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U.S. Citizenship and Immigration Services
Department of Homeland Security
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Submitted via www.regulations.gov

The Immigrant Legal Resource Center submits this comment in response to the Department of Homeland Security's (DHS) advance notice of proposed rulemaking (ANPRM) published on August 23, 2021.

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 advance notice of proposed rulemaking. The following comment provides additional input from the ILRC.

While the ILRC applauds the administration for taking steps to provide regulatory clarity related to public charge, the ILRC will continue to advocate for a restructuring of our immigration laws, including abolishing the antiquated public charge ground of inadmissibility. Public charge first entered our immigration law in 1882 and excluded "any convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge" from entry into the

United States. While this law has remained virtually unchanged, our nation's values and understanding of public welfare have evolved. With no clear definitions, our public charge law operates as a blunt tool to exclude individuals based on race and class. The ILRC does not support a wealth test to determine who lives within our nation's borders. As such, we implore DHS to promulgate regulations that limit the use of our laws to carry out racist immigration policies.

A. Definition and Purpose

DHS should define someone likely to become a public charge for inadmissibility purposes as a person who is "likely to become primarily and permanently reliant on the federal government to avoid destitution." This would be consistent with the congressional intent and historical understanding of public charge as applying to a narrow set of immigrants who are likely to become a "public charge" by virtue of being so in need of assistance that they were housed in almshouses and poorhouses for indefinite stays. It is also consistent with case law. In 2020, the Second Circuit Court of Appeals relied on the Board of Immigration Appeals' interpretation of 'public charge' to mean a person who is "unable to support herself, either through work, savings, or family ties."

This approach follows from the evidence presented above that people of limited means, including immigrants, make extraordinary contributions to American life and that full use of health, nutrition, and income support programs by immigrant and U.S. citizen members of the community is good economics and good policy.

Under this definition, reliance on the government should not be taken into account unless:

- The government provides the *primary* source of income. Many people receive only modest public benefits that supplement their earnings by improving their access to nutrition, health care, and other services. Using these supplemental benefits will not make a person a public charge. In addition, if an individual is relying on a benefit, but is also receiving income from a job or income from other family members in the household, the individual is not *primarily* reliant on the government. 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."
- The reliance is *permanent*. 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.
- The reliance is to avoid destitution. The Board of Immigration Appeals has held that the "ordinary meaning" of the term public charge, refers to individuals "being destitute." Likewise, federal courts have held repeatedly in *in forma pauperis* cases that public charge and destitute are synonymous.

B. Public Benefits Considered

The definition "likely to become primarily and permanently reliant on the federal government to avoid destitution" should guide any assessment of an applicant's benefit use. By statute, the public charge ground of inadmissibility is forward looking, requiring adjudicators to determine if, in the future, an applicant will become primarily and permanently reliant on the federal government to avoid destitution. As such, current or past use of public benefits in general is limited in its probative value. Further, public benefits programs aimed at improving the well-being and financial stability of the applicant or the applicant's family do not shed much light on the applicant's long-term reliance on the government for income. Indeed, involvement in many programs increases well-being and decreases financial reliance in the future. There is no clear negative correlation between use of short-term benefit programs

and long-term reliance to avoid destitution. We recommend that the public charge notice of proposed rulemaking (NPRM):

- **Consider only two specific, *federal* programs that provide cash assistance for income maintenance.** Receipt of health care, nutrition or housing assistance is not an indication that a person is primarily or permanently reliant on the government. The Center on Budget and Policy Priorities estimated that nearly half of U.S.-born citizens received one of the benefits included in the 2019 rule in their lifetime. The only two programs that could be relevant in determining whether someone is "likely to become primarily and permanently reliant on the federal government to avoid destitution" are cash assistance under Temporary Assistance for Needy Families (TANF) and Supplemental Security Income (SSI). However, receipt of these programs in itself does not make someone a public charge. TANF is temporary by definition. Many personal factors, including gaining legal status and changed relationships additionally positively impact a person's need for further support. In considering these benefits, officers should be guided that individual facts of the case might indicate movement from past use or use of the benefit that shows they are moving away from primary dependence should be considered.
- **Do not consider Medicaid – even for institutional long term care – in a public charge determination.** According to the Kaiser Family Foundation, today in the U.S., one in three people turning 65 will require nursing home care in their lives, and Medicaid is the primary payer for long-term care in the US, covering six in ten nursing home residents. We should not penalize immigrants for our national policy choices that make Medicaid the only meaningful payer for long-term care and make it difficult to get care at home and force people into institutional care. In addition, including any type of Medicaid benefit will confuse people and lead them to forgo health care.
- **Identify and update a list of the programs that do not count in order to minimize the chilling effect**. The regulation should include language that says, that "benefits other than SSI or TANF shall not be considered in a public charge determination." In the preamble, the NPRM and final rule should name as many as possible of the other types of cash, tax, food, health, housing, employment, nutrition, education, immigration fee waivers, and other benefits that are *not* included as factors in a public charge test and create guidance where additional/new programs can be added as a reliable resource/reference. The guidance should address COVID-related, other disaster-related benefits such as FEMA, and unemployment insurance benefits in particular; in addition to programs that provide universal basic or guaranteed income to all. The preamble should state that any omission of a program from this list should not be interpreted by adjudicators and community members to mean that it will be counted.
- **Exclude programs funded completely by state, local, tribal and territorial governments.** Clarify that state or local government funded programs—even if they provide cash assistance—are exercises of the powers traditionally reserved to the states and are not counted as factors in a public charge test. We recommend this approach because limiting the benefits that may be considered to *two federal benefits* will be easier for adjudicators to administer and to explain to immigrants and their families than a patchwork of state, local and tribal programs, reducing the chilling effect. It will also be easier for state and local eligibility offices to provide information about recent receipt of TANF, rather than any number of other state or local benefits. States and localities have a compelling interest in promoting health and safety that includes providing benefits at their own expense without barriers caused by federal policies. Since these benefits vary significantly by state, specifically naming two federal programs that are relevant will make the public charge rule easier for both immigrants and DHS adjudicators to understand.
- **Exclude family members and sponsors' use of benefits.** Make clear that benefits used by an applicant's family members or sponsors do not count as factors in the applicant's public charge test. This is critical in minimizing the chilling effect of the public charge rule on access to benefits by people, including U.S. citizen children, who are not subject to a public charge determination but whose family members may seek LPR status in the future.

- **Exclude any use of benefits by survivors of domestic violence and other serious crimes and by anyone during public emergencies.** Benefits used by survivors of domestic violence or other serious crimes, or used by anyone during natural disasters or other extraordinary circumstances, such as the COVID-19 pandemic or in the aftermath of hurricanes and wildfires, should not be included as factors in a public charge determination. Use of these benefits is due entirely to external events and does not provide any information on the recipient's likelihood of becoming primarily and permanently reliant on government assistance at a future date.
- **Specify that use of benefits as a child or when in an exempt status will not be included in a public charge determination, nor will benefits used when applying for an exempt status, regardless of a person's pathway to legal status**. DHS should propose that benefits received by children—whose long-term economic contributions are generally *bolstered* by childhood receipt of benefits—be excluded from consideration. In addition, benefits received when in an exempt status, such as cash assistance provided to a refugee, should be excluded regardless of a refugee's pathway to legal status. Finally, benefits should be excluded if an individual is applying for an exempt status, for example, if an individual has applied for asylum.
- **Provide clear guidance that use of benefits is not dispositive to a public charge determination.** Like other factors in the public charge consideration, use of benefits can be a positive factor when assessing a future risk. Past use of a benefit can show a person was able to overcome obstacles and no longer needs support. Current use of certain benefits can show that the applicant's needs are limited to supplemental support or not permanent in nature. Any guidance surrounding use of public benefits should be clear that all factors must be considered in totality to assess future reliance on specific federal programs.

C. Considering Statutory Factors

Statutory factors should be considered in so far as they shed light on whether someone is likely to become primarily and permanently reliant on the federal government to avoid destitution. Factors can positively influence the decision, and guidance should be framed to look to the factors in their totality if a public charge concern is present. For the most part, applications for lawful permanent residence now require an affidavit of support. For most cases, a sufficient affidavit of support will also demonstrate that the totality of circumstances tips in favor of the applicant. 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 propose 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." The current Foreign Affairs Manual instructions also clarify that a properly filed affidavit of support should "normally be considered sufficient" to satisfy the public charge requirement. In addition, the affidavit of support's legislative history indicates that it is intended to allow the immigrant to be admitted when there would otherwise be a public charge concern. DHS should prohibit immigration officials from questioning the credibility or motives of a sponsor who signs an affidavit of support, looking only to its legal validity. Finally, relying on the affidavit of support to provide a favorable presumption is easier to administer, providing an effective way to apply a fair and transparent decisionmaking tool, and avoiding potential discrimination.

The judicial and administrative decisions that were used to add the five "totality of circumstances" factors to the statute in 1996 overwhelmingly found immigrants *not* excludable based on one or more of the factors when considering the totality of circumstances. In other words, the five statutory factors and totality of circumstances test were ways to demonstrate that an applicant would *not* be excludable as a public charge and were never

intended to be a list of negative and positive factors to be weighed individually in every case. For example, if "financial status" is a concern because the applicant is not working while also in nursing school, but "education and skills" are positive because the applicant is training to become a nurse, on balance the person is not "likely to become primarily and permanently reliant on the federal government to avoid destitution." DHS should also provide reasonable opportunities for applicants to address or cure any concerns about the statutory factors and propose that a properly filed affidavit of support be sufficient to overcome or outweigh any negative factors identified when looking at the factors together.

DHS should not repeat the mistakes of the 2019 public charge rule by defining the statutory factors in a manner that disproportionately burdens people of color, women and people with disabilities or that creates the opportunity for conscious or implicit bias to affect an individual adjudicators' determinations. For example, the 2019 public charge rule, counted income under 125 percent of the federal poverty level as a "heavily weighted negative factor," which likely would have resulted in an immigration policy that favors white immigrants from Europe rather than Latino, Black, and Asian immigrants from Mexico and Central America, South America, the Caribbean, Asia, or Africa. The Biden administration's January 20, 2021 Executive Order on racial equity requires federal government agencies, including DHS, to promote equitable delivery of government benefits and equitable opportunities for all. DHS should craft an NPRM that requires adjudicators to:

D. Providing An Opportunity To Overcome A Negative Public Charge Finding

Past iterations of public charge policies fail to provide a meaningful pathway for applicants to provide additional evidence to overcome a negative public charge finding. Any regulation should ensure that applicants have an opportunity to respond to any concerns related to potential public charge inadmissibility and provide additional evidence through the "request for evidence (RFE)" process before public charge inadmissibility is determined.

The 2019 public charge rule provided a flawed bond process to overcome a public charge finding, which should not be adopted. The proffered process vested officers with complete discretion to offer a bond at all, providing no uniform pathway to overcome a public charge finding through a bond. In addition, the bond amount was variable, and the process offered no means to challenge the bond amount required or to further appeal the negative public charge finding should a bond be paid. Bond systems leave immigrant families vulnerable to predatory lending schemes and do not provide clear timelines or processes for return of monies paid. Such a structure should be avoided in the public charge context, where affidavits of support, declarations of community support, job possibilities, and other evidence are more appropriate.

Without upfront resources, bond schemes often require families to draw money from bond companies which, at best, result in high interest loans that do not promote well-being and financial security. In the current immigration bond contexts, many fall victim to predatory bail bond companies. For example, Libre by Nexus forces customers to wear oppressive ankle-monitoring technology and puts their customers in debt by charging $880 upfront, 20% of the bond amount, and an additional $420/month.[1] This pushes families into poverty, creates emotional strain for parents and children, and makes it extremely difficult for families to use their financial resources effectively to meet the needs of their families.

[1] See various accounts in the press and litigation, including https://www.washingtonpost.com/local/libre-by-nexus-immigrants-settlement-virginia/2020/11/30/82b66e8e-2f49-11eb-860d-f7999599cbc2_story.html; https://www.washingtonpost.com/local/this-company-is-making-millions-from-americas-broken-immigration-system/2017/03/08/43abce9e-f881-11e6-be05-1a3817ac21a5_story.html

Any bond process to overcome a public charge finding should be limited in amount by regulation and active for a fixed period of time of one year, at which point the obligor can apply to have the funds returned. Bond should be offered uniformly in all cases in which an officer has made a public charge inadmissibility finding. An applicant should be allowed to pay the bond while still fighting the public charge determination, if desired.

Conclusion

We urge DHS to move as expeditiously as possible to issue a NPRM and a Final Rule on this topic. The constantly changing public charge policies have led to confusion among many immigrants and their families, contributing to the chilling effect. Publishing a fair and reasonable final rule, as we have recommended here, is the best way to limit this harm in the absence of abolishing the outdated law altogether.

Sincerely,

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