TAHIRIH JUSTICE CENTER®

Protecting Immigrant Women and Girls Fleeing Violence

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Re: Comments in Response to Executive Office for Immigration Review; Fee Review, EOIR Docket No. 18-0101, 85 Fed. Reg. 11,866 (Feb. 28, 2020)

Dear Ms. Reid:

The Tahirih Justice Center (Tahirih) submits the following comments in response to the fee increases and new fees proposed in the Executive Office for Immigration Review Fee Review. The proposed changes, which were published in the Federal Register on February 28, 2020, include drastic increases to the fees for filing an appeal or motion to reopen with the Board of Immigration Appeals (BIA) as well as for applications for cancellation of removal and a novel fee for filing an asylum application in immigration court (collectively, proposed changes).

Tahirih is a national, nonpartisan policy and direct services organization that has assisted over 25,000 immigrant survivors of gender-based violence throughout the past twenty-one years. Our clients endure unimaginable atrocities such as human trafficking, domestic violence, forced marriage, honor crimes, and sexual assault.

Tahirih urges that the proposed changes be withdrawn in their entirety. Because abusers use economic control as a tool of abuse, those changes would prevent many survivors from applying for relief and from pursuing appeals to the BIA and the federal courts. Especially in light of recent changes to the immigration courts and the BIA, the proposed changes would therefore prevent survivors from accessing impartial judicial review. And the proposed changes violate both the federal constitution and United States treaty obligations.

I. The Proposed Changes Will Disproportionately Harm Survivors of Gender-Based Violence

Women and girls fleeing gender-based violence are among the most vulnerable asylum seekers in the United States. Gender-based violence takes many forms, with government actors, families, and communities targeting women for forced marriage, Female Genital Mutilation/Cutting, honor crimes,

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rape, domestic violence, femicide, and other hum/an rights abuses. Survivors suffer not only violent retaliation for trying to escape, but economic isolation and severe social ostracization as well.

Those who overcome tremendous odds and manage to escape face further peril as they search for a safe haven. The vast majority of survivors arrive in the United States with no assets and a support system that is tenuous at best. According to a nationwide survey of advocates, immigrant women, and service providers that Tahirih conducted in late 2017, safe and affordable housing and economic hardship ranked among the top three most urgent and prevalent systemic challenges, respectively, confronting immigrant women in the United States. *See Nationwide Survey*, http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf. Unable to afford basic necessities, survivors are once again highly vulnerable—this time, to exploitation by traffickers, abusers in the United States, and other bad actors preying on their desperation to survive.

The proposed fee for asylum applications will further empower these bad actors and effectively function as a bar to asylum for survivors. An asylum application functions as a potential route to status and work authorization, and therefore to independence, but the vast majority of survivors are indigent and unable to pay filing fees. Moreover, traffickers and abusers use acute and chronic threats of harm to keep survivors in a perpetual state of isolation, poverty, and various forms of dependence. They are also commonly known to hold survivors' documents hostage, all but guaranteeing indefinite dependence on the abusers. *See, e.g.*, Anne L. Ganley, Health Resource Manual 16, 37 (2008); Rachel Louise Snyder, *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us* 36 (2019) (abusers seek to "dominate and control every aspect of a victim's life"); Immigration & Customs Enforcement, Information for Victims of Human Trafficking (2016), https://www.ice.gov/sites/default/files/documents/Document/2017/brochureHtVictims.pdf. Traffickers and abusers therefore will not assist survivors by providing the filing fee for an asylum application that could cause them to lose control of a survivor. *See, e.g.*, Edna Erez & Nawal Ammar, *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003), https://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf; *Violence Against Women Act of 2000 Section-by-Section Summary*, 146 Cong. Rec. S10188-03, at S10195 (2000). And given that survivors often arrive in the United States with no money at all, even a $50 fee becomes a prohibitive barrier to seeking relief and independence.

The increased fee for applying for cancellation of removal will have the same effect. Under the Violence Against Women Act (VAWA), survivors abused by spouses or children who are lawful permanent residents may apply for cancellation of removal on Form EOIR-42B. *See* 8 U.S.C. § 1229b(b)(2). Because economic control is routinely used as a tactic of abuse, the dramatic proposed increase in fees for filing that application—from $100 to $360—will unquestionably mean that numerous survivors eligible for VAWA cancellation will be financially unable to afford the application.

The huge proposed increases for BIA appeals and motions to reopen will likewise close courthouse doors to survivors. A survivor is exceedingly unlikely to be able to access almost $1,000 for *any* purpose—much less to pursue an appeal that could give them legal status and, therefore, a

work permit and independence from their abusers. A fee of that magnitude is effectively designed to prevent survivors who are economically dependent on traffickers or abusers from pursuing an appeal. The inevitable result will be that survivors who are erroneously denied relief by the immigration courts will not have the opportunity to appeal those erroneous denials. And if survivors are barred by the fee from pursuing appeal to the BIA, they also will be unable to receive review in federal court. *See* 8 U.S.C. § 1252(b)(9).

The process for obtaining a fee waiver will not obviate these problems. There is no public data to evaluate whether fee waivers have previously been adjudicated in consistent, rational ways. There is therefore also no mechanism to ensure uniformity in adjudication. And absent uniformity, survivors faced with the proposed fees and fee increases will, at best, face a game of judicial roulette in which the survivors' own lives are on the line.

Even assuming that waivers have previously been granted whenever appropriate, there can be no doubt that the drastic proposed increases in fees would lead to many more waiver requests. An increase in fee applications would increase the burden on judges to evaluate, and rule on, applications that have little to do with the merits of any given case. An increase in waiver applications would therefore also increase the number of cases pending before the immigration courts—a number that already exceeds 1,000,000. *See* TRAC, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/.

Furthermore, the Executive Office of Immigration Review (EOIR) has proposed these fees without any clear statement of why the fees are necessary. To be sure, it is clear that the agency believes that its services cost more than the fees it currently charges. But *no* court system recoups its costs in filing fees; in fact, the entire point of court systems is to provide everyone with access to impartial adjudication (and, thus, to safeguard their First Amendment petition rights). Filing fees are, in that way, entirely distinct from other "user" fees for services provided by government agencies. And there is no statement in the proposed rule that EOIR requires any additional funds at all, much less that it requires funds in an amount that necessitates fee increases that far outstrip the rate of inflation. There is also nothing in the proposed changes to suggest that EOIR will actually recoup a meaningfully increased amount of fees from the changes—and given that the number of fee waiver requests will increase drastically, that outcome cannot be taken for granted. *See* USCIS, *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 84 Fed. Reg. 62,280, 62,302 (Nov. 14, 2019) (proposed to exempt applications often used from survivors from fee increases because "it is more efficient to exempt that population from fees than to employ staff to review fee waiver requests that would usually be approved").

II. Appeals Are Crucial to Survivors' Ability to Receive Neutral, Informed Judicial Review

The proposal to increase a fee that would preclude survivors, and many others, from pursuing appeals to the BIA comes at a time when those appeals are more important than ever. Some immigration courts grant relief to so few individuals that they have effectively created asylum-free zones within the United States. *See, e.g.*, Katie Shepherd, *Asylum Free Zones in the U.S. Examined by Inter-American Commission*, https://immigrationimpact.com/2016/12/20/

asylum-free-zones/#.Xni4m3IpDIV; Complaint, *Las Americas Immigrant Advocacy Center v. Trump*, D. Or. No. 3:19-cv-2051, Dkt. 1, at 25-31 (Dec. 18, 2019). These asylum-free zones include the areas covered by the Atlanta and Houston courts, both of which granted fewer than 5% of asylum applications in 2019, and in which Tahirih regularly represents survivors. *See* TRAC, *Asylum Decisions*, at https://trac.syr.edu/phptools/immigration/asylum/. The fact that other courts show much higher asylum grant rates (*see id.*) compels the conclusion that many of the denials in asylum-free zones are erroneous or, at a minimum, very open to challenge on appeal.

Recent changes to the immigration courts have further heightened the need for an accessible appeals process. From the beginning of 2018 through the first quarter of 2020, EOIR hired 201 new immigration judges—meaning that 43% of active judges have, at most, a bit more than two years' experience. *See* Immigration Judge Hiring, https://www.justice.gov/eoir/page/file/1104846/download. Whistleblower reports strongly suggest that these new judges have been selected *because* they are hostile to asylum and other forms of relief. *See, e.g.*, Letter from Eight Members of Congress to Michael E. Horowitz, May 8, 2018, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Dems%20to%20Horowitz.pdf. And the scant information available to the public about the training of immigration judges indicates that neither new nor existing judges receive any significant training in the effects of trauma, the modus operandi of abusers, or other issues surrounding gender-based violence—even though those issues speak directly to a survivor's credibility, the nature of her past experiences, and the possibility of future harm. *See, e.g.*, *EOIR Releases Materials from the 2018 Legal Training Program for Immigration Judges*, https://www.aila.org/infonet/eoir-2018-training-program-judges; *Most Recent New Immigration Judge Training Materials*, https://www.muckrock.com/foi/united-states-of-america-10/most-recent-new-immigration-judge-training-materials-69160/.

New judges are not the only recent change increasing the importance of appeals. The so-called "Performance Measures" instituted in 2018 actively discourage thoughtful consideration of asylum applications by requiring immigration courts to rush through preset percentages of their docket and imposing employment sanctions on those who do not do so. *See* Memorandum, *Case Priorities and Immigration Court Performance Measures*, https://www.justice.gov/eoir/page/file/1026721/download. And the Attorney General's attempts to limit continuances and administrative closure as tools of docket management (*see Matter of Castro-Tum*, 27 I.&N. Dec. 271 (AG 2018); *Matter of L-A-B-R-*, 27 I.&N. Dec. 405 (AG 2018))—which are illegal (*e.g.*, *Zuniga-Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019))—have likewise increased the number of appeals that survivors must take by preventing immigration judges from allowing USCIS to rule on pending applications for relief before completing removal proceedings.

A survivor's ability to petition for review in federal court is also especially critical at this juncture. The Board of Immigration Appeals (BIA) has never been a perfect institution. *See, e.g.*, *Niam v. Ashcroft*, 354 F.3d 652 (7th Cir. 2004); *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003). Recent changes to the BIA will deepen these shortcomings. The BIA, like immigration judges, is now subject to artificial speed-based goals in processing cases. *See* EOIR, *Organization of the Executive Office of Immigration Review*, 84 Fed. Reg. 44,537 (Aug. 26, 2019); James R. McHenry III, *Case Processing at the Board of Immigration Appeals* (Oct. 1, 2019). Moreover, five new board members were appointed last year—and all of them, like the new immigration judges, are notably

hostile to asylum claims. *See, e.g.*, Tanvi Misra, *DOJ Changed Hiring Practice to Promote Restrictive Immigration Judges* (Oct. 29, 2019), https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/. And there is no reason to believe that BIA judges are better trained in the nuances of trauma and abuse dynamics than their immigration-court counterparts.

Thus, neither immigration judges nor the BIA are likely to reach correct outcomes in most—or even many—cases involving survivors. The problem will also extend to many other cases, as highlighted by the fact that the BIA recently went so far as to contradict a federal court of appeals and "def[y] a remand order." *Baez-Sanchez v. Barr*, 947 F.3d 1033, 1035 (7th Cir. 2020) (Easterbrook, J.). As a result, review in the federal courts is more important now than ever before. The effect of the proposed fee increases for appeals and motions to reopen will, however, be to prevent survivors and other asylum seekers from accessing the federal courts for redress.

III. The Proposed Fee for Asylum Applications and Proposed Increases for BIA Appeals and Motions Violate Federal Law

Even assuming, *arguendo*, that EOIR has the statutory authority to impose fees for asylum applications, cancellation of removal, appeals, and motions to reopen, it cannot set those fees at a level that will prevent large numbers of immigrants from seeking further review in the federal courts of appeals. The Petition Clause of the First Amendment "protects the right of individuals to appeal to courts and other forums established by the government for the resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). At least absent a uniform, accessible, rational fee-waiver process that allows indigent individuals to consistently have fees waived—and, as noted above, there is no evidence that EOIR has such a process—the proposed changes violate that constitutional right.

The proposed changes also violate the United States' obligations under international law. Under the 1951 Convention Relating to the Status of Refugees, the United States has an obligation to accept all those who enter the country seeking protection from persecution. The imposition of a fee to apply for relief is flatly inconsistent with that obligation, especially given that—as the government knows—most asylum seekers arrive with effectively no assets and few belongings.

In addition, the proposed changes raise serious equal protection concerns, as they disproportionately increase fees for forms commonly used by survivors of gender-based violence and other low-income immigrants. The proposed changes therefore add to a series of regulatory changes that collectively operate to permit only wealthy immigrants to enter and remain in the United States. *See* DHS, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019); U.S. Dep't of State, *Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54,996 (Oct. 11, 2019); USCIS, *U.S. Citizenship & Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements*, 84 Fed. Reg. 67,243 (Dec. 9, 2019); *Presidential Proclamation on the Suspension of Entry of Immigrants Who Will Financially Burden*

the United States Healthcare System (Oct. 4, 2019). Given that immigrants are no more likely to access public benefits than people born in the United States, these policies are unlawful, unnecessary, and have no basis in fact. *See, e.g.*, Alex Nowrasteh & Robert Orr, *Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs*, https://www.cato.org/publications/immigration-research-policy-brief/immigration-welfare-state-immigrant-native-use-rates (May 10, 2018). The only rational explanation for the proposed rule and related policies is instead that they implement the animus high-ranking government officials have repeatedly expressed about keeping non-white immigrants from places as disparate as Central America, Haiti, Mexico, the Middle East, and Nigeria out of the country. *See, e.g.*, President Donald Trump, *Remarks on the Illegal Immigration Crisis and Border Security* (Nov. 1, 2018), https://perma.cc/F4DX-RZ84; Jeff Sessions, U.S. Att'y Gen., *Remarks on Immigration Enforcement*, Las Cruces, NM (Apr. 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement, https://perma.cc/DT3U-X4UG; Rebekah Entralgo, *Conservatives want a man who compared immigrants to rats to lead DHS* (Apr. 11, 2019), https://thinkprogress.org/conservatives-cuccinelli-dhs-immigrants-trump-7233d8f6f1ce/. A policy implemented on that basis violates the Equal Protection Clause of the Fourteenth Amendment.

Sincerely,

/s/Richard Caldarone

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