



October 13, 2020

Michael J. McDermott,  
Security and Public Safety Division, Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Ave. NW,  
Washington, DC 20529-2240

**RE: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services;  
DHS Docket No. USCIS-2019-0007; RIN 1615-AC14  
Submitted via: [www.regulations.gov](http://www.regulations.gov)**

Dear Mr. McDermott:

On behalf of ASISTA, I submit this comment in response to the U.S. Citizenship and Immigration Service (USCIS) notice of proposed rulemaking, entitled “Collection and Use of Biometrics by U.S. Citizenship and Immigration Services” published in the Federal Register on September 11, 2020 (hereinafter “proposed rule”).<sup>1</sup>

ASISTA’s mission is to advance the dignity, rights, and liberty of immigrant survivors of violence. For over 15 years, ASISTA has been a leader on policy advocacy to strengthen protections for immigrant survivors of domestic violence, sexual assault, human trafficking and other crimes created by the Violence Against Women Act (VAWA) and the Trafficking Victims Protection Act (TVPA). We assist advocates and attorneys across the United States in their work on behalf of immigrant survivors of violence. We submit this comment based on our extensive experience.

USCIS’s proposed rule will significantly burden immigrant survivors of domestic violence, sexual assault, human trafficking and other crimes. The expansion of biometrics collection will discourage survivors from coming forward to access relief and needlessly jeopardize survivors’ privacy and security.

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<sup>1</sup> U.S. Citizenship and Immigration Service, Department of Homeland Security. Notice of Proposed Rulemaking “Collection and Use of Biometrics by U.S. Citizenship and Immigration Services ” (hereinafter “Proposed Rule” ( 85 FR 56338) September 11 2020, available at <https://www.regulations.gov/contentStreamer?documentId=USCIS-2019-0007-0001&contentType=pdf>

## I. The Proposed Rule's Comment Period Is Inadequate

The proposed rule is over 80 pages long and is extremely detailed and complex, and yet USCIS provided the public with a mere 30 day period in which to provide comment. In normal times, 30 days would be wholly insufficient to provide meaningful review.<sup>2</sup> The proposed rule not only expands the modalities of biometric collections, but also broadens how frequently individuals would be required to submit them, creating increased concerns about security and privacy.

And yet, these are not normal times. A 30-day comment period is even more egregious given the significant challenges organizations like ours are experiencing during the COVID-19 pandemic. When over 100 organizations wrote to USCIS to request an extension of the comment period outlining these challenges, USCIS provided no response.<sup>3</sup> Our agency must balance the demands of responding to constant and complex changes to immigration policy,<sup>4</sup> while at the same adapting to variable work conditions, engaging in care-taking responsibilities, including in some instances, helping children navigate the extraordinary challenges of remote or hybrid learning.

Part of USCIS' purported mission is to "safeguard...its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits."<sup>5</sup> Providing such a short period for comment violates this mission by not providing a meaningful opportunity to review and respond to such a complex and far-reaching rule. For these procedure deficiencies alone, we call on USCIS to withdraw the proposed rule. Given the extreme limitations USCIS has placed on the comment period, this comment reflects only a fraction of the substantive issues we would have liked to address in our response.

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<sup>2</sup> Executive Order 12866 states that agencies "should afford the public a *meaningful opportunity* to comment on any proposed regulation, which in most cases should include a comment period of *not less than* 60 days." Executive Order 12866 58 Fed. Reg. 190 (September 30, 1993), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf> [Emphasis added].

<sup>3</sup> CLINIC. "More Than 100 Organizations Join to Urge DHS to Provide 60-Day Comment Period to Respond to DHS's Proposed Biometrics Expansion Rule" (Sept. 17, 2020), available at <https://cliniclegal.org/resources/federal-administrative-advocacy/more-100-organizations-join-urge-dhs-provide-60-day>

<sup>4</sup> E.g. ASISTA recently provided comment in response to the Executive Office for Immigration Review, Department of Justice. "Notice of Proposed Rulemaking: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure" (hereinafter "proposed rule" (85 FR 52491) August 26 2020, available at <https://www.federalregister.gov/documents/2020/08/26/2020-18676/appellate-procedures-and-decisional-finality-in-immigration-proceedings-administrative-closure>; In addition, both DHS and DOJ continue to publish substantive policy changes at a rapid-fire pace overwhelming interested stakeholders, See e.g. EOIR Docket No. 19-0010; A.G. Order No. 4843-2020, [Proposed Rules on Procedures for Asylum and Withholding of Removal](#), with comments due October 23, 2020; Changes to Affidavit of Support Requirements, with comments due November 2, 2020. <https://www.federalregister.gov/documents/2020/10/02/2020-21504/affidavit-of-support-on-behalf-of-immigrants>

<sup>5</sup> U.S. Citizenship and Immigration Service "Mission and Values" (last updated: July 5, 2020), available at <https://www.uscis.gov/about-us/mission-and-core-values>

## II. The Proposed Rule will Create Additional Burdens for Immigrant Survivors

The bipartisan Violence Against Women Act (VAWA) in 1994 created special protections for foreign nationals who are victims of battery or extreme cruelty committed by their U.S. citizen or lawful permanent resident spouse or parent, or their adult U.S. citizen son or daughter. These protections enable survivors to obtain legal immigration status independently of their abusive sponsors.<sup>6</sup>

When VAWA was reauthorized in 2000, in conjunction with the passage of the Trafficking Victims Protection Act (TVPA), a bipartisan majority in Congress established two additional remedies for immigrant survivors: the T visa to assist victims of human trafficking, and the U visa to assist noncitizen victims of certain qualifying crimes (including domestic violence, sexual assault) who are willing to assist in the investigation or prosecution of those crimes. These forms of relief recognize how abusers and perpetrators of crime often use immigration status as a tool of abuse and control, and aim to spare survivors from being forced to choose between living with abuse and facing deportation and possible separation from their children.<sup>7</sup>

Over the last several years, USCIS has created significant barriers to immigration relief--some by way of seismic regulatory overhauls, others through a series of discrete and calculated procedural shifts. For example, USCIS's implementation of its Notice to Appear Memoranda has disproportionately impacted survivor-based claims and has created new risks for survivors applying for relief.<sup>8</sup> USCIS has also implemented policies

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<sup>6</sup> Nearly 75% of abused immigrant women in one survey, for example, reported that their spouse had never filed immigration papers to give them legal status. Abusers who eventually filed papers for their immigrant spouses waited almost 4 years to file. See Mary Ann Dutton, Leslye E. Orloff, & Giselle Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 Geo. J. Poverty Law & Pol'y 245, 259 (2000).

<sup>7</sup> Proposed Rule at 56359.

<sup>8</sup> Beginning November 19, 2018, USCIS has implemented its notice to Appear (NTA) guidelines to apply to forms of relief such as I-360 VAWA self-petitions, I-914: Applications for T Nonimmigrant Status, I-918: Petition for U Nonimmigrant Status, and I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant. See USCIS. Updated Notice to Appear (NTA) Policy Guidance (November 20, 2018), available at: <https://www.uscis.gov/outreach/updated-notice-to-appear-nta-policy-guidance-0>; See also Priyanka Boghani, "Undocumented Crime Victims Face Heightened Risk of Deportation" *Frontline* (Nov. 30, 2018); <https://www.pbs.org/wgbh/frontline/article/undocumented-crime-victims-face-heightened-risk-of-deportation/>; See also Martin de Bourmont, "New U.S. Policy Raises Risk of Deportation for Immigrant Victims of Trafficking" *Foreign Policy* (Jul. 9, 2018); [https://foreignpolicy.com/2018/07/09/new-us-policy-raises-risk-of-deportation-for-immigrant-victims-of-trafficking-immigration-visa/?fbclid=IwAR3Nf0pvUszN4OQ30cNSDSKb6lv2Obo\\_UzvvSbGOExqvjRn82piGN9qzEIE](https://foreignpolicy.com/2018/07/09/new-us-policy-raises-risk-of-deportation-for-immigrant-victims-of-trafficking-immigration-visa/?fbclid=IwAR3Nf0pvUszN4OQ30cNSDSKb6lv2Obo_UzvvSbGOExqvjRn82piGN9qzEIE)

instructing adjudicators to reject asylum applications and applications for T and U nonimmigrant status for merely for blank spaces on forms,<sup>9</sup> issued overbroad guidance on discretion,<sup>10</sup> and heightened scrutiny of fee waivers for survivor-based cases.<sup>11</sup> These are just a few examples of the myriad ways USCIS is now focused on reducing the number of applicants rather than providing relief to the most vulnerable.

### A. Expansion of Biometrics

The proposed rule expands biometrics collection in a way that is overbroad, vague, and unnecessarily invasive. The proposed rule expands USCIS's authority to collect biometric data from a wide range of individuals "associated" with an immigration benefit or request including applicants, petitioners, sponsors or beneficiaries.<sup>12</sup> It also expands the current biometric collection beyond fingerprints and photographs to include additional "modalities" such as iris scan, palm print, facial recognition, voice print, and DNA.<sup>13</sup>

USCIS does not sufficiently explain why this broad expansion is necessary and why the current biometrics collection framework does not provide "reliable" results. By expanding the modalities of biometrics, USCIS is collecting far more information than it conceivably needs to verify identity and family relationships and conduct background checks. USCIS has over prescribed solutions while failing to adequately diagnose any problem.

For survivors who have experienced abuse or stalking, complying with these new and invasive biometric requirements may exacerbate the harm and trauma they have suffered and cause even more trepidation about accessing immigration relief. USCIS fails to specify *which* modalities will be utilized in the biometrics collection involving survivor-based relief, and *why* deploying those modalities are necessary. This lack of transparency causes uncertainty and fear and will prevent eligible individuals from seeking benefits created for their protection.

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<sup>9</sup> Sign on letter to Kenneth T. Cuccinelli Senior Official Performing the Duties of the Director on behalf of 146 national, state and local organizations (August 13, 2020), available at

<https://asistahelp.org/wp-content/uploads/2020/08/Letter-to-USCIS-Blank-Space-Rejection-Policy-8.13.2020.pdf>

<sup>10</sup> Joint Comment Submitted in Response to USCIS Policy Manual Chapters on Applying Discretion in USCIS Adjudications; 1 USCIS-PM E.8 and 10 USCIS-PM A.5 (August 14, 2020), available at

<https://asistahelp.org/wp-content/uploads/2020/10/Joint-Comment-USCIS-Policy-Manual-USCIS-Policy-Manual-Appling-Discretion-in-USCIS-Adjudications-1-USCIS-PM-E.8-and-10-USCIS-PM-A.5-Aug.-14-2020-002.pdf>

<sup>11</sup> ASISTA letter to USCIS: Request for USCIS to Provide Clarification on Fee Waiver Practice for Humanitarian Unit at Vermont Service Center (July 30, 2018), available at

<https://asistahelp.org/wp-content/uploads/2019/12/ASISTA-Fee-Waiver-Letter-July-30-2018-.pdf>

<sup>12</sup> Proposed Rule at 56340.

<sup>13</sup> *Id.* at 56355.

## 1. The Proposed Rule Underestimates Burden and Costs to Applicants

USCIS' estimations regarding the cost of implementing the proposed rule significantly undervalues intangible burdens to applicants. This includes but is not limited to the cost of missing school, especially given the expansion of biometrics to children.<sup>14</sup> USCIS does not take into account that applicants may have trouble obtaining transportation to the nearest Application Support Center (ASC) for a biometrics appointment, either having to navigate public transportation, or having to rely on a friend or family member to help them. In addition, ASCs are often more than the 50 miles round trip estimated by USCIS.<sup>15</sup> For instance, the closest ASC for a survivor residing in Scranton, Pennsylvania is in Philadelphia, a trip nearly 2 hours away and about 260 miles round trip.

## 2. Unreliable and Problematic Biometric Modalities

Many of these additional biometric modalities contained in the proposed rule are unreliable, especially with regard to children. Reports from agencies like UNICEF indicate that biometric technology was created to “identify adults, and may not be appropriate for use in recognizing children”.<sup>16</sup> This not only has to do with the “difficulty in capturing the biometric trait (such as an iris scan with very young children); but also “the relatively poor performance of the trait among certain age groups (facial recognition).”<sup>17</sup> The proposed rule also raises questions of consent and a child’s agency to make informed decisions about their personal data. UNICEF reports, “While requiring parental consent is an important means of addressing such issues, many parents or guardians may also not fully understand the risks either, thus increasing the vulnerability of children.”<sup>18</sup>

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<sup>14</sup> USCIS expanded biometrics collection to children under 14 pursuant to a 2017 memoranda. “DHS Biometrics Expansion for Improved Identification and Encounter Management,” May 24, 2017, available at [https://www.dhs.gov/sites/default/files/publications/dhs\\_biometrics\\_expansion.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_biometrics_expansion.pdf). The proposed rule expands on this policy by removing age restrictions on biometrics collection in the context of issuing Notices to Appear (NTAs). Proposed rule at 56345.

<sup>15</sup> Proposed rule at 56381.

<sup>16</sup> UNICEF: “Faces, Fingerprints & Feet: Guidance on assessing the value of including biometric technologies in UNICEF-supported programs” (July 2019), available at [https://data.unicef.org/wp-content/uploads/2019/10/Biometrics\\_guidance\\_document\\_faces\\_fingerprint\\_feet-Jul-y-2019.pdf](https://data.unicef.org/wp-content/uploads/2019/10/Biometrics_guidance_document_faces_fingerprint_feet-Jul-y-2019.pdf)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Facial recognition technology has been shown to demonstrate racial and gender bias.<sup>19</sup> A recent MIT and Stanford University study tested three commercial facial analysis systems and found “error rates in determining the gender of light-skinned men were never worse than 0.8 percent. For darker-skinned women, however, the error rates ballooned — to more than 20 percent in one case and more than 34 percent in the other two.”<sup>20</sup> Furthermore, facial recognition software has been found to misgender transgender individuals and as well as not identify non-binary genders.<sup>21</sup>

USCIS’ plan for voice prints to be integrated into USCIS call center processes is not only deeply disturbing, but also raises concerns of racial and gender bias.<sup>22</sup> Again, USCIS has not demonstrated why this is necessary, when applicants can present less-invasive information (such as Alien Registration numbers) to help verify the identity of the caller.

Furthermore, these biometrics may link to databases that have incomplete, inaccurate or outdated information about the applicant. USCIS purports to have “internal procedural safeguards to ensure technology used to collect, assess, and store the differing modalities is accurate, reliable, and valid.”<sup>23</sup> However, DHS databases have demonstrated a documented need for additional oversight. For example, ICE has issued detainers and deported U.S. citizens at concerning rates.<sup>24</sup> The proposed rule cites 8 CFR 103.2(b)(16)(i), indicating that applicants will be offered an opportunity to rebut derogatory information the agency considered in its adjudication but does not provide applicants with any redress in the event the information is erroneous.

Lastly, the expansion of biometrics is deeply concerning for survivor-based forms of immigration benefits given its potential to increase *who* has access to this vast array of biometric information. Abusers and perpetrators of crime often threaten to report survivors to the police or to the immigration authorities in order to maintain power over their victims and

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<sup>19</sup> Ali Breland. “How white engineers built racist code – and why it’s dangerous for black people” The Guardian (December 4, 2017), available at <https://www.theguardian.com/technology/2017/dec/04/racist-facial-recognition-white-coders-black-people-police>

<sup>20</sup> Larry Hardesty. “Study finds gender and skin-type bias in commercial artificial-intelligence systems” MIT News (Feb. 11, 2018), available at <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212>

<sup>21</sup> See Matthew Gault. “Facial Recognition Software Regularly Misgenders Transgender People” Vice (Feb. 19, 2019), available at <https://www.vice.com/en/article/7xnwed/facial-recognition-software-regularly-misgenders-trans-people>

<sup>22</sup> Joan Palmiter Bajorek. “Voice Recognition Still Has Significant Race and Gender Biases” Harvard Business Review (May 10, 2019), available at <https://hbr.org/2019/05/voice-recognition-still-has-significant-race-and-gender-biases>

<sup>23</sup> Proposed Rule at 56341.

<sup>24</sup> Amicus Brief of Cato Institute filed in Gerardo Gonzalez v. Immigration and Customs Enforcement (Case No. Nos. 20-55175) (June 12, 2020), available at <https://www.cato.org/sites/cato.org/files/2020-06/Gonzalez-v-Immigration-and-Customs-Enforcement.pdf>

keep them silent.<sup>25</sup> Congress realized “threats of deportation are the most potent tool abusers of immigrant victims use to maintain control over and silence their victims and to avoid criminal prosecution.”<sup>26</sup> For this reason Congress created confidentiality protections for survivors codified at 8 USC § 1367, to ensure that abusers and other perpetrators of crime do not use the immigration system against their victims.<sup>27</sup> The proposed rule states that “biometric collection contemplated here would also be protected from disclosure in accordance with the requirements and exceptions found in 8 U.S.C. 1367.”<sup>28</sup> And yet even with numerous internal procedures put in place, DHS has found that most components lack necessary policies for protecting these survivor’s records in compliance with their agency directives.<sup>29</sup>

These protections are paramount. We are extremely concerned that expansion of modalities of biometrics will lead to additional disclosures (either intentionally through vulnerabilities to hacking),<sup>30</sup> which will place survivor’s information and safety at risk. The proposed rule acknowledges there are privacy concerns about risks involved with the collection and retention of biometric information. and that the proposed rule would expand the number of individuals who may have these concerns.<sup>31</sup> Whenever sensitive information about a victim is shared between agencies, the security of that information is vulnerable due to the increasing number of people authorized to access the information. These risks are augmented by the potential for data-sharing with the databases in which these new forms of biometric information will be stored.<sup>32</sup> Survivors of domestic violence, sexual assault, human trafficking and other crimes

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<sup>25</sup> See e.g. Samantha Schmidt. “Deputy accused of sexually assaulting girl, 4, threatening to have mother deported if she spoke up.” Washington Post (June 18, 2018) available at <https://www.washingtonpost.com/news/morning-mix/wp/2018/06/18/deputy-accused-of-sexually-assaulting-girl-4-threatening-to-have-mother-deported-if-she-spoke-up/>

<sup>26</sup> Representative Conyers Jr. Congressional Record 151: 164 (December 18, 2005) E2606, Available at: <https://www.congress.gov/crec/2005/12/18/CREC-2005-12-18-pt1-PgE2605-4.pdf>

<sup>27</sup> “Department of Justice Appropriations Authorization Act, Fiscal Years 2006 through 2009: Report of the Committee on the Judiciary, House of Representatives, to accompany H.R. 3402” H.R. Rep. No. 109-233, at 120 (2005). Available at: <https://www.congress.gov/109/crpt/hrpt233/CRPT-109hrpt233.pdf>

<sup>28</sup> Proposed Rule at 56350.

<sup>29</sup> See e.g. DHS. Privacy Compliance Review of the Privacy Incidents Affecting Individuals Protected by Section 1367” (February 4, 2019) available at <https://www.dhs.gov/sites/default/files/publications/1367%20PCR%20Report%20FINAL%2020190204.pdf>

<sup>30</sup> See e.g., Brian Barret. “Hack Brief: Hack Brief: Hacker Leaks the Info of Thousands of FBI and DHS Employees” Wired (Feb. 8, 2016), available at <https://www.wired.com/2016/02/hack-brief-fbi-and-dhs-are-targets-in-employee-info-hack/>

<sup>31</sup> Proposed rule at 56364.

<sup>32</sup> Chris Burt, *U.S. agencies working on standard for seamless communication between biometric databases*, Biometric Update (Sept. 26, 2018), at <https://www.biometricupdate.com/201809/u-s-agencies-working-on-standard-for-seamless-communication-between-biometric-databases> (discussing Electronic Biometric Transmission Specification (EBTS) database--inclusive of DHS, DoD, and FBI information--is also compatible with NATO’s standard, enabling information sharing with foreign partners)

may have justified concerns about what information is shared, with whom and for what purpose; and the proposed rule fails to address these concerns.

### B. Expansion of DNA collection

The proposed rule will permit DHS, in its discretion, to request, require, or accept DNA test results for individual benefit requests requiring proof of a genetic relationship<sup>33</sup> This would include but is not limited to:

- VAWA Self-Petitions (Form I-360)<sup>34</sup>
- Application for T Nonimmigrant Status Supplement A (Form I-914A);
- Petition for U Nonimmigrant Status Supplement A (Form I-918A);
- Petition for Qualifying Family Member of a U-1 Nonimmigrant (Form I-929).<sup>35</sup>

USCIS estimates that the numbers of applicants that will potentially be subject to these new requirements will be significant.<sup>36</sup> However, USCIS' estimates of applications that would be impacted by the proposed rule are not well explained when it comes to survivor-based cases. USCIS bases its estimates on data compiled from FY2013-FY2017, when USCIS statistics are available up to FY2019 and beyond. Furthermore, USCIS does not adequately explain how it derives which percentages of applicants claim a genetic relationship and thus would be subject to testing. For example, Table 19 in the proposed rule indicates that for the fiscal years FY2013-FY2017, there were an average of 8,767 petitioners who claimed a genetic relationship to 13,151 petitioners.<sup>37</sup> However, USCIS data reflects the following:

<b>Fiscal Year<sup>38</sup></b>	<b>Principal Filings Total</b>	<b>Derivative Filings Total</b>
2019	28,364	18,861
2018	34,547	24,117
2017	36,531	25,155
2016	35,044	25,666
2015	30,106	22,560

<sup>33</sup> Proposed Rule at 56343.

<sup>34</sup> *Id.* at 56375.

<sup>35</sup> *Id.* at 56378.

<sup>36</sup> *Id.* at 56380.

<sup>37</sup> *Id.*

<sup>38</sup> USCIS. U visa Data Set FY2019, Fourth Quarter, available at [https://www.uscis.gov/sites/default/files/document/data/i918u\\_visastatistics\\_fy2019\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/document/data/i918u_visastatistics_fy2019_qtr4.pdf)



2014	26,039	19,229
2013	25,432	18,263

The average of principal applicants and derivatives is 30,630 and 22,175 respectively for the period FY2013-FY2017. Using the most recent five-year-period, these average numbers increase to 32,918 principal applicants and 23,272 for derivatives. Thus, the proposed rule is unclear as to how it derives its estimates and how many survivor-based applicants and petitioners will be impacted by this rule.

As these requests are within the “discretion” of the adjudicator, this will result in inconsistent treatment of survivors, adding additional costs and burdens to an already difficult adjudication process. The potential costs to survivors is staggering; DNA tests often incur a \$440 fee to test first genetic relationship and \$220 for each additional test, which are costs **the applicant** must take on.<sup>39</sup>

While intimate partner violence permeates all income levels, there is research cited by the Centers for Disease Control and Prevention that indicates that intimate partner victimization is associated with economic, food and housing insecurity.<sup>40</sup> Experts note that “batterers create economic instability for their partners through economic sabotage and control. And poverty, in turn, creates increased vulnerability to violence and additional barriers to safety.”<sup>41</sup> Similarly, Freedom Network USA explains that “trafficking survivors have, by definition, suffered a financial crime. Trafficking survivors have been robbed of their earned income by the traffickers who have exploited and abused them.”<sup>42</sup> USCIS has not shown that there is any systemic problem in establishing qualifying relationships in these cases, nor has USCIS sufficiently acknowledged that these additional costs create significant barriers to survivors who may be facing economic instability related to their victimization.

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<sup>39</sup> Proposed Rule at 56382.

<sup>40</sup> NISVS. “An Overview of Intimate Partner Violence in the United States — 2010 Findings”, available at <https://www.cdc.gov/violenceprevention/pdf/ipv-nisvs-factsheet-v5-a.pdf>

<sup>41</sup> Sara J. Shoener and Erika A. Sussman. “Economic Ripple Effect of IPV: Building Partnerships for Systemic Change” Domestic Violence Report. August/September 2013, available at [https://csaj.org/document-library/Shoener\\_and\\_Sussman\\_2013\\_-\\_Economic\\_Ripple\\_Effect\\_of\\_IPV.pdf](https://csaj.org/document-library/Shoener_and_Sussman_2013_-_Economic_Ripple_Effect_of_IPV.pdf)

<sup>42</sup> Freedom Network USA. Comment in Response to DHS Docket No: USCIS-2019-0010 “U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements” (Feb. 10, 2020), available at <https://static1.squarespace.com/static/5b9f1d48da02bc44473c36f1/t/5e507210576c4c1eab3a70ae/1582330386661/FNUSACommentUSCISFeeRule10Feb2020.pdf>

As mentioned above, in cases involving domestic violence, stalking, human trafficking and other crimes, survivors may have valid concerns about this process and the privacy of their DNA information. According to the National Network to End Domestic Violence (NNEDV), a survivor reaching out for assistance often does so at great personal risks--“[i]f an abuser should discover that a victim is seeking services, the abuse could increase in frequency and severity. There can also be potential societal and personal repercussions from being identified as a victim, such as housing or job discrimination. Even without these concerns, the experiences of any survivor are theirs and they should be in complete control over their privacy and who knows their story.”<sup>43</sup> NNEDV resources also explain that “government databases and other public records must be carefully regulated to ensure the safety of victims who may be tracked by these means.”<sup>44</sup>

While the proposed rule acknowledges the protections of 8 USC 1367, it does not sufficiently consider the unique concerns of survivors of crime with regard to DNA collection, and lacks specific details about how this information may potentially be used outside the adjudication setting.

### **III. VAWA and T Visa Adjustment of Status Evidentiary Changes**

USCIS proposes new documentary requirements for good moral character determinations in both VAWA self-petitions and T visa adjustment of status applications. In particular, the proposed rule would remove the requirement that VAWA self-petitioners and T visa-based adjustment applicants who have resided in the United States submit police clearance letters as evidence of good moral character.<sup>45</sup>

Like so much of this proposed rule, these changes are solutions without demonstrable problems. VAWA self-petitioners are required to submit biometrics in order to obtain work permits incident to approval of the self-petition. Similarly, T visa holders are required to submit biometric evidence upon filing of their adjustment applications. Thus, USCIS already has existing mechanisms in place in order to verify an applicant’s identity. As indicated above, databases that USCIS searches as a result of biometrics may also contain incomplete, inaccurate or outdated information about the applicant. Indeed, USCIS has not sufficiently demonstrated how the current process is unreliable or how it directly burdens USCIS to review these police letters.

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<sup>43</sup> National Network to End Domestic Violence. Technology Safety Confidentiality Toolkit, available at <https://www.techsafety.org/confidentiality>

<sup>44</sup> National Network to End Domestic Violence. “Policy Center. Policy Issues-Confidentiality” available at <https://nnedv.org/content/confidentiality/>

<sup>45</sup> Proposed Rule at 56342.

In addition, the proposed rule permits USCIS to consider conduct beyond the requisite period<sup>46</sup> immediately before filing, where: (1) The earlier conduct or acts appear relevant to an individual's present moral character; and (2) the conduct of the self-petitioner/applicant during the three years immediately before filing does not reflect that there has been a reform of character from an earlier period. See generally 8 CFR 316.10(a)(2).<sup>47</sup>

The proposed rule's reliance on regulatory language from the naturalization context is in direct conflict with the statute and is inappropriate for VAWA self-petitions and T visa adjustment adjudications. The naturalization statute at INA 316(a)(3) states that "during **all** the periods referred to in this subsection **has been** and **still is** a person of good moral character."<sup>48</sup> In addition, INA 316(e), states: In determining whether the applicant has sustained the burden of establishing good moral character...the Attorney General shall not be limited to the applicant's conduct during the five year period, but may take into consideration as a basis for such determination thea applicant's conduct and acts at any time prior to that period. Thus, the language in the regulations 8 CFR 316.10(a)(2) reflects that USCIS is permitted to look beyond the 5 year statutory lookback period.

It is improper and incorrect to impose the naturalization regulatory language on VAWA and T visa adjustment of status good moral character determinations.<sup>49</sup> In the context of VAWA self-petitions, good moral character determination focuses exclusively on the present tense, e.g. that the applicant **is** a person of good moral character.<sup>50</sup> In the T visa adjustment of status content, Congress also limited the requisite period for evaluating good moral character. INA 245(l)(1)(B) indicates that T visa holders applying for adjustment of status must show they "have been" a person of good moral character during such period of at least 3 years since admitted as a T nonimmigrant **or** during the period during the investigation or prosecution of the trafficking and the Attorney General determines it is complete.<sup>51</sup>

This was done to ensure that T visa holders would not be unjustly prejudiced repeatedly adjudicating issues that already would have been addressed as part of their underlying T visa application. By allowing this look back beyond the period authorized by Congress, USCIS is

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<sup>46</sup> For VAWA self petitioners, the requisite period to demonstrate good moral character is 3 years, according to the regulations. See e.g. 8 CFR 204.2(c)(2)(v); With regard to T visa applicants applying for adjustment, the requisite period is for "for a continuous period of at least 3 years since the date of admission as a nonimmigrant" or "continuous period during the investigation or prosecution of acts of trafficking." See INA 245(l)(1)(A).

<sup>47</sup> Proposed Rule at 56360 and 56351.

<sup>48</sup> Emphasis added.

<sup>49</sup> Proposed Rule at 56360.

<sup>50</sup> INA 204(a)(1)(A)(iii)(II)(bb); INA 204(a)(1)(A)(vii)(II); INA 204(a)(1)(B)(ii)(II)(bb); INA 204(a)(1)(B)(iii)

<sup>51</sup> INA 245(l)(1)(A) and (B).

unlawfully introducing additional subjective elements which can be used to retraumatize survivors and subjectively deny them the protections afforded under the law.

Lastly, removing the presumption of good moral character for VAWA self-petitioners and T visa adjustment applicants under 14 creates unnecessary barriers for young applicants and increases the burden on survivors and their families. USCIS already has the ability to request additional information from applicants if warranted, and codifying these provisions in the regulations adds additional barriers without sufficient justification.

#### **IV. The Proposed Rule Erects Unnecessary Barriers and Costs**

The proposed rule adds additional stresses to an immigration system that is already under enormous strain. USCIS is currently working its way through a massive, historic backlog and is struggling to keep up with document production and other functions.<sup>52</sup>

For survivor-based cases, these processing delays are staggering. In October 2020, U visa processing times are now posted at 57 to 57.5 months, more than double where they were four years earlier.<sup>53</sup> According to USCIS data, the average processing time for U visa applications was 5 months in FY2014.<sup>54</sup> In FY2020, the average processing time was 47.3 months, an 846 % increase.<sup>55</sup> VAWA self-petitions now take between 17 and 22.5 months to be adjudicated.<sup>56</sup> USCIS' posted processing times for T visa applications for victims of human trafficking are between 18 and 27 months,<sup>57</sup> which at the higher limit represents a 321% increase from FY2014 when these applications took 5.8 months to adjudicate.<sup>58</sup>

Now, under the proposed rule, survivors who are facing these incredible backlogs will potentially face even greater hardship as USCIS extends scarce resources for new equipment, training, operating procedures, and steps to the adjudication process. Resources put toward implementing the proposed rule will unfairly take away from the adjudication of benefits, which is the principal function of USCIS.

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<sup>52</sup> Ombudsman's Alert: Card Production Delays at USCIS (July 22,2020), available at <https://content.govdelivery.com/accounts/USDHS/bulletins/2969646>

<sup>53</sup> See USCIS Processing Times at <https://egov.uscis.gov/cris/processTimesDisplayInit.do> for processing times for I-918 Application for U Nonimmigrant Status adjudicated at the Vermont Service Center

<sup>54</sup> USCIS. "Historic National Average Processing Times for All USCIS Offices" (captured June 22, 2018), available at <https://web.archive.org/web/20180622001323/https://egov.uscis.gov/processing-times/historic-pt>

<sup>55</sup> USCIS. "Historic National Average Processing Times for All USCIS Offices", available at <https://egov.uscis.gov/processing-times/historic-pt>

<sup>56</sup> See USCIS Case Processing Times: <https://egov.uscis.gov/processing-times/> for processing times for I-360 VAWA self petitions adjudicated at the Vermont Service Center

<sup>57</sup> *Id.* for processing times for I-914 Application for T Nonimmigrant Status processed at Vermont Service Center

<sup>58</sup> See note 54, *supra*.

## **V. Continuous Vetting Erodes Due Process & Violates Survivor Privacy**

The proposed rule creates “continuous vetting” procedures in which individuals may “be subjected to continued and subsequent evaluation of eligibility for their immigration benefits to ensure they continue to present no risk of causing harm subsequent to their entry.”<sup>59</sup> This rule proposes that any individual who is present in the United States following an approved immigration benefit may be required to submit biometrics unless and until they are granted U.S. citizenship.”<sup>60</sup> Demanding that immigrants and U.S. citizens submit to needlessly invasive biometrics collection seriously infringes on their privacy rights, and DHS does not provide any justification why these procedures are necessary.

These policies raise significant civil rights concerns and open up further discriminatory surveillance of people of color. Requiring survivors to submit biometrics repeatedly, at any time, until they obtain citizenship not only is a tremendous waste of agency resources, but creates instability and insecurity for survivors seeking to heal from victimization.

## **VI. Conclusion**

There are other issues of concern to our organization that we simply do not have the time nor capacity to address in this comment. We deeply oppose the proposed rule; it represents an unlawful and unjustified departure from prior practice and policy, and with a significant and unique impact on survivors of gender-based violence. We call on USIS to promptly withdraw the proposed rule in its entirety, given its substantial procedural and substantive deficiencies.

Respectfully submitted:



Cecelia Levin  
Policy Director  
ASISTA

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<sup>59</sup> Proposed Rule at 56340.

<sup>60</sup> Proposed Rule at 56352.