance were created in 2010, which is critical to planning any changes. The Form I-912 request for fee waiver with its three-step eligibility formula, and the 2011 guidance, were specifically created to simplify the fee waiver adjudication process. The eligibility for receipt of a means-tested benefit was the linchpin of that simplified process.

We urge USCIS, rather than implementing the revision, to perform public outreach to include public meetings, teleconferences, and in-person meetings with immigrant organizations concerned with this issue to gather information, and then engage in full notice and comment procedures on all substantive changes proposed in order to ensure the fair and efficient adjudication of immigration benefits and naturalization.

Sincerely,

/s/Susan E. Reed

Susan E. Reed
Managing Attorney

/s/Eva Alvarez

Eva Alvarez
Public Policy Coordinator