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August 13, 2020

Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17<sup>th</sup> Street NW  
Washington, DC 20503  
Attention: Desk Officer  
U.S. Citizenship and Immigration Services, DHS

**Submitted via Email:** [DHSDeskOfficer@omb.eop.gov](mailto:DHSDeskOfficer@omb.eop.gov)

**RE: Attention: Desk Officer for U.S. Citizenship and Immigration Services, DHS, OMB Control No. 1615-0067; United States Citizenship and Immigration Services, Docket ID USCIS-2020-0016, “Collection of Information.”**

To Whom It May Concern:

The Harvard Immigration & Refugee Clinical Program (“HIRC”) writes to recommend that the “collection of information” related revisions to the I-589 form<sup>1</sup> included in the June 15, 2020 Proposed Rule, *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, be withdrawn in full.<sup>2</sup> Contrary to the Agencies’ contention, the proposed changes to the I-589 would make the asylum adjudication process less efficient, not more.<sup>3</sup> Some of the most objectionable changes in the Form I-589 include, *inter alia*, requiring an asylum applicant to:

- delineate their particular social group(s) (“PSGs”), if any;
- define their persecutor as a state or non-state actor, and, if the persecutor is a non-state actor, to require the applicant to fully articulate why the state was “unable or unwilling to control” and/or acquiesced to persecution or torture, respectively;

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<sup>1</sup> See TABLE OF CHANGES – FORM, Form I-589, Application for Asylum and for Withholding of Removal, OMB Number: 1615-0067 (June 9, 2020), available at <https://beta.regulations.gov/document/EOIR-2020-0003-0003>.

<sup>2</sup> See *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 36264 (June 15, 2020).

<sup>3</sup> Cf. *id.* at 36271 (June 15, 2020) (expressing that a goal of the Departments is to “more efficiently” identify meritorious claims).

- represent their and their family members’ unlawful presence, if any; and
- represent their tax liabilities, if any.<sup>4</sup>

These proposed changes unreasonably require asylum applicants who may be traumatized and unrepresented, and who may speak no English, to (within one year of their arrival in the U.S.), provide extremely complicated legal and factual representations. The proposed changes also unreasonably encourage adjudicators to unlawfully pretermite applications for asylum and other forms of protection, or improperly limit the legal theories applicants are permitted to pursue.<sup>5</sup>

*i. Statement of interest*

HIRC is one of the oldest clinical programs in the country that focuses on the advancement of immigrants’ rights while teaching students critical lawyering skills. HIRC includes two distinct clinics: (1) the Immigration & Refugee Advocacy Clinic, which represents clients seeking humanitarian protections in a range of different fora, including administrative tribunals and federal appellate courts and (2) the Crimmigration Clinic, which focuses on the growing intersection of criminal law and immigration law. HIRC faculty and staff also teach a range of courses concerning immigration policy, refugees and trauma, the intersection of immigration law and labor law, and the intersection of criminal law and immigration law. HIRC faculty and staff regularly publish scholarship concerning asylum adjudication, due process protections in removal proceedings, working with traumatized refugees, crimmigration, and immigration detention.

HIRC has worked with thousands of immigrants and refugees since its founding in 1984. Its advocacy includes representation of individual applicants for asylum and related relief and the development of theories and policy relating to asylum law, crimmigration, and immigrants’ rights. As a clinic engaged in direct representation of asylum seekers (and therefore in I-589 preparation), HIRC has a strong interest in the proposed changes to the I-589.

*ii. Many asylum applicants, especially those proceeding pro se, are unlikely to be able to meaningfully respond to the I-589’s added questions*

Noncitizens are as a general rule required by statute to apply for asylum within one year of their arrival in the United States.<sup>6</sup> Accordingly, Congress intended for the asylum application to be a “a short application that could be updated with more information over time and ‘generous[ly] ... amend[ed]’ throughout the asylum process.”<sup>7</sup> Chairman of the Senate Judiciary Committee Orrin Hatch emphasized that Congress in establishing asylum’s one-year filing deadline nonetheless sought to “ensur[e] that those with legitimate claims of asylum are not

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<sup>4</sup> See TABLE OF CHANGES–FORM, Form I-589, Application for Asylum and for Withholding of Removal, OMB Number: 1615-0067 (Jun. 9. 2020), <https://beta.regulations.gov/document/EOIR-2020-0003-0003>.

<sup>5</sup> Compare *Ordonez-Azmen v. Barr*, 965F.3d 128, 138 (2d Cir. 2020) (noting Congress intended for asylum applicants to “update [their applications] with more information over time” and “generously amend” those applications) (citations omitted); and *Matter of A-A-*, 20 I.&N. Dec. 492, 501 n. 21 (BIA 1992) (“An application for relief is a continuing one...”) with 85 Fed. Reg. at 36277 (encouraging pretermission “based on the [new] Form I–589 application itself and any supporting evidence”) and *Matter of M-A-F-*, 26 I.&N. (BIA 2015) (describing a newly raised theory for relief as a “new application [for asylum] because it was predicated on a different factual basis”).

<sup>6</sup> 8 U.S.C. 1158(a)(2)(B).

<sup>7</sup> See *Ordonez Azmen v. Barr*, 965 F.3d at 138 citing H.R. Rep. No. 104-469, pt. 1, at 176 (Mar. 4, 1996).

returned to persecution, *particularly for technical deficiencies.*”<sup>8</sup> But the proposed changes to the I-589 are *designed* to induce claim denials due to “technical deficiencies”—and as such will exacerbate, rather than mitigate, the immigration court system’s backlog of 1.2 million cases, because of the copious meritorious appeals that will follow such denials.<sup>9</sup>

Applicants for asylum and related relief are likely to have experienced traumatic events,<sup>10</sup> and often lack access to counsel<sup>11</sup> or access to adequate interpretation.<sup>12</sup> Nonetheless, especially because of asylum’s one-year-filing deadline,<sup>13</sup> applicants are often forced to prepare I-589s without professional—or even any—assistance. These circumstances often result in the “omission of relevant information,”<sup>14</sup> as traumatic memories can manifest in a story that is “incomplete...fragmented and chronologically fractured.”<sup>15</sup> The effects of trauma and the absence of legal representation are particularly deleterious to detained asylum applicants’ chances of prevailing in immigration court.<sup>16</sup> While access to counsel is insufficient in general (only 37 percent of all immigrants securing representation), those in detention are “the least likely to” secure counsel, as just 14 percent of detained applicants obtained legal representation, per a widely-cited 2016 study.<sup>17</sup> Applicants with counsel that were never detained were three-and-a-half times more likely to succeed on their claims, while detained applicants with counsel were “*ten-and-a-half times* more likely to succeed” on their claims as compared to detained applicants without counsel.<sup>18</sup> The proposed changes to the I-589 will only worsen this disparity in outcomes, because of the complexity involved in responding to the added questions as discussed below.

**iii. The proposed “collection of information” modifications further encourage adjudicators to unlawfully pretermitt asylum applications**

The proposed changes to the I-589 are part of an agency effort to encourage pretermission of asylum applications.<sup>19</sup> Purportedly as an application of *Matter of A-B-*,

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<sup>8</sup> 142 Cong. Rec. S11,840 (daily ed. Sept. 30, 1996) (statement of Sen. Hatch) (emphasis added).

<sup>9</sup> Cf. TRAC, *Backlog of Pending Cases in Immigration Courts as of April 2020*, [https://trac.syr.edu/phptools/immigration/court\\_backlog/](https://trac.syr.edu/phptools/immigration/court_backlog/) (accessed Aug. 10, 2020).

<sup>10</sup> See, e.g., U.N. High Comm’r for Refugees (UNHCR), *Beyond Proof: Credibility Assessment in EU Asylum Systems*, 61 (May 2013), <https://www.unhcr.org/en-us/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html>.

<sup>11</sup> Ingrid Eagly and Steven Schafer, Esq., *Access to Counsel in Immigration Court*, American Immigration Council-Special Report (September 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) (only 37% of immigrant in removal proceedings and 14% of detained immigrants secured representation).

<sup>12</sup> See, e.g., Rachel Nolan, *A Translation Crisis at the Border*, THE NEW YORKER (Jan 6, 2020).

<sup>13</sup> Cf. 8 U.S.C. 1158(a)(2)(D).

<sup>14</sup> See U.N. High Comm’r for Refugees (UNHCR), *Beyond Proof: Credibility Assessment in EU Asylum Systems* at 62.

<sup>15</sup> See Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 487-88 (2016).

<sup>16</sup> See Ingrid Eagly and Steven Schafer 23., *Access to Counsel in Immigration Court*, American Immigration Council-Special Report (September 2016),

[https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf).

<sup>17</sup> See *id.* at 2.

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> See 85 Fed. Reg. at 36277 citing *Matter of A-B-*, 27 I.&N. Dec. 316, 340 (AG 2018).

adjudicators are now encouraged to pretermite an I-589 should even a *pro se* applicant’s initial filing be “fatally flawed in any respect,”<sup>20</sup> such as through a failure to articulate a cognizable PSG (where applicable).<sup>21</sup> But such action would violate U.S. obligations under domestic<sup>22</sup> and international law.<sup>23</sup>

The Board of Immigration Appeals (“BIA”) has long recognized the centrality of a refugee’s testimony to establishing their eligibility for protection.<sup>24</sup> In *Matter of Fefe*, the BIA ruled that it was inappropriate for the immigration judge (“IJ”) to issue a ruling on the basis of the applicant’s I-589 and supporting materials alone,<sup>25</sup> and that the IJ should have held a full hearing that gave the applicant an opportunity to testify in support of his asylum claim.<sup>26</sup> The BIA subsequently explained in *Matter of S-M-J-* that immigration judges (unlike article III judges) must take “a cooperative approach” in adjudicating asylum applications because immigration judges have a “responsibility” to ensure “that refugee protection is provided where such protection is warranted.”<sup>27</sup> In fact, as the BIA emphasized in *S-M-J-*, immigration judges must “take an active role in helping the respondent develop [their]<sup>28</sup> legal theory from the facts.”<sup>29</sup> In *S-M-J-*, the BIA reaffirmed a core principle in refugee law: that adjudicators must

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<sup>20</sup> See *id.*

<sup>21</sup> Cf. See TABLE OF CHANGES–FORM, Form I-589, Application for Asylum and for Withholding of Removal OMB Number: 1615-0067 (Jun. 9. 2020), available at <https://beta.regulations.gov/document/EOIR-2020-0003-0003>. (asylum applicants will be required to “identify the[ir] particular social group(s) on the I-589.”)

<sup>22</sup> See 8 U.S.C. 1229a(a)(4)(B) (guaranteeing a noncitizen, including an asylum applicant, in removal proceedings a “reasonable opportunity to . . . to present evidence on [their] own behalf.”); *Matter of E-F-H-L-*, 26 I.&N. Dec. 319, 342 (BIA 2014) (“[I]n the ordinary course of removal proceedings, an applicant for asylum or for withholding or deferral of removal is entitled to a hearing on the merits of the applications, including an opportunity to provide oral testimony and other evidence, *without first having to establish prima facie eligibility for the requested relief.*”) (emphasis added) (*overturned on other grounds Matter of E-F-H-L-*, 27 I.&N. Dec. 226 (AG 2018)); *Matter of S-M-J-*, 21 I.&N. Dec. 722, 740 (BIA 1997) (Rosenberg, Bd. Mem., concurring) (“[T]he application should be considered as a component part of the applicant’s evidence, viewed on the record as a whole.”); *Matter of Fefe*, 20 I.&N. Dec. 116, 117–18 (BIA 1989). *Matter of A-B-* is itself silent as to the question of claim pretermission by asylum officers and immigration judges. See 27 I.&N. Dec. at 340. Rather, the Attorney General in that decision addressed the necessary scope of the BIA’s analysis upon his remand, *where the applicant had already received a full, counseled hearing on the merits of her asylum application.* See *id.*

<sup>23</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Feb. 2019) 44–45, <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>; see *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438–39 (1987) (“In interpreting the Protocol’s definition of “refugee” we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status.”).

<sup>24</sup> See *supra* note 22.

<sup>25</sup> See *Matter of Fefe*, 20 I.&N. Dec. at 118 (BIA 1989) (“In the ordinary course, however, we consider the *full examination* of an applicant to be an *essential* aspect of the asylum adjudication process for reasons related to fairness to the *parties* and to the integrity of the asylum process itself.”) (emphasis added).

<sup>26</sup> See *id.*; see also 8 U.S.C. 1229a(a)(4)(B).

<sup>27</sup> See *Matter of S-M-J-*, 21 I.&N. Dec. 722, 723–24 (BIA 1997); see also *Cantarero-Lagos v. Barr*, 924 F.3d 145, 154 (2019) (Dennis, J., concurring in the judgment) (same).

<sup>28</sup> See Sabrineh Ardan, *Refugee Eligibility: Challenging Stereotypes and Reviving the ‘Benefit of the Doubt,’* Rethinking Refuge (July 2020), <https://www.rethinkingrefugee.org/articles/rethinking-refugee-eligibility-challenging-stereotypes-and-reviving-the-ben>.

<sup>29</sup> *Cantarero-Lagos v. Barr*, 924 F.3d 145, 151 (5th Cir 2019); see *S-M-J-*, 21 I.&N. Dec. at 723–24 (recognizing the responsibility of the immigration judge to ensure that refugee protection is provided when warranted, and specifying that a “cooperative approach” between the immigration judge and the applicant is therefore necessary in immigration court); see also *Matter of Y-L-*, 24 I.&N. Dec. 151, 161 (BIA 2007) (admonishing the immigration judge for failing to notify an asylum applicant of her concerns with the application and providing the applicant with

give refugees the “benefit of the doubt,”<sup>30</sup> in evaluating asylum claims.<sup>31</sup> These precedents shape the scope of 8 USC 1229a’s guarantee that a noncitizen in removal proceedings “shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the[ir] own behalf.”<sup>32</sup> In light of all of the above, the BIA in 2014’s *Matter of E-F-H-L-* affirmed *Matter of Fefe*’s common-sense holding that an applicant for asylum or for withholding or deferral of removal is *entitled* to a hearing on the merits of those applications, rather than a final decision based on the I-589 submission alone.<sup>33</sup>

However, the current administration has undermined that guarantee. In 2018, Attorney General Sessions vacated *Matter of E-F-H-L-* based on a technicality.<sup>34</sup> Around that same time, the Executive Office for Immigration Review imposed case completion quotas upon immigration judges.<sup>35</sup> These changes may incentivize adjudicators to “summarily deny asylum without testimony,”<sup>36</sup> a conclusion reinforced by the proposed rulemaking’s embrace of claim pretermission based on an applicant’s representations in the new I-589.<sup>37</sup> Nonetheless, in *D-C-L-*, a September 2019 unpublished decision, a three-member panel of the BIA reversed an immigration judge who denied an application as *prima facie* insufficient without affording the applicant a full hearing.<sup>38</sup> The panel specifically instructed the IJ to “include testimony . . . contemplated under of *Matter of Fefe*,” suggesting the above-discussed legal obligations continue to apply, notwithstanding the Attorney General’s procedural vacatur of *E-F-H-L-*.<sup>39</sup>

**In light of this new administrative backdrop, the proposed changes to the I-589 must be withdrawn.** Refugees are not U.S. asylum lawyers, but the new I-589 would require them to be given asylum law’s complex jargon and standards. Indeed courts have repeatedly recognized that defining a PSG is an “unspeakably complex” process with “ever changing” requirements that “even experienced immigration attorneys have difficulty” navigating.<sup>40</sup> And

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an opportunity to respond); *Toure v. Att’y Gen. of U.S.*, 443 F.3d 310, 325 (3d Cir. 2006) (“an [immigration judge] has a duty to develop an applicant’s testimony, especially regarding an issue that she may find dispositive”); *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (“[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief.”); UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (Dec. 16, 1998) (“the adjudicator shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator [...] guiding the applicant in providing the relevant information.”).

<sup>30</sup>See *supra* note 23; see also *Grace v. Whitaker*, 344 F. Supp. 3d 96, 124 (D.D.C. 2019) (“In interpreting the Refugee Act in accordance with the meaning intended by the Protocol, the language in the Act should be read consistently with the United Nations’ interpretation of the refugee standards”), (*aff’d in part Grace v. Barr*, \_F.3d\_, 2020 WL 4032652 (D.C. Cir. 2020)). UNHCR provides interpretative guidance regarding states parties’ treaty obligations on which federal courts have consistently relied. See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (en banc); *De Pena-Paniagua v. Barr*, 957 F.3d 88, 97 n. 3 (1st Cir 2020); *Diaz-Reynoso v. Barr*, \_F.3d\_, 2020 WL 4557855 at \*8–\*10 (9th Cir. 2020).

<sup>31</sup> 21 I.&N. Dec. 722 (BIA 1997).

<sup>32</sup> 8 U.S.C. 1229a(a)(4)(B). This statute expressly contemplates its application in asylum proceedings. See 8 U.S.C. 1229a(c)(7)(C)(ii).

<sup>33</sup> See 26 I.&N. Dec. 319 (BIA 2014) (emphasis added).

<sup>34</sup> Fatma Marouf, *Denying Asylum Without a Hearing Violates Due Process*, JURIST- Academic Commentary, July 17, 2020, <https://www.jurist.org/commentary/2020/07/fatma-marouf-denying-asylum-violates-due-process/>

<sup>35</sup> Jeffrey S. Chase, *Are Summary Denials Coming to Immigration Court?*, July 24, 2018, AILA Doc. No. 18062543 <https://www.aila.org/infonet/former-ij-jeffrey-s-chase-asks-are-summary-denials>.

<sup>36</sup> See *id.*

<sup>37</sup> See 85 Fed. Reg. at 36277.

<sup>38</sup> See *D-C-L-*, AXXX-XXX-525, (BIA Sept. 25, 2019) (unpublished) (attached).

<sup>39</sup> See *id.*

<sup>40</sup> *Cantarero-Lagos*, 924 F.3d at 154 (Dennis, J.L., concurring in the judgment).

when an applicant alleges their persecution was at the hands of a non-state actor, the applicant must show that the government was either “unable or unwilling” to control the persecutor.<sup>41</sup> This bifurcated determination also involves complicated fact-finding and legal analysis,<sup>42</sup> making it inconsistent with the “short application” Congress intended asylum seekers to submit.<sup>43</sup>

Whether a noncitizen has accrued “unlawful presence” is yet another complex legal inquiry, and it is plainly unreasonable to expect asylum applicants to accurately represent their and/or their family members’ periods of “unlawful presence.”<sup>44</sup> In a cable issued to its own diplomatic and consular personnel (who must calculate “unlawful presence” pursuant to visa issuances), the United States Department of State cautioned, “there are many special rules, caveats, and exceptions which can make calculation of the period of unlawful presence quite complicated.”<sup>45</sup> Similarly, it is intuitive that an asylum applicant might not know, or understand, his or her tax liabilities, but the new I-589 requires their disclosure. Federal appellate judges have described U.S. immigration laws as “second only to the Internal Revenue Code in complexity.”<sup>46</sup> The modifications to the I-589 would require asylum applicants to become experts as to both.

Considering the above, we urge the Agencies to withdraw in full the current proposed changes to the I-589, and instead work towards developing a trauma-cognizant asylum application that is consistent with both Congressional intent and governing international obligations regarding adjudication of asylum claims.

Finally, in its decades of existence, HIRC attorneys have supervised the preparation of countless I-589s. I-589 preparation is already a difficult, time-consuming process. Given the legal and factual complexity involved in answering the new questions, HIRC is concerned about the additional time that will be needed to complete the new I-589. Accordingly, HIRC requests the empirical evidence the Agencies relied upon in representing that the “estimated hour burden per response is 18 hours” for the new I-589 (as opposed to 12 hours for the current form),<sup>47</sup> after factoring in all proposed changes.<sup>48</sup>

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<sup>41</sup> See *Matter of Acosta*, 20 I.&N. Dec. 211, 222 (BIA 1987).

<sup>42</sup> See *Rosales Justo v. Sessions*, 895 F.3d 154, 162 (1st Cir. 2018); see also *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (en banc).

<sup>43</sup> See *Ordonez-Azmen*, 965 F.3d at 138.

<sup>44</sup> See, e.g., Immigrant Legal Resource Center (ILRC), *Understanding Unlawful Presence*, Practice Advisory (March 2019) (describing many of the complicated rules and exceptions governing whether a noncitizen accrues “unlawful presence”).

<sup>45</sup> 75 No. 15 INTERPRETER RELEASES 543, 547 (1998).

<sup>46</sup> *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004) citing *Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1987) (same); see also Hon. Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 8 (2008) discussing the U.S.’s “complicated maze of immigration laws”; *Judy v. Holder*, 768 F.3d 595, 597 (7th Cir. 2014) (describing the statute establishing unlawful presence as a “a complex statute that changed immigration law in many ways”).

<sup>47</sup> See USCIS, *Form I-589, Application for Asylum and for Withholding of Removal—Instructions*, OMB No. 1615-0067 14 (Exp. Sept. 30, 2022), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

<sup>48</sup> See 85 Fed. Reg. at 36290.

We appreciate the opportunity to provide comments on this proposed rule. If you have questions, please contact us by phone at 617-384-8165 or by email at [hirc@law.harvard.edu](mailto:hirc@law.harvard.edu).

Sincerely,

Harvard Immigration and Refugee Clinical Program  
Harvard Law School  
6 Everett Street, Suite 3103 (WCC)  
Cambridge, MA 02138

Attachments

1. *D-C-L*, AXXX-XXX-525, (B.I.A. Sept. 25, 2019) .....1-2





**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

*5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041*

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Name: C [REDACTED] L [REDACTED], D [REDACTED]

A [REDACTED]-525

**Date of this notice: 9/25/2019**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr  
Chief Clerk

Enclosure

Panel Members:  
Mann, Ana  
Kelly, Edward F.  
Liebmann, Beth S.

User team: Docket

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Falls Church, Virginia 22041

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File: A ██████-525 – Newark, NJ

Date: SEP 25 2019

In re: D ██████ C ██████ L ██████

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tahir Mella, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's summary order dated November 1, 2017, which pretermitted his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and for protection under the Convention Against Torture, 8 C.F.R. § 1208.16(c). The Department of Homeland Security has not replied to the respondent's brief on appeal. The record will be remanded.

The Immigration Judge discussed with the parties the content of the respondent's application and supporting statement and determined that he had not met his burden of proof to show eligibility for relief (Tr. at 18-27). However, there is no indication that the Immigration Judge placed the respondent under oath and swore him to the contents of his application or that the parties otherwise stipulated to the content and credibility of his testimony. *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989). Moreover, the Immigration Judge did not prepare a separate oral or written decision in this matter setting out the reasons for the decision; the explanation of the reasons in the transcript is not sufficient. *See Matter of A-P-*, 22 I&N Dec. 468 (BIA 1999). *See* 8 C.F.R. § 1240.12(b) (listing the circumstances under which an Immigration Judge may issue a summary order).

Under the circumstances, a remand is appropriate for further proceedings, to include testimony by the respondent or a stipulation contemplated under *Matter of Fefe*, as well as for the preparation of a full decision by the Immigration Judge. Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

  
\_\_\_\_\_  
FOR THE BOARD