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U.S. Citizenship and Immigration Services
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Re: 85 FR 56338; EOIR Docket No. 19-0007, CIS No. 2644-19; RIN 1615-AC14; Comments in Opposition to Proposed Rulemaking: Collection and Use of Biometrics by U.S. Citizenship and Immigration Services

To Whom It May Concern:

The following comment on the Department of Homeland Security's (DHS) aforementioned proposal to amend DHS regulations concerning the use and collection of biometrics in the enforcement and administration of immigration laws by U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE) (Proposed Rule) is offered in my capacity as a Research Fellow at the Cato Institute. The Cato Institute is a public policy research organization dedicated to the principles of individual liberty, limited government, free markets, and peace.

Background

I will provide specific comments, keyed to DHS's proposal as outlined in the NPRM summary. Per the NPRM summary, DHS proposes the following:

"First, DHS proposes that any applicant, petitioner, sponsor, beneficiary, or individual filing or associated with an immigration benefit or request, **including United States citizens**, must appear for biometrics collection without regard to age unless DHS waives or exempts the biometrics requirement." (emphasis added)

With respect to the two aforementioned proposals, the proposed rule appears to be in direction violation of this statute:

https://www.law.cornell.edu/uscode/text/6/1118

The operative section reads as follows:

"Nothing in this section shall be construed to permit the Commissioner of U.S. Customs and Border Protection to facilitate or expand the deployment of biometric technologies, or otherwise collect, use, or retain biometrics, not authorized by any provision of or amendment made by the Intelligence Reform and Terrorism Prevention Act of 2004 (https://www.law.cornell.edu/rio/citation/Pub._L._108-458; 118

Stat. 3638) or the Implementing Recommendations of the 9/11 Commission Act of 2007 (https://www.law.cornell.edu/rio/citation/Pub. L. 110-53; 121 Stat. 266)."

The two statutes in question provide no authority for any biometrics use along the lines in the proposed rule with respect to U.S. citizens.

Per the NPRM summary, DHS proposes the following:

"Third, DHS proposes to define the term biometrics. Fourth, this rule proposes to increase the biometric modalities that DHS collects, to include iris image, palm print, and voice print."

In fact, PL 108-458 already provides a definition of "biometric identifier." Unless the proposed rule mirrors that language, it is my view that the Department will need legislation to modify it to encompass the proposed—and clearly expanded—definition of "biometric identifier" the Department seeks.

Further, DHS provided no evidence in the NPRM that it consulted NIST in the drafting of the NPRM to ensure that it adhered to NIST recommended best practices with respect to the operational employment of any biometric technology, including mitigation measures to avoid the kinds of demographic and algorithmic biases found in recent NIST examinations of facial recognition technology.[1] The same concerns apply to DHS's apparent failure to consult NIST and adhere to recommended best practices with respect to other proposed biometric modality expansions contained in the NPRM.

Per the NPRM summary, DHS proposes the following:

"Fifth, this rule proposes that DHS may require, request, or accept DNA test results, which include a partial DNA profile, to prove the existence of a claimed genetic relationship and that DHS may use and store DNA test results for the relevant adjudications or to perform any other functions necessary for administering and enforcing immigration and naturalization laws."

The DNA Fingerprint Act of 2005, title X of Public Law 109-162, authorizes the Attorney General to collect DNA samples from individuals who are arrested, facing charges, or convicted and from "non-United States persons who are detained under the authority of the United States."[2] Neither that law, nor any other current statute or federal court decision, appear to allow the kind of sweeping DNA collection from persons simply seeking to immigrate to the United States or otherwise come here lawfully to work.

Per the NPRM summary, DHS proposes the following:

"Sixth, this rule would modify how VAWA and T nonimmigrant petitioners demonstrate good moral character, as well as remove the presumption of good moral character for those under the age of 14."

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[1] NISTIR 8280, Face Recognition Vendor Test (FRVT), Part 3: Demographic Effects, December 2019. Available at https://doi.org/10.6028/NIST.IR.8280.

[2] See Sarah B. Berson, Debating DNA Collection, National Institute of Justice Journal 264 (Nov. 2009), https://www.ncjrs.gov/pdffiles1/nij/228383.pdf (discussing the DNA Fingerprint Act of 2005 and state court decisions grappling with the collection of DNA from persons not yet convicted of any crime, prior to Maryland v. King).

DHS failed to justify why existing methods to establish good moral character, including police certifications, are insufficient and require the use of radical and sweeping biometric measures. Moreover, the proposed rule is directly at odds with DHS's own "Blue Campaign" against human trafficking.

8 CFR § 3610 (b)(2)(vii) states that an applicant shall not be considered to be of good moral character if they are or were "involved in prostitution or commercialized vice as described in section 212(a)(2)(D) of the Act."[3] Yet the DHS "Blue Campaign" website lists a series of indicators of potential human trafficking that include "Is a juvenile engaged in commercial sex acts?" and "Is the person fearful, timid, or submissive?" and "Does the person lack personal possessions and appear not to have a stable living situation?"

In its January 2020 report on human trafficking, the Department stated, in relevant part, "In the past five years, DHS identified and assisted 2,670 human trafficking victims and 5,105 child sexual exploitation victims in the United States. Of these victims, 5,912 were U.S. nationals."[4]

Nearly one in four of the victims of human trafficking uncovered by the Department over the last five years were not U.S. citizens, yet the proposed rule as currently drafted would almost certainly exclude the very victims of human trafficking—and especially victims of child sexual exploitation—that the Department claims to be so concerned with helping.

Conclusion

As the foregoing analysis demonstrates, the proposed rule 1) conflicts with multiple existing statutes in key areas, 2) shows a clear lack of intergovernmental coordination and consultation, and 3) includes provisions that are unquestionably at cross-purposes with existing Department initiatives. Accordingly, the author advises the Department to withdraw the NPRM, engage in a proper interagency coordination and consultation process, and directly engage civil society stakeholders in the redrafting process.

Sincerely,

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[3] 8 CFR § 3610 (b)(2)(vii), accessible at https://casetext.com/regulation/code-of-federal-regulations/title-8-aliens-and-nationality/chapter-i-department-of-homeland-security/subchapter-c-nationality-regulations/part-316-general-requirements-for-naturalization/31610-good-moral-character.

[4] Department of Homeland Security: Strategy to Combat Human Trafficking, the Importation of Goods Produced with Forced Labor, and Child Sexual Exploitation, January 2020, p. 12. Accessible at https://www.dhs.gov/sites/default/files/publications/20_0115_plcy_human-trafficking-forced-labor-child-exploit-strategy.pdf