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Samantha Deshommes, Chief

Regulatory Coordination Division, Office of Policy and Strategy

U.S. Citizenship and Immigration Services

Department of Homeland Security

Submitted via www.regulations.gov

April 25, 2022

Re: DHS Docket No. USCIS-2021-0013, Comments in Response to Proposed Rulemaking, Public Charge Ground of Inadmissibility

Dear Ms. Deshommes:

The Immigrant Legal Resource Center submits this comment in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking on the Public Charge Ground of Inadmissibility, published in the Federal Register on February 24, 2022. We believe the public charge ground of inadmissibility is a relic of outdated and racist immigration policies that discriminates against unmarried women, people with disabilities, and others deemed incapable of self-sufficiency over its long history. We will continue to work to change the statute to eliminate this ground. Until this piece of our law is eliminated, this rule provides clarity and reasonable standards. If finalized with our recommendations, the rule would provide needed clarity and stability for immigrants and their families. We urge that you finalize a rule that includes our recommendations as soon as possible.

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 is a leader in family-based immigration, including the affidavit of support, producing trusted legal resources including webinars, trainings, and manuals such as *Families & Immigration: A Practical Guide* and *Public Charge and Immigration Law*. The ILRC provides technical legal support for attorneys, DOJ-accredited representatives, and non-profit programs who represent immigrants during the process of applying for permanent residence.

The ILRC 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 service providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. For many, one of the benefits of becoming a U.S. citizen is being able to sponsor family members such as parents, children and siblings by filing a visa petition and meeting the requirements of the public charge ground of inadmissibility and the affidavit of support. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits and sponsor family members.

The ILRC is also a part of the Protecting Immigrant Families campaign and has joined many organizations in a comment related to this proposed rulemaking. The following comment provides additional input from the ILRC.

The ILRC believes that the nation is stronger when we welcome people who are willing to contribute to the country and recognize their potential. Our communities and economy depend on the labor of immigrants and U.S. citizens who too often receive modest pay and few benefits for their essential work, and public benefits play a critical role in supplementing their earnings. Nationally, such core health, nutrition, and housing assistance programs help nearly half of Americans make ends meet.

We appreciate that the proposed rule recognizes that use of these supports, which in fact help lift people out of poverty and establish self-sufficiency, should in no way be linked to the exclusionary "public charge" provision – they represent the country's policy choices about how to help all workers and families succeed. Time and again, individuals with limited means make important contributions to the United States – caring for the most vulnerable, teaching our children, keeping us fed, and enriching the country.

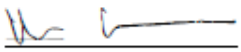
Our immigration policies should not discourage immigrants and their family members from seeking physical or mental health care, nutrition, or housing benefits for which they are eligible. We urge DHS not to exclude people from immigrating simply because conditions in their countries of origin, discrimination they may have faced in the United States, and other circumstances have made it difficult for them to complete an education, secure professional credentials, or earn a high income.

Clear, administrable regulations are needed so that immigrants and their families, along with USCIS officers, states, localities, immigration lawyers, public benefits providers, and others can understand how a public charge assessment will be determined. This is particularly important because lack of clarity can cause the same damage as an overly broad rule. It can cause immigrant families to avoid interacting with the government and to forgo critical public benefits for which they are eligible due to fear and confusion.

These harms can extend outside of the receipt of public benefits, such as a domestic violence survivor forgoing police protection or a parent becoming fearful of seeking health care for their U.S. citizen child.

Thank you for the opportunity to submit comments on the proposed rulemaking. Please do not hesitate to contact me to provide further information.

Respectfully submitted,



Erin J. Quinn

Senior Staff Attorney

The ILRC submits the following detailed comments addressing the proposed rule:

I. Time Savings, Reduced Chilling Effect and Consistency in Adjudications

The ILRC commends the agency for putting forward regulations to guide the public charge inquiry. Absent rulemaking, the uncertainty facing potential applicants for status has created a chilling effect- both to applications for lawful permanent residence as well as to applications for needed benefit programs available to immigrants and their families. On the whole, the proposed regulation provides welcomed clarity to the legal standard and categories of immigrants exempt from public charge. We appreciate the regulatory guidance for T visa holders and applicants for adjustment.

These clarifications will help advocates counter the chilling effect from years of harsh rhetoric and inconsistent adjudications relating to public charge. In addition, legal service providers will be able to provide clear advice regarding eligibility for status and impact of the public charge inadmissibility ground to potential applicants. This will greatly reduce the time burden to service providers in advising and preparing applications for lawful permanent resident status. Likewise, clearer messages related to eligibility and inadmissibility will alleviate the fear of potential applicants for lawful permanent residence that filing for status will result in family separation and deportation.

The ILRC fields thousands of questions from practitioners in the field every year. We receive numerous questions indicating that confusion around what benefit programs "count" in a public charge determination deter applications and results in hours of additional work for legal service providers assessing cases. Further, gathering documents and doing research to properly assess each case takes additional time, and often leads to unclear advisals because the legal advocate is unsure how the case will

be adjudicated. Naturally, those otherwise eligible to adjust might refrain from filing if they fear their application might be denied. Clear regulations will provide greater confidence in assessing eligibility and will streamline advisals and information gathering. Clear regulations will directly decrease the time needed by ILRC to respond to questions from the field. In addition, we estimate that advising, researching and document gathering for legal service providers could be reduced from 2 to 20 hours per case, depending on the facts presented.

Regulations will promote uniform adjudications and reduce arbitrary and inconsistent decision making across offices, regions, and individual officers. Thus, this guidance will save hours of preparation and advisal time by advocates in the field, streamline adjudications and increase consistency, and likely result in an increased number of applications for status filed by eligible individuals. The ILRC makes several recommendations to strengthen this necessary rule.

II. Using Inclusive, Non-derogatory Terms

The agency should remove the term "alien" from the preamble and regulatory text of the public charge rule and replace it in the preamble and the regulatory text with "noncitizens."

A recent Policy Memorandum from the Executive Office for Immigration Review (EOIR) directs EOIR staff to use language that is "consistent with our character as a nation of opportunity and of welcome." EOIR suggests the following language to replace "alien:" respondent, applicant, petitioner, beneficiary, migrant, noncitizen, or non-U.S. citizen.

EOIR's policy implements President Biden's Executive Order 14012, Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans (Feb. 2, 2021), providing that the "Federal Government should develop welcoming strategies that promote integration [and] inclusion." That Executive Order and Executive Order 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border (Feb. 2, 2021), does not use the terms "alien" or "illegal alien" to describe migrants.

In addition, news articles have reported that USCIS is planning to remove "aliens" from the USCIS policy manual. We suggest that as regulations, like the public charge rule, and agency guidance are updated, the agency replace any use of "aliens" with another term, such as "noncitizens." USCIS leadership indicated, "this change is designed to encourage more inclusive language in the agency's outreach efforts, internal documents and in overall communication with stakeholders, partners, and the general public. The guidance does not affect legal, policy or other operational documents, including forms, where using

terms (such as applicant, petitioner, etc.) as defined by the Immigration and Nationality Act would be the most appropriate."

III. Definitions

§ 212.21 (a) Likely at any time to become a public charge.

Recommendation: Delete proposed regulatory text and replace with "8 CFR § 212.21 (a) Likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of (1) Supplemental Security Income (SSI), 42 U.S.C. 1381 et seq.; or (2) Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 et seq."

For more than 100 years, the interpretation of the public charge ground of inadmissibility remained consistent: a public charge for inadmissibility purposes is a person who "is likely to become primarily dependent on the government for subsistence." A public charge determination was designed to be a narrowly focused tool and remained that way for more than a century. A comment detailing the legislative history of public charge by more than one hundred U.S. Representatives noted, "Congress has amended the statutory ground of inadmissibility several times since 1882, but it has never changed this longstanding primary meaning." As the 2022 proposed rule recognizes, the public charge test was never designed to prevent immigration of low- and moderate-income families who may at some point need access to public programs to overcome temporary setbacks.

- In the months leading up to and following publication of the 1999 Field Guidance, the INS Commissioner confirmed that the public charge doctrine had not been altered in legislation enacted in 1996. The Field Guidance simply summarized longstanding law with respect to public charge. The definition in the 1999 field guidance, similar to the definition we propose, was based upon, and encapsulated in, decades of administrative and judicial decisions interpreting the term. For example, in *Matter of Martinez-Lopez* the Attorney General affirmed that the respondent was not excludable as a public charge and reasoned, "The general tenor of the holdings is that the statute requires more than a showing of a possibility that the alien will require public support. Some specific circumstance, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency..." The Ninth Circuit Court of Appeals (Ninth Circuit) found that the concept of public charge did not "encompass" people who used benefits that "were not sufficient to provide basic sustenance." Additionally, there are many scenarios where people receive government benefits for a period of time but not permanently: for example, if an individual is currently using a benefit but is about to get a raise or a new job and will no longer access it, or if someone is recovering from a temporary illness or treatment and relying on a federal government benefit to recuperate. The Ninth Circuit also found that public charge had never encompassed persons likely to make "short-term use" of benefits. Given this landscape, a primary dependence upon support, as opposed to use of supportive programs generally remains appropriate.

- The only two programs that should be relevant in determining whether a person is "likely at any time to become primarily dependent on the government for subsistence" are Supplemental Security Income (SSI) and cash assistance under Temporary Assistance for Needy Families program (TANF) (other than supplemental or special purpose cash benefits).

The 1999 Field Guidance indicated that both of these programs should be considered in a public charge determination, and HHS agrees that these programs should be included as well. There is a long history of counting "cash assistance for income maintenance" in a public charge determination dating back to the colonial poor laws that permitted each town to expel "outsiders" who became "public charges" by requesting material support such as cash and clothing. TANF and SSI are the only programs that should be considered as falling under this construct. However, receipt of TANF or SSI programs *alone* should not make someone likely to become a public charge, as proposed in 8 CFR § 212.22(a)(3). HHS agrees with this statement and recently indicated that "while receipt of cash assistance does not necessarily mean that an individual is primarily dependent on the government, unlike non-cash benefits, it is relevant to the determination."

- Adjudicators should consider only an applicant's *current* use of TANF and SSI. Individuals who received benefits in the past and no longer receive them have experienced a change in circumstances that may make them unlikely to need benefits in the future. In addition, DHS should make clear that applicants will be asked to provide information about current receipt of cash benefits from two specific programs, TANF and SSI, and that receipt of those benefits is simply one aspect of the totality of circumstances to be considered.

§ 212.21 (b) Public Cash assistance for income maintenance

Recommendation: Delete proposed regulatory text. (In other words, incorporate proposed 8 CFR § 212.21 (b) (1) and 8 CFR § 212.21 (b) (2) to section 8 CFR § 212.21 (a) above and delete (b)(3)).

We oppose the inclusion of State, Tribal, territorial, or local benefits, including programs providing cash assistance for income maintenance and recommend that they be removed from the regulatory text. Programs funded by state and local government —including any cash assistance that they choose to provide—are an exercise of the powers traditionally reserved to the states. States and localities have a compelling interest in promoting health and safety, which includes their ability to provide benefits at their own expense without barriers caused by federal policies. The Attorney Generals of 19 states collectively commented on the public charge ANPRM advocating that any type of state cash assistance, whether filling a gap for people ineligible for TANF, or cash for specific, supplemental purposes, should not count in a public charge determination, stating: "The undersigned States are charged with safeguarding the public health and promoting the welfare of the people in their jurisdictions. To that end, States make independent public policy determinations, including with respect to providing public benefits to all individuals within their jurisdictions regardless of immigration status."

We, at ILRC, have witnessed the direct fallout from inclusion of local and state programs during the COVID-19 pandemic. California offered various forms of relief to support our collective health—including support for California's families, workforce and economy. While immigrants and their families were

included, many refrained from needed supports out of fear that using such programs would trigger public charge consequences. The ILRC helped service providers message around the safety of using such programs, but without clear guidance from the federal government, organizations frequently reported individuals were too scared to seek medical care, use rental assistance, and apply for other benefits specifically designed to support our communities. During the COVID-19 pandemic, counties attempted to initiate stimulus funds, knowing cash would be the most flexible and needed support, yet doing so created fear that such programs would count as cash aid for income maintenance. Public charge concerns directly impacted our ability to effectively execute public health programs and economic stimulus within California.

In addition, limiting consideration to federal benefits would result in a single, uniform, federal standard. The policies of a state where an applicant resides when applying for admission, has resided in the past, or will reside in the future should not be factored into their admission to the U.S. State and local programs can be dynamic and variable. States continue to experiment with new ways to support their residents, including U.S. citizens, immigrants, and their family members. In 2021 alone, more than twenty localities piloted guaranteed income programs. In addition, at least seven states and many localities provided disaster cash for immigrants excluded from federal assistance, and five new states expanded their earned income tax credit to reach certain immigrants. Several states are exploring alternatives to unemployment insurance for excluded workers, and with the federal advance child tax credit expiring, some states are considering providing monthly advance payments of state credits.

The confusion about which programs can be considered in a public charge determination and which are excluded cannot be overstated. Organizations like the Center for Law and Social Policy have even received questions about whether receipt of a Paycheck Protection Act loan for a small business would be considered in a public charge determination. The ILRC receives questions about various local California programs, including one-time stipends, relief funds and rental assistance funds.

As a practical matter, immigrants and immigration attorneys, who are not experts in the intricacies of public benefits programs, will be afraid to participate in programs designed by their state or local government to support them. Immigration attorneys confronted with an array of State, Tribal, territorial, or local cash benefits programs will simply advise their clients not to use public benefits.
If the impact of using a program is legally unclear, and no specific regulatory provisions exclude a specific program, legal counsel often feel compelled to advise that there is some risk.

As more new programs come into existence, developing and updating a guidance or record of all the programs, including whether they will or will not be considered by immigration officials, will be a complex and burdensome task, and likely impossible to do with legal accuracy given the broad definition of cash assistance currently proposed.

§ 212.21 (c) Long-term institutionalization at government expense

Recommendation: We strongly urge DHS to exclude institutionalization at government expense altogether from the definition of public charge.

Including any Medicaid coverage causes confusion and contributes to the chilling effect. The best way to mitigate the chilling effect that has occurred is to exclude Medicaid full stop. Medicaid is the primary payer of long-term care in the U.S. and covers 6 in 10 nursing home residents. Many people living in the U.S. will one day rely on Medicaid for their long-term care needs.

Medicaid funded long-term care plays a much different role in today's society than almshouses played in the early days of the public charge doctrine. Of the 1.4 million people that rely on nursing homes, about 836,000 people or 2.6 percent of people in the U.S. live in nursing homes paid for by Medicaid. In 1903, only .1 percent of the U.S. population lived in publicly-funded almshouses (101 "paupers" per 100,000 people). In other words, a 26 times greater share of the population relies on institutions for long term care at government expense today than relied on almshouses at the turn of the century. The vast majority (80 percent) of people in long term care today are 65 and older and have multiple self-care needs. In contrast, people who lived in almshouses of the early 1900s, were often expected to engage in farming and other work and included, not only "the aged and infirm," but also people with disabilities, people who engaged in sex work, seasonal agricultural work, and children of all ages.

Because public charge is a forward-looking test, it is difficult to provide clear messages to people who need Medicaid that their enrollment for non-institutional purposes now will not be used to indicate that they will rely on Medicaid should they need long-term care in the future. By considering a public benefit that only people with disabilities and older adults use, disability and/or age are adversely considered multiple times as factors in the totality of the circumstances

§ 212.21 (d) Receipt of Public Benefits

Recommendation: Detailing what constitutes "receipt" of countable benefits provides clarity and will ease the adjudicative process for applicants, representatives, and adjudicators. We welcome this clarifying that only benefits actually issued for and received in fact by the intending applicant count in the determination.

§ 212.21 (e) Government

Recommendation: Delete proposed regulatory text. Rather than defining "government," DHS should clarify that SSI and TANF are the specific programs that may be considered in a public charge determination.

If federal programs were already specified, it would not be necessary to include a definition of government for this purpose. Nonetheless, should a definition remain, any such definition should omit

cash aid and benefits programs funded by any state, tribe, territory or locality. See reasoning provided above.

IV. Statutory Factors and the Totality of the Circumstances Framework

§ 212.22(a)(1) Factors to Consider

Recommendation: We support DHS's proposed language at § 212.22(a)(1) that simply acknowledges the statutory language, without attempting to further speculate on how they should be weighed in any given case.

The ILRC appreciates the proposed rule's general adoption of the straightforward, longstanding framework from 1999, without adding arcane heavily weighted factors or irrelevant evidence requirements for each statutory factor within the totality of the circumstances analysis, as the previous administration attempted to do with the 2019 rule. As we saw, the 2019 approach was excessively burdensome for applicants and adjudicators, without providing greater clarity. The overly detailed totality of the circumstances guidance in the 2019 rule would likely have made such adjudications more subjective, variable, inconsistent, and prone to bias.

The ILRC supports the proposed rule's decision to make it clear that no single factor, apart from failure to include an affidavit of support where required, should determine whether an individual is likely to be a public charge.

§ 212.22(a)(2) Consideration of Affidavit of Support

Recommendation: We agree that a statutorily sufficient affidavit of support pursuant to INA § 213A should be favorably considered when determining public charge. We recommend that the regulatory language goes one step further, to acknowledge longstanding adjudicatory practice: a statutorily sufficient affidavit of support demonstrates that the applicant, in consideration of the totality of factors, is not likely to become a public charge, absent extraordinary factors.

The INA at section 212(a)(4)(B)(i) instructs adjudicating officers to consider, at a minimum, the applicant's age, health, family status, assets, resources and financial status, and education and skills when making a public charge inadmissibility determination.

The Department of State has been the leading federal agency in implementing and interpreting the public charge ground of inadmissibility, both before and after the 1996 statutory changes. In fact, it created or codified what became the five statutory factors, which were lifted by Congress almost verbatim from the Foreign Affairs Manual. In 1997, on the eve of formal implementation of the new affidavit of support form, that agency issued one in a series of interpretive memos. The first one stated: "If the applicant and his/her spouse or dependents are in good health and appear to be employable, an Affidavit of Support that meets the minimum income level should generally be considered adequate." Department of State, "I-864 Affidavit of Support Update No. One – Public Charge Issues," UNCLAS STATE 228862 (Dec. 1997).

This was followed soon by another memo that elaborated on the significance of the affidavit of support and its weight in determining whether the applicant was likely to become a public charge. While "an I-864

demonstrating financial resources at or above the 125 percent benchmark will generally be adequate for visa issuance," consular officers could still consider other factors if there is a "need for medical treatment or other financial obligations," or "anticipated medical or other costs on behalf of the applicant which the sponsor does not appear capable of meeting." Department of State, "I-864 Affidavit of Support: Update No. 12: § 212(a)(4) v. § 221(g)," 98-State-064917 (April 1998).

Further memos cemented the agency's position that the submission of a legally sufficient affidavit of support that meets the minimum 125 percent of poverty requirement will usually satisfy the public charge ground of inadmissibility and will not require a separate examination of the five other factors. Applicants who are in good health, "employable," and submit an acceptable affidavit of support should not be found inadmissible for public charge. Only where "significant public charge factors" exist should the consular officer require further assurances and more documentation that the sponsor, or perhaps a joint sponsor, has the necessary financial resources to support the applicant. These significant public charge factors include advanced age, poor health, or a serious physical impairment that is likely to require costly medical treatment. See, e.g., Department of State, "I-864 Affidavit of Support: Update No. 14 – Commitment to Provide Assistance," UNCLAS STATE 102426 (June 1998).

This interpretation incorporates the Attorney General's holding in *Matter of Martinez-Lopez*, 10 I&N 409, 421–422 (AG, Jan. 6, 1964), which concluded that in order to make a finding of public charge inadmissibility ''[s]ome specific circumstances, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency."

Sponsor deeming of income, legally enforceable obligations on the sponsor to support the applicant, contractual requirements to reimburse any benefits the sponsored immigrant managed to receive, coupled with the 1996 welfare law's restricting lawful permanent residents' access to federal means-tested programs meant that it was nigh impossible for the immigrant visa applicant to become a public charge, at least for the first five years after immigrating. In other words, safeguards and restrictions put in place in 1996 obviated the need to conduct a deep analysis of the intending immigrant's financial outlook. Once granted lawful permanent residence, the individual would be disqualified from receiving the major federal benefits programs, including cash assistance for income maintenance purposes or long-term institutionalization.

For these reasons, a qualifying affidavit of support is one of the strongest indicators that an applicant is not in danger of becoming a public charge in the future, in consideration of all factors including age, health, family status, and other factors listed in the statute. A sufficient showing on an affidavit of support indicates the person has family and community ties willing to support them, while taking into account family size and financial resources of the household.

The affidavit of support provides documentary evidence that the applicant is not inadmissible under INA § 212(a)(4) and that statutory factors weigh in favor of the applicant. DHS should indicate that a properly filed affidavit of support satisfies the INA § 212(a)(4) requirements and creates a presumption that the applicant overcomes the public charge ground of inadmissibility. This would be consistent with the USCIS adjudicator's field manual in effect

under the 1999 field guidance, which indicated that the affidavit of support's purpose "is to overcome the public charge ground of inadmissibility."

Acknowledging that the affidavit of support provides sufficient data in consideration of all factors provides a tool to achieve consistent adjudications and establish guidelines for potential applicants by which to assess their likelihood of demonstrating admissibility. Regulating that, barring extraordinary factors, a sufficient showing of support overcomes a public charge given the totality of circumstances rests on longstanding policies and provides predictability to application process for admission as an immigrant.

In conclusion, the ILRC welcomes a new rule to provide clarity and consistent adjudications on public charge and appreciate the agency's reliance on longstanding principles. We are excited to see a rule that recognizes the contribution of all immigrants.