



ADVISORY BOARD

Hon. John Burton
Hon. Nancy Pelosi

BOARD OF DIRECTORS

Cynthia Alvarez
Richard Boswell
W. Hardy Callcott
Aidin Castillo
Eva Grove
Bill Ong Hing
Luca D. Mangini
Anita Martinez
Michelle Mercer
Toni Rembe
Rudy Ruano
Guadalupe Sordia-Ortiz
Lisa Spiegel
Alan Tafapolsky
Mawuena Tendar
Hon. James L. Warren (Ret.)
Allen S. Weiner
Roger Wu

GENERAL COUNSEL

Bill Ong Hing

OF COUNSEL

Don Ungar

EXECUTIVE DIRECTOR

Eric Cohen

San Francisco

1458 Howard Street
San Francisco, CA 94103

Washington, D.C.

600 14th Street, NW
Suite 502
Washington, D.C. 20005

San Antonio

500 Sixth Street
Suite 204
San Antonio, TX 78215

Austin

6633 East Hwy 290
Suite 102
Austin, TX 78723

ilrc@ilrc.org
www.ilrc.org

January 12, 2022

Andrea B. Lage
Acting Regulatory Coordinator, Visa Services
Bureau of Consular Affairs
Department of State
600 19th St, NW
Washington, DC 20006

Re: Docket DOS-2021-0034 and RIN 1400-AE87
Visas: Ineligibility Based on Public Charge Grounds
IFR: Reopening of public comment period

Dear Ms. Lage,

I am writing on behalf of the Immigrant Legal Resource Center (ILRC) in response to the U.S. Department of State's (DOS) Federal Register notice *Visas: Ineligibility Based on Public Charge Grounds* published on November 17, 2021. We appreciate the opportunity to comment.

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 advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC has published dozens of educational materials including manuals, practice advisories, community education materials and advocacy comments on the topic of "public charge" because its definition has a profound impact on immigrants of color and low-income immigrants.

Through our extensive networks with service providers, immigration practitioners, and immigration benefits applicants, we have developed a profound understanding of the barriers faced by low-income immigrants of color who are seeking immigration benefits, including persons who are consular processing. The comments that follow are gleaned from the experiences of many low-income immigrants of color who we and our partners serve.

We agree with the President that "it is essential to ensure that our laws and policies encourage full participation by immigrants, including refugees, in our civic life; that immigration processes and other benefits are delivered effectively and efficiently, and that the Federal Government

eliminates sources of fear and other barriers that prevent immigrants from accessing government services available to them.”¹

The government benefits immigrants may be eligible for should not be linked to the negative public charge definition in DOS’s October 11, 2019 Interim Final Rule (DOS’s 2019 public charge rule). The benefits represent our country’s policy choices about how to help all workers and families succeed. The Administration has clearly stated that policies or rules that discourage full participation by immigrants should be eliminated. Therefore, DOS’s 2019 public charge rule should be removed from the Code of Federal Regulations (C.F.R.).

We believe that our immigration laws should not discourage immigrants and their family members from seeking health care, nutrition, or housing benefits for which they are eligible, particularly during a time of a pandemic that disproportionately impacts immigrants.

We recommend that DOS comply with Executive Orders by removing the text of DOS’s 2019 public charge rule from the C.F.R. and restoring the longstanding regulatory text that appeared prior to the 2019 rule.

We suggest restoring the regulatory text that existed prior to the 2019 rule because 1) the Administration has clearly stated that policies that discourage immigrant participation should be eliminated; 2) the chilling effect of the 2019 Trump public charge policy persists, and the current DOS policy is confusing for immigrants and their family members; 3) the regulations prior to DOS’s 2019 public charge rule set out a clear policy that was in use for decades; and 4) DOS’s 2019 public charge rule is discriminatory and virtually identical to the DHS’s 2019 public charge rule which was found to be unlawful, was vacated by a federal court, and was withdrawn from the federal rules.

1. Remove the DOS’s 2019 public charge rule because it contradicts the President’s Executive Orders.

The President’s Executive Orders state that the government’s goal is to restore faith in our legal immigration systems and to strengthen integration and inclusion. One order specifically calls on the government to reduce barriers posed by public charge policies that have caused fear and confusion in immigrant communities.²

The DOS’s public charge changes to the 2018 Foreign Affairs Manual (FAM) and to 2019 regulations sent the message to prospective immigrants that government programs were to be avoided at all costs, because if people availed themselves of benefits even though they qualified for them, it would be judged negatively against them at the time they tried to immigrate. Policies which discourage immigrants from seeking health benefits during a pandemic are not in compliance with the Administration’s mandates. To comply with the Executive Order, DOS’s 2019 public charge rule should be removed from the Federal Register.

2. Remove the DOS’s 2019 public charge rule from the Federal Register because the chilling effect of the Trump public charge policy persists, creating hardships for immigrants during an era of pandemic.

The effect of DOS’s 2019 public charge rule is not limited to potential immigrant visa applicants living abroad. Some people currently living in the United States must leave the country and undergo processing abroad to receive an immigrant visa, and their application would be subject to DOS’s 2019 public charge rule. In addition, family members in the United States may fear that if a family member here uses a benefit, it will affect the immigrant visa application of the applicant family member who must travel abroad for processing. Given the substantial number of families and households with members of different immigration statuses, it is often difficult to understand who may be penalized by the rule.

The current DOS policies confuse immigrants and their families, causing them to avoid accessing health care during the COVID-19 pandemic. Although DOS’s 2019 public charge rule is enjoined by a preliminary injunction, it remains

¹ The White House, *Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans* (Feb. 2, 2021).

² *Id.*

DOS's official policy because it is still codified in the Federal Register. This fear of accessing services and benefits has continued in our nation's second year of the COVID-19 pandemic. In order to send a clear message, DOS needs to remove its 2019 rule from the Federal Register.

On March 15, 2021, DOS revised the Foreign Affairs Manual (FAM) to align with the INS's (now USCIS's) 1999 Field Guidance ("1999 Field Guidance") on public charge, which is the operating policy for DHS as well. Having a policy in practice that is different than the one that is published in the federal rules is confusing for immigrants and their families, as well as for immigration attorneys, benefit-granting agencies, and others who advise immigrants. While DOS's 2019 public charge rule remains in the Federal Register, it is in conflict with both the 2021 FAM and the 1999 Field Guidance.

3. Restore the 22 C.F.R. 40.41 (2018) regulations that were in place prior to DOS's 2019 public charge rule, which provided a clear policy and also promoted administrative efficiency.

For almost 20 years before DOS amended the FAM on January 3, 2018, the DOS's public charge policy and practice was clear. In practice, consular officials relied on the National Visa Center (NVC) to conduct a technical review to determine whether an affidavit of support form was complete. The consular officer then decided in a brief interview whether the individual was admissible. That decision was largely based on an adequate affidavit of support that had been pre-screened by NVC. Consular officers at the visa interview have extremely limited time to make decisions due to the high volume at posts, making the pre-review by NVC a critical part of the process. This process allowed consulates to operate with greater administrative efficiency.

The pandemic halted consular operations in March 2020, and resumption of services is still partial in most of the world. The DOS lost personnel during the closures and is still not at full staffing or normal operations.³ The DOS's public charge rule required extensive, repetitive, and irrelevant documentation from applicants, and the consular officers had the added burden of reviewing all those documents. Given the current situation at consulates, the DOS's 2019 public charge rule would sabotage all efforts to regain the normal flow of operations. This is another reason it should be removed from the Federal Register.

The regulatory language immediately prior to DOS's 2019 public charge rule supported efficient and clearer consular practices. The previous regulations stated that individuals can be denied an immigrant visa if they failed to fulfill the affidavit of support requirement, failed to provide an additional affidavit of support by a joint sponsor when needed, or could not provide confirmation of written employment or post a bond to remove a public charge concern.

The pre-2019 DOS regulations and the USCIS 1999 public charge field guidance were simpler for immigration lawyers to explain to their clients and helped combat the chilling effect and confusion that had been caused by the lack of clarity after the 1996 legislation. In the rulemaking that led to the 2019 public charge rules, DHS and DOS failed to provide any evidence of harm caused by the previous policy.

In addition to burdening prospective immigrants with voluminous documentation requirements and confusing standards, the DOS's 2019 public charge rule created an enormous administrative burden for consular officers who were ordered to enforce the unclear new standards.

4. Remove the DOS's 2019 public charge rule because it mirrors the discriminatory DHS public charge policy that was found unlawful and vacated by a federal court.

As noted in the DOS's Federal Register notice reopening the comment period on the DOS rule, circumstances have changed with the vacatur of the DHS's 2019 public charge final rule, thus there is no reason to publish a DOS rule which mirrored the unlawful DHS rule.

³ See Suanne Monyek, Roll Call, *Limited Operations at U.S. consulates Keep Visa Holders on Edge*, (Dec. 22, 2021) <https://www.rollcall.com/2021/12/22/limited-operations-at-us-consulates-keep-visa-holders-on-edge/>.

Also, the COVID-19 pandemic began in March 2020, impacting health and economic conditions and emphasizing the need for all persons to access public health. Any undue fear of government services needs to be dispelled to prevent people from avoiding vaccinations and testing for public health purposes.

The Administration has announced that it wants to address the terrible impact that the COVID-19 pandemic has had on communities of color, including immigrants.⁴ Describing the pandemic, the Administration stated “... for Black and Brown Americans, it’s a mass casualty event. Because of structural racism, people of color are contracting COVID-19 at higher rates and dying from COVID-19 at higher rates.”⁵

DOS’s 2019 public charge rule is a discriminatory policy shown to have a disparate impact on immigrants of color. As noted by the court in *Make the Road v. Pompeo*, “Plaintiffs provide substantial evidence of the disproportionate impact of the challenged government actions on immigrants from countries that are predominantly comprised of people of color...”⁶

DOS’s 2019 rule is virtually identical to DHS’s 2019 public charge rule which was found unlawful and vacated in *Cook County v. Wolf*. After the court vacated the DHS’s 2019 public charge rule, DHS issued an interim final rule to remove it from the Federal Register. As a result, it is no longer DHS’s policy either in regulatory text or in practice. While DHS undergoes further rulemaking, the 1999 Field Guidance remains in effect. DOS should not leave its discriminatory and unlawful 2019 public charge rule language in the C.F.R. for a future administration to revive.

We urge DOS to move as expeditiously to issue rulemaking on public charge. The constantly changing public charge policies have led to confusion among immigrants and their families, contributing to the chilling effect. Restoring the public charge policy and regulations that were in place before the 2019 rule, as we have recommended here, is the best way to limit this harm. It also will return the DOS consular and NVC offices to the level of administrative efficiency that they operated under prior to the public charge rule changes. Importantly, this change is needed to comply with the President’s Executive Order, which promises that government actions will restore faith in our legal immigration system.

Thank you for your consideration of our comments.

Respectfully submitted,

Peggy Gleason
Senior Staff Attorney, on behalf of the Immigrant Legal Resource Center

⁴ The White House, *Fact Sheet - President Elect Biden’s Day One Executive Actions Deliver Relief for Families Across American Amid Converging Crises*, (Jan 20, 2021).

⁵ *Id.*

⁶ P. 41, *Make the Road New York v. Pompeo, Memorandum Decision and Order*, Case 1:19-cv-11633 (SDNY) (July 20, 2020).