October 8, 2020

Mr. Kenneth T. Cuccinelli
Senior Official Performing the Duties of the Director
U.S. Citizenship and Immigration Services
20 Massachusetts Ave., NW
Washington, DC 20529

RE: Implications of U.S. Citizenship and Immigration Services’ “Blank Space” policy

Dear Mr. Cuccinelli:

I write on behalf of the American Bar Association (ABA) to express our concern regarding the implications of U.S. Citizenship and Immigration Services’ (USCIS) decision to reject certain applications and petitions when any spaces on the forms are left blank. This policy runs counter to prior practice, was put in place without adequate notice, applies to even immaterial omissions, and has caused applicants to miss deadlines that have serious consequences for their eligibility for relief. For these reasons, we respectfully urge USCIS to reconsider this decision.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and builds public understanding around the world of the importance of the rule of law. Working with and through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable. Our views are informed in part by our experience in operating two direct representation immigration projects at the Southern border (ProBAR in Harlingen, Texas and the Immigration Justice Project in San Diego, California) that serve detained (and some non-detained) adult and unaccompanied minor immigrants and asylum seekers, as well as the Children’s Immigration Law Academy (CILA), a legal resource center in Houston that serves children’s immigration legal services programs throughout Texas.

The ABA has long supported the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. We also believe that the nation’s immigration system must realistically and humanely addresses the obstacles faced by immigrant victims of crime, and that the government should not erect additional undue hurdles for these individuals. Therefore, we have concerns about the implications of USCIS’ “blank space” policy, which places unduly restrictive and inflexible limitations on accepting applications for asylum, T visa applications, and U visa petitions.
This policy was implemented in late 2019 for I-589 Applications for Asylum and Withholding of Removal (I-589 Application), and has resulted in the rejection of applications that contain any blank spaces, even when the requested information is optional, not applicable to the applicant, or immaterial.\(^1\) The policy was later applied to U visa petitions,\(^2\) and T visa applications.\(^3\) Below we explain our concerns in more detail.

First, the policy represents a departure from prior practice and was instituted without adequate notice. USCIS did not alert stakeholders regarding this change in policy, and, even now, the notice is not displayed prominently on the portion of USCIS’ website providing information regarding the I-589 Application.\(^4\) Rather, a visitor must scroll down the page, click on an arrow to the right of “Where to File,” and scroll through a long chart before the following text appears: “We will not accept your Form I-589 if you leave any fields blank. You must provide a response to all questions on the form, even if the response is ‘none,’ ‘unknown’ or ‘n/a.’” A reasonable asylum applicant looking for information on whether she should leave any spaces blank would not expect to find such information in a portion of the website addressing filing locations.\(^5\) Nor did USCIS update the instructions for these forms to reflect any change in the policy for accepting forms with blank spaces.

Second, the policy is applied even when the missing information is clearly not applicable or is immaterial to the agency’s consideration of the application or petition. For example, our ProBAR project had an I-589 Application rejected because the applicant (1) did not fill in the expiration date of his passport or travel document, even though he indicated in response to the prior question that he did not have a passport or travel document; and (2) because he only filled out three of the four lines provided in the area of the application seeking information about his siblings – because he only has three siblings. An I-589 Application for another ProBAR client was rejected because, when asked on what date the applicant last left her country, the applicant truthfully answered “10/unk/19,” rather than providing a specific date when she truthfully could not remember. And a third application filed by ProBAR was rejected where the applicant forgot to check the box indicating whether she had any children, even though the applicant responded “N/A” in response to her “total number of children” and filled in the boxes seeking information about any children with “N/A.” There are additional examples of applications filed by ProBAR that were rejected where USCIS need only have engaged in a cursory review to determine that the purportedly missing or incorrect information was provided elsewhere on the same page of the application, or the meaning of the blank space was abundantly clear in the context of the surrounding information.

These rejections evidence an unduly restrictive and inflexible standard for accepting an application as complete, especially considering that these applications and petitions are filed by asylum seekers and victims of crime who are seeking humanitarian relief. These individuals are particularly vulnerable members of our society who already face many barriers to presenting successful claims, including lingering effects of trauma, language barriers, and lack of

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5 The policy is displayed prominently on the landing pages for T visa applications and U visa petitions.
knowledge regarding the complexities of immigration law. It is therefore particularly troubling that USCIS chose to apply this policy to these applications and petitions.

Third, the application of the policy can have serious consequences for an individual’s eligibility for relief or how her case will be processed. For example, in four cases, ProBAR filed asylum applications for unaccompanied children (UAC) before their eighteenth birthdays, but the receipt notices from USCIS rejecting their applications as incomplete were received after the client had turned eighteen. ProBAR resubmitted the applications, but it is unclear whether USCIS will continue to treat the applications as filed by a UAC. This is significant because asylum officers have initial jurisdiction over any asylum application filed by a UAC, regardless of whether the UAC is already in immigration proceedings. In providing USCIS with initial jurisdiction over asylum applications filed by UAC, Congress recognized their special vulnerabilities and ensured that they would be able to access a non-adversarial process for adjudicating their asylum claims. UAC should not be deprived of this important statutory protection because of non-material omissions in their applications for humanitarian relief.

Similarly, the policy may cause asylum seekers to miss the one-year deadline for filing the Form I-589. An applicant may submit her I-589 Form before the one-year deadline, and then receive a notice from USCIS saying that the application has been rejected as incomplete. If she is unable to re-submit the application in time to comply with the one-year deadline, or the one-year deadline has already passed, it is unclear whether USCIS will still consider the applicant to be eligible for asylum. The ABA has long opposed the one-year filing deadline precisely because it places unduly inflexible limitations on vulnerable asylum seekers, and this policy demonstrates the potential for harsh consequences to result from good faith efforts by asylum seekers to comply with statutory deadlines.

The rejection policy also can impact an individual’s case simply by creating additional delay. For example, regulations governing asylum applicants’ eligibility for employment authorization recently have changed. Given the timing and nature of these changes, initial rejections of asylum applications could end up impacting when asylum applicants are eligible for employment authorization, or whether they will be eligible at all.

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6 An “unaccompanied alien child,” is a person under 18 who has no lawful immigration status in the United States and for whom there is (i) no parent or legal guardian in the United States or (ii) no parent or legal guardian in the United States available to provide care and physical custody. 6 U.S.C. § 279(g)(2).
7 8 U.S.C. § 1158(b)(3)(C). Congress also exempted UAC from the requirement to file an application for asylum within one year after the non-citizen’s arrival in the United States. Id. § 1158(a)(2)(E).
8 Id. § 1158(a)(2)(B).
9 Id. § 1158(a)(2)(D) (providing that an application for asylum may still be considered, notwithstanding the one-year deadline, if the non-citizen demonstrates “extraordinary circumstances relating to the delay in filing an application within the period specified”); 8 C.F.R. § 208.4(a)(5)(v) (“extraordinary circumstances” may include where “[t]he applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by [USCIS] as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter”).
These delays also add to USCIS’ burden at a time when case processing times have increased and the agency came close to furloughing more than 13,000 employees. As a result of the “blank space” rejection policy, the agency must expend additional funds to mail rejected applications back to the applicant or petitioner, and use employee time to review applications and petitions for any missing information and send complicated Notices of Action explaining what information is missing. These steps further compound existing delays in the adjudication of applications and petitions.

For the foregoing reasons, USCIS should reconsider this policy. Alternatively, USCIS should modify the policy and consider any application or petition filed on the date of initial receipt, regardless of whether it contains blank spaces, if the applicant or petitioner demonstrated a good faith effort to submit a complete application and the missing information is either (1) not material to the agency’s eligibility determination or (2) can be provided at a later date (such as at an interview) without materially impacting the agency’s review process. When making this determination, the agency should consider whether the applicant or petitioner is represented and apply a presumption of good faith to unrepresented respondents, particularly those who are not fluent in English. USCIS also should provide reasonable and accessible notice of any modifications to the “blank space” policy, and institute a grace period during which applications and petitions will be accepted without applying any new policy decision.

Thank you for considering our views. If you have any questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at kristi.gaines@americanbar.org.

Sincerely,

Patricia Lee Refo
President

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12 The format and content of the Notices of Action that reject incomplete applications also are unduly complicated and not easy to understand, which presents particular challenges for applicants and petitioners who are not represented.

13 If the agency reconsiders the policy it should take measures to ensure that those individuals whose submissions were initially rejected are not materially impacted by liberally applying its discretion to preserve the initial filing date where the individual would otherwise miss the one-year filing deadline, not be considered a UAC at the time of filing, have a derivative beneficiary age-out of protection, or face similar consequences.