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May 2, 2025
Samantha Deshommes
Chief, Regulatory Coordination Division
U.S. Citizenship and Immigration Services Office of Policy and Strategy
20 Massachusetts Ave, NW
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Washington, DC 20429-2140

Re: Proposed Rule – U.S. Citizenship and Immigration Services Generic Clearance for the Collection of Certain Information on Immigration Forms

Dear Ms. Deshommes,

The Immigrant Legal Resource Center (ILRC) submits these comments on the U.S. Citizenship and Immigration Services Generic Clearance for the Collection of Certain Information on Immigration Forms (OMB Control Number 1615-NEW, Docket ID USCIS-2025-0002) (the "Identifying Information Collection") urging that this rule be abandoned.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local services providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship.

Through our extensive network with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by vulnerable immigrant communities – including black and brown communities, survivors of intimate partner violence, sexual violence, human trafficking, or other forms of trauma and low-income communities – seeking to access immigration benefits. The recommendations that follow are gleaned from the experiences of many communities who we and our partners serve.

I. The Identifying Information Collection Is Not Within the Scope of the Executive Branch's Power.

The Identifying Information Collection is not within the scope of the Executive's power and these rules violate Federal laws, including the Fifth Amendment of the Constitution, the Administrative Procedure Act, and the Privacy Act.

The Identifying Information Collection is not within the scope of the Executive's power. The President does not have inherent powers to be exercised in the public interest, rather the President's power to issue executive orders must stem either from an act of Congress or from the Constitution itself. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Where an executive order purports to create a requirement, a penalty, or a right, which is outside the scope of their powers, these orders "encroach on Congress's constitutional authority to make the law, thereby violating" the Separation of Powers doctrine.[1] The basis for the Identifying Information Collection does not stem from an act of Congress nor from the Constitution itself. The basis of the power to promulgate the Identifying Information Collection is stated to stem from Executive Order 14161, *Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats* (the "EO 14161").[2] An executive order is not one of the bases for which the executive branch derives their power.

The Identifying Information Collection violates Federal law. The President can implement executive orders within the constitutional authority of the executive branch, so long as they do not violate any federal laws.[3] Thus, the Identifying Information Collection, even if legitimately passed, cannot violate Federal law. The Identifying Information Collection infringes on the Fifth Amendment, the Administrative Procedure Act and the Privacy Act, as identified in their respective sections below. Given these identified violations of Federal law, the Identifying Information Collection should be abandoned.

II. The Identifying Information Collection Violates the Due Process Clause of the Fifth Amendment.

The Fifth Amendment's Due Process Clause applies to immigration proceedings insofar as those proceedings must comport with general principles of procedural due process. The proposed Identifying Information Collection flouts those requirements.

Noncitizens are entitled to due process under the Fifth Amendment in various ways depending on the type of immigration relief sought and the stage of the proceedings at which they are situated. For example, "[noncitizens] in removal proceedings are entitled to due process of law under the Fifth Amendment." *Karroumeh v. Lynch*, 820 F.3d 890, 896 (7th Cir. 2016). Even absent a constitutional right to remain in the United States, noncitizens who entered unlawfully are nevertheless entitled to due process. *See Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1036 (5th Cir. Unit B 1982). Pursuant to Fifth Amendment principles, agencies are permitted to change their procedures, "even without notice, *so long as there is no*

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[1] Christopher Wright Durocher, *What is an Executive Order and What Legal Weight Does it Carry?*, In Brief (Mar. 19, 2025), https://www.acslaw.org/inbrief/what-is-an-executive-order-and-what-legal-weight-does-it-carry/#:~:text=The%20Legal%20Effect%20of%20Executive%20Orders&text=This%20would%20encroach%20on%20Congress's,authority%20to%20issue%20the%20order.

[2] Executive Order 14161, *Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats*, (Jan. 20, 2025), https://public-inspection.federalregister.gov/2025-02009.pdf.

[3] Christopher Anders, *What is an Executive Order and How Does it Work*, ACLU (Feb. 4, 2025), https://www.aclu.org/news/privacy-technology/what-is-an-executive-order-and-how-does-it-work; Christopher Durocher, *What is an Executive Order and What Legal Weight Does it Carry?*, In Brief, (Mar. 19, 2025), https://www.acslaw.org/inbrief/what-is-an-executive-order-and-what-legal-weight-does-it-carry/

due process loss of substantive rights." *Colby-Bates-Bowdoin Educ. Telecasting Corp. v. FCC*, 534 F.2d 11, 13 (1st Cir. 1976). Due process protects against the unfair deprivation of substantive rights such as the right to privacy and interests in nondiscretionary immigration relief such as naturalization, *see Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981) (noting that an individual has no due process right to *discretionary* immigration relief); *see also* 8 U.S.C. § 1427 (governing naturalization, which is a nondiscretionary form of relief).

If adopted as proposed, the Identifying Information Collection would drastically transform USCIS's procedures. Indeed, it seeks to collect a mountain of irrelevant information that has never before been requested on any type of application or other consular form. The proposed collection makes no attempt to grapple with the impact that it would have on noncitizens. By virtue of this generic collection, applicants would be forced to expend significant additional efforts to track down swaths of information that, had they submitted their applications a day earlier, they would not be forced to procure. Individuals consulting with lawyers will be forced to regroup, likely pay additional legal fees, and delay the filing of their applications. This use of a generic collection to effectuate a massive shift in practice does not reflect a fair and transparent process, and is instead symptomatic of a "due process loss of substantive rights." *Colby-Bates-Bowdoin*, 534 F.2d at 13. In this way, the Identifying Information Collection presents grave due process concerns that may rise to the level of constitutional infirmity.

III. If Adopted as Proposed, the Identifying Information Collection Would Violate the Administrative Procedure Act Because It Is Arbitrary and Capricious and Not Adequately Justified.

As an administrative agency housed within the Executive Branch, the Department of Homeland Security ("DHS") and its divisions, including the United States Citizenship and Immigration Services ("USCIS"), are subject to the mandates of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 701(b)(1) (defining "agency" for purposes of the APA); *see also, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (assessing whether action taken by DHS and USCIS violated the APA). The APA sets out 1) procedures that administrative agencies must follow when engaging in certain actions and 2) standards of judicial review that apply if those actions are subsequently challenged in court.

The Identifying Information Collection runs afoul of the APA and would not withstand APA scrutiny if challenged in court. The APA establishes a "basic presumption of judicial review for one 'suffering a legal wrong because of agency action.'" *Regents*, 591 U.S. at 16; see also 5 U.S.C. § 702 ("A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *id*. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

Where judicial review is permitted, a court must "hold unlawful and set aside agency action, findings, and conclusions" that are determined to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

The APA compels courts to set aside agency action that is "arbitrary and capricious." *See id*. "A rule may be arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 539 (N.D. Cal. 2020) (quoting *Motor Vehicle Mfr. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Moreover, the agency may not bury its head in the sand when faced with uncertainty or contrary evidence; rather, "[a]gencies are required to 'reflect upon the information contained in the record and grapple with contrary evidence'" and "'rationally explain why the uncertainty' supports the chosen approach." *San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1104 (N.D. Cal. 2019) (first quoting *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017); and then quoting *Grater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011)). Additionally, the APA "requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

In *Wolf*, the court concluded, at the preliminary injunction phase, that parts of a final rule promulgated by DHS and USCIS were arbitrary and capricious because they 1) failed to disclose the data on which the agency relied in promulgating the rule, relied on unexplained data, or ignored relevant data; 2) failed to consider certain important elements of the problem purportedly addressed by the rule; 3) failed to justify a shift in policy; and 4) relied on factors Congress did not wish DHS to consider. 491 F. Supp. 3d at 539–44. Similarly, in *San Francisco*, the court held that the plaintiffs were likely to succeed on the merits of their claim that a rule promulgated by DHS and USCIS was arbitrary and capricious because DHS failed to consider the costs and benefits of the rule. 408 F. Supp. 3d at 1105.

Comparable bases apply to the Identifying Information Collection, too. First, USCIS has not provided any data or other concrete evidence on which the substance of the proposed collection is based. It refers to EO 14161 generally, but it does not demonstrate that USCIS undertook to methodically analyze the ways in which this proposed collection would further the mandates of EO 14161 or the burdens and costs associated with expanding the information gathered from applicants for immigration relief. For example, nothing in either EO 14161 or the Identifying Information Collection explains how the telephone number used by a family member five years ago will facilitate the identification of individuals who intend

to commit terrorist attacks or threaten our national security. USCIS cites to no data indicating that this kind of information has been linked to the successful apprehension of terrorists.

Second, USCIS failed to account for certain critical elements of the impact of the Identifying Information Collection altogether, and its attempts to assess other factors are entirely unreasonable. For instance, the proposed collection applies to numerous application forms for vastly different types of immigration relief. The proposed collection makes no mention of the fact that the costs of collecting and providing this information may vary widely depending on the form of relief sought. For instance, asylum seekers — among the most vulnerable subpopulations of noncitizens — may be unable to obtain this information because they have been estranged from their homes, cut off from their families, and divorced from their previous forms of communication. Asylum seekers may also fear endangering their loved ones by providing their identifying and contact information on immigration applications. Nowhere in the Identifying Information Collection are these critical considerations addressed.

Relatedly, USCIS's attempts at estimating the likely time and financial costs of compliance are the definition of arbitrary. It is unreasonable to conclude that collecting this additional information will require less than an hour of an applicant's time. Tracking down the requested information will force applicants to do any combination of the following: contact service providers to verify past contact information, reach out to family members or public records keepers to obtain biographic information about loved ones, speak to former employers to procure the relevant contact information, and review their own records and past communications to identify data points such as prior email addresses and phone numbers. And the time that this will require could be amplified by language barriers, unreliable access to the internet, and a host of other factors that disproportionately affect noncitizens. Yet none of these crucial variables appear to have been considered by USCIS, and they certainly are not reflected in the absurd estimate of the time that it will take applicants to comply with this proposal. The representation that compliance will have no financial cost is equally asinine.

Each of these factors — and this is a non-exhaustive list of the proposal's flaws — demonstrates the shoddy work done by USCIS in putting this proposed collection together. The Identifying Information Collection is a textbook example of arbitrary agency behavior: USCIS clearly did not examine relevant data and consider the costs and benefits of this proposed collection before proposing it, and the result is a poorly reasoned set of new requirements that will be burdensome for applicants and boast no discernible coincident benefit to the national security of the United States.[4] If adopted as proposed, the Identifying Information Collection would not survive judicial review.

Moreover, as a general matter, the Identifying Information Collection is not adequately justified. The APA's "arbitrary and capricious" standard compels agencies to provide reasons supporting an agency action. *See Prometheus Radio*, 592 U.S. at 423. Indeed, courts have determined that the "arbitrary and capricious" standard is not a difficult one to satisfy:

[4] Worse still, the invocation of national security concerns seems disingenuous and made in bad faith—it is little more than a thinly veiled attempt to shield the Identifying Information Collection from any kind of judicial scrutiny under the APA or otherwise. Agencies cannot simply slap a generic justification on its actions without any basis in fact and thereby immunize those actions from review.

> so long as the agency examines the relevant data and has set out a satisfactory explanation including a rational connection between the facts found and the choice made, a reviewing court will uphold the agency action, even a decision that is not perfectly clear, provided the agency's path to its conclusion may reasonably be discerned.

Karpova v. Snow, 497 F.3d 262, 268 (2d Cir. 2007). And yet, USCIS comes nowhere close to satisfying it. It has made no attempt to demonstrate that the Identifying Information Collection is reasonable or well-reasoned. It provides no "facts" that it has found that compel these new requirements, and it makes no effort to include "a rational connection between the facts found and the choice made." *Id*.

Here again, these flaws are compounded by the fact that the proposed collection applies with equal force to numerous application forms for several different types of immigration relief. This is true despite the fact that, typically, the contents of each individual form are tailored to the type of relief sought. For example, Form I-589 is the form noncitizens use to apply for asylum. It asks questions that are clearly related to the ground for relief sought by the applicant, such as the basis upon which the applicant's asylum claim is founded. Logically, for instance, Form I-485 (the application for permanent resident status or adjustment of status) does not include a similar question. Here, much of the requested information has no relation whatsoever to the type of immigration relief sought, and is even internally inconsistent with the facts giving rise to a particular applicant's eligibility. For example, requesting a foreign address for applicants for adjustment of status — that is, applicants who reside in the United States and have no foreign address — is clearly unreasonable and nonsensical. In this way, the Identifying Information Collection is doubly irrational, bolstering our position that it could be set aside as arbitrary and capricious if it is ultimately adopted in its current form. Accordingly, USCIS has failed to discharge its obligations on two levels: the proposed collection is not adequately justified as a global matter, and it is certainly not adequately justified as it applies to each individual application form.

For these reasons, the Identifying Information Collection is arbitrary and capricious and, as proposed, would not withstand judicial review under the APA.

IV. The Proposed Collection and Uses in the Social Media Collection Are Inconsistent with the Privacy Act of 1974.

a. The Proposed Information Collection Has Not Been Sufficiently Demonstrated as Relevant or Necessary to Meet the Stated Goal

Under the Privacy Act of 1974 ("Privacy Act"), information collected by an agency must be relevant and necessary. 5 U.S.C. § 552a(e)(1). EO 14161 does not justify the expansion of the currently collected information to include some or all of the newly added fields.

Fields of information, such as historical telephone numbers, email addresses, and business telephone numbers and email addresses have not been demonstrated as relevant or necessary in vetting applicants. Old phone numbers are regularly reassigned to new users. Without clear dates of use, information related to these could be misapplied to unrelated individuals. Many populations of people use temporary, pay-as-you go phones. In doing so, they will have a potential myriad of old devices that were never intended to be long-term in use. Similarly, details around the telephone numbers of family

members may have these same issues. Aside from issues of relevancy, it isn't clear from any information provided by USCIS how these fields of information are necessary for the vetting process.

b. The Proposed Information Collection Would Obtain Information About Third Parties

The proposed additional fields of information include several that, in addition to not being necessary or relevant, gather information about individuals other than the applicant. The Privacy Act requires that agencies "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs." 5 U.S.C. § 552a(e)(2). Logically some of the named individuals will themselves have their own application processes. Even if individuals are not part of the application process, particularly if they are otherwise presently or in the future part of the USCIS system of records, this information collection is still in contravention of the Privacy Act. *[ILRC – there is an opportunity here to make reference to the current climate of detaining and in some instances deporting people and that this information will be potentially relevant. We are mindful of how – took a stab at some language, feel free to edit or delete (LT).]* The specter of mass deportation has been raised repeatedly by the current administration, and based on news reports and the admissions of agency officials, the main tool for facilitating a substantial increase in immigration enforcement is the collection and sharing of information between government agencies. DHS already has at its disposal massive amounts of information on noncitizens, particularly those who have applied for an immigration benefit. Yet the information collections propose to mine even further for information on not just the applicant, but anyone with whom the applicant might have had contact. The current political climate indicates that the only purpose collecting this information can serve is to facilitate detention and removal for broad swaths of the immigrant population.

c. The Proposed Information Collection Does Not Indicate That There Will Be Appropriate Information Provided to Individuals at or before the Time of Collection

The Privacy Act requires that the agency "inform each individual whom it asks to supply information … (C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and (D) the effects on him, if any, of not providing all or any part of the requested information." 5 U.S. § 552a(e)(3).

Any intended use of this information is not known beyond vetting the individual who is applying. With this in mind, the information should, in theory, be limited to this use. In the event that USCIS intends to use this information for other purposes, it should update the proposed rule to make clear the full scope of intentions for this information.

V. Recommendations.

In light of the myriad deficiencies inherent in the Identifying Information Collection, we respectfully request that the entire collection be rescinded. If it is not rescinded, we make the following recommendations to improve the proposed collection and ensure it comports with relevant legal principles.

1. **The Identifying Information Collection should be tailored to each individual application form, and the information sought should correspond with the requirements for each**

different type of immigration relief. It is arbitrary to impose blanket data collection requirements on all applicants for immigration relief without explaining how each data point is relevant to a given type of applicant or application. USCIS already promulgates individualized forms for each type of relief; there is no reason that the proposed collection could not similarly be adapted and changed to better address the wide variation in backgrounds, lifestyles, needs, and access to information that is ubiquitous among noncitizens applying for immigration relief.

2. **Several of the terms in the Identifying Information Collection should be defined more clearly to avoid issues such as vagueness.**

3. **Information that is not patently relevant should be collected only on a case-by-case basis as needed.** For example, some of the identifying information might prove relevant to an individual application, such as past employer information for a noncitizen applying for an employment-based visa. If that is indeed the case, and USCIS discharges its obligation to demonstrate as much, then it is more appropriate to seek this information 1) in a form that is narrowly tailored to the information required for each specific type of relief (see Recommendation 1, above) or 2) at a later stage in the process, after concerning information about the applicant has been uncovered. For the reasons discussed throughout this comment, it is inappropriate and impermissible to seek this information from every single applicant for any type of immigration relief. Doing so flouts the values upon which this country was built, and it flies in the face of the freedom that makes the United States an attractive emigration destination in the first place.

4. **The Identifying Information Collection should expressly incorporate a grace period to allow current or near-future applicants to complete the application process and provide time for other noncitizens to understand what may be required of them should they choose to apply for relief.**

5. **The Identifying Information Collection should address data security.** As it currently stands, there is no guarantee that the sensitive and vast information that will be provided pursuant to this proposed collection will be protected from misuse or data breaches. Many applicants and their loved ones could experience retaliation or harassment as a result of their attempts to obtain immigration relief in the United States. It is imperative that DHS and USCIS safeguard this data to the maximum possible extent.

Yours truly,

/s/Elizabeth Taufa
Elizabeth Taufa
Senior Policy Attorney & Strategist