October 13, 2020

Comment in Opposition to Proposed Rule on Collection and Use of Biometrics by U.S. Citizenship and Immigration Services
RE: DHS Docket No. USCIS-2019-0007
VIA: http://www.regulations.gov
TO: Michael J. McDermott, Security and Public Safety Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security

Dear Mr. McDermott,

1. About the Organization Submitting this Comment

   The Advocates for Human Rights (“The Advocates” or “AHR”) 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 has provided free legal representation to asylum seekers and trafficking victims for nearly four decades, working with more than 10,000 cases to assess, advise, and represent clients. In addition to legal representation, The Advocates also works with women’s and LGBTI human rights defenders worldwide to document persecution, repression, and death at the hands of state and non-state actors on account of their identities, and to train and support those activists as they advocate for accountability and safety. The Advocates is a global expert in women's human rights, particularly in the area of domestic violence, and partners with women’s human rights defenders to document threats to life and freedom faced by women due to government failure to protect people from human rights abuses. The Advocates has 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, The Advocates helps draft laws that promote the safety of women and has provided commentary on new and
proposed domestic violence laws in nearly 30 countries. The Advocates works with host country partners to document violations of women's human rights, including domestic violence, and to train police, prosecutors, lawyers, and judges to implement effective domestic violence laws. In addition, The Advocates’ Stop Violence Against Women website serves as a forum for information, advocacy, and change, and, working with the UN, The Advocates developed the Legislation and Justice sections of the UN Women's Virtual Knowledge Center to End Violence Against Women.

II. The 30-day comment period is insufficient to fully comment on such an expansive infringement on human rights and privacy

The Advocates for Human Rights states at the outset that the 30-day period provided for comments on the proposed rule is insufficient. Over nearly 100 pages, the proposed rule seeks to expand the type of private data collected for all immigration benefits. The proposed rule would include at least four new types of biometric data—and leaves open the possibility for further expansion. Additionally, the rule touches every type of immigration benefit, including expanding those who would have to provide such expansive data to include all children and U.S. citizen petitioners. Further, the Department proposed the rule during the COVID-19 pandemic, with unprecedented restrictions on travel and workplace safety concerns. If the Department truly wished to receive thoughtful commentary and provide thorough analysis before finalizing such a harmful rule, it would have provided well beyond the 30-day minimum comment period required by law. As it did not, the rule should be withdrawn on its face.

Due to this limited commenting period, The Advocates has limited its comments to the sections of the rule that most directly impact our work and clients. As a provider—for more nearly four decades—of legal services to immigrant victims of human rights abuses, such as asylum seekers, trafficking victims, and torture survivors, our comments are aimed at the impact the proposed rule would have on these populations. In addition, as an expert on international law with Special Consultative
Status at the United Nations, we also provide commentary on how the rule would violate universal rights to privacy, family and non-discrimination. The United States is party to the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR). Under both such instruments, the U.S. is obliged to ensure that no one, regardless of immigration status, is “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . [and ensure that] Everyone has the right to the protection of the law against such interference or attacks.” (ICCPR, Art. 17). This proposed rule violates these obligations by creating arbitrary and unlawful incursions into applicants’ privacy—by collecting extensive and unjustified data—as well as the family, by demanding DNA evidence of relationships even in relationships entitled to immigration benefits that do not involve DNA relationships.

Because the rule violates international law and Congress’s intent, is arbitrary, and thwarts human rights protections we are required to uphold, it must be withdrawn. We provide further detail, below.

III. The Expansive Proposed Collection of Private Data Effectively Thwarts U.S. Obligations Under International Law

a. The Proposed Data Collection Will Discourage Asylum Seekers and Torture Victims from Obtaining Protection, Violating Non-Derogable International Obligations

The United States’ asylum system was first codified in statute through 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.”1 The 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.

The asylum protections provided by United States law are valuable both to those protected and to
the United States. Asylum provides those fleeing persecution with physical safety, a path to citizenship
and security, and the opportunity to reunite with immediate family members who remain abroad in
danger.\(^2\) Many see the domestic asylum system as a symbol of the United States’ commitment never to
repeat its failure to save thousands of Jewish refugees refused entry to the United States on the St. Louis
and others fleeing the Holocaust.\(^3\) Others point to the critical role that domestic asylum policy plays in
serving the United States’ foreign policy interests abroad. For those individuals seeking asylum in the
United States, the stakes could not be higher—a claim denied often means return to death or brutal
persecution.\(^4\) Importantly, asylum provides refugees with a means of integrating permanently into the
community.

Despite Congress’s clear intent to codify the Refugee Convention’s obligations into federal law,
some have viewed the asylum process as an “end run” around immigration laws. As a result, today the
laws, regulations, and process governing asylum adjudications have become exceedingly harsh and
increasingly out of step with international obligations. Asylum seekers bear the evidentiary burden of
establishing their eligibility for asylum\(^5\) in the face of a complex web of laws and regulations, without
the benefit of appointed counsel and often from a remote immigration jail. The recent spate of changes
to the asylum and refugee system evidence a clear distain for those attempting to exercise their right to


\(^3\) See BRIEF OF THE ANTI-DEFAMATION LEAGUE, JEWISH COUNCIL FOR PUBLIC AFFAIRS, UNION FOR
REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND WOMEN OF REFORM JUDAISM AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS in Trump v. International Refugee Assistance Project, et al, Nos. 16-
1436 & 16-1540 at 14-19, Available at https://www.scotusblog.com/wp-content/uploads/2017/09/16-1436-16-1540-bsac-
Anti-Defamation-League.pdf

\(^4\) See https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-
and#, https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/ or

\(^5\)
seek protections, and are blatant attempts to either discourage applicants or make it nearly impossible to succeed.

The United States has a non-derogable legal obligation under international human rights law to ensure the protection of migrants. Grounded in the Universal Declaration of Human rights and the nine core international human rights instruments, this principle applies to all migrants, at all times, irrespective of migration status. To ensure compliance with these protection obligations, the United States has a legal obligation under international human rights law to respond to the protection needs of migrants, including a particular duty of care to migrants in vulnerable situations. To comply with its international human rights law obligations, the United States should (1) put in place and allocate resources to the identification and assessment of protection needs; and (2) establish mechanisms for entry and stay of migrants who are considered to have protection needs prohibiting their return under international human rights law, including non-refoulement, as well as the rights to health, family life, best interests of the child, and torture rehabilitation.

Among these non-derogable obligations is the principle of non-refoulement. The principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. The principle of non-refoulement under international human rights law applies to any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the person would be at risk of irreparable harm on account of torture, ill-treatment, and other serious breaches of international human rights obligations.

The prohibition against refoulement applies to a range of serious human rights violations, including torture, other cruel, inhuman or degrading treatment, flagrant denial of the right to a fair trial,

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risks of violations to the right to life, integrity or freedom of the person, serious forms of sexual and gender-based violence, death penalty, female genital mutilation, and prolonged solitary confinement.  

The United States is obligated to ensure heightened consideration to children in the context of non-refoulement and must act in accordance with the best interests of the child. International human rights law is clear: a child should not be returned if such return would result in the violation of their fundamental human rights, including if there is a risk of insufficient provision of food or health services.

The principle of non-refoulement is the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees and is binding on parties to the 1967 Protocol Relating to the Status of Refugees. As a party to the Protocol, the United States affirmatively obligated itself to develop and interpret United States refugee law in a manner that complies with the Protocol’s principle of non-refoulement (the commitment not to return refugees to a country where they will face persecution on protected grounds). The United Nations High Commissioner for Refugees (UNHCR) makes clear that “Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.” The principle of non-refoulement applies to recognized refugees and asylum-seekers alike.

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8 Convention on the Rights of the Child, General Comment No. 6, para 27 (see also para 84)


The proposed rule violates these international obligations by discouraging applicants who may—rightly—fear providing such extensive personal data. Many asylum seekers have already been surveilled by their own governments, causing them to seek protection in the U.S. By demanding that they now provide personal data and submit to continued surveillance for the opportunity to apply for protections, the rule fails to uphold our international obligations to asylum seekers. Moreover, by demanding extensive biometrics to prove family relationships—often, where it will be unavailable or exceedingly difficult due to in-country resources—the rule violates international obligations around family unity and protections of refugee children. And, as detailed below, the discriminatory nature of the proposed rule infects it with a fatal flaw throughout.

b. The Proposed Data Collection Will Unlawfully Restrict Protections for Trafficking Victims, Violating Obligations under the Palermo Protocol

The United States is also party to the United Nations Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. As a party, the United States is obliged to uphold and implement the Convention and Protocol. In furtherance thereof, the United States Congress passed the Trafficking Victims Protection Act in 2000, which has been unanimously reauthorized since. Under the Protocol, the United States has agreed to “protect and assist the victims of such trafficking, with full respect for their human rights” (Art. 2). The Protocol further requires that parties “protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential” (Art. 6) and take appropriate measures to ensure that victims of trafficking may remain in their territory (Art. 7).
The proposed rule would violate these obligations. By requiring all trafficking victims to provide extensive private data without, as detailed further herein, providing specific protections against breaches of such, the proposed regulation is insufficient to keep trafficking victims’ identities confidential. Moreover, by making good moral character determinations more difficult and discouraging applications for T visa protections by demanding extensive personal data, the proposed rule fails to fulfill our obligations under Articles 6 and 7. The rule, therefore, should be withdrawn.

IV. The Proposed Rule Violates Congressional Intent

The proposed regulations also run afield of Congressional intent in passing the 1980 Refugee Act (“the Act”), the Trafficking Victims Protection Act (and its reauthorizations), and U.S. immigration laws. Looking at the legislative history, the 1980 Refugee Act had two overarching purposes: to unify the piecemeal asylum law that existed in the United States prior to the Refugee Act and to protect human rights and respond to humanitarian concerns.11 The opening purpose of the Act celebrates the “historic policy of the United States” to provide humanitarian assistance and asylum to persons in need.12 The Act’s sponsors reaffirmed this underlying purpose. In 1979, the bill’s original sponsor in the Senate, Senator Edward Kennedy, argued on the Senate floor when introducing his bill, “[The Act] will also give statutory meaning to our national commitment to human rights and humanitarian concerns, which are not now reflected in our immigration laws.”13 Senator Kennedy also stressed the importance of conforming U.S. law “to the United Nations Convention and Protocol relating to the status of refugees,”14 which the United States signed in 1968.15 Moreover, the House Committee on the Judiciary

12 Id.
14 Id.
wanted to ensure fair asylum policy that was consistent with the traditions of welcoming the oppressed.\textsuperscript{16} Overall, this evidence of Congressional intent shows that the central purpose of 1980 Refugee Act was to ensure that the United States fulfills its international human rights law and treaty obligations and to help refugees by making the system more fair and logical.

When Congress passed the Refugee Act of 1980, it unambiguously stated that its intent was to reform United States law to ensure that it conformed to the nation’s obligations under the United Nations Protocol Relating to the Status of Refugees.\textsuperscript{17} This treaty, to which the United States acceded in 1968, incorporated the United Nations Convention Relating to the Status of Refugees into United States law and reaffirmed the nation’s commitment to addressing the “grave humanitarian concerns” of those uprooted by persecution.\textsuperscript{18} In order to accomplish these goals, Congress directly incorporated the Convention\textsuperscript{19} definition of “refugee” into the Act and noted its intention that interpretation of this term was to be guided by the United Nations and the rights-protective purpose of the Convention.\textsuperscript{20}

Similarly, Congress has expressed its clear intent to provide protections for victims of trafficking. In passing the Trafficking Victim Protection Act and its reauthorizations, Congress included broad waivers of inadmissibility, extensive classes for family reunification, generous access to social support, and additional protections for minors. It is clear that Congress passed these acts not with the goal of discouraging trafficking victims from coming forward by subjecting them to extensive surveillance and questioning their character; rather, the broad protections evince a clear intent to protect victims, and

\textsuperscript{18} Id. at 11.
\textsuperscript{19} For ease of reference, the United Nations Protocol Relating to the Status of Refugees and the United Nations Convention Relating to the Status of Refugees are collectively referred to as the “Convention.”
\textsuperscript{20} Id. at 63 (citing S. REP. NO. 96-590, at 20 (1980)) (“The Conference substitute adopted the House provision with the understanding that it is based directly upon the language of the Protocol and it is intended that the language be construed consistent with the Protocol”).
prevent and punish trafficking. The proposed rule, by discouraging applicants and expanding power to
deny trafficking-related cases, violates this intent and must be withdrawn.

The proposed rules would have the effect of penalizing asylum-seekers, refugees, trafficking
victims, and their families, as well as violating non-refoulment obligations. By demanding extensive
biometrics data without, as explained below, providing clear and practical procedures to ensure
protection of that private data, the rule will discourage and punish these people Congress has expressed
a clear intent to protect. Moreover, by requiring DNA evidence and establishing a focus on fraud in
family relationships, the proposed rule will harm asylees, refugees, and trafficking victims who seek
reunification with family members. The rule must, therefore, be withdrawn.

V. The Proposed Changes Take Narrow Statutory Authority and Expand it Beyond Logic and
Law

A two-step framework articulated in Chevron guides the determination of whether a court should
467 U.S. 837, 842 (1984). But, before even reaching that first step, the agency must actually have been
degligated the responsibility to implement the statute’s policies. Absent an express delegation, the
authority to make major policy decisions remains with Congress. See BATF v. FLRA, 464 U.S. 89, 97
(1983) (“[W]hile reviewing courts should uphold reasonable and defensible constructions of an agency’s
enabling Act, they must not rubber-stamp administrative decision that they deem inconsistent with a
statutory mandate or that frustrate the congressional policy underlying a statute.”) (citations and quotations
omitted)). Judicial deference to an agency’s decision does not apply to decisions that Congress did not
The Department proposes to interpret the “broad statutory authority described [ ] as authority for
the collection of biometrics when such information is material or relevant to the furtherance of DHS' delegated authority to administer and enforce the INA.” (proposed Regulation at 56347). Yet, where Congress gave DHS an inch, the proposed rule takes a mile. DHS outlines the statutory authority it believes allows for this rule. This, according to DHS, includes:

- The general authority in INA at section 103(a), 8 U.S.C. 1103(a) to administer and enforce immigration laws, including issuing forms, regulations, instructions, other papers, and such other acts the Secretary of Homeland Security (the Secretary) deems necessary to carry out the INA.
- INA section 235(d)(3), 8 U.S.C. 1225(d)(3), “to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.”
- INA 287(b), 8 U.S.C. 1357(b), to, “. . . take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service.”
- INA sections 333 and 335, 8 U.S.C. 1444 and 1446, require the submission of photographs and a personal investigation before an application for naturalization, citizenship or other similar requests may be approved.
- INA section 262(a), 8 U.S.C. 1302(a), provides direct statutory authority for the collection of fingerprints for the purpose of registering aliens.
- INA section 264(a), 8 U.S.C. 1304(a), provides that the Secretary is authorized to prepare forms for the registration and fingerprinting of aliens, aged 14 and older, in the United States, as required by INA section 262.

None of these provisions may justify the sweeping changes proposed in this regulation.

Assuming the agency had been delegated the requisite enforcement responsibility, the first step is to ask “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842–43. In determining whether a statute is ambiguous one first looks to the “ordinary tools of statutory construction.” Id. at 842. The ambiguity
may also have been eliminated by prior judicial determinations. A prior court decision finding the statute to be clear “leaves no room for agency discretion.” Brand X, 545 U.S. at 982. This principle applies equally whether the courts rule the statutory language is “clear” or “plain” or state there is “little room for doubt,” or use similar expressions to describe statutory text. In other words, a court need not describe the text as “unambiguous” to foreclose an agency from later asserting the same language is ambiguous. New York v. EPA, 443 F.3d 880, 886 (D.C. Cir. 2006). This conclusion follows from the basic tenant that, “[w]hen Congress uses a term with a settled meaning, its intent is clear for purposes of Chevron step one.” Grace v. Whitaker, 344 F. Supp. 3d 96, 128 (D.D.C. 2018) (citing B & H Med., LLC v. United States, 116 Fed. Cl. 671, 685 (2014)).

Here, the INA unambiguously grants DHS the authority only to gather fingerprints or photographs in several of the provisions provided by DHS to allegedly give it authority to collect more than six types of biometrics data beyond fingerprints and photographs. Where Congress unambiguously provided the authority for fingerprints and photographs—and did not use the words “other” or “for example” to indicate an intention that such terms be used as examples rather than limiting functions—expansion beyond such terms cannot stand.

Even assuming some ambiguity in the general authority to implement the immigration laws and take “evidence” as outlined in the INA, the Department’s proposed interpretation still falls short. A second, required step under the APA is to determine whether the agency’s action is “based on a permissible construction of the statute” or whether such action is arbitrary and capricious. Chevron, 467 U.S. at 843; see City of Arlington v. FCC, 569 U.S. 290, 307 (2013) (“[W]here Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.”).
An agency’s action is arbitrary and capricious, *inter alia*, when an agency changing its course fails to apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, or when an agency glosses over or swerves from prior precedent without discussion. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971); *Northpoint Tech.*, 412 F.3d at 156; *Comcast Corp. v. FCC*, 600 F.3d 642, 659 (D.C. Cir. 2010). In other words, an agency cannot “undermine democratic transparency and upset the settled expectations of regulated parties” without providing a “reasoned explanation for the change.” *Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 578 (7th Cir. 2012) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); see also *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (holding that DHS’s failure to consider “serious reliance interests” was arbitrary and capricious). And, a “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.” *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

Here, the Departments’ interpretation is impermissible under *Chevron* step two because it is arbitrary and capricious. As detailed in this comment, the Department consistently fails to explain why the current biometrics collection system is insufficient for implementing its obligations under the INA—other than by asserting broad generalities about public safety and national security. Moreover, as detailed throughout, the Department also fails to explain how the expanded collection of biometrics data will assist, given the numerous documented shortcomings of such data. And, the Department fails to justify the exorbitant costs that will be associated despite the fact that it has recently requested additional Congressional appropriations21, planned to furlough nearly 70 percent of its staff due to financial shortfall22, and is facing significant backlogs in adjudicating cases.23

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21 See H.R. 8337: Continuing Appropriations Act, 2021 and Other Extensions Act (Sept. 30, 2020)
22 https://www.aila.org/infonet/uscis-cancels-furlough
23 See https://egov.uscis.gov/processing-times/historic-pt
Despite these fatal flaws, the rule must also fail as it goes well beyond the scope of allowable action without balancing the benefits with the harms. “Reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions,” Michigan, 135 S. Ct. at 2707, but the Proposed Rule does not sufficiently address the advantages and the disadvantages of the changes. In proposing an expansive invasion of privacy that will discourage immigration benefit applicants and harm families, the Departments also fail to “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.” Regents of the Univ. of Cal., 140 S. Ct. at 1915. Additionally, “statutory ambiguities in immigration laws are resolved in favor of the alien.” Grace, 344 F. Supp. 3d at 117 (citing Cardoza-Fonseca, 480 U.S. at 449).

On its face, the Department’s new interpretation is not “favorable to the immigrant” and fails to balance the harms and benefits. Once implemented, this expansive surveillance model will negatively impact asylum seekers who will be discouraged from applying for protections, risk disclosure of private data, and face additional challenges to family reunification. Further, it will severely harm trafficking victims who have applied for protections and cooperated with investigations on the promise that their applications would be evaluated in light of known dynamics of trafficking that sometimes cause individuals to engage in conduct often considered immoral. This is to say nothing of the numerous family members, U.S. citizens and children who will now be forced to choose whether they provide expansive personal data to a Department proven unable to protect against data breaches,24 or instead not submit an application for benefits. Therefore, the Proposed Rule is unreasonable and impermissible because it proposes sweeping changes without even answering the crucial question of “whether these changes will do more good than harm.” Edison Mission Energy, Inc. v. FERC, 394 F.3d 964, 969 (D.C. Cir. 2005).

VI. The Proposed Expansion of Biometrics is Arbitrary and Capricious

a. Contrary to DHS’ Assertion that Biometrics can help with adjudication (e.g., of moral character, or criminal history), biometrics can only help with identification

In attempting to justify its proposed expansion of biometric surveillance, DHS states that “immigration benefit request adjudication and the enforcement and administration of immigration laws include verifying identity and determining whether or not the individual poses a risk to national security or public safety.” (Emphasis added.) While DHS is not wrong to suggest that novel biometric data can be matched against biometric data in a database, DHS *is* wrong to suggest that biometric data can play any role in determining whether or not the individual providing the data poses a “risk to national security” or “public safety.” Biometric data consists of digital representations of physical and biological characteristics, against which statistical analyses can be run to verify the similarity between data points. Nothing about this process entails any information about the identified individual’s “risk to national security” or “public safety.” As will be discussed below, such information is necessarily non-biometric in nature, and so subject to the same problems of reliability that DHS alleges plague the current system.

b. DHS’ “most important[]” reason for expanding biometric surveillance is baseless

DHS claims that the “[m]ost important[]” reason for expanding its biometric surveillance is that “DHS is transitioning to a *person-centric* model for organizing and managing its records.” Despite this being its purported *most important* reason for this rule, which represents a significant expansion of U.S. biometric data collection, DHS does not offer any clue as to what a “person-centric model” is, nor does DHS explain what its present model is (or how its present model is not “person-centric”), or, most notably, why a transition from its present model (whatever it may be) to the undefined “person-centric” model is necessary for the “purposes for which biometrics are collected from individuals filing immigration applications or petitions,” namely: “criminal history and national security background checks; identity enrollment, verification, and management; secure document production, and to
administer and enforce immigration and naturalization laws.” Especially since DHS already does these things, DHS must offer a reasonable explanation in order to comply with the Administrative Procedures Act (APA).

c. DHS Fails to Justify Its Expansion of Biometric Surveillance

What little rationale DHS does offer for its expansion of biometric surveillance is inconsistent with DHS’ own description of its present practice. DHS notes in the proposed rule that “[t]he current DHS biometric collection process for benefits adjudication begins with the collection of an individual’s photograph, fingerprints, and signature.” DHS is clear that it considers an individual’s “photograph” and “fingerprint” to be biometric data, under both its present definition of biometrics as well as its proposed, impermissibly broad definition of biometrics.25 However, despite acknowledging that it already collects biometric data in adjudicating immigration benefits, DHS attempts to justify its expansion of biometric surveillance by stating, without providing justification for departure from the current rule, that “[b]iometrics collection upon apprehension or arrest by DHS will accurately identify the individuals encountered, and verify any claimed genetic relationship.” DHS does not claim that current biometric surveillance is unreliable or insufficient, and it neither makes any claim whatsoever about the efficacy of current biometric surveillance nor the reason the expansion is required. DHS also fails to explain and justify why expanded biometric surveillance would expand its ability to identify individuals and, if it would, why such an expansion would be necessary on balance with the severe infringements on privacy involved.

Furthermore, DHS’ current practice is to collect biometric data in addition to documents submitted by benefit applicants. DHS proposes to eliminate the submission of documentary information, but does not explain how reducing the information available to DHS—from biometric data and

25 “DHS is proposing . . . to expressly define ‘biometrics’ to include a wider range of modalities than just fingerprints and photographs.” (Emphasis added).
documentary evidence submitted by applicants to biometric data only—is necessary to increase DHS’ ability to verify the identity of applicants. While stating the broad goals of “national security” and “public safety” in an attempt to justify this rule, DHS does not explain how such a narrowing of information will better help with the determination of whether an individual is a “national security” or “public safety” threat. DHS claims, without evidence, that there are “inherent inconsistencies” in biographic data, but neither explains what these inconsistencies are, nor how—or, even, if—the proposed expansive list of biometric data do not have similar inconsistencies. Further, DHS does not explain how the “inherent inconsistencies” of the current set of biographic data undermines identity verification. And, finally, DHS does not explain how expanded biometric surveillance would mitigate the apparent problem posed by these “inconsistencies.” An agency must justify a change in regulations under the APA; however, it may not do so by simply referring to general concerns about national security—and certainly cannot do so while, as here, leaving so many questions unanswered.

Whatever DHS may mean by the “inherent inconsistencies” with “biographic data,” DHS’ argument faces two problems. First, any non-biometric data that DHS includes in an applicant’s database record will necessarily be introduced by some non-biometric process; the same opportunities for error that DHS alleges are introduced by the submission of non-biometric data are present whether the non-biometric data are introduced by the applicant or some other human in the process. In DHS’ proposal, it acknowledges that such biographic data will continue to exist in database records. Second, unless biometric data necessarily fail to have “inherent inconsistencies,” DHS must fully explain how the proposed expansive biometric data, but not the current biographic data gathered, are guaranteed to “ensure that an individual’s immigration records pertain only to that individual.” (Emphasis added.)

26 “Under this model, DHS would be able to easily locate, maintain, and update the correct individual’s information such as: current address (physical and mailing), immigration status, or to associate previously submitted identity documentation, such as birth certificates and marriage licenses, in future adjudications thereby reducing duplicative biographic or evidentiary collections.” (Underlining added.)
DHS provides no such explanation, and instead simply says that it “has decided it is necessary to increase routine biometric collections,” despite copious evidence that expansive biometric surveillance may not reliably help with identification, and may in fact make identity verification more challenging.27

d. The Proposed Biometrics Procedures are Inherently Discriminatory and Unjust, and DHS Offers No Justification or Analysis of the Related Benefits and Harms

DHS’ proposal to expand biometric surveillance must be withdrawn because it is rife with flaws that implicate Constitutional and human rights, including: biometric screening is inherently discriminatory and unjust, the practice of biometrically screening every applicant perniciously equates immigrants with criminality, and the proposed rule will have the effect—likely, intended—of discouraging bona fide applicants from applying for benefits, including victims of human rights abuses whom the U.S. is legally obligated to protect.

First, the types of biometric surveillance proposed are doubly discriminatory. Facial recognition technology, for instance, is known to be error-prone for people who are children, transgender, women, or dark-skinned.28 DHS’ false, generalized claims to the contrary notwithstanding, voice prints are


unreliable identifiers for persons who may undergo physical or hormonal changes, like children, transgender people, or people who age. Additionally, if biometric identifiers are allegedly used to identify the records of applicants in order to perform national security or criminal history checks, then those checks will run against gang, crime, and terrorism databases that are also plagued with racial biases encoded in arrest data, conviction data, and watchlist data. U.S. and international law guard against such discriminatory laws and policies. Therefore, the proposed rule must be withdrawn.

Further, DHS’ proposed biometric surveillance must be withdrawn as it discriminatorily and unlawfully equates criminality with immigration. A regulation which is founded on discriminatory biases about nationality cannot be justified by other, related concerns. The only rationales DHS offers for why all immigrant benefit applicants (in addition to LPR and U.S. citizen petitioners) must have their biometric data taken are vague national security concerns and the fact that some immigration benefits require screening for “good moral character,” which requires a criminal history and security check. This is overly broad on its face, but it also presumes criminality in all immigrants. DHS itself acknowledges that applicants for immigration benefits that require a criminal history or national security check—for instance, T-Visa applicants—already provide biometric identifiers. Yet, DHS offers no explanation or evidence as to how its proposed expansion would help with this process. Notwithstanding the moral repugnance of implying that applicants for immigration benefits are criminal until proven otherwise (and even then, only so long as they can continuously prove to be so), there is no evidence

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that applicants for immigration benefits (or the LPR and U.S. citizens who may petition for them) are more prone to criminal behavior than are U.S. citizens.\textsuperscript{30}

Finally, DHS’ proposal is grotesque in the way that it implies that public and national safety can be ascertained or in any way secured by looking into the genetic code of immigration benefit applicants. The Immigration Act of 1924 (“Johnson-Reed Act”) instated egregious national quotas intended to eliminated all Chinese, Asian, and African immigration, as well as minimizing the inflow of Italian, southern European, and Catholic immigrants.\textsuperscript{31} The Johnson-Reed Act depended in part on the idea that genetic ancestry determined worth, and that U.S. immigration benefits should be reserved for those from deserving lineages. This racist system having been removed by Congress, DHS cannot implement rules that harken back to such unlawful and unjustified beliefs. But, this is exactly the message sent by DHS’ proposal, and by DHS’ insistence on equating “family relationship” with “genetic relationship.”\textsuperscript{32}

Not only do these issues underscore the arbitrary and capricious nature of this proposed rule, they also do more harm than good and violate established U.S. and international law. Under the U.S. Constitution, laws and policies which either discriminate on their face or in fact on the basis of protected grounds, are void. Similarly, the U.S. is bound by international treaties—including the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Refugee Convention and the Protocol on Trafficking in Persons—which all bar discrimination. As detailed above, the proposed rule will implement a policy shown to have discriminatory outcomes on the basis of one’s sex, race, nationality, age and gender identity. And, it does so while providing any clear benefit

\textsuperscript{30} Anna Flagg, Is There a Connection Between Undocumented Immigrants and Crime?, The Marshall Project (May 13, 2019, 5:00 AM) (showing no connection between undocumented immigrants and crime), HYPERLINK https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime (study showing U.S. citizens safer in communities with more immigrants.)

\textsuperscript{31} ERIKA LEE, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2019) (describing how white supremacist ideology combined with eugenics to drive xenophobic immigration restrictions in the early 20th century).

\textsuperscript{32} See Part VII below for more on why DHS’ conflation of “genetic” and “family” relationships is objectionable.
that cannot be provided through less draconian and discriminatory systems. The Department, therefore, should withdraw the proposed rule.

e. The Proposed Rule Substantially Changes the Definition of “biometrics” without Justification

DHS proposes substantive changes to the regulations and does not provide any rationale for doing so. For instance, DHS proposes to replace regulations that authorize specific biometric modalities like “fingerprint” or “photograph” with regulations that authorize general, and ever-expanding, biometric surveillance. Despite this substantial change, DHS offers no logical justification or evidence as required for such a change. DHS claims, without support, that various government agencies group together “identifying features and actions . . . under the broad term, biometrics.” DHS then claims without attribution that the terms “information,” “identifiers,” or “data” are used to refer to fingerprints, photographs, and signatures as well as “additional features such as iris image, palm print, DNA, and voice print.” If these are truly new modalities that DHS is proposing, it is hard to understand how it is that they may already be instances of “information,” “identifiers,” or “data” in use by “government agencies.” Nonetheless, DHS claims that the use of terms like “biometric information,” “biometric identifiers,” or “biometric data” by other “government agencies” has resulted in DHS using the terms to refer to (only) fingerprints and photographs as the altogether different terms, “biometrics,” “biometric information,” or “biometric services.” After perhaps inadvertently noting that they use different terms than the terms of other “government agencies,” DHS concludes that they will “update the terminology in the applicable regulations to uniformly use the term ‘biometrics’” to refer to “iris image, palm print, voice print, DNA, and/or any other biometric modalities that may be collected from an individual in the future.”

In effect, DHS is proposing to replace regulations that authorize specific biometric modalities—specifically, fingerprints, photographs, and signatures as outlined in the INA—with regulations that
authorize a generic concept—“biometrics”—that DHS leaves open to unknown and unlawful expansion
to include any “identifying feature and action” that it desires. The scale of such a bait-and-switch is
astonishing, unwarranted, and unlawful. Moreover, as detailed above, such an expansion fails under the
APA as Congress has been clear that DHS may collect photographs and fingerprints only.

VII. Expanding Biometric Surveillance to Minors Under 14 Years of Age is Arbitrary,
Capricious and Against the Plain Language of the INA

DHS’ proposal to expand biometric surveillance to children under the age of 14 is manifestly
unreasonable because it fails to provide justification for the change, ignoring the fact that biometric
records are not reliable diachronic indicators of individual identity, and failing to explain how biometric
data alone can identify “fraudulent families,” notwithstanding DHS’ misleading statements to the
contrary. Further, DHS unlawfully expands Congress’s plain language.

Congress, in the INA, granted DHS the authority, \textit{inter alia}, to prepare forms for the registration
and fingerprinting of aliens, aged 14 and older, in the United States for more than 30 days.\textsuperscript{33} It also
provides authority to “administer oaths and to take and consider evidence concerning the privilege of
any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which
is material or relevant to the enforcement of this chapter and the administration of the Service.”\textsuperscript{34} Yet,
with the proposed rule, DHS attempts to “interpret” the authority to “take evidence” as the authority to
take personal, highly sensitive biometric data, from persons of any age. This, despite the fact that
Congress provides more limiting language, such as specifically stating fingerprints and photographs, in
other instances, indicating a clear intent to distinguish between “evidence” (such as statements or
paperwork) and “biometrics” (limited to fingerprints and photographs). This is particularly clear given
the overarching intent to protect vulnerable persons, including children, throughout the law.

\textsuperscript{33} INA 262
\textsuperscript{34} 8 U.S.C. 1357(b)
Notwithstanding, the rule must fail even if it is determined this language is vague, as DHS’ proposed expansion is arbitrary, capricious and fails to adequately weigh the harms done.

DHS argues that collecting prints of voices, irises, palms, and fingers, as well as facial images, from children ages 0 to 13 will “ensure” that records for children can be related to their records later in life as adults. Yet, many of these modalities are unable to do this. For instance, as every adult human knows, a child’s voice print will likely be very different before the child goes through puberty than it will afterwards.\(^{35}\) A person’s voice print is also likely to be different after hormonal therapy.\(^{36}\) Facial recognition technology also cannot reliably match the images of an individual’s face as a child to an image of their face as an adult.\(^{37}\)

In addition to failing to explain why these errors will not inhibit DHS’ biometric surveillance, DHS improperly attempts to justify this rule change on a false conflation between “family” and “genetic” relationships. Throughout the proposed rule, in all instances except for one, DHS refers to the role of biometric data (particularly DNA) in identifying “genetic relationships” or “biological relationships.” The one exception to this pattern occurs twice, in both instances where DHS alleges that DNA testing has helped identify “fraudulent families.” Of course, one need not be genetically related to a person to truthfully and correctly claim to be their family member—family relationships accepted under the INA include adopted children, spouses, stepchildren, legitimated children, and children as a result of assisted reproductive technologies (ART). Therefore, genetic testing could reveal the lack of a “genetic relationship” or “biological relationship” but could very well still involve a legitimate, non-fraudulent, relationship for immigration purposes. For example, an applicant for asylum could claim a

\(^{35}\) See Andreas Lanitas, supra n. 6.


\(^{37}\) See Karen Hao, supra n. 5.
stepchild or an adopted child with no biological or genetic relation as a derivative. While it recognizes these nuances, DHS does not appropriately narrow its proposed rule for such instances—instead, demanding a massive expansion of surveillance and data collection to include all individuals of any age claiming a family relationship even where the INA allows a broader range of family relationship, and asking us to trust that “To the extent the rule discusses using DNA evidence to establish qualifying relationships in support of certain immigration benefit requests, it is referring only to genetic relationships that can be demonstrated through DNA testing.” Such a broad brush when a narrower pen would do is in violation of the APA, and the rule must be withdrawn.

Furthermore, even if DHS’ misleading claim were in fact correct—that every family unit identified as “fraudulent” was in fact claiming to be genetically or biologically related—DHS does not explain how current identification practices would be insufficient for identifying such a claim, nor why any possible difference in identification of fraud warrants such a substantive expanse of biometric surveillance. Moreover, DHS does not give any indication that the benefits of such an expansion are justified by the alleged savings of the difference in identifying fraudulent families. Absent DHS’ misleading claims about identifying fraudulent families, DHS provides no evidence that the proposed rule is necessary and, if necessary, that current biometric and investigative practices are insufficient.

VIII. DHS Does Not Provide a Coherent Rationale for Continuous Vetting

DHS also claims that its massive expansion in biometric surveillance is required to conform to its responsibilities over the constitutionally-questionable Executive Order to continuously vet non-


39 “DHS also plans to implement a program of continuous immigration vetting, and require that aliens be subjected to continued and subsequent evaluation to ensure they continue to present no risk of causing harm subsequent to their entry.”
citizens.\(^{40}\) DHS claims without evidence that its proposed expansion of biometric surveillance would “\textit{ensure} [noncitizens who receive immigration benefits and the citizens and LPRs who may petition on their behalf] continue to present no risk of causing harm subsequent to their entry.” Here again, DHS conflates \textit{identification} with \textit{adjudication}, conflates applicants for immigration benefits (and their LPR and U.S. citizen petitioners) with criminals, and conflates biometric information with information that predicts risk of threat. This generalized and improper analysis is arbitrary, and necessitates the withdrawal of the rule.

Biometric information \textit{alone} cannot help adjudicators determine if the individual risks causing harm. At best, biometric information can verify the identity of an individual, and adjudicators can compare that identity to the identity of any record in its database in order to assess the non-biometric information associated with that record in determining the risk implied by that non-biometric information. Notably, this is already possible with current biometrics, and DHS gives no reason for thinking that expanded biometric surveillance is required for this adjudication to take place.

Furthermore, the proposed rule must be withdrawn as it rests entirely on the incorrect and unlawful presumption that those applying for immigration benefits are or may be criminals, and that criminality is the measure by which good moral character or threats to national security may be judged. This reasoning is arbitrary and capricious, and rests on unconstitutional assumptions equating immigration status to criminality, and criminality with continuing threats to security. Without sufficient justification for the change and how the expanded biometrics collection will respond to those

\(^{40}\) See Donald K. Hawkins, \textit{Privacy Impact Assessment for the Continuous Immigration Vetting}, DHS/USCIS/PIA-076, at 3 (Feb. 14, 2019), (“In furtherance of [Executive Order 13780] . . . USCIS is working with U.S. Customs and Border Protection (CBP) and ICE to develop Continuous Immigration Vetting (CIV), a vetting capability that applies uniform screening and vetting standards across identified immigrant and nonimmigrant populations and will vet applicants and beneficiaries from the time of the initial immigration filing, through the duration of the benefit or status, until the individual becomes a naturalized U.S. citizen. CIV leverages the successes realized with ATLAS and connects ATLAS to CBP’s Automated Targeting System (ATS) to conduct checks against CBP holdings, to further automate and streamline the vetting process.”), https://www.dhs.gov/sites/default/files/publications/pia-uscis-fdnsciv-february2019_0.pdf.
justifications—including why no more narrowly tailored approach will suffice—the rule must be withdrawn.

Biometric data alone cannot predict risk of threat. Even assuming, contrary to the evidence outlined in this comment, that biometric data reliably identifies an individual, and even assuming, contrary to the evidence, that database entries will not be rife with erroneous, non-biometric data pulled in from interoperable databases, the assessment that an identifiable individual poses a “public safety” or “national security” risk requires that an adjudicator have a concept of “public safety” or “national security” against which to judge the individual. The agency offers no justification or data to explain how the expanded biometrics data will help this analysis. Criminal records data is already obtainable from the current biometrics system, and there is no evidence that past criminal history is an agreed indicator of future risk to public safety or national security. Even assuming, arguendo, that criminal records data is a reliable indicator, the Department fails to explain how the proposed rule is necessary to obtain that data, and completely ignores all manner of other evidence that could be probative. Even going so far as to narrow the other types of such evidence and rely solely on biometrics data for such assessments.

Finally, the rule does not weight the pros and cons of continuous vetting, particularly failing to note the serious harms—both to the applicant and the country—caused by a constant uncertainty and fear related to review. DHS notes that it plans to “require that aliens be subjected to continued and subsequent evaluation . . . .” The proposed rule, however, is devoid of analysis as to how such continued and subsequent evaluation will be limited; clarified for the applicant, their employers or others; or implemented. The law favors certainty and finality. Keeping cases open—particularly as relates to something as fundamental as whether someone will be able to remain in the U.S. with their family or employer—is contrary to these values. And, because the proposed rule completely fails to analyze these concerns, it also fails under the APA.
IX. **DHS’ Proposed Changes to T-Visa Processing are Arbitrary and Capricious**

DHS’ proposed 8 C.F.R. § 245.23(g) also makes several arbitrary changes that violate the protections afforded trafficking victims. Most generally, DHS proposes to entirely change the nature of § 245.23(g) from a regulation that guides applicants regarding the kinds of evidence to be submitted to show good moral character for T-Visa applicants to a regulation that guides *adjudicators* regarding determination of good moral character. For example, in the present rule, section (g) states that “[t]he applicant must submit evidence of good moral character as follows,” and describes the kind of evidence required in the subsequent provisions (1)–(4).\(^{41}\) However, the proposed rule states that “USCIS will determine an applicant’s good moral character as follows.” This is a substantive change from a rule aimed at guiding applicants in determining what evidence to submit to show good moral character to a rule aimed at guiding adjudicators in the evidence they are to assess. DHS makes no mention of this monumental shift in the nature of § 245.23(g). Yet, it is of crucial importance.

T nonimmigrants are a category of nonimmigrant specifically provided special protections by Congress through the TVPA and its reauthorizations. Trafficking victims are given broad waivers of inadmissibility,\(^{42}\) special protections from removal,\(^{43}\) statutory rights to waivers of fees,\(^{44}\) and more—all in recognition of the fact that the harms they suffered and the important role they play in investigations have been determined important by Congress. Thus, shifting the dynamics of the good moral character inquiry—from one in which applicants are allowed to *show* their character to one in which USCIS may determine it and the trafficking victim attempt to rebut the determination—is in violation of the congressional intent in the TVPA.

\(^{41}\) Emphasis added.
\(^{42}\) 8 CFR 212.16(b)(3).
\(^{43}\) 8 CFR 214.11(j)(2).
\(^{44}\) The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Section 201(d)(3), Pub. L. 110-457 (PDF), 122 Stat. 5044, 5054 (December 23, 2008) (adding INA 245(l)(7)).
The proposed rule also fails to provide sufficient guidance to either adjudicators or applicants and petitioners as to the kind of evidence that will be considered. Proposed Section 245.23(g)(1) states that USCIS adjudicators will determine an applicant’s good moral character by “[r]eviewing any credible and relevant evidence,” without offering a scintilla of explanation as to what counts as “credible” or “relevant” evidence. While the any available evidence standard was beneficial to applicants in presenting their evidence; the Department, in proposing to shift the burden to the applicant to rebut evidence, should not benefit from the same standard. Instead, it must be restricted to provide evidence in predictable and discernable ways while continuing to allow applicants appropriate leeway to present any available and relevant evidence in order to protect the rights of applicants. An opposite standard can only result in arbitrary and capricious determinations, even assuming a best-faith application of the regulation.

In addition, DHS provides a substantively different and entirely new requirement regarding derogatory information on the conduct of applicants as it pertains to good moral character. Currently, § 245.23(g) requires applicants demonstrate good moral character “since first being lawfully admitted as a T-1 nonimmigrant and until USCIS completes the adjudication of their applications for adjustment of status.” DHS dramatically changes course in the proposed rule to require that applicants demonstrate good moral character prior to lawful admission as a T-1 nonimmigrant “if the earlier conduct and acts appear relevant to a determination of the applicant’s present moral character,” and if the conduct of the applicant between lawful T-1 nonimmigrant admission and USCIS adjudication of their application to adjust status “does not reflect that there has been a reform of character” since the pre-T-1 admission period. 8 C.F.R. § 245.23(g)(2). Without justifying why it is doing so, DHS changes administrative course and introduces a new requirement for determination of good moral character including a new burden of proof of applicants. Furthermore, DHS does not explain the means by which an applicant may prove rehabilitation, nor does DHS explain whether conduct during the requisite period that conforms
with an adjudication of good moral character counts as evidence of rehabilitation in the event that there is also evidence of conduct that does not conform with an adjudication of good moral character prior to the requisite period. Such a change fails to include the fact, recognized by Congress, that trafficking victims often are forced to engage in illegal activities by their trafficker and may, due to trauma, be involved in further actions that could be used as evidence against moral character but-for the Congressionally-recognized understanding of these dynamics. Indeed, Congress authorized a broad waiver of grounds of inadmissibility for T nonimmigrants and their families, which the proposed GMC standard would contradict. The rule must be withdrawn, as the proposed expansion of good moral character review runs afoul of Congressional intent and create unfair burdens on trafficking victims.

DHS also fails to offer sufficient rationale for changing the regulation at all, and for changing the regulation as it pertains to police letters. First, DHS acknowledges that good moral character adjudication occurs through the assessment of non-biometric data including criminal histories and other biographic data. But, DHS misleadingly suggests in proposed § 245.23(g)(1) that adjudications will be based on “criminal history information obtained through the applicant’s biometrics” among other evidence. As has been stated multiple times in this comment, biometric data do not contain information pertaining to an individual’s non-biometric characteristics or biography, including criminal history. Biometric data can only assist with verifying that two profiles of physical and genetic characteristics have sufficient similarity, and adjudicators can then locate the record associated with that biometric profile to assess the associated non-biometric data. DHS further fails to explain how GMC determinations for T nonimmigrants equating criminal history with moral character will not be arbitrary and capricious. This is crucial given, as noted above, the established protections in the TVPA/TVPRA regarding criminal history associated with the trafficking experience and trauma therefrom. Had the rule

45 “Adjudicators would assess good moral character based on the applicant’s criminal history, national security background check, and any other credible and relevant evidence submitted.” (Emphasis added.)
only proposed to remove the requirement to submit police letters, it would reflect such an understanding; however, by focusing its inquiry on biometric data related to criminal history, the proposed rule will result in arbitrary determinations that a T nonimmigrant lacks good moral character.

Finally, while DHS proposes that eliminating the requirement that T-Visa applicants submit police letters or verified criminal history checks will make the process easier for applicants, who will not have to produce such letters, and easier for adjudicators, who will have access to more reliable evidence than that which the applicant can produce, the proposed change does not do so. While DHS should make the process for protecting trafficking victims easier, this change does not do so—particularly when paired with the expansive timeframe for considerations of good moral character and the elimination of the presumption of GMC for applicants under 14-years-old. First, applicants, and not adjudicators, are better positioned to know whether or not the information contained in a criminal background check is accurate, and allowing applicants to ensure the evidence initially being considered contains correct information, rather than attempting to rebut incorrect derogatory information after an adverse decision, is a more efficient use of resources and more in-line with the congressional intent of the T nonimmigrant adjustment. Second, as DHS itself recognizes, DHS’ massive database is interoperable with state and federal criminal databases, so DHS will already have access to such information. That means that any degree of non-reliability of the information that DHS argues warrants expanding biometric surveillance of T-Visa applicants is also present in their proposed rule. Moreover, as plagues the entirety of this extensive proposed regulatory change, the Department fails to explain how the proposed change serves some purpose that the current biometrics process does not. Absent an independent explanation, then, DHS provides no good reason for the change.
X. **DHS Impermissibly Places the Onus on the Applicant to Rebut Derogatory Evidence, Despite Acknowledging Inherent Flaws and Providing No Explanation of How to Rebut Classified Evidence**

The proposed rule creates new standards without providing justification and impermissibly places a new burden on applicants without analyzing Congressional intent or the harm it will cause. In particular, the proposed rule proposes to allow applicants the “opportunity” to rebut derogatory information. While such an opportunity is the minimum required, it is insufficient as the propose rule provides no information as to how applicants will be able to access the derogatory information obtained—particularly if it involves classified material. This change not only may deprive applicants of due process of law, but also impermissibly changes the burden of proof without following required procedure.  

DHS acknowledges—though severely underestimates—the possibility of adjudicatory error based on database errors (biometric or non-biometric), and suggests that applicants are permitted to rebut adverse adjudications: “if a decision will be adverse to an applicant or petitioner and is based on derogatory information the agency considered, he/she shall be advised of that fact and offered an opportunity to rebut the information.” DHS cites 8 C.F.R. § 103.2(b)(16)(i) to support their claim, but does not mention the exceptions to the rule. Notably, § 103.2(b)(16)(iv) does not permit the applicant or petitioner access to any classified information, and the same set of executive orders requiring continuous vetting calls for the interoperability of classified and non-classified databases. DHS gives no explanation of how rebuttable, non-classified information will be kept separate from non-rebuttable, classified information, and gives no indication that they will implement any process ensuring that all

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46 See below for more on how the proposed rule impermissibly changes the good moral character standard.
possible non-classified derogatory information will be communicated to applicants or petitioners in the event of an adverse adjudication. Furthermore, DHS provides no analysis as to how due process obligations will possibly be met should the applicant be faced with a new burden of proof but be denied access to the accusations against them.

XI. **The Proposed Rule Fails to Justify the Significant Financial Costs**

Despite the extensive flaws outlined in this comment, DHS is proposing a rule that would demand significant financial resources. Yet, the Department has not justified or explained—other than, as infects the entirety of this proposal, by general reference to national security concerns—how the costs of such an expansive program are warranted. The Department estimates that the ten-year (2021-2030) combined cost of biometrics and DNA fees “could range from $3,204.1 to $4,996.9 million [nearly five billion], with a midrange of $4,100.5 million.” It is unclear, moreover, if such estimates account for waivers of the biometrics fees, which are statutorily allowed for trafficking victims, among others. And, while DHS also recognizes that “There could be some unquantified impacts related to privacy concerns for risks associated with the collection and retention of biometric information,” it fails to even provide an estimate of those costs—likely, because the data retention and protection, as well as any damages for breach, are so costly as to drive the estimates of this proposed rule even further beyond reason. All this despite the fact that U.S. Citizenship and Immigration Services recently requested additional Congressional appropriations in the face of possible furloughs of about three-quarters of the workforce that would process these applications and implement this proposed scheme. Without such an analysis, including sufficient justification, the rule must fail.
Conclusion

For the foregoing reasons, we request that this rule be withdrawn in its entirety. Should you require further information, please feel free to contact us.

Sincerely,

Michele Garnett McKenzie
Deputy Director, The Advocates for Human Rights