

## HARVARD LAW SCHOOL IMMIGRATION PROJECT

3085 WASSERSTEIN HALL | 6 EVERETT STREET  
CAMBRIDGE, MA 02138

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December 30, 2019

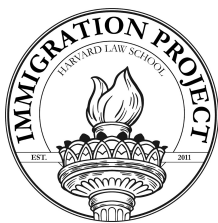
Via Federal e-Rulemaking Portal

Samantha Deshommes  
Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue NW,  
Washington, DC 20529-2140

**RE: Request for Comment on Proposed Rule to Increase Fee for Citizenship, Lawful Permanent Residence, Deferred Action for Childhood Arrivals, Asylum, and Other Applications and Transfer of Funds for Enforcement, 84 F.R. 62280 (Nov. 14, 2019), DHS Docket No. USCIS-2019-0010**

Dear Ms. Deshommes:

The Harvard Law School Immigration Project (“HIP”) and the Harvard Immigration and Refugee Clinical Program (“HIRC”) at Harvard Law School write jointly in response to the Department of Homeland Security (“DHS”) request for comments on Proposed Rule to Increase Fee for Citizenship, Lawful Permanent Residence, Deferred Action for Childhood Arrivals, Asylum, and Other Applications and Transfer of Funds for Enforcement, 84 F.R. 62280 (Nov. 14, 2019) (“the Rule”). HIP is a student practice organization that represents clients seeking release from detention in Massachusetts, promotes policy reform, and provides representation to refugees and asylees who are seeking family reunification and legal residency. One of the first immigration and refugee clinics in the United States, HIRC has represented thousands of individuals from all over the world seeking humanitarian protection since its founding in 1984. As immigration lawyers and law students, we write to address how the Rule would affect U.S. obligations to asylum seekers.



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In its Rule, DHS proposes to adjust USCIS fees by a weighted average increase of 21 percent, add new fees for certain benefit requests, and establish multiple fees for petitions for nonimmigrant workers.<sup>1</sup> Among these changes—and for the first time in U.S. history—DHS proposes to charge applicants a fee to file I-589 Forms, running afoul of the United States’ obligations under the Refugee Act of 1980. HIP and HIRC urge DHS to reconsider its proposal to charge noncitizens a fee to apply for asylum in order to comply with obligations under U.S. and international law.

### **1. Charging asylum seekers an application fee contravenes the purpose of the Refugee Act of 1980.**

Throughout its history, the United States has played a role in protecting the world’s refugees, regardless of socioeconomic status. In 1968, the United States became a signatory to the 1967 United Nations Protocol Relating To The Status of Refugees, which broadened the scope of refugee status under international law.<sup>2</sup> In 1980, Congress enacted the Refugee Act, which codified into law U.S. obligations under the 1967 Protocol to the Refugee Convention. In the Act, Congress declared it “the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.”<sup>3</sup> Section 208 of the Immigration and Nationality Act directs the Attorney General to “establish a procedure for a noncitizen physically present in the United States ... to apply for asylum ...” and gives to the Attorney General the authority to grant asylum to qualified refugees.<sup>4</sup> The regulations establishing the procedure for applying for asylum are codified at 8 C.F.R. s 208 (1981).

Therefore, by treaty, statute, and regulations, the United States has manifested a clear intention to hear the petitions of immigrants who come to this country fearing persecution in their homelands. Adding a monetary barrier to the right

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<sup>1</sup> See 84 Fed. Reg. 62280 (Nov. 14, 2019).

<sup>2</sup> 19 U.S.T. 6223, T.I.A.S. No. 6577.

<sup>3</sup> Pub.L. 96-212, 94 Stat. 102 (March 17, 1980).

<sup>4</sup> 8 U.S.C. s 1158.



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to apply for asylum will effectively render the protections provided by the treaties and statutes discussed above non-existent for many persons who might otherwise seek protection here. Many HIP and HIRC clients applying for asylum have recently arrived in the U.S. after fleeing violence, threats, and other persecution in their home countries. They often lack resources and a pre-existing support network, and HIRC and HIP provide pro bono legal support because they otherwise could not afford legal representation. Moreover, our clients have often arrived with few belongings and rely on nonprofit and community resources for housing, basic toiletries, and school supplies, as well as clothing drives that enable them to dress warmly for the winter—even reimbursement to take public transportation to our offices. Thus, charging a fee to apply for asylum—a form of immigration relief codified in both U.S. and international law—is not only unlawful, it unjustly burdens those who need resources and support the most.

### **2. Charging asylum seekers an application fee violates Article 29 of the 1951 Convention Relating to the Status of Refugees.**

In construing treaties, the U.S. government uses principles analogous to those that guide in construing statutes.<sup>5</sup> Rather than having evolved from a judicial common law, however, principles of treaty construction are themselves codified in Article 31 of the Vienna Convention on the Law of Treaties, of which the United States is a signatory.<sup>6</sup> U.S. courts apply the Vienna Convention in interpreting treaties.<sup>7</sup>

As with statutes, treaties are to be construed first with reference to their terms’ “ordinary meaning in their context” and “in light of their object and purpose.”<sup>8</sup>

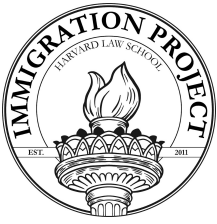
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<sup>5</sup> See *United States v. Stuart*, 489 U.S. 353, 371(1989) (Scalia, J., concurring) (if “the Treaty’s language resolves the issue presented, there is no necessity of looking further to discover ‘the intent of the Treaty parties’”).

<sup>6</sup> 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

<sup>7</sup> See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir.1975) (Warsaw Convention), cert. denied, 429 U.S. 890 (1976), as has the United States Department of State. See Letter from Edwin D. Williamson, Legal Adviser, Department of State, to Timothy E. Flanigan, Acting Assistant Attorney General 2 (Dec. 11, 1991) (regarding *HRC v. Baker*).

<sup>8</sup> Vienna Convention, art. 31(1).



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The plain meaning of treaty terms controls unless “application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.”<sup>9</sup> To stray from clear treaty language, there must be “extraordinarily strong contrary evidence.”<sup>10</sup> According to Article 32 of the Vienna Convention, “supplementary means of interpretation,” which consist primarily of the preparatory and conclusory circumstances of a treaty (the international equivalent of legislative history) are to be turned to only as a last resort, and then only if the primary tools of interpretation enumerated in Article 31 of the Vienna Convention “leave[ ] the meaning ambiguous or obscure” or lead to a “manifestly absurd or unreasonable result.”<sup>11</sup>

The Proposed Rule directly contravenes the plain language of Article 29 of the 1951 Convention Relating to the Status of Refugees. The United States ratified the 1967 Protocol to Convention, which it incorporated into U.S. law through the Refugee Act of 1980. In the Article, entitled “Fiscal Changes,” the Convention states, “Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.” Presently, only three countries out of 145 signatories to the Convention charge fees for asylum seekers, and even those states allow for waivers of the fee.<sup>12</sup> The Proposed Rule, therefore, will impose upon refugees a burden that those seeking asylum in other countries do not face. Moreover, given that the U.S. was founded by those who sought freedom from an oppressive regime, charging a fee to apply for asylum contravenes America’s own history.

This reading of Article 29 is further supported by the “object and purpose” not only of that article, but also of the Refugee Convention as a whole. It is clear

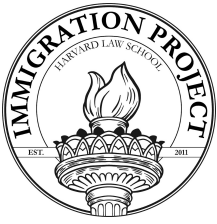
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<sup>9</sup> *United States v. Stuart*, 489 U.S. at 365–66 (citations omitted).

<sup>10</sup> *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

<sup>11</sup> See Vienna Convention on the Law of Treaties, Art. 32, 1155 U.N.T.S., at 340.

<sup>12</sup> Zolan Kanno-Youngs and Miriam Jordan, “New Trump Administration Proposal Would Charge Asylum Seekers an Application Fee,” *N.Y. Times*, Nov. 8, 2019, <https://www.nytimes.com/2019/11/08/us/politics/immigration-fees-trump.html>.



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that the purpose of Article 29 is to prevent all refugees from being put into the hands of those who would persecute them. One of the considerations stated in the Preamble to the Convention is that the United Nations has “endeavored to assure refugees the widest possible exercise of fundamental rights and freedoms.” Article 29 has been construed as part of the bundle of rights “attributed to ‘refugees’ without qualifications of any kind.”<sup>13</sup>

Any application fee would be prohibitive for many asylum seekers and would impermissibly suppress their rights. Preventing individuals from applying for asylum due to their inability to pay would not only contravene the plain language and the object and purpose of longstanding U.S. and international law, but also betray the history of the United States and unjustly burdens those most in need of protection. We strongly urge its reconsideration.

Thank you for your consideration.

Sincerely,

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<sup>13</sup> See James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. I.J. 481, 493 (2000).