**Template Comment to Oppose the Proposed Public Charge Rule**

AILA, AIC and the Immigrant Legal Resource Center collaborated to create this template to help you draft your own comments in opposition to the public charge notice of proposed rulemaking. You may receive several template comments from different organizations, and we encourage you to use the template or template sections of your choice and to mix and match.

Comments should be submitted online at <https://www.regulations.gov/document?D=USCIS-2010-0012-0001>. Click on “comment now” and either enter your comment in the text box (must be fewer than 5000 characters) or upload your comments as a PDF.  As you are drafting your comment, here are some important tips to keep in mind.

**Write comments in your own words.** Agency staff must code and organize all comments, and the process is very different if they have to pause and consider what’s similar and what’s different in each comment, as opposed to just counting the number of commenters saying the same thing. It’s fine to work from a sample comment, but you should modify it to reflect your own thoughts and experiences so that it counts as a *unique* comment.  Directions in YELLOW indicate sections that you should customize as you create your comment.

Here are a few recommended approaches.

* If you are an expert on a program, please detail how that program improves people’s lives. For example: *I am an immigration attorney that has practiced for 10 years. (add examples of helping immigrant families or your expertise).*  Please explain your expertise, and cite relevant research.
* If you work directly with immigrants, please describe why they usually come to the country; how they use government benefits, what it means for the well-being of them and their children; and how they contribute to their families and community.

***Submitted via*** [***www.regulations.gov***](http://www.regulations.gov)

U.S. Citizenship and Immigration Services

Department of Homeland Security

20 Massachusetts Avenue NW

Washington, DC 20529-2140

RE: DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds

Dear Sir/Madam:

I am writing on behalf of [ORGANIZATION NAME] in response to the Department of Homeland Security (DHS) Notice of Proposed Rulemaking, “Inadmissibility on Public Charge Grounds,” which was published in the Federal Register on October 10, 2018.

We strongly oppose the proposed changes to the public charge rules, which, as we know from our years of experience in immigration law and training immigration professionals on complex legal matters, will cause uncertainty, inconsistency, and chaos in the adjudication of immigration benefits and a chilling effect in applying for immigration benefits. This stands in stark contrast to our country’s commitment to family reunification and facilitating the inclusion and integration of immigrants into the United States.

[Insert description of your organization and why this is particularly urgent to you, plus the expertise you have on issues raised.]

The proposed rule would dramatically expand the interpretation of public charge to include any individual who is likely to use more than a minimal amount of public assistance, and expands the types of benefits that could be considered in the public charge determination to include programs that support basic human needs, including Medicaid and Supplemental Nutrition Assistance Program (SNAP). If finalized as written, this rule would facilitate a vision of America that a majority of Americans rejects: a country that excludes people with disabilities and people who may currently earn lower wages but are contributing to their families and communities. The rule would also have a disproportionately negative impact on women and people of color, preventing them from securing lawful immigration status and reuniting with their families. Though the impact on families will undoubtedly be devastating, our comments focus on the impact the proposed rule would have on the adjudication of applications and petitions for immigration benefits, the practice of immigration law, and fairness and justice within our immigration system.

1. **Impact on USCIS Adjudications**
   1. **Implementation of the Proposed Rule Would Consume Significant U.S. Citizenship and Immigration Services (USCIS) Resources and Deepen Delays in Immigration Benefit Form Processing**

The proposed rule would impose an immense administrative burden on USCIS. Among other obligations, it would require the agency to conduct time-intensive public charge inadmissibility determinations, as well as process Forms I-944, *Declaration of Self-Sufficiency*, in connection with an estimated 382,264 adjustment of status applications annually. It also compels public charge assessments of an estimated 511,201 applications for extension or change of nonimmigrant status each year. These operational demands would be levied upon an agency that already suffers profound capacity shortfalls. With nearly 6 million pending cases as of March 31, 2018, DHS has conceded that USCIS lacks the resources to timely process its existing workload.[[1]](#footnote-1) In fact, processing times for many of the agency’s product lines has doubled in recent years.[[2]](#footnote-2)

Processing delays upend the lives of immigrants and their U.S. citizen families. Lengthy wait times can result in applicants losing their jobs, thus depriving their families—including families with U.S. citizen children—of income essential to necessities like food and housing.[[3]](#footnote-3) Adjudication delays also lead to expiration of driver’s licenses, which immigrants may rely upon to access banking, medical treatment, and other indispensable services, as well as for transportation to school and work. Delays also prolong the separation of families dependent on case approval for their reunion.

Despite the Department’s admission of USCIS’s inability to accommodate its current inventory, the proposed rule would substantially increase the agency’s workload. This would, in turn, deepen USCIS case processing delays and compound the resulting harm to the public through heightened job loss, food shortages, and family separation. In short, the proposed rule will make an operational crisis appreciably worse, and immigrant families throughout the country will suffer the consequences.

* 1. **The Proposed Rule Would Establish an Incoherent Adjudicative Framework Resulting in Inconsistent and Unfair Public Charge Determinations**

The proposed rule would replace clear, easier-to-administer public charge guidelines with a nebulous framework all but precluding USCIS adjudicators from reaching fair and consistent public charge determinations. Under current policy, a sufficient Form I-864, *Affidavit of Support*, demonstrating a commitment from a sponsor to support the immigrant at the legally required levels, generally establishes to USCIS’s satisfaction that, under the totality of circumstances, an individual will not become a public charge. This adjudicative framework is straightforward and efficient and has largely yielded predictable, consistent public charge assessments.

The proposed rule would replace this policy with an amorphous test requiring adjudicators to weigh a potentially unlimited number of “factors” and apply a host of unclear “considerations,” without meaningfully distinguishing “factor” from “consideration” and often referring to specific criteria as both a factor *and* a consideration. Moreover, a factor’s weight can shift based on various circumstances and that factor’s relationship with one or more factors, and DHS even appears to assert that factors not specifically identified “may be weighted heavily.” In other words, not only would there exist an unknown and possibly infinite universe of factors that adjudicators could assess, it appears that adjudicators could find virtually *any* circumstance ultimately dispositive within the totality of circumstances in a given public charge determination.

This is a prescription for process and outcome ambiguity, rendering inconsistent adjudications a certainty, and leaving the regulated community completely in the dark. Public charge determinations will inevitably vary from adjudicator to adjudicator and case to case, with similarly situated applicants receiving contrary decisions. Appeals will escalate, further tying up limited agency resources. The plasticity of the public charge analysis, moreover, opens the door for political pressure, rather than dispassionate adjudication, to shape conclusions. In all, the proposed rule would transform a functional standard into an unworkable jumble that will ensure uneven and unjust outcomes.

* 1. **The Proposed Bond Procedures and Penalties are Exceptionally Harsh and Create an Opportunity for Unscrupulous Private Bond Companies to Exploit Immigrant Families**

The proposed rule not only establishes an excessive bond minimum of $10,000, it also authorizes USCIS to set a dramatically higher bond in its discretion—with no cap—and bars any appeal of that amount. The rule stipulates that the penalty for *any* bond breach is the full bond amount and that *any* use of a specified public benefit while the bond remains in effect constitutes such a breach.

These harsh conditions would drive many noncitizens to accept crippling surety bond terms to avoid family separation. Under those terms, the bond “principal”—in many cases the noncitizen —would have to pay the bond company up to 15 percent of the bond up front. This alone could prove destabilizing for low and moderate-income families. For example, for a family of four with an annual income of $31,000—representing 125% of the U.S. Federal Poverty Guidelines—15% of even the minimum bond amount of $10,000 could mean foregone rent and meals, stifling rather than promoting that family’s ability to become self-sufficient.

In the event of a breach, the principal would have to reimburse the bond company for the full amount of the breach penalty. For instance, if a $30,000 public charge bond is in effect for a noncitizen mother who then uses only $1,500 worth of public benefits, the bond would be breached and she would be liable for the entire $30,000—20 times more than what she received in benefits—and she would face potential separation from her family.

As this example illustrates, the proposed rule would impose strict bond requirements and severe penalties that prioritize the revenue streams of private bond companies over family unity, thus creating an opportunity for unscrupulous bond companies to take advantage of immigrant families.

* 1. **The Proposed Rule to Require a Public Charge Assessment of Applicants to Extend/Change Status Is Unnecessary and a Waste of USCIS Resources**

Under the proposed rule, USCIS would be required to conduct public charge assessments of an estimated 511,201 individuals seeking an extension or change of nonimmigrant status each year. In each of these cases, USCIS would have discretion to require the applicant to submit Form I-944, *Declaration of Self-Sufficiency*. In key respects, this is duplicative of work done by the Department of State (DOS) and U.S. Customs and Border Protection (CBP). Consular offices already conduct public charge assessments of most nonimmigrants when processing their visas, and CBP conducts an admissibility determination when processing nonimmigrants at the port of entry.[[4]](#footnote-4)

In addition, many nonimmigrant classifications require the applicant to prove they can support themselves financially. F-1 and M-1 students, for example, must provide evidence of “sufficient funds available for self-support during the entire proposed course of study.”[[5]](#footnote-5) B-1 and B-2 tourists also need to show that they have adequate means of financial support during the course of their stay in the U.S.[[6]](#footnote-6) Meanwhile, by definition, most employment-based nonimmigrant visas mandate sponsorship and compensation by employers. Financial stability is therefore already widely built into most nonimmigrant visa categories. Given these existing safeguards, any investment of USCIS resources to assess nonimmigrants on public charge would be an unnecessary administrative burden assumed by an already overstretched agency.

Lastly, but not insignificantly, this proposed rule is yet another example of a needlessly restrictive and bureaucratic process imposed by the current administration that has fostered a growing perception among foreign nationals that the U.S. has become an undesirable destination. The proposed rule will reinforce that view, damaging the long-held perception of the U.S. as a country of welcome and chilling international travel and commerce.

1. **Impact on Immigration Court Proceedings**
   1. **The Proposed Rule Would Compound the Immigration Court Backlogs and Create Inconsistencies in the Adjudication of Adjustment of Status in Immigration Court**

Although immigration judges are not bound by DHS rules, the Department of Justice (DOJ) is in the process of creating a public charge rule that is believed will parallel the DHS proposed rule.[[7]](#footnote-7) However, until a DOJ rule is finalized, the DHS proposed rule will likely be used as persuasive authority by immigration judges tasked with making public charge assessments. This will occur in at least three scenarios: (1) individuals without lawful status and seeking to adjust status; (2) returning lawful permanent residents who are treated as applicants for admission under INA § 101(a)(13)(C); and (3) lawful permanent residents placed in removal proceedings who are seeking to re-adjust status with a waiver under INA § 212(h). Adjudication of adjustment of status applications will also likely increase due to a 2018 policy change at USCIS under which notices to appear will be issued in any case in which USCIS issues a denial and the applicant has no legal status if denied. This will result in an increase of adjustment of status applications in front of an immigration judge, increasing the frequency of cases requiring a public charge adjudication.

Until a DOJ rule is promulgated, Immigration and Customs Enforcement (ICE) attorneys, who *are* bound by DHS regulations, will likely argue that immigration judges should apply the proposed rule’s heightened standards. Lacking any binding precedent on the interpretation of INA § 212(a)(4), some immigration judges will agree and will rely on the proposed rule as a guide, while other immigration judges will not.[[8]](#footnote-8) This will create inconsistencies in adjudication that will increase administrative inefficiencies through additional appeals and motions. Cases that are before judges that rely on the DHS framework for assessing public charge will take significantly more court time, due to the heightened evidentiary requirements and need additional and more detailed testimony. These heightened evidentiary requirements will also impact ICE attorneys, who will be required to review that evidence and prepare a response, as well as the respondent and his or her counsel, if represented.

With an immigration court backlog that is already above 750,000 cases,[[9]](#footnote-9) the public charge rule would further exacerbate an already record high case volume. Increased evidentiary requirements, heightened scrutiny, and uncertainty as to what standard to apply will delay adjudications, add to the backlog, and result in inconsistent court adjudications.

1. **Impact on Consular Processing**

In January 2018, DOS implemented significant changes to the Foreign Affairs Manual (FAM) that raised the public charge bar for immigrant visa applicants. This shift prompted numerous improper visa denials on public charge grounds, barring affected individuals from entering the United States and reuniting with their families.[[10]](#footnote-10) Making matters worse, those denials oftentimes result in revocations of visa applicants’ approved I-601A provisional waivers, compelling these individuals to seek I-601 provisional waivers instead, even when they promptly overcome the public charge findings by providing additional documentation. The I-601 application process typically lasts longer than a year, during which time these individuals must remain overseas, apart from their loved ones.

The proposed rule threatens to multiply these problems exponentially. DOS has indicated that it could further modify its own public charge guidance in response to DHS’s final public charge rule.[[11]](#footnote-11) If consulates begin applying a standard similar to the one proposed by DHS, the more than one million individuals that seek visas from DOS annually would be subject to burdensome and arbitrary standards, with many finding themselves unfairly shut out of the country and unable to join their families. Overall legal immigration could drop sharply, with severe consequences for family unity and the national economy.

1. **Impact on Immigration Attorneys and Accredited Representatives**
2. **Incoherent Adjudicative Frameworks Creates Confusion Around Eligibility**

By replacing a time-worn and effective standard with an incoherent framework, immigration attorneys and accredited representatives will find it next to impossible to advise intending immigrants on their eligibility for lawful permanent residence or other immigration benefits. The process consistently utilized by DHS, DOJ, and DOS for years, involving submission of a legally enforceable I-864 Affidavit of Support, was a straightforward and efficient process for adjudicators and immigrants. The proposed rule will add many layers of confusion to the process, to such an extent that what should be a clear adjustment of status case becomes riddled with uncertainty. This will make it almost impossible for an immigrant to navigate the system without legal help, and yet, lawyers will be hard-pressed to offer guidance without a clear legal standard. Combined with USCIS’s new policy for placing individuals in removal proceedings, people who are entitled to lawful permanent residence will be too afraid to apply to adjust status, leading to more people in the US without status.

**B.** **DHS Grossly Underestimates the Time Burden of the Proposed Rule**

DHS estimates the time burden associated with filing Form I–944 and to receive certified documents is 4 hours and 30 minutes per applicant, “including the time for reviewing instructions, gathering the required documentation and information, completing the declaration, preparing statements, attaching necessary documentation, and submitting the declaration.”[[12]](#footnote-12) However, this appears to be grossly underestimated. [Include estimate here about how long it takes an attorney from your organization to adequately prepare these forms currently]. If the proposed rule is implemented as written, the time it will take to properly assess a case and advise immigrant families will increase substantially. In addition to preparing the form and gathering supporting documentation, lawyers must assess every factor and consideration under the new framework (including evaluating household members), identify other issues not listed in the rule that might impact the public charge assessment, and muddle out inconsistencies in real case scenarios in order to offer advice. Aside from the legal uncertainty this brings to every case, the time to advise, document and fill out forms will increase by at least threefold. The proposed rule grossly underestimates the time burden.

1. **Impact on Immigrants**
   1. **Chilling Effect on Immigration Applications and Public Benefits**

As immigration attorneys and organizations dedicated to improving access to legal information, we will seek to educate diverse communities about the proposed public charge rule and its impact. Notwithstanding these efforts, uncertainty and confusion about what the proposed rule means and how it will be implemented will prevent many qualified individuals from filing immigration applications out of fear of a denial based on public charge grounds. In addition, as has been well-documented, widespread misinformation and confusion created by drafts of the rule leaked to the press have resulted in a marked decline in the use of a wide variety of life-sustaining benefits by immigrant families,[[13]](#footnote-13) as well as instability and anxiety among individuals with lawful status - including those in exempt categories such as refugees.[[14]](#footnote-14)

This chilling effect will disproportionately impact applicants for lawful permanent residence through the family immigration system and unduly harm women and families of color.

* 1. **Consideration of Prior Application for a Fee Waiver Creates Double-Counting Problems and is Impermissibly Retroactive**

Under the proposed rule, the use of a fee waiver (Form I-912) for any immigration benefit would be considered a factor in determining an immigrant’s financial status. This is improper. Separate consideration of the use of a fee waiver means that factors such as income would be unfairly counted twice. For example, an immigrant who received a fee waiver based on their household income would have two strikes against them for what is essentially the same factor - once for the income and a second for the fee waiver granted because of the income. As a result, consideration of the use of a fee waiver has the unintended effect of double-counting negative factors related to financial status.

Second, the consideration of fee waiver usage is improperly retroactive. The statute calls for a forward-looking analysis of whether the immigrant is likely to become a public charge in the future. Because a fee waiver is not a continuing benefit, the proposed rule’s consideration of *prior* receipt of a fee waiver impermissibly penalizes applicants for their financial status on the date of the application for the fee waiver and not on the date of application for admission, adjustment of status, or for a visa.

In conclusion, [ORGANIZATION NAME] opposes the proposed public charge rule. If implemented this rule will disproportionately impact low-income immigrants, immigrants with disabilities, persons of color, seniors and other members of our communities. For these individuals this rule would, in effect, deny them a path to come to the US and ultimately gain citizenship. Immigrants, fearful of navigating this complex rule change, will be less likely to file pro se applications or seek adjustment of status. [Add additional concluding remarks on how rule would impact individuals your organization represents]. Thank you for the opportunity to submit comments on the proposed rule. Please do not hesitate to contact me at [INSERT Contact info] if you have any questions or need any further information.

[Name]

[Title]

[Contact Info]

1. USCIS Webpage, “Data Set: All USCIS Application and Petition Form Types: Fiscal Year 2018, 2nd Quarter” (Jul. 17, 2018);<https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY18Q2.pdf>.DHS, “Annual Report on the Impact of the Homeland Security Act on Immigration Functions Transferred to the Department of Homeland Security” (Apr. 13, 2018);<https://www.uscis.gov/sites/default/files/reports-studies/Annual-Report-on-the-Impact-of-the-Homeland-Security-Act-on-Immigration-Functions-Transferred-to-the-DHS.pdf>. [↑](#footnote-ref-1)
2. *See* USCIS Webpage, “Historical National Average Processing Time for All USCIS Offices” (up to Jul. 31, 2018);<https://egov.uscis.gov/processing-times/historic-pt>. [↑](#footnote-ref-2)
3. *See* AILA, “Deconstructing the Invisible Wall” (Mar. 19, 2018);<http://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>. [↑](#footnote-ref-3)
4. *See* 9 FAM 302.8;<https://fam.state.gov/fam/09fam/09fam030208.html>. [↑](#footnote-ref-4)
5. USCIS, Students and Employment (Feb. 6, 2018); *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*. [↑](#footnote-ref-5)
6. DOS, Visitor Visa,<https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html>. [↑](#footnote-ref-6)
7. *See* DOJ Fall 2018 Unified Agenda, available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1125-AA84> [↑](#footnote-ref-7)
8. The Board of Immigration Appeals (BIA) has not issued any precedent decisions interpreting public charge since Congress amended those provisions in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. [↑](#footnote-ref-8)
9. TRAC Immigration, Immigration Court Backlog Surpasses One Million Cases, Nov. 6, 2018 *available at* http://trac.syr.edu/immigration/reports/536/#f1. [↑](#footnote-ref-9)
10. “AILA, CLINIC, and NILC Express Concerns Over Improper Public Charge Determinations and I-601A Revocations” (Aug. 28, 2018); <https://www.aila.org/advo-media/aila-correspondence/2018/aila-clinic-and-nilc-express-concerns-over>. [↑](#footnote-ref-10)
11. *See* “Exclusive: Trump administration may target immigrants who use food aid, other benefits” Reuters (Feb. 8, 2018);

    <https://www.reuters.com/article/us-usa-immigration-services-exclusive/exclusive-trump-administration-may-target-immigrants-who-use-food-aid-other-benefits-idUSKBN1FS2ZK>. [↑](#footnote-ref-11)
12. 83 Fed. Reg. 51114, 51254 (Oct. 11, 2018). [↑](#footnote-ref-12)
13. *See* Migration Policy Institute, “Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use,” (June 2018), *available at* <https://www.immigrationresearch-info.org/system/files/Chilling_Effects_Public_Charge_Rule.pdf>. [↑](#footnote-ref-13)
14. *See* The Henry J Kaiser Family Foundation, "Living in an Immigrant Family in America: How Fear and Toxic Stress are Affecting Daily Life, Well-Being, & Health," (December 2017), *available at* https://www.kff.org/report-section/living-in-an-immigrant-family-in-america-issue-brief/ [↑](#footnote-ref-14)