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Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Chief, Regulatory Coordination Division
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Washington, DC 20529-2140

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Docket ID No. USCIS-2010-0012

Re: OMB Control Number 1615-0003

DHS 60-Day Notice and Request for Comments: Inadmissibility on Public Charge Grounds

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) and American Immigration Council (Council) submit the following comments in response to the above-referenced 60-Day Notice and Request for Comments on the Department of Homeland Security (DHS) proposed rule, “Inadmissibility on Public Charge Grounds,” published in the Federal Register on October 10, 2018.¹

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. In addition, through its work on the economic benefits of immigration reform, the Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

¹ 83 Fed. Reg. 51114 (Oct. 10, 2018).

A. Introduction

If implemented as written, the proposed public charge rule would undermine the purpose and function of the U.S. immigration system by reversing decades of established public charge policy in favor of a convoluted framework that is as restrictive as it is inefficient. DHS seeks to radically heighten the standard for determining whether an applicant for admission to the United States is “likely to become a public charge” and is thus inadmissible under INA § 212(a)(4). If implemented, DHS would subject affected applicants to an income test, penalize even the modest use of an array of public benefits, and unnecessarily exclude individuals from the United States.

These changes would significantly advance the alarming shift of our legal immigration system from one that welcomes towards one that excludes, with harmful consequences to communities across the country. Noncitizen spouses and parents, who may just be starting out on the path to economic security, would face separation from their loved ones, including U.S. citizen children. Immigrant families would be deterred from obtaining basic, life-sustaining medical and nutritional assistance. Budding entrepreneurs would find themselves shut out of the American dream. Altogether, the public charge rule proposed by DHS threatens the very foundation of our immigration system—one that is based on preserving family unity, powering the U.S. economy, and upholding our tradition as a nation of immigrants.

In addition, the proposed rule would mandate a confusing and onerous public charge determination process that would be all but impossible for adjudicators to apply fairly and consistently. With multiple layers of “minimum factors,” “heavily weighted negative factors” and “heavily weighted positive factors,” the process would require adjudicators to engage in an analysis that is significantly more complex than what is currently required, involving the review of a substantial amount of detailed and highly technical supporting evidence. The operational burden of processing and administering that paperwork and navigating the unnecessarily complicated public charge assessment would fall on U.S. Citizenship and Immigration Services (USCIS)—an agency already overstretched—deepening case processing delays. In short, the proposed rule would foster inconsistency, uncertainty, and inefficiency throughout our immigration system—the opposite of what government regulations should achieve.

This harmful rule also is completely unnecessary. DHS states that the purpose of the proposed rule is to “better ensure that applicants for admission to the United States ... are self-sufficient, *i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations.”² However, nowhere in the proposed rule does DHS claim or cite to any authority to support a claim that immigrants are not typically self-sufficient. The reason for this is clear: not only are immigrants not eligible for most public benefits, but when they are eligible, their net consumption is far less than native-born Americans.³ Moreover, study after study confirms the economic benefits of immigration and, in the long term, the positive net fiscal contributions of immigrants and their

² 83 Fed. Reg. 51114 at 51122.

³ “Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs,” *CATO Institute* (May 10, 2018), available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/irpb6.pdf>.

children to the nation.⁴ Thus, the proposed public charge rule is quite simply a solution in search of a problem.

B. Background and Current Agency Interpretation of Public Charge

Public charge provisions have been a part of the U.S. federal immigration laws since at least the late 19th century.⁵ Historically, ambiguity in these and earlier state provisions left them vulnerable to use as a pretext for the exclusion of disfavored immigrant populations, often motivated by racial or class prejudice.⁶ The Irish, Japanese, unmarried women, LGBT individuals, the disabled, and Jews fleeing Nazi Germany all faced discrimination on public charge grounds.⁷ In 1952, Congress passed the Immigration and Nationality Act (INA), thus establishing the basic structure of our present immigration laws, and included language similar to that which is reflected in today's INA § 212(a)(4)(A), excluding anyone who “in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission” is “likely at any time to become [a] public charge[.]”⁸ The traditional test applied by legacy Immigration and Naturalization Service (INS) to determine whether an individual is likely to become a public charge was based on the “totality of the circumstances” of the applicant for admission.⁹

In September 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),¹⁰ which mandated consideration of the following factors in the public charge assessment: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills.¹¹ In addition, IIRIRA included new provisions, requiring most family-based applicants and some employment-based applicants to submit a Form I-864, *Affidavit of Support* by a qualifying U.S. citizen or lawful permanent resident sponsor. In signing the affidavit of support, the sponsor enters into a contract agreeing to use his or her

⁴ See generally, The American Immigration Council: Economics of Immigration, *available at* <https://www.americanimmigrationcouncil.org/topics/economics-immigration>; “7 Ways Immigrants Enrich Our Economy and Society,” UnidosUS, *available at* <https://www.unidosus.org/issues/immigration/resources/facts>; “Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power,” National Immigration Forum (Sept. 6, 2018), *available at* <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/>.

⁵ See 22 Stat. 214 (Aug. 3, 1882), which excluded “any person unable to take care of himself or herself without becoming a public charge.”

⁶ Emma Green, “First, They Excluded The Irish,” *The Atlantic* (Feb. 2, 2017) *available at* <https://www.theatlantic.com/politics/archive/2017/02/trump-poor-immigrants-public-charge/515397/>.

⁷ See *id.*; Chris Richardson, “Trump Has Found a New Way to Immigrant Families,” *The Nation* (Oct. 26, 2018) *available at* <https://www.thenation.com/article/trump-public-charge-abolish/>; Barbara L. Bailin, “The Influence of Anti-Semitism on United States Immigration Policy With respect to German Jews During 1933-1939” *City University of New York* (May 10, 2011) *available at* https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1261&context=cc_etds_theses.

⁸ Public Law 82-414; 66 Stat. 163 at 183, establishing INA § 212(a)(15), eventually amended and recodified as INA § 212(a)(4).

⁹ *Matter of A-*, 19 I&N Dec. 867 (Comm. 1988).

¹⁰ Public Law 104-208, div. C, 110 Stat 3009-546 (1996).

¹¹ INA § 212(a)(4)(B)(i).

resources to support the immigrant(s) named in the affidavit if necessary.¹² Federal, state, or local benefits-granting agencies may consider the sponsor’s resources when determining whether the immigrant is eligible for means-tested public benefits, and if the sponsored immigrant actually receives such benefits, the benefits-granting agency may ask the sponsor to repay the cost of those benefits, or compel repayment through litigation.¹³ Thus, in addition to being enforceable by the sponsored immigrant, the affidavit of support is enforceable by the entity providing means-tested public benefits to the sponsored immigrant.¹⁴

In 1999, legacy INS issued field guidance interpreting the IIRIRA public charge provisions.¹⁵ This guidance, which remains in effect today, explains that a public charge is someone “primarily dependent on the government for subsistence” and identifies two types of public assistance relevant to the assessment: “cash assistance for income maintenance” and “long-term institutionalization for medical care.”¹⁶ For the past two decades, a properly-completed, non-fraudulent I-864 has generally been sufficient to establish to USCIS’s satisfaction that, under the totality of circumstances, the immigrant will not become a public charge. This adjudicative framework has largely yielded predictable, consistent public charge assessments. Given this successful track record, DHS has presented no satisfactory justification for morphing the current process into the convoluted and unworkable system articulated in the proposed rule.

C. Brief Summary of the Proposed Rule

DHS’s proposed rule would establish a public charge standard that is far less clear than the current one. First, it would redefine “public charge” to include anyone who uses certain public benefits, even for limited periods of time and in modest amounts. It would also expand the list of specified public benefits to cover, among other things, Medicaid and Supplemental Nutrition Assistance Program (SNAP). The proposed test to determine an individual’s likelihood of using those benefits includes an indefinite range of often ill-defined factors. The “heavily weighted negative” factors including use of designated public benefits in the 36-month period prior to the filing of an application for admission and an income level below 125 percent of the federal poverty guidelines for the relevant household size, far outnumber the specified “heavily weighted positive” factors. And in a major departure from existing regulations and practice, the proposed rule requires nonimmigrants seeking a change of status or extension of status in the United States to demonstrate that they are not receiving and are not likely to receive identified public benefits. Finally, the proposed rule would create a public charge bond system giving USCIS discretion to permit certain individuals to post bond to overcome a determination of inadmissibility on public charge grounds, but only at a non-appealable and widely prohibitive minimum of \$10,000.

¹² See Form I-864 Instructions, available at https://www.uscis.gov/system/files_force/files/form-i-864instr.pdf?download=1.

¹³ *Id.*

¹⁴ INA § 213A(a)(1)(B).

¹⁵ “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999); <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html>.

¹⁶ *Id.*

D. The Proposed Rule Would Endanger the Well-Being of Immigrant Families.

The proposed rule would deter—and has already widely deterred—immigrant families from accessing public benefits that they are legally permitted to access to support their basic needs. Even before DHS published the proposed rule, community providers reported reduced participation in vital health and nutrition-based benefits programs due to fears over the rule’s rumored issuance and implementation.¹⁷ If the proposed rule is finalized, this chilling effect would undoubtedly broaden, jeopardizing the well-being of an estimated “22.2 million noncitizens and a total of 41.1 million noncitizens and their family members.”¹⁸

Children would not escape the proposed rule’s damaging effects. Fearing present or future repercussions, many parents will disenroll or choose to forego enrolling their children (U.S. citizen and noncitizen) in essential benefits programs, including programs not implicated by the rule. Without access to critical nutritional assistance and medical treatment, impacted minors will suffer greater food insecurity and illness, impaired development, diminished intellectual performance, and low work capacity.¹⁹ DHS acknowledges this and more, admitting that the contemplated changes to public charge policy could lead to “[w]orse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children ... [i]ncreased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated ... [i]ncreased rates of poverty and housing instability; and ... [r]educed productivity and educational attainment.”²⁰ Not only does DHS fail to explain why the proposed rule is even necessary, DHS also fails to justify these acknowledged harmful effects.

E. The Proposed Rule Would Consume Significant USCIS Resources and Deepen Delays in Immigration Benefits Form Processing

The proposed rule would impose an immense administrative burden not only on the regulated community but on USCIS by requiring the agency to conduct complex public charge inadmissibility determinations, as well as process Forms I-944, *Declaration of Self-Sufficiency*, in connection with what DHS states is an estimated 382,264 adjustment of status applications annually.²¹ The rule would also compel public charge assessments of an estimated 517,508 applications for extension or change of nonimmigrant status each year and establish USCIS’s

¹⁷ See, e.g., Helena Bottemiller Evich, “Immigrants, Fearing Trump Crackdown, Drop Out of Nutrition Programs,” *Politico* (Sep. 3, 2018) available at <https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292>.

¹⁸ Manatt, “Manatt on Health: Medicaid Edition - Proposed Public Charge Regulation Could Have Significant Coverage Impact” (Oct. 30, 2018) available at <https://www.jdsupra.com/legalnews/manatt-on-health-medicaid-edition-84148/>.

¹⁹ Reynaldo Martorell, “The Nature of Child Malnutrition and its Long-Term Implications,” *Food and Nutrition Bulletin*, Vol. 20 No. 3, available at <https://journals.sagepub.com/doi/pdf/10.1177/156482659902000304>.

²⁰ 83 Fed. Reg. at 51270.

²¹ 83 Fed. Reg. at 51241. However, this number is incorrect. DHS’s source for this figure is Table 7 of the 2016 Yearbook of Immigration Statistics, available at <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>. This table provides only the number of individuals who were granted adjustment of status—not the total number of applicants—which means DHS’s figure is significantly underestimated.

discretion to request Form I-944 from such applicants.²² Cumulatively, this would create an estimated annual agency workload of 899,772 public charge evaluations and up to that same number of Forms I-944.²³

Despite this magnitude, nowhere in the proposed rule is an estimation of the time or resources that would be required for agency implementation, making it difficult to project the associated administrative burden. But conservatively estimating that USCIS adjudicators performing a public charge analysis of adjustment of status applicants would review all required documentation and scrutinize and weigh all factors in an average of 60 minutes—which seems impracticable given the volume of paperwork and considerations involved—USCIS would need the equivalent of approximately 214 full-time adjudicators—working 40 hours per week, 52 weeks per year—to complete DHS’s estimated 382,264 public charge determinations on adjustment of status applications alone. More difficult to estimate, given the discretionary component, are the additional resources that would be required to complete public charge assessments and review associated Forms I-944 relating to requests for extension or change of nonimmigrant status and to process Forms I-945 filed for purposes of public charge bonds.

These significant new operational demands would be levied upon an agency that already suffers from profound capacity shortfalls. With more than 5.6 million pending cases as of June 30, 2018, DHS has conceded that USCIS lacks the resources to timely process its existing workload, which is due in part to “increasing complexity and length of forms, new statutory and policy decisions, and increased security checks,” as well as “staffing difficulties at certain locations and facility constraints.”²⁴ In fact, processing times for many of the agency’s product lines have doubled in recent years.²⁵

Case processing delays upend the lives of immigrants and U.S. citizens and the operations of American companies. Processing delays often impact an individual’s ability to work, thus depriving families—including families with U.S. citizen children—of income essential to affording necessities like food and housing.²⁶ Adjudication delays also lead to the expiration of driver’s licenses, which are critical to facilitate access to banking, medical treatment, and other indispensable services, as well as for transportation to work and of children to school or day

²² This includes an estimated 336,335 requests for extension of status or change of status through Form I-129; 6,307 through Form I-129CW; and 174,866 through Form I-539. 83 Fed. Reg. at 51246.

²³ *Id.*

²⁴ USCIS Webpage, Data Set: All USCIS Application and Petition Form Types: Fiscal Year 2018, 3rd Quarter, available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY18Q3.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) available at <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>.

²⁵ See USCIS Webpage, “Historical National Average Processing Time for All USCIS Offices” (up to Jul. 31, 2018) available at <https://egov.uscis.gov/processing-times/historic-pt>.

²⁶ See *Deconstructing the Invisible Wall*, American Immigration Lawyers Association (Mar. 19, 2018); available at <http://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>.

care.²⁷ Long processing times can also prolong the separation of families dependent on case approval for their reunion, increasing risks to family members who remain overseas in dangerous circumstances and long-term damaging effects to children who endure lengthy parental absences.²⁸ Agency delays also threaten U.S. businesses' ability to hire and retain workers essential to productivity.

The proposed public charge rule would substantially increase USCIS's already unmanageable workload, thus deepening case processing delays and compounding harms to the public through heightened job loss and family separation. In short, the proposed rule would make an operational crisis appreciably worse, and immigrant families, individuals, and companies throughout the country would suffer the consequences.

F. The Public Charge Test Will Result in Inconsistent and Unfair Adjudications

The current public charge guidelines are clear and easily understood by both applicants and adjudicators. Under current policy, absent receipt of cash assistance or long-term government-funded institutional care, a properly completed, non-fraudulent Form I-864, *Affidavit of Support*, is generally sufficient to satisfy any public charge concerns. This adjudicative framework is straightforward and efficient and has largely yielded predictable, consistent public charge assessments.

The proposed rule would replace a simple and straightforward policy with an amorphous test requiring adjudicators to weigh a potentially unlimited number of factors to determine whether the applicant is likely to become a public charge.²⁹ Moreover, DHS asserts that a factor's weight may be mutable, depending on "the particular facts and circumstances of each case and the relationship of the factor to other factors in the analysis."³⁰ In other words, DHS anticipates that adjudicators will not only evaluate each factor individually, but also determine how those factors "operating together ... in tandem" may impact the public charge analysis.³¹ Thus, the proposed rule contemplates an unknown and possibly infinite universe of factors that could be relevant in the public charge assessment, and it appears that adjudicators could find virtually any circumstance dispositive within the totality of the circumstances analysis.

Adding to the unpredictability of the proposed framework is the subjectivity of the various factors articulated in the rule. For example, when assessing the applicant's "health," the proposed regulation requires the adjudicator to determine whether a health condition or disorder is significant enough to interfere with the person's ability to care for him- or herself, attend school, or attend work, and whether the condition is likely to require extensive medical treatment or

²⁷ See Letter to Director Rodriguez on USCIS Processing Delays, American Immigration Lawyers Association (Mar. 11, 2016), available at <https://www.aila.org/advo-media/aila-correspondence/2016/letter-director-rodriguez-uscis-processing-delays>.

²⁸ See, e.g., CIS Ombudsman, *Annual Report 2016* (Jun. 29, 2016), available at https://www.dhs.gov/sites/default/files/publications/CISOMB%20Annual%20Report%202016_2.pdf.

²⁹ Proposed 8 CFR § 212.22.

³⁰ 83 Fed. Reg. at 51179.

³¹ *Id.*

institutionalization in the future.³² To analyze this factor, the adjudicator must assume the role of a medical expert.

In addition, the proposed rule creates multiple opportunities for arbitrary decision-making when assessing one's "family status" and/or "financial status." First, the adjudicator must calculate the applicant's household size, yet the individuals who comprise the applicant's "household" depend on a variety of subjective determinations. For example, included in one's "household" are individuals who provide to the applicant at least 50 percent of their financial support.³³ This requires a fact-intensive review of not only cash support, but non-cash support such as room and board or payment of utilities that may only be partly attributable to the noncitizen. This overly complicates the household size assessment, particularly as compared to the relatively straightforward determination used for the current Form I-864, *Affidavit of Support*.

Moreover, the proposed rule's reliance on one's credit score or credit history as a public charge indicator is misplaced, given the fact that credit scores change frequently and credit reports often contain inaccurate data. The rule also lacks any meaningful standard for determining what constitutes a "good" or "poor" credit score or history. By requiring this information, adjudicators are tasked with performing a credit and risk analysis normally conducted by trained financial lenders and credit analysts.

The proposed rule's application to nonimmigrants seeking a change or extension of status also creates opportunities for arbitrary results. For change of status applicants, the rule requires the adjudicator to "consider the prospective nonimmigrant classification, the reasons for seeking the change of status, and the expected period of stay."³⁴ With differing standards applied to different nonimmigrant classifications and the subjectivity inherent in the reasons why an individual might seek a change of status, inconsistent decision-making on the public charge question is virtually guaranteed in this context.

In evaluating the sufficiency of an affidavit of support, the proposed rule tasks the adjudicator with assessing "how close of a relationship the sponsor has to the alien," under the assumption that a close family member "would be more likely to financially support the alien if necessary."³⁵ However, the closeness of a relationship is a subjective determination, not necessarily based on the existence of a blood relationship but rather on personal connections and history that an outside adjudicator would find difficult to comprehend. Moreover, "closeness" ebbs and flows over time, and events that take place subsequent to the submission of an affidavit of support can also affect the relationship.

Due to the impractical, unfair, and burdensome process outlined in the proposed rule, denials of adjustment, change, or extension status will undoubtedly rise, and given the inevitability that similarly situated individuals will receive conflicting decisions, an escalation of appeals and federal court actions will further bind limited agency resources. In all, the proposed rule would

³² Proposed 8 CFR §§ 212.22(b)(2)(i), (ii)(B).

³³ Proposed 8 CFR § 212.21(d)(1)(vi).

³⁴ Proposed 8 CFR § 248.1(c)(4).

³⁵ Proposed 8 CFR § 212.22(b)(7)(i)(A)(2); *see* 83 Fed. Reg. at 51198.

transform what is now a functional standard into an unworkable jumble that will ensure uneven and unjust outcomes.

G. DHS Has Seriously Underestimated the Significant Burdens the Proposed Rule Would Impose on Applicants

The proposed rule would also impose unreasonable burdens and financial costs on immigration benefit applicants and petitioners. Perhaps most significantly, the rule would create a new Form I-944, *Declaration of Self-Sufficiency*, that all adjustment of status applicants subject to public charge inadmissibility grounds must prepare and submit. Though DHS projects an average Form I-944 preparation time of 4 hours and 30 minutes, the evidentiary requirements associated with the form and the public charge assessment overall suggest that DHS has seriously underestimated the time commitment.³⁶

For example, using a method of assessing “household size” that differs significantly from the long-accepted definition used to evaluate Form I-864, *Affidavit of Support*,³⁷ the proposed rule and Form I-944 instructions require individuals to submit extensive supporting documentation of the financial status of the applicant’s household, including all sources of household income and all cash and non-cash assets that can be converted into cash within 12 months. For every such asset, an applicant must provide a description of the asset, along with the value, basis of the claim for the value, and proof of ownership.³⁸ The net value of a home may be included as an asset, but *only* if accompanied by documentation of ownership, evidence of all secured loans or liens, and a recent appraisal completed by a licensed appraiser (estimated to cost an average of \$300 to \$400 for a single family home).³⁹ These requirements alone could consume significant amounts of time beyond the DHS estimate.

The proposed Form I-944 instructions also require the submission of three years of tax transcripts for all listed household members, and mandate, under certain circumstances, the submission of foreign tax returns or transcripts for the applicant or any household member, which may be difficult, time-consuming, or even impossible to obtain while in the U.S.⁴⁰

Applicants also are required to obtain and submit a credit score and credit report, which DHS acknowledges applicants might have to pay a fee to obtain if a free credit report under the Fair Credit Reporting Act (FCRA) is not available.⁴¹ Applicants who do not have a credit report may, in lieu of submitting a credit bureau report of “no record found,” submit evidence of “continued payment of bills.” A significant amount of paperwork could be associated with complying with

³⁶ 83 Fed. Reg. at 51254.

³⁷ Proposed 8 CFR § 212.21(d).

³⁸ Proposed 8 CFR § 212.22(b)(4)(ii).

³⁹ Proposed Form I-944 Instructions at Part 3, Item Number 3, page 6, *available at* <https://www.regulations.gov/contentStreamer?documentId=USCIS-2010-0012-0047&contentType=pdf>. According to Angie’s List, the average cost of an appraisal for a home in the United States is \$300 to \$400. *See* <https://www.angieslist.com/research/home-appraisal/>. Outside the United States, the requirement of a licensed appraisal will at times be impossible to meet because some countries do not license appraisers.

⁴⁰ *See* Proposed Form I-944 Instructions at Part 3, Item Number 1, page 6.

⁴¹ 83 Fed. Reg. at 51254.

this requirement and could add a substantial amount of preparation time to Form I-944, *Declaration of Self-Sufficiency*.⁴² A copy of each page of the applicant's health insurance policy, documentation of each specified public benefit applied for and/or received, educational documentation, medical documentation, and language certifications are only some of the form's additional evidentiary requirements.

Obtaining, compiling, and submitting all the information requested would place burdens on applicants that are significantly higher than DHS's estimate. In addition to the added time burdens on applicants, given the complexity of the proposed public charge determination, many immigrants will opt to retain an attorney or accredited representative to ensure the required forms are completed properly and that all supporting documentation is in order. In order to provide competent representation, attorneys would be required to devote additional hours and resources to preparing applications, responding to Requests for Evidence (RFEs), and appealing or otherwise challenging unwarranted public charge determinations.

H. Public Charge Assessments of Nonimmigrants Would Cause Administrative Redundancies and Create Uncertainty for Businesses and Students

In a major departure from current regulation and practice, the proposed rule would require a public charge assessment of all nonimmigrants seeking a change of status or extension of stay in the United States.⁴³ These applicants would not only be required to demonstrate that they have not received public benefits but that they *are not likely to receive* specified public benefits in the future. In each of these cases, USCIS would have the discretion to issue an RFE requiring the nonimmigrant to submit Form I-944, *Declaration of Self-Sufficiency*.

In key respects, such assessments would prove duplicative of work done by the Department of State (DOS) and U.S. Customs and Border Protection (CBP). Consular officers already conduct public charge assessments of most nonimmigrants when adjudicating a visa application.⁴⁴ Moreover, CBP conducts admissibility determinations when processing nonimmigrants at the port of entry.⁴⁵ In addition, many nonimmigrant categories require the applicant to prove they can support themselves financially as a condition for receiving a visa. 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."⁴⁶ B-1 and B-2 visitors must also show that they have adequate means of financial support during the course of their stay in the U.S.⁴⁷ With employer sponsorship and compensation required for most employment-based nonimmigrant visas, financial stability is either required or built into the majority of nonimmigrant categories. Given these existing safeguards, investing USCIS resources to assess nonimmigrants on public charge places an unnecessary administrative burden on an already overstretched agency.

⁴² Proposed Form I-944 Instructions at page 7.

⁴³ Proposed 8 CFR § 214.1(a)(3)(iv).

⁴⁴ See 9 FAM 302.8-2(A), available at <https://fam.state.gov/fam/09fam/09fam030208.html>.

⁴⁵ See <https://www.cbp.gov/border-security/ports-entry/overview>.

⁴⁶ USCIS, Students and Employment, available at <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment>.

⁴⁷ DOS, Visitor Visa, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html>.

While nonimmigrants on temporary work visas often are paid enough to meet or exceed 250 percent of the Federal Poverty Guidelines—a “heavily weighted positive factor” under the proposed rule—not all will be able to satisfy that standard, thus raising the level of uncertainty for such individuals and their U.S. employers. Delays in processing Forms I-129, *Petition for a Nonimmigrant Worker*, Forms I-539, *Application to Extend/Change Nonimmigrant Status*, and Forms I-765, *Application for Employment Authorization*, effectively lower household incomes, thus subjecting impacted individuals to a more rigorous public charge assessment. For example, nonimmigrants who are required to request and receive an employment authorization document (EAD) along with their change/extension of status request in order to work are now forced to wait unreasonable lengths of time (currently 6 months or more) to receive or extend their permission to work, leading to job loss or suspension. If the administration’s proposal to eliminate work authorization for spouses of H-1B nonimmigrants is finalized and implemented, this also will have the effect of substantially decreasing nonimmigrant household incomes.⁴⁸

The proposed rule’s lack of clarity concerning public charge RFEs on extension/change of status applications and petitions will cause significant uncertainty for American businesses who employ temporary workers. While the rule states that USCIS adjudicators may issue RFEs “on a discretionary basis,” it provides no meaningful information or criteria that may influence the exercise of that discretion, leaving U.S. companies in the dark as to which of their current and future employees may be subjected to agency-imposed delays in time-sensitive adjudications. For many years, unnecessary and duplicative RFEs in other adjudicatory contexts have disrupted U.S. business operations and created obstacles to effective business planning. Under the proposed rule, even more uncertainty will be injected into the employment-based nonimmigrant sponsorship process, increasing hiring and retention costs for U.S. employers.

Finally, the proposed rule could result in more denials of change of status petitions for recent graduates of U.S. colleges and universities, who may not yet have significant assets or a high-paying job, but who would bring their creativity and talent to the U.S. economy. Regardless of individual financial status, the rule may discourage nonimmigrants from coming to the United States in general, as the spirit of the rule contributes to the growing perception among foreign nationals that America is an undesirable and unwelcoming destination.

I. The Proposed Public Charge Bond System is a Relic of a Bygone Era that Is Vulnerable to an Abuse of Discretion

As noted in the Notice of Proposed Rulemaking (NPRM), bond provisions were codified in the federal immigration laws in 1903.⁴⁹ Under INA § 213, the language of which has remained largely the same since 1907:⁵⁰

An alien inadmissible under [INA § 214(a)(4)] may, if otherwise admissible, be admitted in the discretion of the Attorney General ... upon the giving of a suitable and proper bond

⁴⁸ See Regulatory Agenda, Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1615-AC15>.

⁴⁹ Immigration Act of 1903, 32 Stat. 1213 (Mar. 3, 1903).

⁵⁰ Act of February 20, 1907, 34 Stat. 898, 907 (Feb. 20, 1907).

... in such amount and containing such conditions as he may prescribe ... holding the United States and all States, territories, counties, towns, municipalities and districts thereof harmless against such alien becoming a public charge.

Under proposed 8 CFR § 213.1, DHS would be given unfettered discretionary authority to allow a person deemed inadmissible under INA § 212(a)(4) to submit a public charge bond in a *minimum* amount of \$10,000. The proposed rule fails to outline specific considerations or factors relevant to the assessment of the bond amount, stating merely that “USCIS will consider an alien’s individual circumstances when determining the exact amount of the bond the alien is required to post.” The absence of any meaningful standard guiding these determinations, as well as a lack of an appeal process, leaves noncitizens vulnerable to arbitrary and oppressive bond amounts and inconsistent determinations among similarly situated individuals. The proposed public charge bond process is further flawed in that “only the obligor”—i.e., the bond company—“may challenge [a] breach determination.”⁵¹ Thus, the noncitizen’s ability to challenge a faulty breach determination is tied inherently to the willingness of a for-profit enterprise to make such a challenge, prioritizing the financial interests of surety companies over the welfare of immigrant families.

Although the statutory bond provision has remained intact for more than 100 years, practically speaking, bonds have not been utilized in decades because they simply aren’t necessary. The public charge bond provisions of the INA are a remnant of our nation’s immigration laws from the early 20th century, long before the 1952 Act established our current legal immigration system which generally requires an intending immigrant to be sponsored by a close family member or employer. Moreover, as acknowledged in the USCIS Adjudicator’s Field Manual (AFM), changes ushered in by IIRIRA further rendered the public charge bond provisions functionally obsolete. According to Chapter 61.1 of the AFM, “[bond] authority is rarely exercised in light of the statutory changes contained in ... [IIRIRA] which created the enforceable affidavit of support.”

Thus, for at least the past two decades, the posting of public charge bonds has been deemed unnecessary, and rightly so. Although DHS attempts to justify the need for a public charge bond process in addition to the affidavit of support by pointing out the differences between the two, fundamentally there is no distinction, except for the potential windfall to the government.⁵² In both instances, the federal government could compel repayment of public benefits used by the immigrant. However, in the affidavit of support context, the government could seek reimbursement of the amount of public assistance used, whereas in the public charge bond context the government could seek payment of the full amount of the bond even if the public benefits consumed represent only a small fraction of the posted bond.⁵³ For example, if a \$30,000 public charge bond is posted by a noncitizen who then uses a mere \$1,500 worth of public benefits, the bond would be breached and the noncitizen would be liable for the entire \$30,000—20 times more than what was received in benefits.

⁵¹ 83 Fed. Reg. at 51220.

⁵² See 83 Fed. Reg. at 51220, “Relationship of the Public Charge Bond to the Affidavit of Support,”

⁵³ Proposed 8 CFR § 213.1(h).

J. The Proposed Rule Would Compound the Immigration Court Backlogs and Create Inconsistencies in the Adjudication of Adjustment of Status Applications 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 will parallel the DHS proposed rule.⁵⁴ 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 seeking to adjust status; (2) returning lawful permanent residents who are treated as applicants for admission under INA § 101(a)(13)(C);⁵⁵ and (3) lawful permanent residents placed in removal proceedings who are seeking to re-adjust status with a waiver under INA § 212(h).⁵⁶

Until a DOJ rule is promulgated, Immigration and Customs Enforcement attorneys, who *are* bound by DHS regulations, likely will argue that immigration judges should apply the proposed rule's heightened standards. Lacking any recent binding precedent on the interpretation of INA § 212(a)(4), some immigration judges will rely on the proposed rule as a guide, while other immigration judges will not.⁵⁷ This will create inconsistencies in court adjudications that will increase administrative inefficiencies through an increase in appeals and motions. In addition, cases 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 for additional and more detailed testimony. With an immigration court backlog that has recently surpassed one million cases,⁵⁸ the public charge rule would further exacerbate an already record high case volume.

K. Impact on Consular Processing

The Department of State recently implemented significant changes to the Foreign Affairs Manual (FAM) that raised the public charge bar for visa applicants. Previously, 9 FAM 302.8-2(B) stated: "A properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the totality of the circumstances analysis." This provision mirrored USCIS's current public charge adjudicative framework. But in January 2018, DOS eliminated that language, directing instead that the affidavit of support would now constitute merely a "positive factor" in the public charge analysis. This and related shifts have not only spurred confusion and inefficiencies in consular

⁵⁴ See DOJ Fall 2018 Unified Agenda, *available at*

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1125-AA84>

⁵⁵ See 83 Fed. Reg. at 51135, 51135 n. 173 (acknowledging that lawful permanent residents will be required to meet the new public charge test when treated as applicants for admission).

⁵⁶ As a result of a 2018 USCIS policy change giving USCIS adjudicators greater authority to issue notices to appear (NTA), we can also expect to see adjustment of status cases denied by USCIS referred to immigration court with much greater frequency, thus increasing the overall number of adjustment of status cases that immigration judges will be hearing, each of which will require a public charge adjudication.

⁵⁷ 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.

⁵⁸ TRAC Immigration, Immigration Court Backlog Surpasses One Million Cases, Nov. 6, 2018 *available at* <http://trac.syr.edu/immigration/reports/536/#f1>.

processing, they've also led to numerous improper visa denials on public charge grounds, barring affected individuals from entering the United States and reuniting with their families.⁵⁹

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.⁶⁰ If—more likely when—consulates begin applying a framework equivalent to the one proposed by DHS, the millions of individuals that seek visas annually would be subject to these burdensome and unnecessary standards. Many immigrants would find themselves unjustly shut out of the country and unable to join their families. Spouses, children, and other immediate relatives of U.S. citizens risk a total bar to entry. This would create severe consequences for our communities and the national economy, as well as our legacy as a nation of immigrants.⁶¹

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

⁵⁹ “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>.

⁶⁰ See “Exclusive: Trump Administration May Target Immigrants Who Use Food Aid, Other Benefits,” *Reuters* (Feb. 8, 2018) available at <https://www.reuters.com/article/us-usa-immigration-services-exclusive/exclusive-trump-administration-may-target-immigrants-who-use-food-aid-other-benefits-idUSKBN1FS2ZK>.

⁶¹ DOS Webpage, “Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts: Fiscal Years 2014 - 2018” available at <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport-TableI.pdf>.