NATIONAL IMMIGRATION LAW CENTER
NILC

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Submitted via Regulations.gov

Samantha Deshommes
Chief, Regulatory Coordination Division
USCIS Office of Policy and Strategy
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

RE: Comments in Opposition to DHS e-Docket No. USCIS-2018-21101, OMB Control No. 1615–0116, Proposed Rulemaking Concerning Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions

Dear Ms. Deshommes:

We are writing you to strongly oppose USCIS's proposed rule change to eliminate the current policy of considering means-tested benefits as evidence of eligibility for a fee waiver.

Founded in 1979, NILC is the leading advocacy organization in the U.S. exclusively dedicated to defending and advancing the rights and opportunities of immigrants and their families. We focus on issues that affect the well-being and economic security of immigrant children and their families with low income: health care and safety net programs; education and training; workers' rights; and federal and state policies affecting immigrants.

NILC has been at the forefront of many of the country's greatest challenges in addressing immigration issues and has developed particular expertise in public benefits laws and policies affecting low-income immigrants.

The proposed changes are unjustified, complex, and counterproductive. Rather, we respectfully request that USCIS withdraw this proposed rule and continue processing fee waivers pursuant to its current policy. We urge you to retain the I-912 fee waiver form and accompanying guidelines set forth in Policy Memorandum PM-602-0011.1, published March 13, 2011.

I. USCIS's rationale is unfounded and the agency presents no evidence of problems in current adjudication processes to reasonably justify changes to the current rule.

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In its proposed rule change, USCIS seemingly suggests that states' grant of means-tested benefits to people with varying incomes frustrates its ability to adjudicate fee waiver applications.[1] However, the agency provides no facts or examples to further support its reasoning. On the contrary, mere variations in state-based determinations of the need for benefits do not justify a change in processing of requests for fee waivers. Rather, these differences may more accurately account for need by considering state-specific circumstances of people living in poverty, such as cost of living and need, supporting the current administration of the fee waiver program.

Beyond this rationale, USCIS presents no further evidence of issues in adjudicating the I-912 Form, where the proposed changes would create any demonstrated benefits for the agency. The Notice of Proposed Rulemaking does not identify any negative outcomes that would justify stemming the use of means-tested benefits as an indicator of a person's inability to pay. For example, USCIS fails 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. The agency also provides no justification for requiring additional documentation under the proposed rule. And USCIS does not provide any reason why an Internal Revenue Service (IRS) transcript is preferred over a federal tax return.

If the fee waiver application process were unnecessarily burdensome or complicated, or if its structure resulted in wrongful approval of waivers for fees that applicants could pay, there would be reason to revisit the requirements. The proposed change will only make it harder for qualified people to obtain immigration benefits, and more difficult for the agency to adjudicate requests: the precise opposite of the intended effect of fee waivers.

A. Receipt of means-tested benefits is in and of itself sufficient to meet current legal standards to qualify for a fee waiver.

8 C.F.R. § 103.7(c) merely requires sufficient evidence of inability to pay, and receipt of a means-tested benefit meets this standard. Current regulations do not impose standard income limits on applicants, because a person's ability to pay depends upon his or her unique circumstances *at the time of the application*. An applicant simply needs to demonstrate a lack of disposable income to pay his or her immigration fees.

It has always been, and remains, true that people with disparate earning levels lack the ability to pay applications fees and thus qualify for fee waivers. Even self-sufficient families may lack the disposable income for expenses such as an immigration fee. For example, an annual salary of $30,000 may enable a single, healthy young person who lives alone to pay an application fee, but may not suffice for a single person who supports her extended family or who lost his or her home and possessions in a recent natural disaster. Receipt of a means-tested benefit does not always mean that income is below a fixed amount, but it does demonstrate that the recipient is in financial constraints, and therefore renders a person eligible for a fee waiver under controlling law. The law requires that, regardless of the resulting "costs," USCIS must waive fees for all applicants who demonstrate an inability to pay.

[1] 83 F.R. 49121 ("USCIS has found that the various income levels used in states to grant a means-tested benefit result in inconsistent income levels being used to determine eligibility for a fee waiver. Therefore, the revised form will not permit a fee waiver based on receipt of a means-tested benefit, but will retain the poverty-guideline threshold and financial hardship criteria."

II. The proposed change would shift the cost of immigration services to those least able to afford them.

The proposed changes to the fee waiver eligibility criteria and accepted forms of evidence would drastically reduce the total population eligible for a fee waiver, and would make it especially hard for the most vulnerable to secure the waiver. The rule change would devastate immigrants and their families who would otherwise be unable to move forward on their path to U.S. citizenship or obtain valid unexpired proof of their legal status in the U.S.

Low-income applicants will have a harder time meeting the stricter evidentiary requirements proposed to prove eligibility, as further explained below. Moreover, fee waivers are particularly critical for survivors to obtain relief. The proposed changes will harm survivors of domestic violence, sexual assault, human trafficking, and other serious crimes, who often need fee waivers to secure the vital immigration protections Congress created in the Violence Against Women Act (VAWA) and Trafficking Victims Protection Act (TVPA). Fleeing from abusive situations, survivors often do not have resources to pay for fee-based ancillary forms nor have primary documentation (e.g., tax transcripts, bank account statements, etc.) to demonstrate their economic need. Abusers commonly prevent survivors from accessing or acquiring financial resources in order to maintain power and control in the relationship.

A. This proposal will place significant burdens on individuals and their families in applying for immigration benefits.

To demonstrate eligibility for a fee waiver, an applicant can show: 1) receipt of a means-tested benefit, 3) income below 150% of the federal poverty guidelines, or 3) otherwise demonstrate financial hardship. The first two standards serve as bright-line tests for applicants to qualify for a fee waiver, whereas the last criteria is a discretionary decision made by the adjudicator and requires more documentation and time in putting together an application. By removing one of two bright-line tests, this proposal will place a time and resource burden on those applying for a fee waiver. The increased requirements and additional evidence to be collected from applicants on the proposed amended Form I-912 will extend the time and work required for applicants to complete the waiver application process.

The proposal eliminates an individual's ability to use proof of receipt of means-tested public benefits to demonstrate an inability to pay the prescribed fee. This proof is often the most common and straightforward way to demonstrate eligibility, as applicants have already proven current receipt of benefits by providing a copy of an official eligibility letter, or Notice of Action, from the government agency administering the benefit. In some cases, applicants are not otherwise able to complete the form, because they do not have other required documentation at hand to demonstrate their need. By eliminating receipt of a means-tested benefit as a way to show eligibility, the government is imposing an additional burden on immigrants who already are facing the economic challenge of paying for application fees. Moreover, 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.
In addition, if finalized in its proposed form, more applicants will need to provide additional documentation to qualify for a fee waiver. The proposal requires individuals to obtain new documents and does not account for those individuals who might need assistance obtaining a transcript due to lack

of access to a computer or delays involving delivery of mail. Currently, applicants can submit a copy of their most recent federal tax returns to meet this requirement –documents that individuals (if required to file) may not have easily on hand, if they haven't kept a copy. Under the proposed changes, the applicant must also procure additional documents -- including a federal tax transcript from the IRS to demonstrate household income at less than or equal to 150% of the federal poverty guidelines. Requiring each applicant to submit their own I-912 Form is also an unreasonable burden to place on applicants and their families. Currently, a family can submit a single fee waiver application, which is particularly beneficial for families who apply with their minor children. It simplifies the application process, as all relevant data is collected in one location. If finalized in its proposed form, the rule would now require that each applicant separately gather the required documentation, including an IRS transcript, documentation showing they are not required to file federal taxes, and/or verification of the non-filing from the IRS. This increases the burden on the applicant and is duplicative for a family who should submit their request together.

B. Otherwise eligible applicants will be deterred from pursuing naturalization or requesting proof of status, unfairly excluding them from critical immigration benefits due to their inability to pay.

This proposal will impose unnecessary barriers on individuals, especially those who are vulnerable, in applying for immigration benefits for which they are eligible. Even now, the filing fee associated with various immigration benefits is an insurmountable barrier for applicants and their families. Requiring more documents and adding complexity to the application process will further deter applications for immigration benefits or naturalization —not because a person is ineligible, but because the government has erected a needless hurdle in his/her path. These additional burdens placed on applicants will prevent them from securing a permanent future here in the U.S.

This rule change creates greater uncertainty of a fee waiver grant and will deter otherwise eligible applicants from pursuing agency services ranging from basic identification documents to major events like obtaining citizenship through naturalization. Studies show that a significant number of people eligible for naturalization choose not to because of the cost of applying.[2] The naturalization fee has gone up 600% over the last 20 years, pricing many qualified green card holders out of U.S. citizenship. This number would undoubtedly increase as fee waivers become more difficult to access. Receipt of a means-tested benefit has long served as a bright-line qualification for a fee waiver, whereas an adjudicator's evaluation of income and financial hardship is discretionary, thus rendering the results less predictable. Fewer immigrants would begin this more intensive and burdensome process, when coupled with less assurance of success.

The harms of the proposed rule extend beyond applicants for naturalization, with people living in or near poverty losing access to fee waivers for services such as applying for employment authorization documents, certificates of citizenship, and replacements or renewals of legal permanent resident cards, each of which serve as crucial proof of eligibility to work in the United States. These services are essential for day-to-day living in the U.S., serving as proof of work authorization, eligibility to vote, and,

[2] Ana Gonzalez-Barrera, Pew Research Center, *Mexican Lawful Immigrants Among the Least Likely to Become U.S. Citizens* (June 29, 2017) *available at* http://www.pewhispanic.org/2017/06/29/mexican-lawful-immigrants-among-least-likely-to-become-u-s-citizens/.

critically, proof of lawful presence in the U.S. when confronted with immigration enforcement. These services should not be contingent on whether an individual can afford to pay for them. Reducing the likelihood that lawful permanent residents and naturalized citizens can present proof of status also exposes sister agencies like Immigration and Customs Enforcement and Customs and Border Protection to the embarrassment and liability of erroneous enforcement efforts targeting people who cannot document their status as citizens.[3]

Rather, any opportunity to mitigate the costs associated with filing should be designed to ease, rather than exacerbate, these obstacles. Research also confirms that the reverse is true: when fees are removed as a barrier, rates of naturalization nearly double.[4] The benefits of naturalization are numerous and well-documented. Naturalizing increases a person's earning power by 8 to 11 percent, regardless of industry, occupation, or length of residence in the United States.[5] Similarly, becoming a citizen increases employability, where the naturalization increases the employment rate among people born abroad by 2.2%.[6] Naturalized citizens are also more likely to establish roots by purchasing their home and by investing in the United States[7] than other foreign born populations. These characteristics all flow into benefits for the United States, generally. For example, studies indicate that if all eligible residents had naturalized in 2012, the result would have been a $37 to $52 billion increase in the U.S. gross domestic product over 10 years.[8]

A. Many immigrants who pay for these application fees will suffer financial harms resulting from the high cost of these applications.

This proposal could undermine the stability and economic security of immigrants and their families who pay for fees that they cannot afford. For applicants who nevertheless manage to pay the full unaffordable application fee, the financial repercussions of the expense will be severe. For example, for a family of four living at 175 percent of the federal poverty guidelines (and thereby ineligible for a fee waiver under the proposed rule), an application for a replacement permanent resident card would cost nearly 15 percent of their monthly income.[9] While this document is necessary to demonstrate

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[3] Page St. John & Joel Rubin, *ICE held an American man in custody for 1,273. He's not the only one who had to prove his citizenship*, L.A. Times (Sep. 17, 2018) *available at* https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html.

[4] Jens Hainmueller *et al.*, *A randomized controlled design reveals barriers to citizenship for low-income immigrants*, at 1 (Jan. 30, 2018) *available at* http://www.pnas.org/content/pnas/115/5/939.full.pdf.

[5] Manuel Pastor & Justin Scoggins, *Citizen Gain: The Economic Benefits of Naturalization for Immigrants and the Economy*, Center for the Study of Immigrant Integration Report, at 23 (Dec. 2012), *available at* https://dornsife.usc.edu/assets/sites/731/docs/citizen_gain_web.pdf.

[6] María Enchautegui & Linda Giannarelli, *The Economic Impact of Naturalization on Immigrants and Cities*, The Urban Institute Report, at vi (Dec. 2015) *available at* https://www.urban.org/sites/default/files/publication/76241/2000549-The-Economic-Impact-of-Naturalization-on-Immigrants-and-Cities.pdf.

[7] *Id.* at 33.

[8] Pastor & Scoggins, *supra* note 8, at 20.

[9] Georgia Department of Community Health, *2018 Federal Poverty Guidelines (FPG) Annual & Monthly Income Levels From 100% to 250%* (Jan 2018), *available at* https://dch.georgia.gov/sites/dch.georgia.gov/files/2018%20Federal%20Poverty%20Guidelines.pdf.

authorization to work and lawful status in the U.S., the tradeoff can have dramatic impacts on the well-being of families.

Studies show that "financial shocks," or necessary expenses that an individual cannot afford, can have devastating consequences for low-income families, including for people above the 150 percent of the federal poverty guidelines proposed by the rule. For example, 50% of families who rent their home and with incomes under 200 percent of the poverty line report low confidence in their ability to cover an unexpected expense of $400[10] – an amount at the low end of application fee costs. Especially where expenses are deemed critical by an individual or family -- a quality foreseeably ascribed to immigration applications -- research shows that people living in or near poverty will forego other needs to make those payments.

The proposed rule will needlessly amplify the effects of poverty for people who are no longer eligible for fee waivers. Multiple studies examining income volatility show financial shocks increase the likelihood that a family will experience food insecurity, where unexpected costs cause families to go hungry.[11] This effect extends beyond nutrition, as families forced to pay for needed expenses they cannot afford will skimp on medical care, utilities payments, educational costs, and other basic essentials so that they can cover the unexpected cost.

III. The proposed change contravenes Congressional intent.

USCIS' proposed revisions to fee waiver guidance and forms run in direct opposition to the bipartisan Congressional intent in establishing the evidentiary requirements for certain populations and will discourage many from pursuing the relief Congress intended for them. USCIS must not impose a higher evidentiary standard on fee waivers than it would on the underlying petitions.

First, by limiting the ways a survivor can show he or she qualifies for a fee waiver, USCIS has created unnecessary hurdles to access the legal protections created by Congress to ensure survivors can access safety and justice. Congress created the special "any credible evidence" standard for survivor-based protections like VAWA self-petitions and U and T visa applications, with the intent to ease evidentiary challenges that immigrant survivors often face. Fee waivers for ancillary-forms like work permits and waivers are important to ensure that all survivors have access to immigration protections for which they may be eligible. Contrary to what Congress intended, the proposed revisions to the fee waiver forms and guidance will exacerbate the barriers that immigrant survivors already face when coming forward to access protection. The proposed revisions ignore the reality of the intersections of financial instability and intimate partner violence.

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[10] Corianne Payton Scally & Dulce Gonzalez, *Homeowner and Renter Experiences of Material Hardship*, Urban Institute Report, at 11 (Nov. 2018) *available at* https://www.urban.org/sites/default/files/publication/99271/homeowner_and_renter_experiences_of_material_hardship_implications_for_the_safety_net_2.pdf.

[11] Vanessa Wight, *Understanding the Link between Poverty and Food Insecurity among Children: Does the Definition of Poverty Matter?*, 20 J. CHILD POVERTY 1 (Jan. 2015) ("Further, a handful of studies have examined the effect of income volatility and food insecurity and found that dramatic changes in income and negative income shocks increase the probability that a household will experience food insecurity") *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4096937/.

Second, Members of Congress have repeatedly instructed USCIS to respect the importance of naturalization. Consistent Congressional directives to USCIS exist regarding the agency's responsibilities in facilitating naturalization. For example, the House of Representatives Appropriations Committee's Homeland Security Bill Reports have consistently emphasized the need for naturalization to remain affordable and accessible. In House Report 115-948, concerning the Department of Homeland Security Appropriations Act of 2019, the Committee made clear that "USCIS is expected to continue the use of fee waivers for applicants who can demonstrate an inability to pay the naturalization fee…The Committee encourages USCIS to maintain naturalization fees at an affordable level while also focusing on reducing the backlog of applicants.[12]" USCIS must facilitate, not pointlessly impede, the naturalization of residents who are committed to our nation and values.

The NPRM fails on both fronts, reducing the number of people with demonstrated financial need who will qualify for fee waivers, while also increasing backlog by creating additional work needed to certify inability to pay.

IV. The proposed changes would increase burdens on adjudicators and relevant federal and state government agencies to address proposed changes to the fee waiver rule.

By proposing to eliminate a simple bright-line test, USCIS will impose a heavier burden on its own adjudicators and other government agencies that assist immigrants and their families.

A. <u>The proposed rule change removes a bright-line test that is efficient, cost-saving, and clear to understand and administer – thereby increasing burdens on USCIS adjudicators who are already backlogged in adjudicating agency applications.</u>

Just as compiling documentation and completing the application will burden applicants, processing more pages of evidence would slow adjudicators. The government estimates that the total number of responses for Form I-912 is approximately 350,000. With nearly 6 million pending cases as of March 31, 2018, DHS has conceded that USCIS lacks the resources to timely process its existing workload. These operational demands would be levied upon an agency that already suffers profound capacity shortfalls. USCIS can ill afford to further delay its operations, where backlogs of pending applications and wait times for adjudication have increased between FY2016 and FY2019 for the agency. These changes will slow down an already overburdened system.

USCIS will waste resources in duplicative efforts if it adopts the proposal. Receipt of a means-tested benefit is the only current method for establishing eligibility that involves a yes-or-no determination that administrators can reach by reviewing a single document. No one piece of evidence—not even a tax return or certification of non-liability for taxes—will always show how an individual's income compares to federal poverty guidelines, nor the extent to which an individual is experiencing current financial hardship. For example, filings with the IRS omit income not subject to taxation but relevant to fee waiver adjudication, such as Supplemental Security Income or personal gifts or inheritance.

[12] H.R. Rep No. 115-948, at 61 (Sep. 12, 2018).

USCIS would further squander resources by prohibiting its employees from relying upon their state and local counterparts' competent work, lengthening and complicating its adjudicators' task. The purpose of using means-tested benefit for assessment of ability to pay also saves administrative expense. Receipt of a means-tested benefit is a straightforward, economic threshold because it takes advantage of the work that local and state adjudicators have already invested in reviewing records, instead of requiring federal adjudicators to repeat it.

The proposal also reduces efficiency and makes the application process more complex, where the agency cannot justify the change as a procedural improvement. When trying to show financial hardship, applicants often need to document many factors, including sources of income as well as extraordinary expenses related to illness, natural disaster, or other special circumstances. The proposed rule would therefore add to a layer of bureaucratic expense and delay at the agency – officials will now be tasked with collecting income information, such as pay stubs, assets, and other information *in every case* to make a determination, provide for administrative appeals, and engage in other tasks that are streamlined under the current structure. The additional delay and expense that would be caused by the rule is unnecessary and counterproductive. Instead of requiring less evidence from applicants, as its *Federal Register* announcement suggests, USCIS forces individuals to collect, and adjudicators to analyze, more voluminous records.

A. <u>The proposed changes would impose administrative and cost burdens on federal and state government agencies who assist immigrants with these applications.</u>

The proposed change would burden government agencies other than USCIS. Many applicants who receive means-tested public benefits are not required to file tax returns. These people would now have to file needless returns or request certification of non-liability for taxes from the IRS, as the most likely first step toward demonstrating income below the poverty guidelines and/or financial hardship. This proposal 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 proposed rule, almost every person who applies for a fee waiver based on their annual income must also request IRS documentation proving their eligibility. Moreover, all changes in employment, or non-employment, inability to work, or need to file will require an IRS verification. An unclear number of applicants will have to return to the IRS for certified copies of their transcripts. This will increase the production and duplication of documents for information that can be proven by evidence the applicant already has (their federal tax returns or pay stubs), in a different manner (affidavits from service organizations), or through a different agency (verification of receipt of a means-tested benefit).

Furthermore, the federal government has long entrusted its state and local counterparts with adjudicating eligibility for federally-funded benefits programs. States have made no alterations in their procedures for awarding means-tested benefits that would justify ending USCIS reliance on this factor. Therefore, there is no reason for the agency to depart from our well-functioning system of local, state, and federal cooperation in assessing need and qualification for assistance.

Under the proposal, more applicants would also have to request certifications from courts overseeing alimony and child support agreements, the Social Security Administration, the Veteran's Administration,

municipal assessors and clerks, and child welfare agencies, as well as banks, social service organizations, and employers.

B. This proposal will negatively impact our communities.

This proposal will make it more difficult for low-income and vulnerable immigrants to stay on the path to U.S. citizenship, and that hurts us all. This unjust rule would essentially put a price tag on legal U.S. residency, turning our immigration system into one that heavily favors prospective immigrants with wealth, over those who seek to follow the path of upward mobility that for centuries has brought millions of immigrants to our shores and enriched our country and economy overall in the process. Just like the administration's termination of DACA and Temporary Protected Status, cruel family separation and incarceration policy, the Muslim and asylum bans, and changes to the public charge rule, this proposed rule is an attempt to close America's doors on those who dare to work toward a permanent future in the U.S.
The proposed rule would not accomplish any objectives that further the purpose of USCIS and would create inefficiency and delay for the agency. In doing so, changes under the rule would also harm many potential applicants by either dissuading them from pursuing needed services due to fees they cannot pay, or by creating financial hardship for people who cannot afford the fees but pay them by foregoing other needs. By contrast, the current structure provides an efficient, proven system for determining ability to pay among applicants for immigration services, and USCIS has demonstrated not need for alterations that would push additional costs on people who can least afford them.

Ensuring equal access to the protections Congress created is crucial, especially for domestic and sexual violence survivors who may have few financial resources of their own. USCIS should not bypass Congressional intent and undermine these laws through fee waiver policy changes. Fee waivers provide an essential pathway for survivors to seek justice and safety.

NILC urges USCIS not to publish the proposed rule and to maintain its current criteria for assessing fee waivers as stated in Policy Memorandum PM-602-001.1.

Respectfully submitted,

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