Comments Submitted by American Gateways RE: Proposed Collection of Information, Joint Notice of Proposed Rulemaking (NPRM) by the Executive Office for Immigration Review, Department of Justice; U.S. Citizenship and Immigration Services, Department of Homeland Security: Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review / RIN 1125-AA94 and 1615-AC42 / EOIR Docket No. 18-0002 / A.G. Order No. 4714-2020 (published in the Federal Register on June 15, 2020).

OMB Control No. 1615-0067

American Gateways provides much needed legal representation for indigent immigrants in Central Texas. Our mission is to champion the dignity and human rights of immigrants, refugees, and survivors of persecution, torture, conflict, and human trafficking through exceptional legal services at low or no cost, education, and advocacy. Our agency began in 1987 as the Political Asylum Project of Austin and was founded to provide legal representation to Central American immigrants fleeing persecution and seeking asylum in the U.S. Over the past thirty-three years, American Gateways has become an indispensable legal services provider for low-income asylum seekers and immigrants in Central Texas.

American Gateways submits these comments specific to the proposed collection of information set forth in the joint notice of proposed rulemaking regarding Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review (the "Proposed Rule"), published by the Department of Homeland Security (DHS) and Department of Justice (DOJ) (collectively, the "Departments") on June 15, 2020, to express its opposition to the proposed I-589, Application for Asylum and for Withholding of Removal (ID EOIR-2020-0003-0002) (the "Proposed Form I-589") and the accompanying instructions for Proposed Form I-589 (ID EOIR-2020-0003-0004) (the "Proposed Instructions"). The proposed collection of additional information on Form I-589 is unnecessary for the proper performance of agency functions, will substantially enhance the burden of collection for applicants, especially *pro se* applicants, and will not improve the quality, utility, or clarity of the information to be collected. The Proposed Form I-589 also runs afoul of the requirement that proposed collections of information be "written using plain, coherent, and unambiguous terminology" that "is understandable to those who are to respond." 5 C.F.R. § 1320.9(d). Finally, the Proposed Form I-589 would make it virtually impossible for service providers like American Gateways to assist *pro se* individuals seeking asylum, statutory withholding of removal, or withholding of removal under the Convention Against Torture (CAT) regulations with completing the I-589 application.

American Gateways staff work inside four detention centers in Central Texas—T. Don Hutto Residential Center, South Texas Detention Complex, Karnes County Residential Center, and Limestone County Detention Center. With limited resources, it is impossible for American Gateways to represent the thousands of detainees who are seeking asylum. Hence, American Gateways staff often provides *pro se* assistance to detained asylum seekers. When providing *pro se* assistance, American Gateways does not give legal advice, but instead educates individuals about the requirements for asylum and withholding of removal so that they can complete applications on their own. The proposed changes to Form I-589 require applicants to have in-depth knowledge of the asylum laws and regulations. For example, the proposed changes would require an individual to list a cognizable particular social group. They would also require that an individual who is seeking protection from torture explain how the perpetrator of such torture was

an official acting in his official capacity or with the acquiescence or consent of an individual acting in his official capacity. The vast majority of individuals that American Gateways serves *pro se* are non-English speakers. In addition, many of them are illiterate or have minimal education. Even those with advanced education do not have the legal knowledge to be able to complete the Proposed Form I-589 on their own, as doing so would require an advanced knowledge of the ever-changing U.S. asylum laws.

American Gateways describes below how some of the proposed changes would impact our organization, our clients, and other individuals we serve, and the reasons for our opposition. Omission of any proposed change from these comments should not be interpreted as tacit approval.

I. The Proposed Form I-589 is not only unnecessary for the proper performance of agency functions but would interfere with the fair adjudication of applications for asylum, statutory withholding of removal, and withholding of removal under the CAT regulations.

The proposed changes to Form I-589 are not necessary for the proper performance of agency functions. The current Form I-589 collects detailed information regarding the factual and legal bases of an applicant's claim for asylum, statutory withholding of removal, and withholding under the CAT regulations. The existing collection tool is more than sufficient to guide the adjudication of claims, especially when supplemented by an applicant's oral testimony. Additionally, collecting information that requires an in-depth understanding of U.S. immigration law from individuals who have little, if any, familiarity with the U.S. legal system cannot possibly assist the Departments in performing their duties to fairly adjudicate asylum and withholding claims.

Pursuant to well-established constitutional and statutory law, immigrants in removal proceedings are entitled to due process of law, including the right to notice and the opportunity to be heard. *See, e.g.*, *Wing v. United States*, 163 U.S. 228, 238-39 (1896) (holding that due process rights applied to individual detained for unauthorized entry into the United States); *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (reaffirming that immigrants in removal proceedings are guaranteed due process rights, including the right "to be heard upon the questions involving [the] right to be and remain in the United States"); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) ("An alien who faces deportation is entitled to a *full and fair* hearing of his claims."); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("[T]he fundamental requisite of due process of law is the opportunity to be heard. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."); *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) ("At a minimum, . . . the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct."). Given these basic due process protections that guarantee a right to a hearing, it is neither necessary nor appropriate for the Departments to collect any additional information on the Form I-589.

The Departments' proposed changes to the Form I-589 would, in fact, impair proper agency functions because the questions posed require knowledge of immigration law that few applicants possess. Although 84.7% of asylum cases with decisions had representation in FY

2019,[1] only a fraction of applicants (many of whom are detained) are able to secure legal representation in connection with preparing and submitting the Form I-589. In fact, representation rates for detained immigrants are only 30%.[2] Most persons seeking asylum do not speak English and have little, if any, familiarity with U.S. immigration law, which courts have described as "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion," including among immigration lawyers. *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003); *United States v. Aguirre-Tello*, 324 F.3d 1181, 1187 (10th Cir. 2003), *vacated* 353 F.3d 1199 (10th Cir. 2004) (en banc). Applications for relief must be submitted in English, or they will be deemed abandoned and the applicant ordered removed. Without counsel, few individuals—most of whom are torture or trauma survivors who suffer from post-traumatic stress disorder or other mental health ailments—can successfully complete the current Form I-589, and even fewer would be able to complete the newly Proposed Form I-589, which requires even greater familiarity with complex and constantly changing laws. As a result, there is a substantial likelihood that the information collected on the Proposed Form I-589 would be incomplete and/or inaccurate by no fault of the applicant. Such incomplete and/or inaccurate information could not possibly enhance the efficacy of adjudicating asylum and withholding claims, much less be indispensable to the performance of agency functions.

Consistent with established law and long-standing practice, immigration judges are well suited to explore the bases of an applicant's asylum claim articulated in a written I-589 application by conducting an evidentiary hearing. As the Eighth Circuit has explained,

> [c]onsidering [a] pro se alien's likely lack of legal knowledge, the difficulty of navigating immigration law, and the possibility of expulsion upon failure to do so successfully, we have recognized it is critical that the [immigration judge] scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.

Ramirez v. Sessions, 902 F.3d 764, 771 (8th Cir. 2018) (internal quotation marks omitted); *see also Barragan-Ojeda v. Sessions*, 853 F.3d 374, 381 (7th Cir. 2017) ("An IJ, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record. Particularly with a pro se respondent . . . , fair questioning by the IJ often is required to obtain information from the alien necessary for a reasoned decision on the claim.") (citations and internal quotation marks omitted); *Mohamed v. Att'y Gen.*, 705 F. App'x 108, 114 (3d Cir. 2017) ("The importance of that full examination is all the more apparent when considering the difficulties faced by a *pro se* applicant with little or no reading skills who was forced to seek help from his fellow detainees in a facility where he had already been assaulted, collect evidence and seek testimony while detained, and present his case via videoconference."); Immigration Court Practical Manual § 4.15(g) (instructing immigration judges to "advise[] the [pro se] respondent of any relief for which the respondent appears to be eligible"). Given the affirmative obligation of immigration

[1] TRAC Immigration, *Record Number of Asylum Cases in FY 2019* (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/.

[2] TRAC Immigration, *Who is Represented in Immigration Court?* (Oct. 16, 2017), https://trac.syr.edu/immigration/reports/485/.

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