THE
LEGAL AID
SOCIETY

The Legal Aid Society
199 Water Street
New York, NY 10038
(212) 577-3300
www.legal-aid.org

Tel (212) 577-3320
Fax (646) 616-4016
sewelber@legal-aid.org

February 18, 2020

Via Electronic Mail

Keri L. Berman
Trial Attorney, Civil Division
United States Department of Justice
Civil Division Federal Programs Branch
1100 L Street, N.W.
Washington, D.C. 20530

Re: *MRNY* v. *Cuccinelli*, 19-cv-7993; *New York* v. *Department of Homeland Security*, 19-cv-7777 (GBD)
Request to Delay February 24, 2020 Effective Date of the DHS Public Charge to Enable Agency to Resolve Errors in Final Notices and the USCIS Policy Manual

Dear Counsel:

We have reviewed the materials published by USCIS on February 5, 2020 in connection with the implementation of the February 24, 2020 effective date for the DHS Rule on public charge ("the Rule") and have found fundamental errors in the forms and USCIS officer guidance (the "USCIS Manual") that will affect nearly every applicant subject to the Rule. Given the critical nature of these errors, described below, we request that the agency (a) immediately undertake to correct the forms and related guidance, and (b) defer the Rule's effective date for a reasonable period after such corrections are made.[1]

Errors and Critical Deficiencies

The following legal errors and deficiencies in the forms and the USICIS Manual are prejudicial to Plaintiffs and the applicants for adjustment of status they serve, and warrant deferral of the Rule's effective date:

1. Agency Use of Wrong Effective Date and Other Errors in Key Forms

Despite the agency's January 31, 2020 announcement that February 24, 2020 shall be the effective date for the Rule, key forms–including for the new Form I-944 and revised Forms I-539 and I-539A, which will be completed by nearly every noncitizen subject to DHS's Rule–still use October 15, 2019, the original, anticipated effective date of the Rule, before Judge Daniels' October

[1] Please note that there are additional errors and inconsistencies noted in the forms and agency guidance, but this letter is limited to those specified herein.

11, 2019 order (the "Order") enjoined the agency from implementing the Rule on that date, rather than February 24, 2020.

The continued use of the October 15, 2019 effective date in these forms is a violation of the Court's Order, and contravenes the agency's regulations, which contemplate that only non-cash benefits used on or after the effective date will count in the public charge determination. *See* 8 C.F.R. §§ 212.22(b)(4)(ii)(E); *see also* 212.22(b)(4)(ii)(F) (providing that only fee waivers applied for or sought after the effective date will count in the public charge determination). The use of the October 15, 2019 effective date likewise conflicts with USICS' announcements to the contrary. The agency's January 31, 2020 announcement stated:

> The Final Rule prohibits DHS from considering an alien's application for, certification or approval to receive, or receipt of certain non-cash public benefits before Oct. 15, 2019, when deciding whether the alien is likely at any time to become a public charge. In light of the duration of the recently-lifted nationwide injunctions and to promote clarity and fairness to the public, DHS will now treat this prohibition as applying to such public benefits received before Feb. 24, 2020. Similarly, the Final Rule prohibits DHS from considering the receipt of public benefits by applicants for extension of stay and change of status before Oct. 15, 2019 when determining whether the public benefits condition applies, and DHS will now treat this prohibition as applying to public benefits received on or after Feb. 24, 2020.

USCIS, *USCIS Announces Public Charge Rule Implementation Following Supreme Court Stay of Nationwide Injunctions*, (Jan. 31, 2020), https://www.uscis.gov/news/news-releases/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-nationwide-injunctions.

Moreover, given the purpose of these forms—to collect very specific information from applicants about their use of benefits that are to be considered under the Rule—the basic dictates of procedural due process require that the forms, including the corresponding instructions, contain the correct effective date, February 24, 2020. Even though the USCIS Manual is clear that only non-cash benefits used after February 24, 2020 will count, asking applicants to report information about benefits received prior to October 15, 2019 could have a deterrent effect and invites the USCIS officer to draw improper inferences about the applicants' likelihood of becoming a public charge on the basis of benefits used prior to the effective date. For the same reason, asking applicants to provide information about receipt of benefits that the Rule expressly prohibits DHS from considering, such as use of Medicaid for an emergency medical condition, as part of school-based benefits or during pregnancy, increases the possibility of mistake and confusion.

In addition to the errors in these documents, the "Appendix: Totality of the Circumstances Framework," issued by USCIS (the "Appendix Summary"), which appears to be a summary guide

for use by USCIS officers, still contains the October 15, 2019 effective date. *See* USCIS, *Appendix: Totality of the Circumstances Framework*, at 4, https://www.uscis.gov/sites/default/files/policymanual/resources/Appendix-TotalityoftheCircumstancesFramework.pdf (stating that certain benefits use after October 15, 2019 should be considered a heavily weighted negative factor).

There are two additional errors we want to bring to your attention. *First*, the Appendix Summary erroneously switches two sets of heavily weighted factors such that the negative factors are labeled as positive and the positive factors are labeled as negative. *See* Appendix Summary at 4 (mislabeling "Applicant's Assets, Resources, and Financial Status"), and 5 (mislabeling "Applicant's Education and Skills"). Because both factors fall under the categories of heavily weighted factors, the misapplication of these factors in any given case is likely to make a difference in the outcome of the public charge determination. *Second*, the new Form I-945 (Public Charge Bond), omits a basis for cancellation of the bond obligation that is contained in 8 C.F.R. §§ 213.1(g)(1)(i)-(v)—*i.e.* having obtained a different immigration status that is exempt from public charge inadmissibility after the grant of lawful permanent resident status. *Id.* at § 213.1(g)(1)(v).

Accordingly, we request that your clients immediately undertake to fix these errors by updating all of the relevant forms with the correct effective date, eliminating questions about receipt of benefits exempt from the public charge determination, fixing the weight attributed in the Appendix Summary, and amending Form I-945 to state all the bases for cancelling the public charge bond. We also request that the effective date be deferred to allow Defendants to undertake these corrections and afford Plaintiffs' counsel reasonable time to review the revised materials.

2. Agency's Unlawful Grant of Automatic Negative Weight to an Applicant Seeking LPR Status

Without any advance notice or authority, the agency has instructed USCIS officers to count the very fact that an applicant for LPR status is seeking LPR status as a negative factor in its consideration of the totality of the circumstances. Chapter 12 of the USCIS Manual states categorically that "[s]eeking adjustment of status as a lawful permanent resident" is a negative factor unless the applicant submits "evidence of ineligibility for public benefits based on immigrations status or expected period of stay." USCIS Manual, Vol. 8, pt. G, Ch. 12. The USCIS Manual's narrative section under "standard" is only slightly more equivocal. It states:

> An adjustment of status applicant's prospective immigration status is that of a lawful permanent resident (LPR). The expected period of stay is permanent and is generally considered a negative factor. In general, aliens seeking admission as LPRs are more likely to receive public benefits than nonimmigrants because they intend to reside permanently in the United State and LPRs are eligible for more public benefits than nonimmigrants. An applicant may otherwise establish that he or she is not eligible for public benefits because of the immigration status or income.

Id. (citing 8 C.F.R. § 212.22(b)(4)(ii)(E)(3) (contemplating evidence that the alien does not qualify or would not qualify for benefit "by virtue of, for instance, the alien's annual gross household income or prospective immigration status or length of stay").

Even the agency's own Rule lacks authority for such instruction. While 8 C.F.R. § 212.22(b)(6) directs the agency to consider an "alien's prospective immigration status and expected period of admission," it does not authorize ascribing negative weight to one's intention to seek LPR status itself. Rather, the regulation provides that "DHS will consider the immigration status that the alien seeks and the expected period of admission as it relates to the alien's ability to financially support himself or herself during the duration of the alien's stay . . ." *Id*. at § 212.22(b)(6)(i). The regulation leaves it open to the circumstances as to whether the prospective status and expected period of admission are given positive or negative weight. For example, for many LPR applicants, who are going from lacking work authorization to obtaining work authorization through the adjustment process, adjustment generally means the ability to obtain a better-paying job with better employee benefits. Moreover, the agency failed to provide proper notice of its intent to give negative weight to virtually every LPR applicant. There is no mention of such intent in the notice of proposed rule-making issued on October 10, 2018 (the "NPRM"). In fact, as reflected in the language of the NPRM, prospective status is given neutral weight. *See, e.g., See* 83 Fed. Reg. 51,114, 51,217 (attributing neutral weight to an applicant for prospective immigration status and period of stay adjustment of status); *id.* at 51,216 (finding an applicant's "prospective immigration status and period of stay" factor as being positive despite the fact applicant is seeking LPR status); *id.* at 51,197 (stating that "USCIS would consider [the] possibility [that a LPR applicant may avail oneself of the available public benefit] in the totality of the circumstances" without ascribing negative weight to applicant's intent to seek LPR status); *id.* at 51,136 (stating DHS would consider prospective status and anticipated additional period of stay without ascribing negative weight); *id.* at 51,291–92 (providing that USCIS will consider "[t]he alien's prospective immigration status and expected period of admission" without ascribing negative weight).

Attributing automatic negative weight to prospective LPR status is not only without authority and without required notice, but it is also arbitrary, unreasonable, and unsupported by any empirical data in the record upon which the agency founded its rulemaking. The agency's own data indicates that far less than half of LPRs ever use the public benefits that count under the Rule. *See*, *e.g., Id*. at 51,162, Table 11 (stating that in 2013, 22.6% of foreign-born non-citizens used public benefits).

Given that nearly every applicant for adjustment will be subject to this aspect of the USCIS Manual, the agency should either remove seeking adjustment as an automatic negative factor, or provide adequate notice and an opportunity to comment on this element of the Rule.

3. Agency Application of an Unlawful Standard of Proof for Admission and Adjustment

Finally, the USCIS Manual subjects applicants to a standard of proof—requiring an applicant for adjustment to "demonstrate that he or she is clearly and beyond doubt admissible to the U.S." — that is inapplicable in the admission context. USCIS Manual, Vol. 8, pt. G, Ch.2 (citing *Matter of Bett*, 26 I. & N. Dec. 437 (B.I.A. 2014). The authority cited pertains to the standard of proof used in *removal* proceedings, not in the context of affirmative applications for adjustment. In contrast, the standard of proof applying to adjustment proceedings is preponderance of the evidence. *See, e.g., Matter of Chawathe*, 25 I & N Dec. 369, 375 (A.A.O. 2010) ("Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought."); USCIS Manual vol. 7, pt. A, Ch. 10 ("In matters involving immigration benefits, the applicant always has the burden of proving that he or she is eligible to receive the immigration benefit sought. . . . In adjustment of status, the standard of proof is generally preponderance of the evidence, proving a claimed fact is more likely than not to be true. If the applicant is unable to prove his or her eligibility for the immigration benefit by a preponderance of the evidence, the officer must request additional evidence or deny the application."). Directing agency officers to apply the wrong standard of proof is another fundamental error in the USCIS Manual that affects every applicant for adjustment. The agency needs to take immediate action to correct it and defer the effective date while it does so.

Conclusion: The Effective Date Should be Deferred

The Supreme Court's stay of the district court's preliminary injunction does not authorize USCIS to use forms that mislead applicants and adjudicators about the effective date of the Rule or to add a new automatic negative factor to the USCIS Manual that is found nowhere in the final Rule or the NPRM. Given the time required for the agency to (a) fix the errors in the forms and the USCIS Manual, (b) either remove the automatic weight given to applying for LPR status or provide adequate notice and comment for this new element of the Rule, and (c) correct the standard of proof, the agency should defer the effective date from February 24, 2020 until such time as the agency can address these issues, and for a reasonable time thereafter to allow Plaintiffs and others to review the updated materials. Please let us know by close of business tomorrow, February 19, 2020, whether you will agree to delay implementation of the Rule until you can address these issues. Plaintiffs reserve all rights should you fail to do so.

Very truly yours,
By: */s/ Susan E. Welber*
THE LEGAL AID SOCIETY
Susan E. Welber, Staff Attorney, Law Reform Unit
Kathleen Kelleher, Staff Attorney, Law Reform Unit
Susan Cameron, Supervising Attorney, Law Reform Unit
Hasan Shafiqullah, Attorney-in-Charge, Immigration Law Unit
199 Water Street, 3rd Floor

New York, New York 10038
(212) 577-3320

CENTER FOR CONSTITUTIONAL RIGHTS
Ghita Schwarz
Brittany Thomas
Baher Azmy
666 Broadway 7th Floor
New York, New York 10012
(212) 614-6445

PAUL, WEISS, RIFKIND, WHARTON GARRISON LLP
Andrew J. Ehrlich
Jonathan H. Hurwitz
Elana R. Beale
Robert J. O'Loughlin
Daniel S. Sinnreich
Amy K. Bowles
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Plaintiffs Make the Road New York, African Services Committee, Asian American Federation, Catholic Charities Community Services (Archdiocese of New York), and Catholic Legal Immigration Network, Inc.

LETITIA JAMES
Attorney General of the State of New York
By: */s/ Ming-Qi Chu*
Elena Goldstein, *Deputy Bureau Chief, Civil Rights*
Matthew Colangelo *Chief Counsel for Federal Initiatives*
Ming-Qi Chu, *Section Chief, Labor Bureau*
Amanda Meyer, *Assistant Attorney General*
Abigail Rosner, *Assistant Attorney General*
Office of the New York State Attorney General
New York, New York 10005
Phone: (212) 416-6201

Attorneys for the State of New York