March 30, 2020

Lauren Alder Reid
Assistant Director
Office of Policy, EOIR
5107 Leesburg Pike, Suite 2600
Falls Church, VA 22041

RE: EOIR Docket No. 18-0101

Dear Assistant Director Adler Reid,

We write on behalf of The Advocates for Human Rights in response to the above-referenced Proposed Rule to express our strong opposition to the Proposed Rule to amend regulations relating to EOIR fees as proposed in the Federal Register. We first note that the comment period, occurring during an unprecedented restriction on movement and access due to the Coronavirus pandemic, provides an insufficient time to comment on these Proposed Rules.

The Advocates for Human Rights is a nonprofit, nongovernmental organization headquartered in Minneapolis, Minnesota. Founded in 1983, The Advocates for Human Rights’ mission is to implement international human rights standards to promote civil society and reinforce the rule of law. Holding Special Consultative Status at the United Nations, The Advocates regularly engages UN human rights mechanisms. The Advocates for Human Rights has provided free legal representation to asylum seekers for more than three decades, working with more than 10,000 cases to assess, advise, and represent in asylum proceedings. The Advocates for Human Rights is a global expert in women's human rights, particularly in the area of domestic violence. We have worked in Central and Eastern Europe, the former Soviet Union, the Caucasus, Central Asia, Mongolia, Morocco, Nepal, Mexico, Haiti, and the United States. At the request of government officials, embassies, and NGOs, we help draft laws that promote the safety of women. We have provided commentary on new and proposed domestic violence laws in nearly 30 countries. We have worked with host country partners to document violations of women's human rights, including domestic violence. We train police, prosecutors, lawyers, and judges to implement both new and existing laws on domestic violence. In addition, our Stop Violence Against Women website serves as a forum for information, advocacy, and change and, working with the UN, we developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.

The Advocates for Human Rights opposes the Agency’s Proposed Rule because it violates statutory and international human rights obligations. In addition, the Proposed Rule lacks justification, fails to appropriately account for the costs imposed on the Agency by decisions of the Department of Homeland Security, and fails to meet the “fairness” standard established by the Independent Offices Appropriations Act of 1952 (“IOAA”), 31 U.S.C. 9701. Finally, The Advocates opposes the Proposed Rule because it promises to negatively impact the most vulnerable persons subject to removal proceedings, including asylum seekers, children, and victims of trafficking.

The Advocates opposes this rule as a violation of federal statute and of international treaty obligations. The increased fees in each category render meaningless rights to pursue appeals, motions to reopen/reconsider, and other relief statutory available. For example, the Agency’s proposed increase in the fee for Form EOIR-26, Notice of Appeal, from $110 to $975, without guidance on how and when fee waivers will be granted, renders meaningless the right of appeal for many.

While the IOAA allows collection of fees, those fees must be consistent with other U.S. laws and policies. Congress has passed the Refugee Act, the INA and the Trafficking Victims Protection Act, which require specific protections for certain categories of vulnerable individuals. For example, the TVPA/TVPRA require that the U.S. and its agencies take steps to protect victims of trafficking, particularly those vulnerable due to immigration status. As detailed below, the proposed fee increase—without specific guidelines that would ensure fee waivers are available and readily granted—would unduly impact trafficking victims in immigration proceedings and create incentives that may allow re-trafficking as victims attempt to get sufficient funds to cover exorbitant fees. Similarly, the 1980 Refugee Act and the INA codify the U.S. obligations under the Refugee Convention.

Federal law establishes the right to a review of decisions by the immigration judge at 8 CFR § 1003.38 International treaty and international human rights obligations require that people fleeing persecution, torture, and trafficking have access to fair adjudicatory processes to raise their claims. While governments may determine the appropriate process to adjudicate protection claims, at a minimum applicants must have the opportunity to have a negative decision reviewed before expulsion. The Agency cannot circumvent its obligations by setting filing fees so high as to effectively block access to the appeals process.

II. The Calculations Used by EOIR Lack Justification and are Fundamentally Unfair

The proposed appeal fee increase of 786%, born only by individuals who appeal, is particularly suspect given the dramatic rise in the number of appeals filed by ICE in recent years. In this case, the Agency’s proposed increase in appeal fees effectively eliminates the right to appeal for individual appellants but leaves the Department of Homeland Security free to appeal. The Agency charges no fee when DHS appeals a decision of the immigration judge. The proposed fee increase not only leaves many individual appellants without the ability to challenge decisions made against them, by charging fees only to respondents and not DHS, it effectively shifts the costs of DHS’s appeals onto the individual.

As the Department of Homeland Security continues to place migrants in removal proceedings, appeal and reopen an unprecedented number of cases, and implement new policies that produce greater rates of denials, more people are forced to fight their cases through the EOIR system and in ways that require many more applications, motions and appeals. Thus, the cost passed-on to the taxpayer for the significant number of appeals processed, for example, is a reflection of the need for appeals created by EOIR and its DHS counterpart; not by the migrants whom EOIR now asks to cover the full cost of

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1 See, Conclusion No. 81 (XLVIII) 1997, para. (h) (A/AC.96/895, para. 18); Conclusion No. 82 (XLVIII) 1997 para.(d)(iii) (A/AC.96/895, para.19); Conclusion No. 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3).
driving this machine. The IOAA should not be used as an excuse to shift the cost of immigration enforcement decisions onto individuals appealing decisions of the immigration judge.

The proposed fees are calculated “based on the amount of time the step takes, the average salary of the responsible staff, and the percentage of total cases in which the step occurs.” (Prop. Rule at p. 23). It is unclear, however, how such time and staffing is determined. For example, the proposed staffing fees for an appeal to the BIA include two legal assistants, a paralegal, an attorney and a Board Member. Without further explanation of the time and contribution of each of these staffing allocations, EOIR cannot justify a nine-fold increase in the cost to appeal.

The proposed regulation purports that a fee increase is necessary to 1) update fees to account for inflation; and 2) update fees under the IOAA in order to cover operating costs. The Advocates notes that, based on inflation, the $110 cost of an appeal would be less than $250—not nearly close to the proposed $975.

In addition, The Advocates clarifies that, under the IOAA, an agency may—not must—charge fees that would ensure recovery of the full cost of providing all such services. The IOAA does not require that agencies do so. Agencies must, however, ensure that that such fees be “fair” and based on Government costs, the value of the service or thing provided to the recipient, the public policy or interest served, and other relevant facts. 31 U.S.C. 9701(b).

As the IOAA states, the fees must be fair and based on public policy and other relevant facts. The fee increase proposed is not fair. The new fee for an appeal to the BIA, for example, will be the same as one month’s salary for a family of two according to the Federal Poverty Guidelines. This cannot possibly be reasonable and fair. Moreover, the IOAA states fee scales should take into account public policy and other relevant facts. Due process requires that one be able to access justice in their case. Migrants are not provided counsel or other guarantees that would generally inure in judicial proceedings. However, due process does require that they not be priced-out of obtaining relief for which they are eligible or in such a way as to discourage them to fight their case.

The proposed fees are significantly more costly than similar fees in other courts—both in federal courts and administrative bodies. Indeed, in our sampling of a variety of other courts, the $975 fee for an EOIR appeal would be the highest appeal fee, including appeals on patents, copyright and to the U.S. Court of Appeals. This is concerning given the lack of justification for staffing costs passed-on to appellant to explain why the Agency’s operating fees are so much higher than other similarly situated—or, in the case the U.S. courts of appeals and district courts, more burdened—courts. A list of those comparisons can be found, below. Such uncommonly high costs raise the question whether fees are being raised to cover operations or to discourage pursuing relief.

- **US Court of Appeals** -- $500 fee per party filing notice of appeal.
- **US District Court** -- $38 for filing an appeal from a magistrate decision on a misdemeanor case
- **US Bankruptcy Court** -- $293 for filing an appeal or cross appeal
- **US Court of Appeals for Veterans Claims** -- $50 for filing notice of appeal or petition for extraordinary relief.
- **Copyright Office** -- $350 for first appeal (per claim); $700 for second appeal (per claim). 37 CFR § 201.3(d).
USPTO Trademark Appeals -- $200 for ex parte appeal, per class. 37 CFR § 2.6(a)(18).
USPTO Patent Appeals -- $800 regular fee, $400 small entity fee, $200 micro entity fee. 37 CFR § 41.20(b)(1).

III. The Proposed Rule Will Severely Impact the Most Vulnerable

A. Asylum-Seekers

Requiring fees for asylum applications is unprecedented in the United States, and rightly so, as asylum is a form of humanitarian relief intended to be accessible to refugees forced to flee for their safety. Many asylum seekers arrive in the United States with few personal belongings and little or no savings. They are often dependent upon distant community connections to provide for their basic needs including housing, food, and transportation. Unable to access the social safety net and ineligible to work unless and until their asylum applications have been pending for 180 days, they are also unable to access income in order to pay the proposed filing fee.

Many of the clients The Advocates for Human Rights serves report being a burden on their hosts and are often reluctant to request help to meet their basic needs. Adding an additional hurdle, including requiring that a $50 fee be paid to initiate the asylum process, will undermine their access to the asylum process. In addition, by requiring a fee for the underlying application, motion to reopen removal proceedings based on asylum will now be subject to the new filing fees of either $145 for motions before the immigration court or $895 for motions before the Board of Immigration Appeals. Subjecting asylum seekers to this fee further erodes their ability to seek protection, reunite with family, and integrate into the United States.

B. Children and Youth

Many asylum seekers represented by The Advocates for Human Rights have been recognized as unaccompanied minors, and thus lack any parent or legal guardian to care for or provide for them. The unaccompanied minor clients of The Advocates for Human Rights have been as young as seven years old when they are filing their initial application for asylum. Unaccompanied alien children are uniquely vulnerable in that they are filing their asylum claims alone, and are solely responsible for providing documentation, evidence, and testimony in support of their claims for protection from deportation to the persecution they fled. This burden placed by the legal system on unaccompanied children is already extremely high, and unparalleled in any other legal setting in which children are present.

According to UNHCR’s most recent survey of unaccompanied children, of 404 unaccompanied children from Mexico, El Salvador, Honduras, and Guatemala, 58 percent “were forcibly displaced because they suffered or faced harms that indicated a potential or actual need for international protection.” A 2017 study by the organization Kids In Need of Defense and other collaborators demonstrated extremely high level of sexual and gender-based violence suffered by female and LGBTQ unaccompanied children fleeing from the Northern Triangle of Central America. The unaccompanied minor clients of The

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1 See unaccompanied alien minor definition, 6 U.S.C. § 279(g).
Advocates have almost universally survived traumatic experiences of child abuse, sexual abuse, death threats and beatings by transnational criminal gangs, or other extreme violence at a young age. These children have legitimate claims for refugee protection, but already face high barriers to presenting these claims. Most unaccompanied alien children lack any familiarity with the U.S. legal system and many lack access to counsel or even adults in their community that can help them navigate the court system and understand even their basic obligations within that system. Since they are not authorized to work before filing their asylum applications, and are also often prohibited from working under state law provisions, and often lack access to any adult who can or will pay application fees on their behalf, imposing fees on children seeking asylum will effectively prevent numerous legitimate refugees from accessing refugee protection.

Requiring children who have no access to any adult legally obligated to care for them to pay fees to file applications for humanitarian protection from deportation is inconsistent with U.S. and international law, unreasonable, and a violation of the rights of these children to access the legal system and seek protection from deportation. Not only does this violate numerous laws, it also will result in the deaths of vulnerable children and adolescents who are deserving of refugee protection under U.S. law.

Moreover, The Advocates for Human Rights represents many families in which parents have fled with their children to the United States seeking refugee protection. These individuals qualify for our pro bono legal services based on their very limited income. While The Advocates for Human Rights endeavors to provide access to counsel for as many asylum seekers as our resources allow, many families seeking asylum lack access to counsel. According to Syracuse University’s TRAC reports, less than 50 percent of families with children in South Dakota are represented and only slightly more than 50 percent of families with children in Minnesota are represented. Many families lack the resources to access counsel. Many of these families are unable to access counsel because of lack of resources. Imposing another financial burden on them will prevent even more families with valid claims for refugee protection from accessing the legal system, leaving the children in those families vulnerable to further persecution and torture.

C. Detained Individuals

Many asylum seekers are held in civil detention during the pendency of their asylum proceedings. This can be for past criminal history, lack of family or other community support, or simply because they don’t have access to resources to pay their bonds. Asylum seekers in detention are particularly impacted by this proposed fee hike. While they are detained, they have no access to gainful employment and are forced to use any savings they have to pay for commissary, attorneys fees, or to use the high-cost phone system. Often, the detained asylum seeker is the sole or primary bread winner for their family. As such, any administrative fee, and even more so an exorbitant administrative fee, is a burden on their family and their finances. DHS should not seek to balance its budget by charging usurious fees to the most vulnerable. Rather than increasing revenue, this policy will force many immigrants and asylum seekers to forego their meritorious applications and appeals simply for lack of immediately-

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6 Unlike in the criminal context, where detainees are able to post 10% of the assigned bond to secure their release, immigration detainees must pay the entire amount. Many bond companies are unwilling to loan money to pay immigration bonds, and the minimum allowable bond in the immigration context is $1,500. TRAC reports that, in FY 2018, only one in twenty individuals had a bond amount that was less than $2,500, median bond amounts ranged from a low of $5,000 to a high of $15,000 depending upon court location, and nearly 40% of bonds were greater than $10,000. (TRAC immigration, Available at: [https://trac.syr.edu/immigration/reports/519/](https://trac.syr.edu/immigration/reports/519/).)
accessible funds. Detention is already a strain on the economy and on families. This unconscionable fee hike will only exacerbate the problem.

D. Trafficking Victims

Noncitizen trafficking victims are often vulnerable to trafficking due to prior immigration violations or uncertain immigration status. Traffickers used these vulnerabilities to exploit victims. Once victims are out of the trafficking situation, federal law provides important benefits to regularize status and ensure participation of victims in the investigation and prosecution of traffickers. Yet, many such victims would need to file a motion with EOIR in order to take access these protections. Already, the $110 fee is a hurdle for many; a nine-fold increase is all the more so. Nearly $1000 is equivalent to one month’s salary at the federal poverty guidelines. Requesting that migrants have an extra month’s salary to use for these fees is not only absurd but also discriminatory against indigent families who may not have resources despite having legitimate immigration relief.

This is particularly troubling for victims of trafficking who may fall prey again if forced to take exploitative work or relationships to cover such fees. While a fee waiver remains available, many pro se applicants will not be aware of this or have the capacity to complete the form themselves. Additionally, there is no guarantee written into policy or this regulation which lays out a clear standard by which fee waivers will be judged if this regulation is implemented. Without such guidance, there is no guarantee that trafficking victims will be able to access justice in the immigration courts, which will prevent them from accessing congressionally-mandated benefits as defined in the TVPRA, and further risks new episodes of exploitation. Indeed, the Code of Federal Regulations, giving effect to the INA and TVPRA, provides that trafficking victims may file motions to reopen prior removal orders to pursue T nonimmigrant status. An insurmountable filing fee of $895 – an increase of more than 713% over current fees for motions filed before the Board of Immigration Appeals - fails to give effect to these provisions and will arbitrarily restrict trafficking victims from obtaining protections afforded them.

For example, The Advocates represented a trafficking survivor who had not been identified as a trafficking survivor until we met him in ICE detention. Because he had a prior removal order, he was facing expedited removal. This, despite the fact that he detailed information about the location and strategies of his traffickers. In order to process his T visa application, however, The Advocates had to file a Motion to Reopen the old removal order. This client had been forced to work in indentured servitude under threat of death by his traffickers before escaping. He had no resources and no other supports in the U.S. However, because he was facing imminent removal due to the prior order, our office had to file the Motion to Reopen quickly and, therefore, could not take a chance that a fee waiver would be denied. An increase of the fee to nearly $1000, however, this would not be possible for a trafficking victim or nonprofit legal services organizations, and our client would likely have been swiftly removed despite being a victim of trafficking.

IV. Conclusion

The Advocates for Human Rights opposes the Agency’s Proposed Rule because it violates statutory and international human rights obligations. In addition, the Proposed Rule lacks justification, fails to appropriately account for the costs imposed on the Agency by decisions of the Department of Homeland

7 8 C.F.R. § 214.11(d)(9)(ii)
Security, and fails to meet the “fairness” standard established by the Independent Offices Appropriations Act of 1952 (“IOAA”), 31 U.S.C. 9701. Finally, The Advocates opposes the Proposed Rule because it promises to negatively impact the most vulnerable persons subject to removal proceedings, including asylum seekers, children, and victims of trafficking.