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Re: Collection of Information, Form I-589 OMB Control Number 1615-0067, Relating to USCIS RIN 1125-AA94, EOIR Docket Number 18-0002

Kids in Need of Defense (KIND) submits the following comments regarding proposed revisions to the Form I-589, Application for Asylum and for Withholding of Removal, published in connection with the Notice of Proposed Rulemaking (NPRM), Procedures for Asylum and Withholding of Removal, Credible Fear and Reasonable Fear Review, at 85 Fed. Reg. 36264 (June 15, 2020). KIND objects to the proposed revisions (herein, the “Proposed Form” and “Proposed Instructions”) on the following grounds that the revisions:

- Make the instructions and form less accessible for applicants, particularly those who are unrepresented;
- Fail to elicit information in a manner that is neutral and unbiased; and require applicants to draw numerous legal conclusions and engage in speculation about matters outside their immediate knowledge or control;
- Create the impression that asylum, withholding of removal, or protection under the Convention Against Torture is virtually impossible to obtain, and create numerous obstacles that are likely to discourage or deter applicants from starting or completing an application;

- Encourage the disclosure of information that contributes to adverse discretionary decisions without providing equal opportunity to disclose positive information, and.
- Impose a significant burden on the public far in excess of the government's estimate that 18 hours are required to complete the form.

These factors will have particularly adverse consequences for the unaccompanied children we serve. We therefore ask that the Proposed Instructions and Proposed Form be withdrawn.

KIND is mindful of the admonition in the NPRM that “[c]omments received on the information collection that are intended as comments on the proposed rulemaking rather than those specific to the collection of information will be rejected.” Having submitted separate comments on the proposed rulemaking on July 15, 2020, KIND intends the current comments solely as specific to the collection of information. Any comments in later sections that reference the rulemaking do so only in the context of explaining the proposed revisions as we understand them. Nonetheless, the request for comments on the information collection is intrinsically tied to the agencies’ flawed process for eliciting comments on the rulemaking. Amendments to a substantive underlying rule are not clearly divisible from information collection amendments made to conform to the underlying rule. The instant revisions to the collection of information are no exception, extensively reflecting the content and concepts of the June 15, 2020 rulemaking. The threat of rejecting comments that may be deemed to be “intended as comments on the proposed rulemaking” is likely to have a chilling effect. This is particularly concerning given the extensive scope of the rulemaking, the abnormally truncated comment period, and the inherent linkage between the information collection and the rulemaking.

In particular, the truncated comment period for the rulemaking effectively forced the public to comment serially, first on the proposed rulemaking and then on the proposed information collection. This structure virtually eliminated any opportunity for commenters to treat the proposed rules and proposed information collection holistically, such as by suggesting changes to the proposed rules and corresponding changes to the Proposed Form and Proposed Instructions. For example, a commenter who recommended withdrawal of a particular provision of the proposed rulemaking would prefer to recommend that the agencies adopt an information collection reflecting that withdrawal. However, in the event the agencies reject the commenter’s recommendation to withdraw a provision of the rulemaking, any call for deleting the corresponding sections from the proposed information collection would render a severe disservice to future users of the revised Form I-589 and Instructions. As a result, commenters on the proposed information collection are effectively forced to accept the proposed rules as a given. The threat to reject commentary on the proposed rulemaking effectively converts comments on the Proposed Form and Instructions to an analysis of how accurately they represent the proposed rulemaking. Intentionally or not, this inhibits robust commentary by

the public and deprives the agencies of full access to the collective experience of those most knowledgeable about the use of the Form and Instructions.

I. Analysis of Revisions to the I-589 Instructions

The proposed revisions to the Form I-589 instructions make preparation of an asylum application significantly more difficult, particularly for unrepresented individuals and children. For more than a decade, KIND attorneys and pro bono counsel have worked closely with children to prepare their asylum applications; even when a child is assisted by counsel, explaining the process of obtaining asylum, the necessary requirements, and the type of evidence the child must provide can involve hours of discussion. Eliciting information can be extremely traumatic for children, many of whom have suffered significant past harm and are frequently afraid to share their stories, even with trusted adults. While experienced counsel can shield children from some of the strain imposed by the increasingly complex and legalistic explanation of asylum requirements included in the instructions, it is impossible to imagine a child attempting to understand the instructions alone without experiencing significant confusion and fear regarding submitting information to the government. We provide general comments below, as well as comments related to specific sections of the instructions, all in the interests of ensuring that access to asylum and other forms of protection remain available to all those persons seeking protection.

1. The Proposed Instructions demand extensive engagement with legal concepts outside the scope of the applicant's responsibility

The Form I-589, which is used by applicants to seek relief from threats to life and safety, plays a central role in ensuring that vulnerable individuals have access to asylum and other protections. Many applicants do not speak English fluently and have little or no experience interpreting U.S. law. Experienced legal counsel is unavailable to every applicant, and yet the process of applying for asylum is filled with potential legal hurdles, such as meeting the one-year filing deadline¹ and running the risk of filing a frivolous claim that could result in the loss of access to all immigration benefits. Consequently, the Form I-589 must be fully accessible and informative to unrepresented persons. Over time, Form I-589 and its accompanying instructions have become increasingly longer, more legalistic, and harder to penetrate for the lay person, whether the applicant is proceeding pro se or reviewing a legal representative's work pursuant to the form's signature requirements. The Proposed Instructions, increasing from 13½ pages to almost 16, represent a sizable incremental step in that trajectory. Of course, it is not merely the raw length of the Proposed Instructions that impairs their accessibility and informational value; rather, it is the length combined with a high proportion of legalese,² embedded assumptions that the filer

¹ Unaccompanied minors are exempt from the one-year filing deadline, but the impact on asylum-seekers generally leads us to highlight the impact of this provision when constructing an accessible form.

² See, e.g., Proposed Instructions at 7-8, discussing adverse discretionary factors.

is responsible for significant legal research,³ and repeated *in terrorem* clauses ostensibly designed to dissuade frivolous filings but that in practice would likely undermine and delay the preparation of good faith applications.⁴

The Proposed Instructions improperly set an expectation that the complete case-in-chief be presented within Form I-589, contrary to the Board’s well-reasoned decision in *Matter of E-F-H-L*.⁵ For example, the Proposed Instructions demand as follows:

[Y]ou must include a detailed explanation of any torture you have experienced and why you fear torture In your response, you must write about any extreme form of cruel or inhuman treatment, severe physical or mental pain and suffering, mistreatment you experienced, or any threats made against you by a government, somebody connected to a government, or someone acting 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.

Applicants for protection, particularly children, who fear or have experienced “any extreme form of cruel or inhuman treatment, severe physical or mental pain and suffering, [or] mistreatment” may be unable to elaborate on those experiences in detail at the time they prepare their written applications. The applicant may need to file the application rapidly to avoid being forced to seek an exception to the one-year filing deadline, or at the behest of an immigration judge. At that point, the applicant may not have obtained assistance of counsel, or therapeutic support for the process of recounting traumatic events. Accordingly, this and other requirements for detailed information should be eliminated from the Proposed Instructions and replaced with an instruction reminding the applicant of future opportunities to supplement the record.⁶

Equally important is what the Proposed Instructions do not accomplish. They do not assist the applicant in understanding how the facts of his or her claim correspond to the legal concepts

³ For example, the Proposed Instructions contain approximately 40% more references to the asylum statute and regulations (INA § 208, 8 CFR Parts 208, 1208) than the 9/10/19 edition of the instructions.

⁴ *E.g.*, multiple admonitions about the penalties for frivolous applications, Proposed Instructions at 9.

⁵ *Matter of E-F-H-L*, 26 I&N Dec. 319, 323 (BIA 2014). We note that the Attorney General’s vacatur of that decision lacked substantive legal analysis. *Matter of E-F-H-L*, 27 I&N Dec. 226 (A.G. 2018).

⁶ Indeed, this would also be more consistent with Congressional intent. *See* H.R. Rep. No. 104–469, part 1, at 175–76 (1996) (“Finally, the Committee believes that the interest in filing a timely application supersedes the interest in filing a comprehensive application. The Committee is aware that current INS regulations require a relatively long and detailed application for asylum. While it may be important for an applicant to be able to commit the details of his or her case to writing prior to an interview with an asylum officer, it is more important that the case be commenced as soon as possible after the alien’s arrival in the U.S. Thus, the Committee encourages the INS to adopt a simpler form of application for asylum, with generous allowance for amendment. Furthermore, the INS should take affirmative steps to notify the public of the 30-day filing requirement.”).

expounded. The Proposed Instructions do not inform applicants about categories of information relevant to establishing positive equities (despite discussion of the discretionary nature of asylum, the applicant’s burden of proof, and enumerated negative discretionary factors). Nowhere do the Proposed Instructions state that U.S. law guarantees the right to apply for asylum and related relief, or that the applicant’s claim will be evaluated on its own merits, with due consideration for all of the evidence. Nor do the Proposed Instructions advise the applicant of the proposed rule on pretermission of applications; in the event the proposed rulemaking is adopted as written, this would mean that the Proposed Instructions signally fail to capture a major new feature of asylum law and fail to provide applicants with notice that they may be denied any opportunity to supplement the filing in writing or at a hearing or interview. And, despite the increasing demands placed on applicants by the Proposed Instructions, they do not offer guidance on access to counsel or language-access rights.

The Proposed Instructions should be rewritten to ameliorate these shortcomings.

2. Comments on specific sections

Page 2, Part 1, Section I (Who May Apply and Filing Deadlines)

The Proposed Instructions state, “You **must** submit certain documents for your spouse and each child included as required by these instructions. Children 21 years of age or older and married children must file separate applications.” Proposed Instructions at 2. The phrasing of the Proposed Instruction begs the question “separate from what?” and embraces an adult-centric approach that assumes the applicant is the head of a household. This incorrectly implies by omission that children who are under 21 and unmarried do not have the right to file applications separately from a parent on whom they are dependent.

The statutory definition of “unaccompanied alien child” is set forth in its entirety in the Proposed Instructions at page 2. In light of the status of the litigation in *J.O.P. v. DHS*, No. 19-cv-1944 (D.Md.), this revision of the information collection is an opportunity to make clear that asylum office jurisdiction over unaccompanied children is not limited to children who at the moment of filing meet the statutory definition, but rather is governed by longstanding USCIS policy as set forth in the May 2018 memorandum “Updated Procedures for Determination of Initial Jurisdiction over Asylum Applications Filed by Alien Children.” Similarly, although not referenced in the previous edition of the instructions, the revision presents an opportunity to indicate in the Proposed Instructions that UAC filers are exempt from the statutory one-year filing deadline.

Page 3, Part 1, Section II A (Asylum)

The Proposed Instructions state:

You will not be found to be a refugee or have it decided that your life or freedom would be threatened based on membership in a particular social group in any case unless you first articulate on the record, or provide a basis on the record for determining, the definition and boundaries of the alleged particular social group.

Proposed Instructions at 3. One positive feature of this amendment to the information collection is that this statement makes clear that an applicant is not required to “articulate” the formulation of a claimed particular social group before the immigration judge, but instead may “provide a basis on the record for determining[] the definition and boundaries of the alleged particular social group,” *id.* However, the syntax of this instruction renders it confusing. First, it is unclear what is meant by “[y]ou will not . . . have it decided” and “in any case.” Second, the natural reading of this Proposed Instruction is that a person cannot be found to be a refugee absent evidence of membership in a particular social group, which is a misstatement of the law given that one may meet the definition of refugee on the basis of other protected grounds.

A third flaw is that this Proposed Instruction wrongly implies that the relief sought by filing Form I-589 is limited to cases where “life or freedom would be threatened”; relief may also be available in many other circumstances, such as where bodily harm such as rape, torture, or other violence is threatened, and cases where persecution occurred in the past. The Proposed Instruction continues:

A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as a basis for any motion to reopen or reconsider . . .

Id. KIND believes this instruction to be groundless and therefore improper: There is no basis in law for instructing that future claims, including ineffective assistance of counsel, shall be waived. Moreover, under the principle of *esjudem generis*, the protected grounds of particular social group must not be adjudicated differently than the four other protected grounds; a heightened requirement on pain of waiver cannot apply to particular social group claims as distinct from claims based on race, religion, nationality, or political opinion.

The Proposed Instructions further state: “[E]ven if you meet the definition of a refugee and are otherwise eligible for asylum, you may be denied asylum in the exercise of discretion.” *Id.* Although later instructions elaborate on negative discretionary factors, the Proposed Instructions never invite the applicant to offer information about factors warranting the positive exercise of discretion, and offer no guidance on categories of positive factors that may be weighed in a discretionary determination.

Page 4, Part 1, Section II B (Withholding of removal under CAT)

Concepts from recent decisional law are incorporated at length into the Proposed Instructions on CAT relief. Proposed Instructions at 3-4. The document introduces, but cannot effectively illuminate, numerous legal concepts, including acquiescence, rogue officials, and breach of a legal responsibility. *Id.* In effect, the applicant is prompted to pre-judge his or her own claim for relief, instead of adducing information, in writing and at a hearing, that enables the adjudicator to determine eligibility. As discussed *supra*, the demands for detailed descriptions of “cruel or inhuman treatment, [or] severe physical or mental pain and suffering,” *id.* at 4, may exceed the capacities of an applicant filing under time pressure, particularly that of a child or other applicants who are survivors of severe trauma. Moreover, for certain cases, the Proposed Instructions require the applicant to “explain whether and how” an official or person acting in an official capacity “had awareness of the activity and breached his or her legal responsibility to intervene to prevent such activity.” To the extent this instruction calls for an assessment of how a third person acquired awareness, compliance with this instruction is not only infeasible but an attempt to speculate on the applicant’s part may expose the asylum-seeker to the more severe penalties envisioned under the expansion of the definition of frivolous filings proffered in the Proposed Rule.

Page 5, Part 1, Section III (Confidentiality)

The Proposed Instructions add incremental detail on exceptions to the agencies’ responsibility to maintain the applicant’s confidentiality. KIND agrees that the disclosure of such exceptions is necessary. However, because the amount of text devoted to the exceptions dwarfs the amount of text devoted to the confidentiality obligation, and because the exceptions are not described in plain language, a chilling effect is likely.

Page 7-8, Part 1, Section V.C. (Additional information about your application)

A discussion of “Adverse Factors Related to the Discretionary Grant of Asylum” comprises a full page of the Proposed Instructions. The failure to devote any space in the Proposed Instructions to guidance on positive factors related to the discretionary grant of asylum is a serious omission, as noted *supra*, and is likely to produce bias in adjudications.

KIND believes that the agencies exceed their statutory authority and contravene binding decisional law in including certain of these factors in the Proposed Instructions. For example, because the location and manner of entry is immaterial to eligibility for asylum, INA § 208(a), and because unlawful entry merits little to no consideration in evaluating an asylum claim, the inclusion of unlawful entry as a “significant adverse factor” renders the Proposed Instructions *ultra vires*. Proposed Instructions at 8.

II. Analysis of Revisions to the I-589 Application

The actual collection of information required in the proposed revisions is extraordinarily burdensome, far exceeding the 18 hours indicated in the notice of information collection.⁷ The current form estimates a 12 hour completion rate, which is itself far from accurate, but even under USCIS's own estimate, completion time of the form has increased by 50 per cent; a 150% increase in completion time against a more reasonable baseline would result in an estimate of several additional workdays per application.

The sensitivity and emotional cost of recounting acts of persecution, intimidation, and harm take a devastating toll that cannot be measured solely in economic terms. Consequently, if USCIS plans to make revisions to the I-589, such revisions should be geared toward making the information collection simpler and more straightforward, rather than more complex, intimidating and legalistic. If USCIS persists in revising the form, it must consider creating a second form for unaccompanied children, who should not be expected to answer many of the questions contained in the current form.

1. Specific comments

Page 5 Part B—Information About Your Application

Question 1

Question 1 now includes a box that requires applicants asserting a claim based on a particular social group to indicate the specific particular social group in question. Although the revised instructions indicate that the applicant need only provide sufficient information to elicit a finding of the existence of a particular social group before an adjudicator, Question 1 implies that a specific and fully articulated group should be provided. An unrepresented individual, particularly a child, may not have the legal knowledge to understand this requirement and risks falling short of the newly proposed regulatory requirements that an individual must articulate all particular social group claims in the first instance.⁸ While KIND has objected to this requirement in our comments on the Proposed Rule, we note here that the new box could easily be used to confound applicants during a hearing if they identified a particular social group that, upon further research and testimony is not the actual group that forms the legal basis for a claim. At a minimum, this question should be revised to ensure that the applicant provides a description to the best of his or her ability and an acknowledgment that this information may be supplemented at the time of hearing. If such guidance is not provided, it affords an opportunity for an immigration judge to pretermite the claim (should the Proposed

⁷ 85 Fed. Reg. 36290.

⁸ See, 85 Fed. Reg. 36279.

Rule go into effect) based on the applicant's inability in the first instance to adequately state a legally cognizable social group.

In KIND's experience, few if any child applicants are equipped to articulate a particular social group in a manner that Question 1 calls for, especially during the early stages of their case. For most child applicants, even coming to understand the concept of a particular social group (and the factors that contribute whether a particular social group is legally cognizable) requires significant time and explanation in developmentally appropriate terms, often over the course of numerous meetings. Even with the assistance of counsel, children who have experienced severe trauma often do not recount all information at the outset of the case due to the need to build trust with the assisting adult and other factors. Given these difficulties faced by children who are represented, a pro se minor applicant will rarely if ever be able to complete this portion of the form in a manner that ensures fair consideration of his or her claim on this ground.

Question 1A

Question 1A adds the language "other similarly situated persons" to the questions regarding whether family, friends, or colleagues have experienced harm and deletes the modifier "close" when referring to friends or colleagues. Both changes significantly expand the universe of information requested, presupposing that the applicant has knowledge of harm that may have occurred to anyone in his or her orbit and extending to people who may be completely unknown to the applicant. These revisions should be deleted as over burdensome and outside the applicant's immediate knowledge.

Question 1A, parts 1-3 break down the question of what happened to an individual into distinct parts, which may make it easier for some applicants to identify the important elements in their claim and is therefore more in keeping with creating an accessible form. On the other hand, for other applicants, the breakdown may simply create more opportunities for an applicant to inadvertently contradict earlier statements. While a more precise set of questions may be valuable generally, in the context of the current revisions, these changes are likely to contribute to additional obstacles for some applicants. The box following part 3, however, regarding harm from a private actor, asks the applicant to explain whether the government was unwilling or unable to provide protection, whether the applicant reported the harm, mistreatment or threats, what was reported, to whom, the outcome of the report, and, if the applicant did not report the incident, the reason for failing to do so. This question, which clearly tracks new evidentiary requirements under the Proposed Rule, seeks to elicit information that an applicant may not have in the first instance, and may not be able to adequately explain outside the scope of a full inquiry into the context of the claim. It provides fodder for an unlawful pre-termination or a finding of a frivolous application and should be removed.

This is particularly true for child applicants who, in many cases, may not have direct knowledge of whether harm or mistreatment was reported to government authorities, or fully understand the reasons why it was not. In circumstances involving threats or harm to children, adult family members or caregivers are usually involved in the decision of whether or not to report incidents to government officials, and/or carry out the reporting. Child applicants therefore rarely have direct knowledge of the full circumstances around reporting without seeking additional information from others involved, usually with the assistance of counsel. Question 1A, part 4 initially required the applicant to offer his or her thoughts on why the harm occurred but has been modified to require the applicant to provide a legal conclusion that the incidents described were on account of a protected ground. This requires the applicant to draw legal conclusions that he or she may be unable to articulate, particularly absent a full hearing, in which the **adjudicator** is required to determine whether the evidence supports a legal determination.

In KIND's experience, child applicants are frequently unable to understand or fully articulate the reason(s) they were harmed. As early as 1998, the legacy INS recognized the difficulties children may have in articulating the legal elements of their claim. The Guidelines for Children's Asylum Claims acknowledge the reality that child applicants may have limited knowledge of events or information relating to their claim, including but not limited to an inability to identify relevant motives for the persecution.⁹ A legal determination that harm was experienced "on account of" a protected ground involves consideration of both direct and circumstantial evidence the latter of which children are often less capable of readily identifying. For example, an indigenous child who experiences discriminatory treatment or harm might not recognize that the harm he or she suffered was on account of race, especially in the absence of direct evidence or full knowledge of the sociopolitical context in which the harm occurred.

Question 1B

This section, which relates to fear of future persecution, adds questions that reflect the Proposed Rule's new burden shifting requirements in cases where the applicant has established past persecution. Question 1B2 includes a new box relating to fear of harm from a private actor, asking the applicant to explain why the government would be unwilling or unable to provide protection. Question 1B3 would require the applicant to explain how the harm would be on account of a protected ground. The objections posed to Question 1B are repeated here,

⁹ See Guidelines for Children's Asylum Claims, U.S. Department of Justice, Immigration and Naturalization Service, Office of International Affairs, File 120/11.26 (December 10, 1998) (hereinafter "INS Children's Guidelines") (providing that in such cases "a nexus can still be found if the objective circumstances support the child's claim that the persecutor targeted the child based on one of the protected grounds").

but we note that it is particularly difficult for an applicant, especially a child, to speculate on the government's actions, particularly if past persecution has already been determined. The likelihood that this question will be used to pretermite cases or decrease the government's responsibility to ascertain all relevant facts in a case is significant. These revisions should be deleted to ensure that these issues are more fully explored in a hearing.

Questions 1C and D

Although the current form includes questions about fear of torture, the proposed revisions move the general question to Part B and significantly expand the scope of the questions. New Question 1C asks whether an applicant fears torture and then asks whether "you, your family, friends, colleagues, or other similarly situated persons" have ever been subjected to torture. The applicant must also explain whether the harm was inflicted by or at the instigation of someone acting in an official capacity. If a private actor, the applicant must explain whether a public official had awareness of the harm and whether a public official acted to prevent such harm. The applicant must also explain whether there is a connection between the private actor and government officials and explain the connection. These questions are then repeated regarding fear of future torture in new Question 1D, but the applicant is also required to explicitly explain "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."

As the government has systematically attempted to reduce eligibility for asylum, it has come to rely increasingly on evidence that honors the Convention Against Torture obligations as a defense to charges that it is not meeting its international protection agreements. Consequently, the significant expansion of questions relating to the Convention Against Torture must be read not as a desire to obtain more legitimate information but as an effort to bolster these claims that individuals will receive a fair review of their application. The questions themselves, however, run counter to that objective, requiring so much speculation and legal conclusion on the part of the applicant, as well as legally unsupported requirements that the applicant definitively establish the connection between private actors and government officials, that it will become even more difficult for applicants to establish a claim based on torture. It appears that this section will be used primarily to permit even more rapid expulsions or removal of individuals who are unable to provide this information in the first instance and who will be unlikely to have the benefit of obtaining an asylum hearing if the Proposed Rule is adopted as written. Given the highly politicized nature of this section, it should be removed from the Proposed Form and the government should revisit its procedures for providing Convention Against Torture determinations.

Page 12, Part C Additional Information About Your Application

Questions 1 to 4.

The questions regarding past immigration history currently contained in Part C Questions 1 and 2 have been significantly expanded on the Proposed Form to encompass Questions 1 to 4, which ask for extensive information on the activities of the applicant and family members regarding prior applications for asylum, travel through other countries, and immigration status in those countries. While the current form frames these questions so that an applicant may provide narrative answers, the proposed revisions break many of the initial questions down into yes/no answers for which the applicant may not have sufficient knowledge. There is no opportunity to answer “I do not know” or to provide additional explanation. Where narrative is required, these questions ask the applicant to address the availability of permanent or temporary relief from removal in countries through which the individual has resided or transited. Again, much of the information requested is likely outside the scope of the applicant’s knowledge and may require legal expertise. As KIND noted in its comments to the Proposed Rule, the TVPRA explicitly exempted children from the safe third country bar in part because Congress recognized that children were likely to face significant limitations understanding or navigating the laws of countries through which they traveled. Finally, this section is designed to elicit negative information that may be applied in consideration of adverse discretionary factors under the Proposed Rule. As such, to the degree that those questions seek to elicit information that, on a substantive level, federal courts have already found to be unlawful means for barring asylum, these questions are invalid and should be removed.

In KIND’s experience, unaccompanied and separated children frequently do not have sufficient information about the whereabouts and activities of their family members to accurately answer these questions. KIND serves children who have been separated from parent(s), guardian(s), and/or other family members at all stages of migration. Such children are not able to accurately answer whether family members from whom they were separated at any point during the migration were eligible to apply and/or applied for protection. Furthermore, children subject to separation from family members frequently do not know whether a parent has filed an application in the U.S. and/or whether the child has been listed as a derivative applicant. Even where such a child has experienced counsel, this information is difficult and, in some cases, impossible to obtain – such as where the parent’s or other family members whereabouts are unknown. At a minimum, these questions must include a response option where the applicant does not know the answer.

Questions 9 and 10.

The proposed revisions add two pages of questions designed to elicit information relating to provisions of the Proposed Rule that require adjudicators to weigh adverse discretionary factors in all cases before a grant of asylum may be made. Question 9 elicits information on three factors relating to manner of entry that adjudicators have been instructed to consider as

significant adverse factors. Question 10 addresses nine additional elements identified in the Proposed Rule as factors that, where present, presumptively should result in a denial of asylum, absent evidence by the applicant of exceptional and extremely unusual circumstances that outweigh the adverse factors. KIND objected extensively to these so-called discretionary factors in our comments to the Proposed Rule; we limit our comments here to the manner in which these questions are skewed to make it more difficult for an applicant to fairly lay out his or her claim.

The information collection for Questions 9 and 10 is not designed to elicit answers that will permit the adjudicator to conduct a fair or balanced inquiry. Questions 9 and 10 contain a total of 12 subparts that require the applicant to check “yes” or “no,” whether or not he or she is aware of all the information necessary to answer the question. For example, Question 9B asks, “Did you or any member of your family included in the application fail to seek protection from persecution or torture, including refugee status or asylum, in any country through which you transited before entering the United States?” The wording of the question itself is biased against the applicant, as it suggests that the applicant has done something wrong even though there may be no legal requirement to seek out protection in another country. Moreover, a lack of knowledge does not necessarily equal failure. An applicant may be separated from family at the time of completing the application and be unable to answer the question because he or she is unaware of the circumstances of other family members’ travel. Alternatively, an applicant may have submitted paperwork in another country without knowing whether it was an application for protection. In many circumstances throughout Questions 9 and 10 “I don’t know” is a reasonable answer, whereas a binary option may lead the applicant to fail to complete the question, or to answer “incorrectly,” both of which could be used to deny the application, question the applicant’s credibility, or even lead to a determination of a frivolous filing. Although Question 9 does provide an applicant the opportunity to claim an exception to these questions per the Proposed Rule, it refers the applicant back to the Instructions rather than offering the applicant an opportunity to check a box or otherwise identify the applicable exception from a menu of choices. While incorrectly identifying a relevant exception could potentially subject the applicant to additional scrutiny, the Proposed Form’s failure to include a complete list of possible exceptions skews the question against the applicant.

Question 10 displays the same shortcomings and biased framing but is even more likely to bias the adjudication against the applicant, as it offers no genuine opportunity to furnish information on positive factors that could weigh in favor of the applicant’s claim. While the Proposed Rule only identifies adverse discretionary factors, there is nothing that would preclude USCIS from listing a series of positive factors that could counter the negative factors. Including a box at the end of this section that allows the applicant to discuss any “extraordinary circumstances that would warrant a favorable exercise of discretion, and explain any exceptional or extremely unusual hardship that would result from a denial of your asylum application” is insufficient to impress upon the applicant the necessity of providing such information or its gravity

in determining whether asylum will be granted. Neither the Proposed Instructions nor the Proposed Form provide the applicant with guidance about the nature of positive factors. An applicant, particularly if unrepresented, is unlikely on his or her own to be able to understand or gather the evidence needed to establish either extraordinary circumstances or exceptional or extremely unusual circumstances. As the only frame of reference for such a standard appears in forms of relief permitting waiver of inadmissibility or other grounds or in the context of cancellation of removal, this one tiny box essentially constitutes a completely separate adjudication that will be conducted after basic eligibility for asylum has been determined. The applicant will likely need to submit significant evidence to address this question, and yet no guidance is offered regarding these new measures.

This is particularly troublesome with respect to claims filed by unaccompanied children, for whom the TVPRA has explicitly required that the asylum process be adapted to their particularly needs and vulnerabilities. In addition to conferring initial jurisdiction over unaccompanied children's claims to USCIS in order to allow children to present their claims in a non-adversarial setting, the TVPRA called for regulations which "take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases." 8 U.S.C. § 1232(d)(8). It further ordered that specialized training be provided to all federal personnel to have substantive contact with, including officers, unaccompanied children. 8 U.S.C. § 1232(e). USCIS adopted measures consistent with this mandate, which recognize the age-related and developmental factors impact a child's ability to comprehend and express information throughout the asylum application and adjudication process.¹⁰ Asylum officers are to conduct "child appropriate interviews taking into account age, state of language development, background, and level of sophistication."¹¹ Such practices derive from USCIS' long-standing incorporation of legacy INS' 1998 Guidelines for Children's Asylum Claims, which explicitly acknowledge that "children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed" and advises adjudicators to "use short, clear, age-appropriate questions and sentences, avoiding long or compound questions" and use avoid "legalistic terms in questions," among many other practices to facilitate children's understanding.¹²

¹⁰ Joseph E. Langlois, "Updated Procedures for Minor Principal Applicant Claims, Including Changes to RAPS," Interoffice Memorandum, August 14, 2007; and, Joseph E. Langlois, "Implementation of Statutory Change Providing USCIS with Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children," Interoffice Memorandum, March 29, 2009.

¹¹ See USCIS, *Interviewing Procedures for Minor Applicants*, available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/minor-children-applying-for-asylum-by-themselves>.

¹² INS Children's Guidelines, *supra* note 9, at 10.

In KIND's experience representing and providing know-your-rights presentations to thousands of unaccompanied children, the above practices are critical to supporting children's meaningful access to asylum. Child applicants generally do not understand even simple legal terms, and attorneys must explain concepts and terms in plain language—most often repeatedly and in a variety of different ways—to facilitate a child's understanding. Furthermore, children are unlikely to volunteer information not specifically asked, particularly when unrepresented and/or where they have a limited or simplistic (child-appropriate) understanding of asylum standards. The biased solicitation of solely negative discretionary factors in Questions 9 and 10 is highly likely to inhibit child applicants' awareness of and tendency to include the countervailing positive discretionary factors that should be considered with equal weight by adjudicators. Furthermore, the one-sided nature of the questions eliciting negative facts are likely to give child applicants the impression that the asylum-adjudication process, including the asylum interview, is adversarial in nature rather than neutral.

The asylum-related provisions of the TVPRA were developed to ensure that the asylum process remains accessible to children. The proposed revisions devastatingly inhibit the accessibility of asylum and related relief to the most vulnerable asylum-seekers, such that it is difficult to envision a child comprehending the added complexities of the form, even with the assistance of experienced counsel.

Conclusion

The proposed revisions to the Form I-589 and its instructions are not in keeping with statutory mandates to minimize the burden of information collections on the public or to make government forms easier for the public to understand and use. If anything, the proposed revisions further complicate an already complex and lengthy form, create numerous opportunities for applicants, particularly those who are not represented, to inadvertently provide inaccurate, incomplete, or misinformed answers, and make no attempt to elicit information in a way that respects the importance of impartial and balanced decision-making. The Proposed Form and Instructions are so biased against applicants that they will essentially become vehicles for rapid termination of claims and the elimination of due process within the asylum system.

KIND represents some of the most vulnerable and youngest asylum seekers. They are traumatized, afraid, and due to past experiences often indisposed to trust government officials. The level complexity and adversarial questioning contained in this information collection is completely at odds with both the purpose of the Form I-589 and the nature of asylum

protection. In the interest of fundamental fairness, the right of access to asylum guaranteed under our laws, and the humanitarian principles that this country has sworn to uphold, the revisions must be withdrawn.

Sincerely,

A handwritten signature in blue ink that reads "Maria M. Odom". The signature is written in a cursive style with a long, sweeping underline.

Maria M. Odom
Vice President for Legal Programs