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*Submitted via [www.regulations.gov](http://www.regulations.gov)*

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Re: 85 FR 11866; EOIR Docket No. 18-0101, A.G. Order No. 4641-2020; RIN 1125-AA90;  
Comments in Opposition to Proposed Rulemaking: Executive Office for Immigration Review: Fee  
Review

March 30, 2020

To Whom it May Concern:

We write on behalf of the National Immigration Project of the National Lawyers Guild (NIPNLG), in response to the above-referenced Proposed Rule published in the Federal Register on February 28, 2020. We write to express our strong opposition to this proposed fee review.

The NIPNLG is a national nonprofit organization that provides support, referrals, and legal and technical assistance to attorneys, community organizations, families, and advocates seeking to advance the rights of noncitizens. NIPNLG focuses especially on the immigration consequences of criminal convictions, and its mission is to fight for justice and fairness for noncitizens who have contact with the criminal legal system.

For the reasons detailed in the comment that follows, the Department of Justice (DOJ) should immediately withdraw their current proposal, and instead recognize that the role played by the Executive Office of Immigration Review (EOIR) and Board of Immigration Appeals (BIA) is to ensure due process in the adjudication of certain immigration applications, which necessarily includes the provision of an open, robust, and accessible appellate review process. This is particularly true for individuals fleeing violence and seeking asylum, and those who are deemed ineligible for certain crucial immigration benefits because of prior contact with the criminal legal system. As other recent rule changes proposed by this and other agencies tasked with immigration adjudication would limit the eligibility for relief of asylum seekers with prior criminal contacts, we write to express particular concern over proposed fees that would prohibit affected asylum seekers from obtaining circuit court review of decisions regarding their eligibility for relief.

## **I. Introduction**

The Proposed Rule issued on February 28, 2020 would dramatically increase EOIR fees and curtail access to justice for some of the most vulnerable litigants. This is particularly true with regard to appeals to the BIA. This comment addresses the failure of the agency to provide sufficient time for the public to review these important fee changes, the crucial role of appeals in determining eligibility for immigration relief, the specific effect of these drastic fee increases on asylum seekers, and the lack of meaningful fee waivers and safeguards for those who are denied fee waivers this agency.

## **II. The Agency Failed to Give the Public and Affected Parties Adequate Opportunity to Comment on the Proposed Rule**

At the outset, NIPNLG notes that EOIR has not provided a meaningful opportunity for the public to comment on this Proposed Rule. The 30 day comment period provided by the agency, ending March 30, 2020, includes the initial period of a national emergency and its related disruption to daily life. On March 11, 2020, the world-wide emergence of the novel coronavirus was declared a pandemic by the World Health Organization.<sup>1</sup> On March 13, 2020, President Trump declared a national emergency.<sup>2</sup> Since that time, President Trump and governors throughout the country have urged Americans to work from home, and schools have closed around the country. At the same time, immigration procedures have been changing on a daily basis, forcing immigration practitioners to keep up and inform clients of this ever-changing landscape.

Despite multiple requests to extend the comment period during this adjustment, the agency has taken no steps to provide the public and affected parties adequate time to comment on such drastic and harmful proposed changes to the fee structure of filings before the immigration court and BIA. Most stakeholders are currently working from home and are unable to access hard copies of resources or background materials they may need to fully comment on the Proposed Rule. For stakeholders who wish to include client stories or other anecdotes, it may not be possible to access physical client files or contact information. As stakeholders learn to perform their jobs remotely, in many instances while providing childcare and/or assisting children to engage in online learning, it is unreasonable to expect the public to submit comments to these sweeping changes by March 30.

In this comment, we reiterate the importance of stakeholders having ample time to carefully review the Proposed Rule and provide comprehensive feedback to the agency. It already would have

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<sup>1</sup> World Health Organization, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>2</sup> White House, *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Conference*, Mar. 13, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-conference-3/>.

been difficult to provide high-quality comments with only 30 days' notice. Now, with the added disruption to normal life imposed by COVID-19, it is unlikely that EOIR will receive the input from stakeholders that the Administrative Procedures Act requires for a rulemaking of this significance.

Moreover, EOIR acknowledges that it has not conducted a fee study in 33 years. Since EOIR has not changed its fees in over three decades, it is imperative that the public be granted sufficient time to understand the reasons and methodology that EOIR used to arrive at such substantial increases, and how EOIR plans to ensure that vulnerable, low income noncitizens will be able to continue asserting their rights in immigration court and before the BIA. The public and affected parties cannot meaningfully comment without enough time to gather data or to conduct the analysis needed to rebut the agency's assertions of its need for additional funding through the increase of fees. Unlike USCIS, EOIR is not a fee funded agency. EOIR has historically drawn the majority of its funding from congressional appropriations.<sup>3</sup> The Proposed Rule never explains why EOIR needs this additional money, nor does it state that it cannot cover its operating costs through congressional appropriations, or that it must be self-sustaining and why. Any increased funding needed by EOIR should be requested through the appropriations process as it has done in previous years. The public also cannot evaluate the agency's information under the Information Quality Act or assess the agency's proposal against objective or publicly available information.<sup>4</sup>

The comment period here does not permit sufficient time for completing these analyses. Nevertheless, NIPNLG attempts to address the many issues of concern to immigrant communities and their advocates, but strongly believes the Proposed Rule requires an extended comment period.

### **III. The Dramatic and Sudden Increases in the Filing Fees Erect Unconscionable Hurdles to Due Process for All Applicants for Immigration Relief**

NIPNLG opposes the sudden and dramatic increases in EOIR fees associated with filings for appeals to the BIA, applications for cancellation of removal or suspension of deportation, applications for asylum, and motions to reopen or reconsider before the immigration courts or BIA. The proposed fee increases are unconscionably high. The greatest increase is nearly 800 percent, from \$110 to \$975, to appeal the decision of an immigration judge, placing it outside the grasp even of families with a moderate income.<sup>5</sup> Likewise, motions to reopen or reconsider before the BIA would rise to \$895. The

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<sup>3</sup> See, e.g., Executive Office for Immigration Review, Department of Justice, *FY 2020 Budget Request*, [www.justice.gov/jmd/page/file/1142486/download](http://www.justice.gov/jmd/page/file/1142486/download).

<sup>4</sup> 44 U.S.C. § 3516 note. See *Harkonen v. United States DOJ*, 800 F.3d 1143 (9th Cir. 2015) (discussing the Information Quality Act).

<sup>5</sup> See, e.g., Neal Gabler, *The Secret Shame of Middle Class Americans*, The Atlantic, May 2016, <https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/>; Anna Bahney, *40% of Americans can't cover a \$400 emergency expense*, CNN Money, May 22, 2018, <https://money.cnn.com/2018/05/22/pf/emergency-expenses-household-finances/index.html>

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cost of filing a petition for review in federal court, by comparison, is only \$500.<sup>6</sup> The proposed fee levels are unreasonable and disproportionate to comparable fees in Federal Courts and elsewhere in the administrative adjudication system.

One of the most troubling aspects of the Proposed Rule is the increase of the filing fee for BIA appeals from \$110 to \$975.<sup>7</sup> Appeals are essential to any adjudicative system, and promote consistency, accountability, and fairness in the determination of rights and privileges. The due process safeguards provided by appeals are especially important within the immigration context, where respondents often appear *pro se* or are victims of ineffective assistance of counsel.<sup>8</sup> The lack of effective representation can be particularly devastating given the complexity of immigration law and the language and cultural barriers faced by many respondents. Courts have noted that “our Byzantine immigration laws and administrative regulations are second or third in complexity [only] to the Internal Revenue Code.”<sup>9</sup> Moreover, noncitizens in immigration court proceedings are often survivors of severe trauma, torture, and domestic violence, that might inhibit their ability to work sufficiently to save the exorbitant fees proposed in this rule. Expenses associated with the retention of attorneys and filing fees can make it even more difficult for immigrants seeking relief from removal to access fair and proper adjudication of their claims.

Appeals serve as a check against such hurdles, a role which has become more critical amid the increased complexity of the precedents being applied in the immigration courts. During the current administration, several decisions have been issued by the Attorney General that reinterpret the asylum laws, affect the rights of respondents in removal proceedings, and alter the eligibility of immigrants for certain benefits, that must be applied by immigration judges in chaotic and time pressured environments. Thus, applicants for relief from removal may be more likely to seek appellate review of requests for continuances, applications for asylum, and applications for other forms of relief such as cancellation of removal.<sup>10</sup> Recently, this agency, along with DHS, proposed new several new eligibility restrictions on applicants for asylum who have had contact with the criminal legal system.<sup>11</sup> Moreover, the Migrant Protection Protocols, or the “Remain in Mexico” program as it’s known, has

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<sup>6</sup> See Court of Appeals Miscellaneous Fee Schedule, <https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule>

<sup>7</sup> See 85 Fed. Reg. 11866 at 11870 (Feb. 28, 2020).

<sup>8</sup> During the 2019 fiscal year, 19 percent of asylum seekers in Immigration Court were not represented by an attorney or BIA accredited representative. *Asylum Decisions by Custody, Representation, Nationality, Location, Month and Year, Outcome and more*, Transactional Records Access Clearinghouse (last accessed Mar. 15, 2020), <https://trac.syr.edu/phptools/immigration/asylum/>.

<sup>9</sup> *Garcia v. USCIS*, 168 F. Supp. 3d 50 (DC Cir. 2016) (quoting *Santiago v. Holder*, 312 F.App’x 867, 868 (9th Cir. 2009) (Pregerson, J., dissenting)).

<sup>10</sup> See, e.g., *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018) (revising standard for evaluating claims for asylum based on domestic violence), *Matter of L-A-B-R*, 27 I&N Dec. 405 (AG 2018) (addressing bases for granting continuances), *Matter of Castillo-Perez*, 27 I&N Dec. 664 (AG 2019) (addressing good moral character in the context of LPR cancellation of removal where respondent had two DUI convictions).

<sup>11</sup> 84 Fed. Reg. 69640 (Procedures for Asylum and Bars to Asylum Eligibility) (Dec. 19, 2019).

dramatically altered the process provided to migrants fleeing persecution who arrive at the US/Mexico border.<sup>12</sup> These and other changes will require appellate review to ensure they are implemented, if at all, in a way that comports with the immigration law, treaty obligations, and the US Constitution.

Under these conditions, it is not surprising that the number of appeals filed has skyrocketed under the current administration. In fiscal year 2019, BIA appeals increased to 55,860 from 17,547 in 2016.<sup>13</sup> The agency does not provide a sufficient explanation for why such a significant fee increase is necessary to adjudicate these appeals, except perhaps to offset the cost of processing appeals filed at no cost by the government, to challenge decisions granting relief to respondents.<sup>14</sup> Of particular concern to the NIPNLG is that the extreme increase in the fee for filing an appeal makes judicial review more inaccessible to respondents, while any decision favorable to the respondent may be appealed at no cost to the government. This imbalance is troubling from an immediate due process standpoint and would inevitably affect the development of circuit case law interpreting the regulations, policies, and caselaw emerging from the executive branch. For this reason, a more thoughtful and reasoned review of the changes proposed by EOIR than is evident in this Proposed Rule is required.

The existence of an independent judiciary to review the actions of immigration agencies is a crucial and necessary check on executive action.<sup>15</sup> By further insulating its actions from review, this Proposed Rule would further embolden the departure from precedent and judicial authority recently criticized by the Seventh Circuit Court of Appeals in *Baez-Sanchez v. Barr*.<sup>16</sup> In that case the petitioner had filed a second petition for review after the BIA disregarded the first remand issued by the Seventh Circuit Court of Appeals. In issuing its directive a second time, the court noted that it “should not be necessary to remind the Board, all of whose members are lawyers, that the ‘judicial power’ under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government.”<sup>17</sup>

#### **IV. NIPNLG Opposes the Proposed Rule’s Impact on Asylum Seekers:**

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<sup>12</sup> Memorandum from Kirstjen Nielson, Sec’y Homeland Security, *Policy Guidance for the Migrant Protection Protocols*, January 25, 2019, [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf).

<sup>13</sup> *Case Appeals Filed, Completed, and Pending*, Executive Office for Immigration Review (Jan. 23, 2020), <https://www.justice.gov/eoir/page/file/1248501/download>.

<sup>14</sup> See 8 CFR § 1003.8(a)(2)(vi).

<sup>15</sup> Because there exists an administrative appeals process in immigration proceedings, the agency must adhere to minimal due process prerequisites, including notice and other safeguards protecting the applicant’s due process rights. See *Gonzalez-Julio v. INS*, 34 F.3d 820, 823 (9th Cir. 1994) (holding that a 10-day deadline for filing a BIA appeal was fundamentally unfair); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005) (“Every litigant in every suit and every administrative proceeding is entitled to due process.”).

<sup>16</sup> 947 F.3d 1033 (7th Cir. 2020).

<sup>17</sup> *Id.* at 1036.

**A. The Drastically Higher Filing Fees for Appeals and Motions to Reopen and Reconsider filed by Asylum Seekers Are Ultra Vires to the Immigration Statute and Violate International Treaty Obligations**

At the outset, NIPNLG opposes the impact of the drastically higher filing fees for appeals and motions to reopen and reconsider on asylum seekers, who would be required to pay a \$50 filing fee for asylum applications filed in removal proceedings. On November 14, 2019, the Department of Homeland Security (DHS) proposed to levy a \$50 fee on applications for asylum using form I-589.<sup>18</sup> In this Proposed Rule, EOIR incorporates the proposed DHS rule applying the fee to applications for asylum without additional rationale.<sup>19</sup> In so doing, it alters the fee required of asylum seekers who appeal their denials from \$0 to \$975, the fee required of all respondents whose underlying applications require a filing fee.<sup>20</sup> The impact of this small change, barely remarked upon in the Proposed Rule at issue here, is devastating to the vast majority of those fleeing persecution. The failure of EOIR to account for such a drastic change to the appellate rights of asylum seekers is arbitrary and capricious, and a violation of its obligations to them under domestic and international law. The absence of a filing fee for applications seeking withholding of removal and relief under CAT does not render the proposal lawful or nullify the harm created by the its barrier to asylum.

**1. The Fees Imposed on Asylum Seekers Conflict with the Principle of *Non-refoulement* Enshrined in the Asylum Law**

The United States asylum system was first codified in the Refugee Act of 1980, described by one prominent scholar as a bipartisan attempt to “reconcile our rhetoric with our law, our national immigration policy and our international treaty obligations so that we could maintain a consistent posture towards the world as a nation with a strong humanitarian tradition and a unique historic role as a haven for persons fleeing oppression.”<sup>21</sup> The Refugee Act—among other measures designed to bring the United States domestic legal code into compliance with the provisions of the United Nations Protocol Relating to the Status of Refugees—created a “broad class” of refugees eligible for a discretionary grant of asylum.<sup>22</sup> By acceding to the 1967 Protocol Relating to the Status of Refugees,<sup>23</sup>

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<sup>18</sup> 84 Fed. Reg. 62280.

<sup>19</sup> 85 Fed. Reg. 11872 (“thus, in proceedings before an immigration judge, a 50 fee would apply to a Form I-589 if the applicant seeks asylum”).

<sup>20</sup> See 8 CFR §§ 1003.8(a)(ii); (iii); (viii) (noting that a fee or a fee waiver is required when filing an appeal or motion before the BIA when a fee is required for the underlying relief application, which in the Proposed Rule by DHS would include applications for asylum filed on form I-589).

<sup>21</sup> Deborah Anker, “The Refugee Act of 1980: An Historical Perspective,” *In Defense of the Alien* 5 (1982): 89-94, [https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/23141008?read-now=1&refreqid=excelsior%3A1060953608aa0bdd30d5d506e1ff6318&seq=1#page_scan_tab_contents).

<sup>22</sup> See *I.N.S. v. Cardoza-Fonseca*, 40 U.S. 421, 423 (1987).

<sup>23</sup> United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

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which binds parties to the United Nations Convention Relating to the Status of Refugees,<sup>24</sup> the United States obligated itself to develop and interpret United States refugee law in a manner that complies with the Protocol's principle of *nonrefoulement*, defined as the commitment not to return refugees to a country where they will face persecution on protected grounds.

Specifically, incorporation of the proposed \$50 fee violates Article 29(1) of the Convention, which explicitly prohibits fiscal charges “whatsoever” other than those that may be “levied on their nationals in similar situations.”<sup>25</sup> For example, asylum seekers in the United States are expected to pay taxes levied on income the same as U.S. citizens. An asylum fee was last proposed in 1994 in the United States, during one of the most restrictive asylum reforms in U.S. history.<sup>26</sup> Unlike the current proposal from DHS, that plan included a fee waiver, and even then, the government ultimately rejected the idea of implementing a fee.<sup>27</sup>

The imposition of this fee would make the United States one of only 4 out of 146 signatories to the Convention that charge a fee for the filing of an application for asylum.<sup>28</sup> The other 3 countries are Iran, Australia, and Fiji.<sup>29</sup> In proposing to impose a filing fee for the request for asylum, the United States would join an adversary on which it imposes sanctions (Iran), a small island nation (Fiji), and one that has been condemned by an independent body of the United Nations Human Rights Council for its mistreatment of asylum seekers (Australia).<sup>30</sup> No other cohort of the United States makes eligibility for asylum conditional upon payment. In total, the DHS proposal was criticized as being “an unprecedented weaponization of government fees,” that would serve only to “restrict legal immigration and even U.S. citizenship.”<sup>31</sup> For the agency itself to erect such a barrier to review of its own decisions presents a grave due process concern. Although no court has had the opportunity to hold that costs should not prohibit asylum seekers from accessing the complete process to which they

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<sup>24</sup> Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954 (hereinafter “Refugee Convention”).

<sup>25</sup> *Id.*, Article 29(1).

<sup>26</sup> Proposed Asylum Rule, 59 Fed. Reg. 14,779 (proposed Mar. 30, 1994).

<sup>27</sup> The current proposal does not include a fee waiver provision. *See* 84 Fed. Reg. 62280.

<sup>28</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Global Legal Research Center, Law Library of Congress, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee*, <https://www.loc.gov/law/help/asylum-application-fees/asylum-application-fees.pdf>.

<sup>29</sup> *Id.*

<sup>30</sup> Ben Doherty, *UN Body condemns Australia for illegal detention of asylum seekers and refugees*, The Guardian, July 7, 2018, <https://www.theguardian.com/world/2018/jul/08/un-body-condemns-australia-for-illegal-detention-of-asylum-seekers-and-refugees>.

<sup>31</sup> Zolan Kanno-Youngs & Miriam Jordan, *New Trump Administration Proposal Would Charge Asylum Seekers an Application Fee*, New York Times, Nov. 8, 2019 (quoting Doug Rand), <https://www.nytimes.com/2019/11/08/us/politics/immigration-fees-trump.html>.

are due under the law, including administrative appeals, the impact of the denial of those rights on the families of asylum seekers may compel such a result.<sup>32</sup>

## **2. The Availability of Review of Withholding of Removal and CAT Denials Without a Fee Does Not Cure the Harm Caused by The Impact of Fees on Asylum Seekers**

EOIR notes that respondents would remain eligible for withholding of removal or relief under Article III of the Convention Against Torture (“CAT relief”), even if they did not pay the filing fee for an asylum application using Form I-589.<sup>33</sup> The continued availability of appeals and motions to reopen and reconsider based on applications for withholding of removal and CAT relief without the requirement of a fee payment, however, does not cure the harm caused by these drastic fee increases. The benefits and protections afforded by these forms of relief are limited, and the standards for approval higher than asylum. Moreover, the limitation of asylum relief to only those who can afford the filing fee or are granted a fee waiver serves to limit the number of noncitizens fleeing persecution who can reunite with their families and embark on a pathway to citizenship. The impact on the future polity of a fee-based asylum system is to render the lowest income, most vulnerable, applicants for relief from persecution permanent outsiders to the social and political community of the United States.

The protections afforded by CAT and by withholding of removal are limited in scope and duration, and they are harder to obtain. As a result, a policy that limits *bona fide* refugees to withholding of removal and CAT protection continues to violate the international treaty obligations enshrined in US immigration law. First and foremost, the most serious harm that can befall a person as a result of this Proposed Rule is removal to persecution and torture, a risk that is not mitigated by the availability of other forms of relief. CAT and withholding protections demand a higher level of proof than asylum claims: a clear probability of persecution or torture.<sup>34</sup> Thus, an applicant may have a valid asylum claim but be unable to meet the higher evidentiary standard for the other forms of relief and be removed to their country of origin, where they would face persecution or even death. The asylum applicants most prejudiced by the Proposed Rule are those with meritorious claims.

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<sup>32</sup> See *Boddie v. Connecticut*, 401 US 371 (1971) (state cannot make it cost prohibitive to access the courts to determine family relationships). But see *Asemani v USCIS*, 797 F.3d 1069 (DC Cir. 2015) (prisoner not entitled to proceed *in forma pauperis* to appeal denial of his naturalization claim).

<sup>33</sup> 85 Fed. Reg. 11868 n.6.

<sup>34</sup> Withholding of removal requires the petitioner to demonstrate his or her “life or freedom would be threatened in that country because of the petitioner’s race, religion, nationality, membership in a particular social group, or political opinion.” *INS v. Stevic*, 467 U.S. 407, 411 (1984) (quoting 8 U.S.C. § 1231(b)(3)). Unlike asylum, however, the petitioner must show a “clear probability” of the threat to life or freedom if deported to his or her country of nationality. The clear probability standard is more stringent than the well-founded fear standard for asylum. *Id.*; see also *Cardoza-Fonseca*, 480 U.S. at 431 (describing the difference between a well-founded fear of persecution and a clear probability of persecution). For CAT relief, an applicant must show it is more likely than not that he or she will be tortured or killed by or at the government’s acquiescence if removed to the home country. 8 C.F.R. § 1208.16(c)(2).

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Withholding and CAT recipients also face permanent separation from their families. Their spouses and children cannot reunite with them in the United States, because only immediate relatives of asylees and refugees are eligible to join them as derivatives.<sup>35</sup> For many, means that the Proposed Rule institutes yet another formal policy of family separation. For example, a mother with two young children who flees to the United States and is unable to pay the filing fee for an asylum application or prevail on a fee waiver, will not be able to ensure that her children can obtain protection in the United States with her if she is granted relief. If her children are still in her home country, they would need to come to the United States and seek asylum on their own, likely as unaccompanied children. If her children fled to the United States with her, then they will need to establish their own eligibility for protection before an immigration judge, no matter their age.<sup>36</sup>

Withholding and CAT recipients also cannot travel internationally, which compounds their separation from family. The United States's treaty obligations under the United Nations Convention Relating to the Status of Refugees afford refugees the right to travel in mandatory terms. Article 28 states, "Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory."<sup>37</sup> By regulation, refugee travel documents are available only to asylees.<sup>38</sup> Moreover, the BIA requires that an individual granted withholding or CAT—unlike an individual granted asylum—must simultaneously be ordered removed, making any international travel, regardless of what country they travel to, a "self-deportation."<sup>39</sup>

Perhaps the most pernicious result of these interlocking proposed rules is that withholding and CAT recipients are not eligible for adjustment of status to permanent residence, and subsequently citizenship. Those with meritorious claims for relief from persecution or torture, who are barred from asylum as a result of the Proposed Rule, would be blocked from a pathway to citizenship and all of its attendant privileges, including the right to vote.

Finally, judicial and administrative efficiency are not served by a fee requirement that has no impact on the number of respondents seeking withholding of removal and CAT relief. Implementation

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<sup>35</sup> 8 C.F.R. § 208.21(a).

<sup>36</sup> Recently, this scenario played out with a mother who was subject to the so-called Migrant Protection Protocols (also known as Remain in Mexico) and the asylum "transit ban," which made the mother ineligible for asylum and thus required the children to establish their independent eligibility for withholding and CAT protection. An immigration judge granted the mother withholding of removal but denied protection to her young children, leaving the children with removal orders and immense uncertainty about their futures. Under imposition of the fee for asylum and subsequent appeals, these situations will certainly increase, separating families and forcing parents to return to countries where it has been established they more likely than not will face persecution and torture, rather than leaving their children on their own. *See* Adolfo Flores, "An Immigrant Woman Was Allowed To Stay In The US — But Her Three Children Have A Deportation Order," *Buzzfeed*, December 21, 2019, <https://www.buzzfeednews.com/article/adolfoflores/an-immigrant-woman-was-allowed-to-stay-in-the-us-but-not>.

<sup>37</sup> 19 U.S.T. 6223 T.I.A.S. No. 6577 (1968).

<sup>38</sup> 8 C.F.R. § 223.1.

<sup>39</sup> *See Matter of I-S- & C-S-*, 24 I.&N. Dec. 432, 434 n.3 (BIA 2008); 8 C.F.R. § 241.7.

of the Proposed Rule would further overload the immigration courts and cause applicants to wait years for a decision. During these extended proceedings, derivative family members in the United States would be required to seek separate forms of relief, further compounding administrative and judicial backlogs. For these reasons, NIPNLG opposes the fee increases for asylum applicants who seek appellate review of their applications for relief.

#### **V. The Agency Fails to Provide Sufficient Safeguards for Due Process in the Adjudication of Fee Waivers**

The proposed rulemaking does not meaningfully address the issue of fee waivers. It states that “[c]onsistent with current practice, the OCIJ and the BIA would continue to entertain requests for fee waivers and have the discretionary authority to waive a fee for an application or motion upon a showing that the filing party is unable to pay. See 8 CFR 1003.8(a)(3), 1003.24(d), 1103.7(c).”<sup>40</sup> Yet nowhere does the Proposed Rule account for the fact that fee waiver requests would increase dramatically with these fees that are up to nine times higher than current fees. Further, EOIR fails to identify a grant or denial rate for fee waivers, making it harder to determine whether fee waivers are reasonably attainable for those who cannot afford the filing fees.<sup>41</sup>

Respondents’ increased reliance on fee waivers under this proposal would heighten the burden on EOIR and the BIA to adjudicate fee waiver requests, and lead to increased litigation over fee waivers. The increasing attention to fee waivers would divert valuable judicial resources to adjudicating fee waivers rather than the underlying substantive claims for relief, at a time when the court already has a backlog of more than a million cases. Keeping EOIR fees at a level that most respondents can afford would ensure that fee waivers do not become necessary for nearly all filings, and do not become a cause of increased backlogs in an already overtaxed system.

The fee increases proposed by this rule are likely have another negative side effect. Respondents have only 30-days to file an appeal and no extension is granted when a fee waiver is denied. As a result, when someone is denied a fee waiver, they often do not have enough time remaining to then file the fee before the appeal window closes. If a family is unable to collect \$975 in 30 days, they would potentially lose the opportunity to pursue an appeal, no matter how meritorious. For this reason, EOIR should provide that if a request for a fee waiver is denied, the 30-day filing deadline will be restarted upon notice of the denial, to provide an opportunity for appellant respondents to supplement their fee waiver request or pay the filing fee in full.

#### **VI. Conclusion**

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<sup>40</sup> 85 Fed. Reg. 11866 at 11871.

<sup>41</sup> See 85 Fed. Reg. 11866 at 11870.

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For the foregoing reasons, NIPNLG strongly opposes this rule. In addition to the arguments made above, the Proposed Rule represents a sweeping and unauthorized change to the fee structure that serves as a gateway to access for review of crucial relief applications. The Proposed Rule would endanger the lives of untold thousands by leaving them at greater risk of *refoulement* in violation of our nation's treaty obligations, and do not contain sufficient safeguards for the preservation of due process for low income applicants for relief from removal. As an organization that works closely with immigrant communities and immigration attorneys, we encourage the agency to rescind this harmful Proposed Rule in full.

I request that the agency consider this comment on the Proposed Rule. Please do not hesitate to contact Cristina Velez at [cristina@nipnlg.org](mailto:cristina@nipnlg.org) if you have any questions or need any further information. Thank you for your consideration.

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