

August 14, 2020

Submitted via electronic mail to: DHSDeskOfficer@omb.eop.gov

Re: Comments in Response to the Information Collection at OMB Control Number 1615-0067, referenced in the United States Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) and Department of Justice (DOJ) Executive Office for Immigration Review (EOIR) (the Departments) Joint Notice of Proposed Rulemaking (NPRM or the rule): [Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review.](#)

Dear DHS USCIS Desk Officer,

The Tahirih Justice Center¹ (Tahirih) submits the following comments in response to the Information Collection, OMB Control Number 1615-0067, issued by the Departments on June 15, 2020 pursuant to the Paperwork Reduction Act. These comments are not intended, and should not be construed, as comments in response to the above-referenced, related NPRM. To the extent that the proposed revisions to the Information Collection Instrument, *Application for Asylum and for Withholding of Removal / Form I-589 and instructions* (asylum application or Form) implement the NPRM, however, we oppose such revisions for the specific reasons outlined in our comments filed on July 15, 2020 responding to the NPRM. Those comments and attachments, as well as all other sources cited in the following comments, are hereby incorporated by reference and are to be considered part of the administrative record.²

Introduction

Tahirih is a national, nonpartisan policy and direct services organization that has answered calls for help from nearly 29,000 immigrant survivors of gender-based violence (GBV) since its inception twenty-three years ago. Our clients are primarily women and girls who endure horrific human rights abuses such as domestic violence, rape and sexual torture, widow rituals, forced marriage, human trafficking, female genital mutilation/cutting (FGM/C), and “honor” crimes.³ We provide free legal and social services to help our clients find safety and justice as they engage in

¹ <https://www.tahirih.org/>

² https://www.tahirih.org/wp-content/uploads/2020/07/Attachment1_Tahirih-comment-on-anti-asylum-NPRM.pdf

³ For background information on these types of gender-based violence, see, e.g., UNHCR, *Guidelines on the Protection of Refugee Women* 17, <https://www.unhcr.org/3d4f915e4.html>; UN Women, *Defining “honour” crimes and “honour” killings*, <https://endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html>; https://en.wikipedia.org/wiki/Female_genital_mutilation; https://en.wikipedia.org/wiki/Forced_marriage.

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the daunting, courageous, and rewarding work of rebuilding their lives and contributing to their communities. Since its founding, Tahirih has also served as an expert resource for the media, Congress, policymakers, and others on immigration remedies for survivors fleeing GBV both abroad and within the U.S. See, e.g., Tahirih Justice Center, *Tahirih in the News*;⁴ Tahirih Justice Center, *Congressional Testimony*;⁵ Tahirih Justice Center, *Comments*.⁶

As further explained below, Tahirih objects to the Information Collection's proposed revisions to the asylum application as a matter of public policy and because its use will violate: 1) asylum seekers' due process; 2) the Immigration & Nationality Act (INA); 3) the Administrative Procedure Act (APA); and 4) our international obligations as a State party to the United Nations (UN) Convention Relating to the Status of Refugees and 1967 Protocol (the Refugee Convention and Protocol).⁷

The Information Collection Instrument is also void as a threshold matter, as it was issued in violation of the Federal Vacancies Reform Act (FVRA). The Form was signed by Chad Mizelle in his purported capacity as "Senior Official Performing the Duties of the General Counsel, U.S. Department of Homeland Security."⁸ Because the DHS General Counsel does not have the authority to sign proposed or final rules under the Homeland Security Act or existing DHS delegations, the Information Collection also includes a paragraph in which purported Acting Secretary Chad Wolf "delegate[s] the authority" to sign the document to Mizelle.⁹ However, both Wolf and Mizelle are serving in violation of the FVRA, 5 U.S.C. §§ 3345 & 3346. As a result, both Wolf's delegation and Mizelle's signature are without force and effect under the FVRA, 5 U.S.C. § 3348(d)(1), and contrary to law under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). In fact, just today, the U.S. Government Accountability Office (GAO) issued a decision finding that "officials...including Chad Wolf...were named by reference to an invalid order of succession..."¹⁰ Accordingly, the Form must be withdrawn.

While we oppose the majority of proposed revisions to the Form, we are especially concerned about the impact they will have on survivors of GBV in light of our specific mission, experience, and expertise serving this particularly vulnerable population.¹¹ GBV is ubiquitous:¹² even women and girls who are also targeted for persecution for reasons unrelated to their gender are unfortunately also likely to suffer gender-based discrimination or violence in some form. GBV in all of its forms typically involves a set of common characteristics that leave survivors uniquely vulnerable. That set of characteristics includes (i) persecution at the hands of family members, communities, and other non-state actors; (ii) severe ostracization and searing social stigmas; (iii) disbelief of survivors; (iv) internalized shame; (v) the inability to disclose gender-based violence to or in the presence of children or male family members; (vi) the absence or nonenforcement of laws to protect survivors;

⁴ <https://www.tahirih.org/news-media/latest-updates/?tab=tahirih-in-the-news>

⁵ https://www.tahirih.org/pubs/?qmt%5Bpub_cat%5D%5B%5D=131

⁶ See FN 2.

⁷ <https://www.unhcr.org/1951-refugee-convention.html>

⁸ 85 Fed. Reg. at 36,306.

⁹ *Id.* at 36,290.

¹⁰ See <https://drive.google.com/file/d/1BCR-YlonpVGhuqCAblAsFN6DNt7w-h5n/view>

¹¹ <https://www.state.gov/other-policy-issues/gender-and-gender-based-violence/#ftn1>

¹² https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf

(vii) laws permitting gender-based discrimination or violence; (viii) cultural acceptance of gender-based violence; (ix) barriers to medical or mental health treatment for survivors; (x) forced dependence or unequal caretaking responsibilities; (xi) multiple victimization and revictimization; and (xii) ongoing violence even after a survivor reaches the U.S.

Survivors are typically isolated, traumatized, and cut off from family and community resources. Those who do manage to escape GBV are in desperate need of counsel,¹³ medical, mental health, and other services as they navigate our system.¹⁴ Yet due to the nature of GBV, survivors are *least* likely to be able to access such services. Access to corroborating evidence to support their claims is also very limited. As noted by UNHCR, “in gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution.”¹⁵ The formidable obstacles survivors already face in seeking safety have only been amplified by the global pandemic.¹⁶

Proposed Revisions to and Comments on the Information Collection Instrument – Form I-589

1. P. 1, Part A.I. Information About You, #10

Many asylum seekers do not identify as either “male” or “female,” rendering the two binary options to choose from in response to this question inadequate. We ask that an additional box to choose from, labeled “other,” be added.

2. P. 5, Part B, Information About Your Application, #1

If you are claiming membership in a particular social group(s), identify the particular social group(s).

The definition of a “particular social group” (PSG) contained in the NPRM is lengthy, technical, and complex. It is so intricate that even USCIS declined to include it in the asylum application. Rather, the application instructions simply refer asylum seekers to the CFR to find it. It is patently inappropriate and unjust to require traumatized individuals who lack knowledge of our legal system, language, and culture, to engage in legal research to locate the PSG definition and nuanced legal analysis to decipher it. This expectation is antithetical to the very experience that embodies what it means to be an asylum seeker in dire need of safe haven. As noted by the United Nations High Commissioner for (UNHCR) in its Handbook on Procedures and Criteria for determining Refugee Status (the Handbook): “The expressions “fear of persecution” or even “persecution” are usually foreign to a refugee’s

¹³ This is particularly the case for detained asylum seekers. See, e.g., Tahirih Justice Center, *Nationwide Survey: A Window into the Challenges Immigrant Women and Girls Face in the United States and the Policy Solutions to Address Them* (Jan. 31, 2018), <http://www.tahirih.org/wp-content/uploads/2018/01/Tahirih-Justice-Center-Survey-Report-1.31.18-1.pdf>

¹⁴ <https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5d290b07a8dea8000138bf97/1562970888076/2019-Advocate-Survey-Final.pdf>

¹⁵ <https://www.unhcr.org/3d58ddef4.pdf>

¹⁶ <https://msmagazine.com/2020/04/14/for-immigrant-survivors-the-coronavirus-pandemic-is-life-threatening-in-other-ways/>; <https://www.tahirih.org/wp-content/uploads/2020/03/Impact-of-Social-Distancing-on-Immigrant-Survivors-of-Gender-Based-Violence-Final-March-23-2020.pdf>

normal vocabulary. A refugee will indeed only rarely invoke “fear of persecution” in these terms, though it will often be implicit in his story.”¹⁷ While UNHCR deems the word “persecution” a term of art too technical for applicants to be expected to use, it is still significantly more accessible to a layperson than the term “particular social group.” It is noteworthy that USCIS cites UNHCR sources, including the Handbook, *in the I-589 Form itself* as legal and interpretive guidance for applicants to consult when completing their applications.¹⁸

In addition, it is extremely re-traumatizing for applicants to piece together precise details of persecution. Such details often include key facts relevant to identifying one’s PSG. Even the fortunate few who are able to retain counsel¹⁹ need sufficient time to develop trust and begin healing in order to coherently describe their claims in their applications. Applicants subject to a fast approaching application deadline are at an even greater disadvantage. Yet, including this technical question on the front end in the application itself imposes a significant risk of swift, erroneous denial of relief under the NPRM; the provision allowing pretermission for failure to establish a *prima facie* asylum claim is of particular concern.²⁰

The consequences of denial of an asylum application are the highest imaginable – return to brutal violence, torture, and even death. With applicants’ lives hanging in the balance, there is no countervailing government interest to justify including this question in the application. In fact, it is unclear what, if any, justification does exist to include it. An adjudicator can certainly elicit the same information effectively, later in the application process per UNHCR: “[O]ften the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail...It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect...”²¹

Finally, survivors of abuses such as forced marriage, “honor” crimes, and human trafficking most often apply for asylum on account of their membership in a PSG. They will undoubtedly and arbitrarily suffer immensely as a result. In light of the above, this question should be removed.

P. 6, Part B, #1A4

Why you believe the harm, mistreatment, or threats occurred. If you are seeking asylum or statutory withholding of removal based on one or more of the protected grounds listed above (race, religion, nationality, political opinion, or membership in a particular social group), you

¹⁷ Handbook, P. 10, Chapter II, B(2)(a) Paragraph 46.

¹⁸ See Form at P.4; II. Basis of Eligibility; D. Legal Sources and Guidance Relating to Eligibility #8-10; P. 5; IV. Right to Counsel citing the UNHCR database at www.refworld.org

¹⁹ Over the past five years, between 15% and 24% of all asylum seekers have been unrepresented by counsel. <https://trac.syr.edu/immigration/reports/588/>

²⁰ See 8 CFR §1208.13(e).

²¹ Handbook p. 12 Chapter II, B(3)(a) Paragraphs 66 and 67.

must explain why you believe the harm, mistreatment, or threats you experienced were on account of one or more of the protected grounds.

P. 6, Part B, #1B3

Why you believe you would or could be harmed or mistreated. If you are seeking asylum or statutory withholding of removal based on one or more of the protected grounds listed above (race, religion, nationality, political opinion, or membership in a particular social group), you must explain why you believe the harm or mistreatment you fear are on account of one or more of the protected grounds.

As with the definition of “PSG” in the NPRM, “nexus” is a similarly technical and nuanced legal construct. The definition of “nexus” is likewise not provided in the asylum application, but rather, applicants must navigate the CFR to find it.²² It is unduly burdensome and inappropriate to require an applicant to identify and analyze this element of asylum in his/her application. As explained above, and consistent with the UNHCR Handbook, it is up to the asylum officer to ask questions to elicit factual information in a trauma-informed manner to inform his/her legal analysis. These questions should therefore also be eliminated.

3. P. 5, Part B, #1A1-3

Have you, your family, friends, colleagues, or other similarly situated persons ever experienced harm, mistreatment, or threats in the past by anyone? If “Yes,” explain in detail 1. What happened; 2. When the harm, mistreatment, or threats occurred; 3. Who caused the harm, mistreatment, or threats.

P. 6, Part B, #1C1-3

Have you, your family, friends, colleagues, or other similarly situated persons ever been subjected to torture in the past? If “Yes,” explain in detail: 1. What happened; 2. When the torture occurred; 3. Who caused the harm, which, along with other factors, amounted to torture.

It is unduly burdensome and unrealistic to require an asylum applicant to know this information at all, and/or in the level of detail asked for. Further, the term “similarly situated” is not defined. Applicants who do have even partial knowledge of harm, threats, or torture to the individuals in this list may fear for victims’ safety upon disclosing it, especially in writing. Applicants may also hesitate to disclose the information requested for fear of breaking victims’ trust if they provided sensitive details in confidence. This is particularly the case where harm includes GBV such as sexual assault, to which intense social stigmas often attach. This question unfairly sets applicants up for negative credibility determinations through no fault of their own. While an applicant’s response may help establish prevalence of the persecution or torture he/she is fleeing, asking this as a “yes” or “no” question in the application is inappropriate. Rather, a similar question could be asked during the asylum interview in a trauma-informed manner. The question should be eliminated.

²² See Form I-589 Instructions at P. 3; Basis of Eligibility.

4. P. 6, Part B, #1B2

If the entity or person(s) who you believe would harm or mistreat you is not the government or a government actor, you must explain whether the government would be unable or unwilling to control the entity or person(s) that caused the harm or mistreatment. Explain whether you believe the government, or a government actor would be able and willing to protect you against the harm or mistreatment you fear, and why or why not.

This question should include a clarification explaining that any relevant country conditions information that applicants submit in response will be duly considered, notwithstanding the NPRM bar on submission of certain evidence.²³ Without this clarification, applicants will be perversely and unlawfully required to violate the NPRM in order to file for asylum and thus also violating their due process.²⁴

5. P. 7, Part B, #1C3 con't

If the entity or person(s) who caused the harm was not the government or a public official acting in an official capacity or other person acting in an official capacity, you must explain whether the harm was inflicted by or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity.

If the entity or person(s) who caused the harm was not the government or a government actor, explain whether the government or a public official acting in an official capacity or other person acting in an official capacity had awareness of the harm, how the government or a public official acting in an official capacity or other person acting in an official capacity became aware of the harm, and whether the government or a public official acting in an official capacity or other person acting in an official capacity acted to prevent such harm.

If the entity or person(s) who caused the harm was not the government or a public official acting in an official capacity or other person acting in an official capacity, explain whether there is a connection between the government or a public official acting in an official capacity or other person acting in an official capacity and the entity or person(s) who caused the harm, and if so, describe [the] how they are connected.

P. 7, Part B, #1C4

Why you believe the torture occurred.

P. 7-8, Part B, #1D2

If the entity or person(s) you believe would harm you is not the government or a public official acting in an official capacity or other person acting in an official capacity, you must explain whether the harm would or could be inflicted by or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity.

²³ See 85 Fed. Reg. at 36,282.

²⁴ See https://www.tahirih.org/wp-content/uploads/2020/07/Attachment1_Tahirih-comment-on-anti-asylum-NPRM.pdf for further analysis.

If the entity or person(s) you fear is not the government or a public official acting in an official capacity or other person acting in an official capacity, explain whether the government or a public official acting in an official capacity or other person acting in an official capacity would become aware of the torture, how the government or a public official acting in an official capacity or other person acting in an official capacity would become aware of the torture, and how the government or a public official acting in an official capacity or other person acting in an official capacity would respond.

If the entity or person(s) you fear is not the government or a public official acting in an official capacity or other person acting in an official capacity, explain whether there is a connection between the government or a public official acting in an official capacity or other person acting in an official capacity and the entity or person(s) you fear, and if so, describe how they are connected.

P. 8, Part B, #1D3

Why you believe you would be tortured.

These questions are virtually incomprehensible; expecting asylum seekers to comprehend them is a violation of due process. Again, note UNHCR's concerns with expecting applicants to use or apply even the basic term "persecution." It is also unreasonable and unrealistic to require applicants to have awareness and produce evidence of what appears to be asked for in these questions. This is particularly the case with regard to the state of mind of a persecutor or torturer. Survivors of GBV in particular will face a virtually impossible task in trying to formulate their responses. The question at P. 8, Part B, #1D3 could also be construed in two different ways, ie. "how do you know you would be tortured?" or "why would the torturer torture you?"

Including these questions poses a risk of erroneous, swift denial of asylum with no justification and they should be removed from the Form.

6. P. 9-10, Part C, Additional Information About Your Application, #4A-B

In #4B, the question should read:

"Have you, your spouse, your child(ren), or other family members, such as your parents or siblings, ever applied for or received any lawful status in any country other than the one from which you are now claiming asylum? Could you, your spouse, your child(ren), or other family members, such as your parents or siblings, ever have applied for any lawful status in any country other than the one from which you are now claiming asylum, but did not?"

However, for these questions, there are only boxes to check for "No" and "Yes." It is unreasonable and unrealistic to expect applicants to know the answers to these questions particularly with regard to family members not included as derivatives in their applications. The question violates applicants' due process by setting them up for negative credibility determinations through no fault of their own. An additional box should be added for applicants to respond "I don't know," or the question should be otherwise eliminated.

7. P. 11, Part C, #9C

If “Yes,” specify in your response what occurred, the circumstances, date, and the reason(s) for the circumstances.

This sentence should be amended as follows to clarify that it refers to #9A-C, and not just #9A:

If you answered “Yes,” to item Numbers 9.A., 9.B., and/or 9.C. specify in your response what occurred, the circumstances, date, and the reason(s) for the circumstances.

8. P. 12, Part C, #10

It is unreasonable to expect an applicant to know whether he/she or his/her derivatives satisfy the specific legal definition of a victim of a severe form of trafficking in persons. On P. 7- 8 of the asylum application instructions there are references to “human trafficking,” but again, applicants are not expert in legal definitions. The second sentence following 10.I should include an additional checkbox so applicants can opt to respond “I don’t know.” Also, the fourth sentence following 10.I should be amended as follows so the applicant knows to include information related to not only him/herself, but also his/her derivatives:

If you answered “Yes” to any of the questions in Item Numbers 10.A-10.I, if applicable, provide any information related to your own, and/or your derivative family members’ extraordinary circumstances that would warrant a favorable exercise of discretion, and explain any exceptional or extremely unusual hardship that would result to you and/or your derivative family members from a denial of your asylum application.

Proposed Revisions to and Comments on the Form I-589 Instructions

1. P. 1; What Is the Purpose of This Form?

The definition of a *frivolous* asylum application is available in the Code of Federal Regulations at 8 CFR sections 208.20 and 1208.20.

P. 9; Part D. Your Signature

The definition of *frivolous* within the context of application for asylum is available in the Code of Federal Regulations at 8 CFR sections 208.20 and 1208.20.

P. 3; Basis of Eligibility; A & B

The definitions of *particular social group, political opinion, persecution, and nexus* are available at 8 CFR 208.1 and 1208.1.

As further explained on p. 3-4 above, the Form instructions do not provide adequate notice to applicants as to the meaning of these highly nuanced legal terms. It is unreasonable in the extreme to expect applicants to access these terms in the CFR. Furthermore, even if the definitions were included in the instructions, applicants cannot be

expected to readily understand and effectively apply them to the facts of their cases.²⁵ The definition of “frivolous” in the NPRM is instructive, as it is a far cry from what a common understanding of the term might be. It is hardly the role of an asylum seeker to become a legal expert to avoid return to harm. Rather, it is the function of an adjudicator to engage in a trauma-informed legal analysis in accordance with UNHCR guidance: “...an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs.”²⁶

2. P. 4; II. Basis of Eligibility; B. Withholding of Removal; Withholding of Removal Under the CAT Regulations

The following paragraph, in the first column, is erroneously duplicated directly below it: *“The victim must be in the custody or physical control of the torturer...may not defeat the objective and purpose of the Convention Against Torture.”*

3. P. 5; III. Confidentiality

No information indicating that you are seeking or have sought asylum or withholding of removal will be disclosed without your written consent, except as otherwise permitted under the regulations at 8 CFR sections 208.6 and 1208.6. For example, upon filing your application, any information contained in your application, any supporting evidence, or any information about you, may be disclosed as part of an investigation or adjudication of the merits of your application or any other application arising under the immigration laws, as part of any state or federal criminal investigation, proceeding, or prosecution, pursuant to any federal mandatory reporting requirement, to deter, prevent, or ameliorate the effects of child abuse, as part of any proceeding arising under the immigration laws, as part of the Government's defense of any legal action relating to your immigration or custody status, or at the discretion of the Secretary of Homeland Security or the Attorney General.

The disclaimer in the first sentence is rendered meaningless by the exceptions to the confidentiality provision in the NPRM. It is highly misleading to include this sentence. The sentence should be removed so applicants do not unwittingly put themselves or others in danger by mistakenly relying on it when deciding whether to disclose sensitive information.²⁷

We also ask for the following question to be added for the same reason:

²⁵ For comments regarding the content of these sections, please see FN 2.

²⁶ See Handbook, P. 31 PART TWO – Procedures for the Determination of Refugee Status; A; Paragraph 190.

²⁷ For our substantive objections to the related confidentiality provisions in the NPRM, see https://www.tahirih.org/wp-content/uploads/2020/07/Attachment1_Tahirih-comment-on-anti-asylumNPRM.pdf at FN2.

Knowing that the information you provide may be disclosed in a variety of circumstances as described above, is there certain information that you are hesitant to disclose because you fear that doing so may put your or others' safety at risk?

7. P. 5; V. Obtaining and Completing the Form

If any question does not apply to you or you do not know the information requested, answer "none," "not applicable," or "unknown."

Throughout the Form, there are only two options for responses to certain questions: "No" or "Yes." This instruction is confusing as a result. The Form should either be revised to include all of these other options as boxes to be checked, or the following sentence should be added to this instruction:

If any question does not apply to you or you do not know the information requested, write in "none," "not applicable," or "unknown" on the application next to the check boxes if there is no box with this option.

8. P. 11; XI. Incomplete Asylum applications; #2

An Application will be considered incomplete in each of the following cases...2. The application is unsigned;

This provision should specify that Part D must be signed, not Part G as explained on Page 9 of the instructions.

9. P. 16; Paperwork Reduction Act;

The public reporting burden for this collection of information is estimated at 18 hours per response, including the time for reviewing instructions, and completing and submitting the form.

Due to the additional time applicants will need to complete this form, the volume of asylum seekers Tahirih will be able to assist both directly and through *pro bono* counsel will decrease. More applicants will therefore proceed *pro se*, putting them at a greater disadvantage. In addition, it is extraordinarily burdensome for asylums seekers recovering from severe trauma to navigate an application so intricate that it requires 18 hours to complete.

III. Conclusion

Use of the revised Form I-589 will arbitrarily and profoundly harm asylum applicants including survivors of GBV. The Form also violates domestic and international law and is patently invalid as it was issued in violation of the FVRA.

We appreciate your careful consideration of these comments and look forward to your detailed feedback. Please contact me at irenas@tahirih.org or 571-282-6180 for additional information.

Respectfully,



Irena Sullivan
Senior Immigration Policy Counsel