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The Honorable Alejandro Mayorkas
Deputy Secretary of Homeland Security
3801 Nebraska Avenue, NW - Stop 1
Washington, DC 20528-0001

May 28, 2015

Re: Request to Limit Use of the I-9 "Other names used" Field

The National Center for Transgender Equality advocates for the more than 700,000 transgender people in the United States and their loved ones. We write to urge the Department of Homeland Security to narrow the use of the "Other names used" field on USCIS Form I-9 to request only other surnames, and to designate this field as optional.

We are concerned that the mandatory collection of prior names on the I-9 requires disclosures that breach the privacy of many transgender workers and open the door to employment discrimination. Workers have expressed to us that they fear a Catch-22, where providing a former name could open them to discrimination, while failing to disclose a former name could also be a basis for adverse action and easily serve as a pretext for discriminatory actions.

The Department of Justice, the Equal Employment Opportunity Commission, and numerous courts have held that Title VII prohibits discrimination based on transgender status, gender identity, or gender transition.¹ Unfortunately, discrimination against transgender workers remains widespread. For transgender workers, disclosing a prior name is tantamount to disclosing a legally protected characteristic, namely their transgender status.² Perhaps the seriousness of the situation can be best understood by comparison; if the I-9 required disclosure of a person's disability or pregnancy status, certainly we would be worried that an employer could improperly take that information into account in deciding whether to continue the hiring process and/or terminate the employee. Transgender workers have frequently faced

¹ See Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); *Macy v. Holder*, EEOC App. No. 0120120821 (2012); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Finkle v. Howard Cty., Md.*, 12 F.Supp.3d 780 (D. Md. 2014); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008).

² See, e.g., *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653, 659-661 (S.D.Tex.2008) (holding job applicants have no duty to disclose transgender status or birth sex and failure to disclose does not constitute a legitimate, nondiscriminatory motive); *Complainant v. Shinseki*, EEOC App. No. 0120133123 (2014) (alleged refusal to change transgender employee's name in computer system, forcing him to explain the name change to coworkers, constituted part of a pattern of discrimination); D.C. Mun. Reg. Tit. 4, § 806 (adverse action based on failure to disclose a prior change of name or gender transition may constitute gender identity discrimination, absent a reasonable business purpose).

firing or the withdrawal of job offers when an employer learns of their transgender status.³ In fact, 26% of transgender people report losing a job due to anti-transgender bias.⁴ Mandatory collection of this information, particularly when it passes through an employer, also raises significant statutory and constitutional privacy concerns.⁵

We understand that the main function the “Other names used” field in the I-9 form is to avoid confusion and delay in cases where a worker uses a married surname but is still listed by another surname on some official documents. The use of this field should be no broader than necessary to serve this purpose, particularly in light of the concerns we have outlined above. We therefore urge the Department to amend the Form I-9 and instructions to return to asking only for maiden names, and to clearly designate the “Other names used” field as “Optional.”

Sincerely,

A handwritten signature in black ink, appearing to read "Harper Jean Tobin". The signature is fluid and cursive, with a long horizontal stroke at the end.

Harper Jean Tobin
Director of Policy

³ See, e.g., *Macy v. Holder*, EEOC App. No. 0120120821 (2012) (employer withdrew job offer upon learning of employee's transgender status); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008) (same); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653 (S.D.Tex.2008) (same).

⁴ Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 53. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.

⁵ See, e.g., *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (holding that individuals have a constitutional right to privacy concerning transgender status); 5 U.S.C. § 552a(e)(1) (requiring that agencies collect and maintain “only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President”).



1325 Massachusetts Ave, NW, Suite 700
Washington, DC 20005



CAPITAL DISTRICT 200208

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THE HONORABLE ALEJANDRO MAYORKAS
DEPUTY SECRETARY OF HOMELAND SECURITY
3801 NEBRASKA AVENUE, NW - STOR 1
WASHINGTON, DC 20528-0001

205280001





**U.S. Citizenship
and Immigration
Services**

July 1, 2015

Harper Jean Tobin
Director of Policy
National Center for Transgender Equality
1325 Massachusetts Avenue, NW, Suite 700
Washington, DC 20005

Dear Ms. Tobin:

Thank you for your letter of May 28, 2015 in which you urge the Department of Homeland Security (DHS) to narrow the use of the "Other Names Used" field on Form I-9, Employment Eligibility Verification, to request only other surnames and to designate this field as optional. You expressed that this step would reduce the risk of potential or actual discrimination by an employer against any employee.

The current version of Form I-9 is set to expire March 31, 2016. U.S. Citizenship and Immigration Services (USCIS) is in the process of reviewing and updating this form and anticipates publishing the revised version and instructions for public review and comment in the upcoming months. As part of revising the form, USCIS will review the "Other Names Used" field in coordination with the agencies that enforce Form I-9 requirements.

After proposed changes to the form are published in the Federal Register in accordance with the requirements of the Paperwork Reduction Act (PRA), the public, including your organization, will have two opportunities to review and submit comments for consideration by USCIS. The proposed changes will only go into effect after review and approval by the Office of Management and Budget. Unless and until the "Other Names Used" field is revised through the process required by the PRA, this field remains a Form I-9 mandatory field, when applicable.

As background, Form I-9 has included since 1987 a field to collect other names used by an employee. Originally, the field was designed only to collect the maiden name of the employee completing the form, and was mandatory "when applicable." The main purpose of the field is to allow employers and the agencies responsible for enforcing Form I-9 to resolve conflicts between the name an individual lists on Form I-9 and documentary or records information. During the last revision of Form I-9 in 2013, USCIS received more than 1,200 public comments requesting that DHS revise the field label "maiden name" to a non-gender-specific word.

After review, including an examination of the situations in which an individual may experience a legal name change (e.g., adoption, marriage, divorce, naturalization), and based on

Ms. Harper Jean Tobin

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After review, including an examination of the situations in which an individual may experience a legal name change (e.g., adoption, marriage, divorce, naturalization), and based on the public comments, DHS changed the field label to "Other Names Used." The field remained mandatory, when applicable.

Again, thank you for sharing your concerns about this important issue. I look forward to engaging with the National Center for Transgender Equality during the upcoming Form I-9 review process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tammy Meckley", with a stylized, flowing script.

Tammy Meckley
Associate Director