THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

March 30, 2020

Via electronic submission

RE: Fee Review
EOIR Docket No. 18-0101; A.G. Order No. 4641-2020

The City of New York ("the City") submits this comment in opposition to the Department of Justice ("DOJ") Proposed Rule entitled "Fee Review," which was published in the Federal Register on February 28, 2020 ("Proposed Rule"). The proposed rule would have devastating consequences for New Yorkers and must be withdrawn. Nothing in these comments constitutes a waiver of any arguments that the City may assert in any other forum.

The Proposed Rule cumulatively creates unprecedented and unjustified barriers to immigrants in the most high-stakes procedural posture of a case – when they are in removal proceedings and facing deportation which may put their life at risk or lead to family separation. The Proposed Rule increases the filing fees for various forms of relief from removal, appeals to the Board of Immigration Appeals (BIA), as well as motions to reopen and motions to reconsider.[1] The fees are so exorbitant, being raised by over 700% for some applications, that they would result in low-income immigrants simply being unable to afford to pursue defenses to removal proceedings regardless of eligibility. Additionally, the proposed rule mimics an ill-conceived element of a recent DHS proposed rule which creates a first-ever asylum fee for those applying for asylum affirmatively, and proposes likewise adding this fee in the defensive context.[2]

Furthermore, this rule comes on the heels of a growing number of proposed rules promulgated by the Department of Homeland Security and to which the City has consistently

[1] The rule would raise fees for: Form EOIR-26 for appeals of the decisions of an immigration judge from $110 to $975; Form EOIR-29 to appeal a decision from a DHS officer from $110 to $705; Form EOIR-40 application for suspension of deportation from $100 to $305; Form EOIR-42A application for cancellation of removal for certain permanent residents from $100 to $305; Form EOIR-42B for cancellation of removal for certain nonpermanent residents from $100 to $360; Form EOIR-45 application for notice of Appeal from a Decision of an Adjudicating Official in a Practitioner Disciplinary Case from $110 to $675; filing a motion to reopen or reconsider before OCIJ from $110 to $145; filing a motion to reopen or reconsider before BIA from $110 to $895; and requiring that asylum applicants pay a $50 fee.

[2] *See* comment in opposition to U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements (12/30/2019) *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/us-citizenship-and-immigration-services-fee-schedule-comment-20191230.pdf.

responded[3] and incorporates by reference, which seek to deter immigrants from applying for asylum and other forms of relief, and to create obstacles to family reunification. This is no less than a coordinated strategy by this administration to challenge immigrant pathways to stability in the United States.

For these reasons, we call upon EOIR to withdraw the proposed rule.

1. The Proposed Rule is Contrary to City Values and Undermines the City's Investments in Access to Justice for Immigrant New Yorkers

New York City is the ultimate city of immigrants, with immigrants making up almost 40% of its population, and over 3.2 million people. This immigrant population is deeply tied to the City as a whole. For example, nearly 60% of New Yorkers live in households with at least one immigrant.[4] Immigrant New Yorkers speak over 200 languages, own over half of our small businesses,[5] and are integral to our ability to thrive as a city. The City of New York is committed to advancing fairness and equity for all New Yorkers. This administration has prioritized three broad goals which include enhancing the economic, civic and social integration of immigrant New Yorkers, facilitating access to justice for immigrant New Yorkers, and advocating for continued immigration reforms at all levels of government in order to eliminate inequities that impact New York's immigrant communities.

Recognizing that New York is not only a city of immigrants, but also a city that thrives because of our immigrant communities, this mayoral administration has increased and enhanced access to legal assistance for immigrants by investing over $30 million dollars in a continuum of free legal service programs for immigrant New Yorkers for fiscal year 2020. Together with the New York City Council, the City of New York has invested over $50 million in immigration legal services. In particular, the City has made huge investments in removal proceedings through a: $22.7 million investment in IOI, which is a network of nonprofit legal providers and community-based organizations conduct outreach across the city and provide legal assistance to low-income immigrant New Yorkers in matters ranging from citizenship and lawful permanent residency application, to more complex immigration matters, including a growing number of asylum applications and removal defense work; a $4 million investment in ICARE, which provides legal and social services to unaccompanied immigrant children entering and living in New York City including immigration legal screening and seeking relief from removal through more complex processes available to immigrant youth such as Special Immigrant Juvenile Status (SIJS) applications; and a $16.6 million investment in NYIFUP, which is the first publicly-

[3] The City has repeatedly commented on the recent slew of Proposed and Interim Final Rules that have sought to impose barriers to asylum, adjustment of status, and naturalization. Most notably *see c*omment in opposition to Public Comments on Agency Information Collection Activities; Revision of a Currently Approved Collection: Medical Certification for Disability Exceptions (10/25/2019); *c*omment in opposition to Asylum Eligibility and Procedural Modifications (8/15/2019); comment in opposition to Inadmissibility on Public Charge Grounds (12/10/2018); comment in opposition to Agency Information Collection Activities; Revision of a Currently Approved Collection: Request for Fee Waiver; Exemptions (11/27/2018);

[4] *Id.* at 23.

[5] New York City Mayor's Office of Immigrant Affairs, State of Our Immigrant City: MOIA Annual Report for Calendar Year 2018, 11, *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

funded legal representation program specifically for detained immigrants in the United States and uses a "public defender" model to provide legal services for low income immigrants who are in detention and face removal cases.

a. Increases in Application Fees Attack Due Process

The Proposed Rule seeks to increase fees at an astounding rate. Applicants applying for relief in removal proceedings will face cost increases of well over 100%. For example, applications for Cancellation of Removal for lawful permanent residents – EOIR-42A – would increase by 205%, and those for nonpermanent residents – EOIR-42B – would increase by 260%. These astronomical fee hikes will prevent individuals from applying for relief for which they would otherwise be eligible – disproportionately denying due process to the most vulnerable populations. It is also worth noting that nonpermanent residents applying for Cancellation of Removal must demonstrate that their removal would cause exceptional and extremely unusual hardship to a lawful permanent resident or U.S. Citizen spouse, child, or parent.[6] Therefore, these applicants are by their nature already likely to be supporting family members including those facing hardship. This Proposed Rule would not only place undue hardship on indigent immigrants, it would also create a ripple effect that will harm the lawful permanent resident and U.S. Citizen family members of individuals in removal proceedings.

This Proposed Rule would also drastically increase the fees for applications to appeal decisions of DHS officers and Immigration Judges – raising the cost of an appeal by over 500%. This means that indigent respondents would have to come up with nearly $975 in only 30 days to appeal their case. This Proposed Rule would leave applicants with exorbitant fees for appeals, and in order to file a timely appeal, only 30 days to gather the money. Furthermore, for applicants who need to file motions to reopen or reconsider their case before the Board of Immigration Appeals ("BIA"), fees for these applications would increase over 700%. This would leave individuals who believe their cases have been wrongly decided for any number of reasons, such as due to legal or factual errors, or ineffective assistance of past counsel, without options.

Possibly the most unprecedented part of this Proposed Rule is that it would create a $50 fee for individuals in removal proceedings filing for asylum. This means that people who have a well-founded fear of persecution in the country to which the Federal Government is seeking to remove them would be prevented from seeking asylum if they do not have $50. Through this Proposed Rule, the Federal Government would essentially be charging people $50 for a chance to live. This fee creation is abhorrent, unnecessary, and unprecedented. This Proposed Rule joins a slew of Proposed and Interim Final Rules from DHS and DOJ attacking the asylum process forcing the City time and again to state its opposition to these unsound policy decisions.

This Proposed Rule would create insurmountable cost barriers to due process – leaving a system where fairness must be bought. Whether a person may pursue the legal remedies in removal proceedings would be predicated on a person's ability to pay rather than on the law, undermining the core principles of the U.S. legal system.

[6] INA § 240A(b).

b. New York City has a strong interest and demonstrated history of welcoming and supporting asylum-seekers

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees ("Protocol"), which largely incorporated the 1951 Convention Relating to the Status of Refugees ("Refugee Convention").[7] Article 33(1) of the Refugee Convention enshrines the principle of nonrefoulement: "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[8] In acceding to the Protocol, the United States sent a message to the world that brave leadership included providing refugees with a safe and welcoming home. New York City is proud to be part of a country that embraced that position, and the City remains committed to upholding those values today.

On November 14, 2019, the Department of Homeland Security ("DHS") and the U.S. Citizenship and Immigration Services ("USCIS") published a Proposed Rule that would charge asylum seekers a fee for filing an I-589 affirmatively. The City commented in opposition to this Proposed Rule,[9] expressing grave concerns about this proposal, as it is the City's position that such a fee is simply unacceptable and flies in the face of our values as a City and as a nation. As such, the City is alarmed at the proposed rule's additional targeting of asylum-seekers. For the first time in American history, EOIR proposes to charge a fee for those applying for asylum defensively – proposed as a $50 fee. The United States has a moral imperative to enable asylum seekers to avail themselves of their rights and pursue their application for relief. The notion that someone fleeing their country due to persecution should have to pay a fee in order to have their application reviewed is simply unacceptable and flies in the face of our values as a City and as a nation.

Additionally, refusing asylum applicants for an inability to pay would effectively cause the U.S. to break its treaty obligations and flies in the face of the basic intent of the 1980 Refugee Act. In fact, the vast majority of countries who are signatories to the 1951 Convention or 1967 Protocol do not charge a fee for an asylum application.[10] The City implores EOIR to

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[7] See Convention Relating to the Statute of Refugees art. 33(1), July 28, 1951, 140 U.N.T.S. 1954 (hereinafter "Refugee Convention"); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (1968) (hereinafter "Protocol"); see also INS v. Stevic, 467 U.S. 407, 416 (1984) ("The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees . . . with respect to "refugees" as defined in Article 1.2 of the Protocol."). The Convention and Protocol have been ratified by 145 and 146 countries, respectively. See U.N. Treaty Collection, Convention relating to the Status of Refugees (last updated Mar. 19, 2018); U.N. Treaty Collection, Protocol relating to the Status of Refugees (last updated Mar. 19, 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&clang=_ en.

[8] Refugee Convention, supra note 1, art. 33(1).

[9] Comment in opposition to U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements (12/30/2019) *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/comments/us-citizenship-and-immigration-services-fee-schedule-comment-20191230.pdf..

[10] *See* Zolan Kanno-Youngs and Miriam Jordan, *New Trump Administration Proposal Would Charge Asylum Seekers an Application Fee*, N.Y. TIMES, Nov. 8, 2019,

adhere to international and domestic obligations and not refuse asylum seekers their chance to seeking protection simply for the inability to pay.

2. EOIR's Justifications for the Proposed Rule Do Not Withstand Scrutiny

EOIR's argues that they need to raise fees in order to cover the cost of these applications. They reference section 286(m) of the INA, (8 U.S.C. 1356(m)), which authorizes DOJ to charge fees for immigration adjudication and naturalization services at a level to "ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants." The rule states that these enormous fee increases are simply covering their costs, and while EOIR acknowledges how drastic these fee increases are, they argue that this is the first review in 33 years, so it is to be expected. However, there are two crucial and related flaws in EOIR's reasoning. The first, is that while they outline the costs for each application, they refer to an itemized list of costs as their "methodology." What this looks like in the rule are charts with items such as, "Immigration Judge - $277.51." The items for each application are then added up and that sum represents the total cost of the application. However, the adding of estimated costs cannot properly be called a "methodology" because there is no explanation for how EOIR came to these numbers. Whether they provide a total cost or an itemized cost breakdown as they do in this rule, without justifications for how they arrived at these estimated costs, this level of specificity provides no added transparency or persuasive force. Second and relatedly, EOIR estimates the cost of processing these applications based on their current processing methods while failing to demonstrate that EOIR has taken steps to reduce processing costs by addressing areas of inefficiency in processing. As a demonstration of this point, the $100 fee for Cancellation of Removal 33 years ago based on inflation would now be approximately $227. Yet, the fee for Cancellation of Removal for nonpermanent residents rose to $360. This means that adjusting for inflation, the cost of Cancellation of Removal for nonpermanent residents has increased by approximately 59% without any explanation as to why.

EOIR also argues that applicants can still apply for fee waivers; however, there are multiple issues with this argument as well. To begin, applying for a fee waiver requires that an applicant – who has no 6th Amendment right to an attorney – know that they are able to apply for a fee waiver, and do so properly. Lastly, the fact that there is a path to circumvent the fee is not a justification for the fee itself. It is entirely illogical to argue that a fee is set at the correct price because some applicants can avoid paying it.

I. Conclusion

New York City's economic, cultural and civic vitality depends on our immigrant communities and the City is deeply committed to innovative and equitable policies that promote the well-being and inclusion of our immigrant communities. The proposed rule stands in sharp opposition to these values and commitments, and indeed undermines the City's investments in supporting immigrant access to justice by erecting significant new barriers to such access.

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https://www.nytimes.com/2019/11/08/us/politics/immigration-fees-trump.html (Noting that the United States would be only the fourth country in the world to charge a fee for asylum).

For the reasons articulated above, the City of New York urges EOIR to promptly withdraw the Proposed Rule, which would create overwhelming and unjustified barriers to non-citizen residents in accessing immigration benefits, and have significant economic and social consequence to the City as a whole. EOIR must instead work to make its adjudication processes more efficient to bring down costs.

Sincerely,

Bitta Mostofi
Commissioner, Mayor's Office of Immigrant Affairs