human rights *first*

American ideals. Universal values.

Comments of Human Rights First
On USCIS-2005-0035: Revision of Form I-765

December 12, 2017

On October 13, 2017, the Department of Homeland Security (DHS) issued a notice in the Federal Register (DHS Docket No. USCIS-2009-0033) proposing revisions to USCIS Form I-765, the Application for Employment Authorization. Human Rights First submits these comments on the proposed changes.

Human Rights First and its Interest in this Issue

For over thirty years, Human Rights First has worked to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. Human Rights First grounds its work on refugee protection in the international standards of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and other international human rights instruments, and we advocate adherence to these standard in U.S. law and policy.

Human Rights First operates a large *pro bono* asylum representation program. With the assistance of volunteer attorneys, we provide legal representation, without charge, to hundreds of refugees each year. We have occasion to complete forms I-765 for virtually all of these clients, while their cases are pending, or to advise volunteer lawyers as they complete this form on behalf of their pro bono clients; on occasion we also help asylum seekers who tried to file for employment authorization on their own or through others with problems that arose with their applications. Based on this experience, we have a number of concerns about the proposed revisions to the I-765 form and the instructions thereto.

With These Proposed Changes, the I-765 Would Become Much Too Long

For many years, the I-765 was one single-sided page. The changes proposed here would make it seven pages long. USCIS itself estimates that it would now take 4 hours and 30 minutes to complete and submit. Human Rights First is concerned that the lengthening of this form—a phenomenon also seen with recent revisions to other USCIS forms, notably the I-485 application for adjustment of status and the N-400 application for naturalization—poses a serious challenge for unrepresented applicants and a further hindrance to access to counsel for those who seek legal help.

Much of the information newly required here is unnecessary, as it is either irrelevant to a person's eligibility for employment authorization, otherwise collected by USCIS, or both. The form, for example, now requires applicants to fill in the number of the passport or travel document, if any, on which they traveled to the United States. Most applicants will already have provided this information in the applications for other status with which the I-765 is typically associated. Why burden them, and those who seek to assist them, by asking for it a second time here? The same question applies to the addition of six questions, strangely titled "Biographic Information," at the top of page 4, which in fact require applicants to list their race, ethnicity, height, weight, eye color, and hair color. With respect to the first two categories, the instructions to the form impose a set of definitions that may not correspond to applicants' own understandings of their identity; if USCIS is going to collect this data, applicants should be allowed to self-identify according to their own definitions. But the larger question is why collect this and other biometric information in the I-765 when applicants are separately scheduled for biometrics appointments whose whole purpose is to collect this information? The proposed new instructions state that providing this information in the I-765 may lessen the time an applicant spends at the USCIS

Application Support Center in connection with the biometrics appointment. But in many cases—for example for clients Human Rights First serves who are filing an initial application for employment authorization based on a pending asylum application, and for most applicants filing renewal I-765's, that biometrics appointment *has already taken place*, so no time is gained by submitting this information again on the I-765. Instead, additional time is expended—the applicant's time, and, for those who are filing the I-765 with the help of interpreters and/or legal representatives, the time of those people as well.

Moreover, the form now requires certifications not only from any person other than the applicant who prepared the form, but also from any interpreter who assisted in its preparation. In addition, the interpreter, if any, is required to certify that he or she has "read to th[e] applicant in the identified language every question and instruction on this application and his or her answer to every question." This is unrealistic and unnecessary. With the proposed revisions, the instructions to the I-765 are 27 pages long. Presumably USCIS does not actually mean to require interpreters to read the entire instruction booklet to applicants? Even if "every . . . instruction" refers only to the questions and instructions on the application itself, as the text suggests, many of these refer to eligibility categories other than the one applicable to the particular applicant. In any case, where an applicant is represented by counsel, and counsel is already familiar with the case (typically because he or she also filed the underlying application for asylum, or for permanent residence, or what have you), even conscientious counsel will not feel the need literally to have every item on this form read back to the applicant by an interpreter, as they will have done the same already in connection with the previously-completed application. One would normally focus instead on confirming information that might be susceptible to change.

The fact that the form now also requires a signature from the interpreter, if one is used, adds an additional complication—and additional time—to this increasingly cumbersome process, particularly for lawyers or legal services organizations who may need to resort to an interpreter over the telephone to complete the I-765, which is, and should remain, a routine and basic application. USCIS should by all means require legal representatives to ensure the accuracy of the information they provide on this and other USCIS forms, but the agency should leave them some realistic margin of professional judgment as to how they accomplish that. While acceptance of photocopied, faxed, or scanned copies of signatures as valid for filing purposes is a welcome development, requiring a signature from the interpreter as well negates that improvement. Many legal services organizations rely on volunteer interpreters who, in many cases, make themselves available over the telephone for tasks like this, sometimes on breaks from their regular jobs. They frequently do not have ready access at that moment to printers and scanners such as to be able to sign certifications and return them to us prior to filing.

All this additional time is time that applicants who retain private counsel will need to pay for, if not on a direct hourly basis, as part of an eventual increase in the fees law offices have to charge for immigration legal services generally. For those who seek free legal help, time a legal services organization spends completing a now cumbersome I-765 is time taken away from providing legal services to another applicant, or to preparing other aspects of this same applicant's case. The need to spend over four hours on administrative tasks like I-765 filing also makes asylum cases less appealing to lawyers who volunteer their time *pro bono*. Overall, and regardless of who is paying counsel, this tends to reduce the number of non-citizens who receive legal services.

Several of the Requirements that Apply Without Exception to All Applicants Pose Serious Obstacles for Asylum Applicants and Other Vulnerable Applicants

The proposed instructions would require all applicants to provide a copy of at least one of: the front and back of an I-94 Arrival-Departure Record, a passport, or other travel document. This poses a serious obstacle for asylum seekers, who may not have arrived in the United States on their own validly issued travel documents, and who, under the 1967 Refugee Protocol, are not to be penalized for such irregularities. It also poses a problem for any asylum applicants (or applicants for certain other forms of relief from removal that entitle a person to apply for employment authorization) who are in removal proceedings and whose original travel and identification documents are being held by Immigration & Customs Enforcement, typically until the conclusion of their removal

proceedings. The same is also true in the case of persons granted withholding of removal, who may never recover from ICE any passports or travel documents taken from them when they were initially detained or at any subsequent stage of the process. The same problem arises for all applicants for refugee protection (asylum applicants and persons granted withholding of removal) who do not have photo identification issued to them by the government of the country they fled. Applying for such identification may be impossible for them, and/or may pose a threat to the security of the applicant and/or of relatives still in the home country. All these applicants will be establishing their identity as part of the asylum process (or, in the case of persons granted withholding of removal, will already have done so), sometimes through means other than government-issued photo identification.

In addition, I-765 applications are frequently filed on behalf of applicants for asylum or SIJS applicants who are young children—too young to work but by the same token too young to be issued most forms of photo identification. These children are not applying for employment authorization in order to seek employment, but in order to facilitate their application for a social security number and for medical coverage, among other things. The newly inflexible identification requirements proposed here would be particularly difficult for children, who tend to have non-photo identification and may face particular obstacles in obtaining passports, for example (e.g. in a case where the child is seeking protection from abuse by a parent who would need to authorize the issuance of the passport).

USCIS should make clear in the instructions to this form, and in the guidance it gives to its own staff, that the requirement to provide copies of these documents does not apply to asylum applicants, asylees or refugees, or other vulnerable categories such as applicants for Special Immigrant Juvenile Status (SIJS) or T or U visas, or persons granted withholding of removal, unless they already have these documents in their possession.

The Provisions in the Instructions with Respect to Proof of Arrests and Conviction for Asylum Applicants Raise Due Process Concerns

The revised instructions indicate that asylum applicants must provide proof of any arrests and/or convictions, that anyone who has been convicted of an aggravated felony is not eligible for employment authorization under eligibility category (c)(8), and that USCIS will make the determination whether a conviction meets the aggravated felony definition. But for applicants in removal proceedings, USCIS is not the ultimate arbiter of that question, which will be decided by the immigration judge as part of the asylum adjudication.

In addition, the new proposed instructions state that "USCIS may, in its discretion, deny your application if you have been arrested and/or convicted of any crime." While the statute states that employment authorization may be provided to asylum applicants under regulation by the Attorney General, we do not see any basis in the statute or the regulations for USCIS to deny employment authorization in an individual case as a matter of discretion based on conviction of a crime that would not bar asylum. Moreover, the notion of denying a person employment authorization based on the mere fact of an *arrest* not leading to conviction is in obvious tension with the presumption of innocence that applies to criminal proceedings. We regularly represent asylum applicants who are wrongly arrested on charges that are then dismissed, often after a considerable period of time (given the slow-moving nature of the criminal process in many states). Denying these applicants employment authorization on the basis of their arrest would have a devastating impact on them and their families.

Final Smaller Notes

With respect to persons applying for employment authorization based on a final order of removal, the proposed instructions provide a helpful clarification that not all of these applicants may be under orders of supervision (as many are not, typically because they were never detained), and that providing a copy of such order is not a requirement for the I-765. We appreciate this clarification.

Page 16 of the proposed new instructions, on the other hand, provides confusing or incorrect guidance on how applicants are supposed to respond to the question on the form that asks for their "place of birth:"

First, the proposed instructions ask people to list the name of the country of their birth as it was named *at the time,* even if the name has changed or the country no longer exists. At least with respect to countries whose names has changed, this contradicts the instructions to the I-589 Application for Asylum and Withholding of Removal, which instruct asylum applicants when completing the application for asylum to list the current name of the country of their birth, NOT historical names. We are concerned that this will create bureaucratic complications for asylum applicants from, say, the Democratic Republic of the Congo who were born in that country when it was named Zaire, whose country of birth will appear differently on different USCIS applications (we are concerned, among other things, with conflicts that may arise when these same applicants then try to apply for social security numbers or drivers' licenses).

Second, the instructions then list two points that, while they appear under the instructions for items 15a-15c ("Place of birth") appear to apply rather to Item 14 ("Country or Countries of Citizenship or Nationality"). The first instructs applicants who are stateless to "type or print the name of the country where you were last a citizen or national." Where a person was born often has nothing to do with his or her citizenship or nationality, if any—indeed, this fact is a contributing factor to the problem of statelessness. This instruction would therefore appear to be directed at item 14. But even there, the instruction does not make sense: a significant proportion of stateless people have never in their lives been a citizen of any country, and it is quite unclear under this instruction how those individuals (e.g. stateless Palestinians, or children of Tibetan refugees from the People's Republic of China who were born in Nepal) are expected to respond to this question. We would strongly recommend that the instructions direct stateless people to fill in the current name of the country of their birth under Item 15, and fill in "Stateless" in response to Item 14.

Conclusion

Human Rights First appreciates the opportunity to provide comments on these proposed revisions to Form I-765 and its accompanying instructions. We urge USCIS to recognize the practical realities and vulnerabilities of asylum applicants and other vulnerable populations who need to obtain employment authorization in order to survive, avoid increasing the burden of paperwork and confusion on these vulnerable applicants and those who seek to assist them, and not create substantive bars to employment authorization in violation of existing law.