

Submitted via www.regulations.gov

November 12, 2019

Megan Herndon
Deputy Director for Legal Affairs
Visa Services, Bureau of Consular Affairs
Department of State
600 19th St NW
Washington, D.C. 20006

Re: DOS-2019-0035 and/or RIN: 1400-AE87, Comments in Response to Interim Final Rulemaking: Visas: Ineligibility Based on Public Charge Grounds

Dear Deputy Director Herndon:

The Catholic Legal Immigration Network, Inc. (CLINIC) respectfully submits the following comments in connection with the Department of State's (DOS) above-referenced Interim Final Rule (hereinafter, IFR) titled "Visas: Ineligibility Based on Public Charge Grounds." CLINIC strongly opposes the interim final rule in its entirety and, for the reasons set forth below, requests that it be withdrawn.

Embracing the gospel value of welcoming the stranger, CLINIC promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of immigration legal services programs. This network includes approximately 380 programs operating in 49 states and the District of Columbia. CLINIC's network employs roughly 1,400 attorneys and accredited representatives who, in turn, serve hundreds of thousands of low-income immigrants each year. Over 90 percent of CLINIC's affiliates offer family-based immigration services, including assistance with applications for adjustment of status to lawful permanent residency.

CLINIC's attorneys conduct training and provide technical support on all the immigration-related legal problems faced by low-income immigrants. The Training, Litigation and Support Section focuses on family-based immigration issues, including the issues surrounding adjustment of status. By the end of the third quarter for 2019, CLINIC attorneys trained more than 8,000 people online and in-person. Further, CLINIC's Religious Immigration Services (RIS) section specializes in assisting international religious workers and their U.S. organizational sponsors. RIS represents approximately 160 dioceses and religious communities throughout the U.S. and over 868 individual clients.

U.S. immigration policy reflects the importance of family reunification. Of the 1,183,505 foreign nationals admitted to the United States in FY2016 as lawful permanent residents (LPRs), 804,793, or 68 percent, were admitted based on family ties. Similarly, the sanctity of the family is a dominant element of Catholic social teaching and a high priority of the Catholic Church. Accordingly, CLINIC supports immigration policies and procedures that promote and facilitate family unity and welcomes changes to the adjustment of status process that assist families in obtaining this immigration benefit. Unfortunately, this IFR is irreconcilable with our nation's values, as it would create unnecessary barriers to achieving the American Dream – a dream that was not intended to be limited to only the affluent. It is also contrary to our Catholic values and faith teachings, as it would negatively affect family unity, stability, and threaten public health.

To say, as DOS admits, that the “Department has chosen to follow DHS's approach in many respects” is a gross understatement. The IFR is almost identical to the final rule published by the Department of Homeland Security on August 14, 2019. That rule was characterized by one federal judge as “a new agency policy of exclusion in search of a justification. It is repugnant to the American Dream of the opportunity for prosperity and success through hard work and upward mobility.” *Make the Road, et al. vs. Cuccinelli*, No. 19 Civ. 7993 (S.D.N.Y. October 11, 2019), slip op. at 19.

CLINIC opposes the IFR for the following reasons:

- DOS bases the need for the IFR in order to comply with a DHS public charge rule, but that rule has been enjoined indefinitely by five courts
- DOS's change has failed to provide appropriate justification and evidence-based reason for deviating from long-standing past practices
- DOS's rule would bypass the legislative process required to change an established, 300-year definition of who is deemed a public charge
- DOS's rule is contrary to legislative intent, case law, and the ordinary meaning of “public charge”
- DOS's rule includes non-cash programs, which is contrary to public policy and would unnecessarily jeopardize public health, safety, and family stability
- DOS's rule is counterproductive and would create tremendous burdens on the agency, legal representatives, and immigrants.

1. The Basis for the DOS Rule No Longer Exists

The DOS justifies the need for the IFR in order to conform its interpretation of the public charge ground of inadmissibility, INA § 212(a)(4), with that of the Department of Homeland Security (DHS). “This rulemaking is intended to align the Department's standards with those of the Department of Homeland Security, to avoid situations where a consular officer will evaluate an alien's circumstances and conclude that the alien is not likely at any time to become a public charge, only for the Department of Homeland Security to evaluate the same alien when he seeks admission to the United States on the visa issued by the Department of State and finds the alien inadmissible on public charge grounds under the same facts.”

But the DHS final rule was enjoined by five federal courts on October 11, 2019.¹ Three of these courts issued nationwide injunctions, while two courts issued regional or state-specific injunctions. CLINIC was an organizational plaintiff in one of those cases, *Make the Road, et al. v. Cuccinelli*, No. 19 Civ. 7993 (S.D.N.Y. 2019). While DHS will surely appeal those decisions, it will take months for those appeals to result in final decisions. Ultimately, the issue of the legality of the DHS final rule will no doubt be resolved by the Supreme Court; at the earliest that will be in the Court’s term beginning in September 2020. None of these injunctions have been stayed during this appeals process. While the injunctions are in place, DHS must use the pre-existing public charge rule to adjudicate applications for benefits.

Therefore, if the agency were indeed sincere in wanting to conform its interpretation of the public charge ground of inadmissibility with that of the DHS, it would withdraw the IFR. In fact, if it proceeds to implement the IFR as written, the agency would be accomplishing the exact opposite of its stated purpose: it would be using an interpretation of public charge that is at complete odds with that used by DHS. It would also be implementing a radically new definition of public charge that has already been found to be in “in excess of statutory jurisdiction, authority, or limitations”; “not in accordance with law”; and “arbitrary, capricious, [or] an abuse of discretion.” *Make the Road, et al.*, slip op. at 6, citing 5 USC § 706(2)(A), (C).

The DOS also states that: “The Department has concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this rule, as the delay associated with notice and comment rulemaking would be impracticable, unnecessary, or contrary to the public interest.” Nothing could be farther from the truth. The stated rationale behind the agency’s applying an exception to public comment before implementation has been eviscerated with the five court injunctions to the DHS rule. More likely, the agency is simply trying to avoid compliance with the Administrative Procedures Act, as it did in January 2018 when it made significant changes to those sections of the Foreign Affairs Manual that interpret public charge. That action is currently being challenged in district court, where plaintiffs recently overcome a motion to dismiss on jurisdictional grounds. *Mayor and City Council of Baltimore v. Trump*, No. 1:18-cv-3636-ELH (D. Md 2018).

2. DOS’s IFR Lacks Justification and Evidence-Based Reasoning

The IFR would change the current definition of public charge from one who is “primarily dependent” or relies on three cash-assistance programs for more than 50 percent of their income and support, to an “alien who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months’ worth of benefits).” This is a significantly lower threshold than that now applied by DHS and the one that has been applied for at least the last 140 years.

¹ See e.g., *Mayor and City Council of Baltimore v. United States Department of Homeland Security*, 19 Civ. 2851 (PJM)(D. Md.); *Casa De Maryland v. Trump*, 19 Civ. 2715 (PWG)(D. Md.); *City and County of San Francisco v. US. Citizenship and Immigration Services*, 19 Civ. 4717 (PJH) (N.D. Cal.); *La Clinica De La Raza v. Trump*, 19 Civ. 4980 (PJH) (N.D. Cal.); and *Cook County, Illinois v. McAleenan*, 19 Civ. 6334 (GF) (N.D. Ill.).

DOS does not state a reasonable explanation for deviating from its long-standing practices. The IFR describes the current method of evaluating public charge, but does not provide any evidence that the results of this method have fallen short of the congressional intent of the underlying statute.

Since there is no rational or evidence-based reason provided in the IFR for issuing this proposed regulation, stakeholders must resort to considering the policy context surrounding the proposal to determine a reasonable explanation for this action. This administration has taken the following actions to reduce family immigration or separate families present in the United States:

- On January 26, 2017, less than a week after taking office, the President issued the first of three executive orders banning people from predominantly Muslim countries from entering or reentering the United States. The ban currently affects millions of people, including hundreds of thousands of U.S. citizens and permanent residents, who are prevented from reuniting with family members who live in the designated countries.
- On September 7, 2017, it terminated the Deferred Action for Childhood Arrivals (DACA) program, which threw approximately 700,000 residents into legal limbo. By March 5, 2018, more than 20,000 DACA recipients had already lost this protection.
- On October 4, 2017, the administration capped the number of refugee admission for Fiscal Year 2018 at 45,000, which was the lowest number since Congress created the current refugee program in 1980. But due to the implementation of new security screening requirements (“extreme vetting”), a three-month suspension of refugee admissions in the beginning of that fiscal year, and other slow-downs in refugee processing, only 22,491 were actually admitted. On September 24, 2018, the administration capped the number of refugees for Fiscal Year 2019 at 30,000—a one-third reduction of the previous official number—during the worst global displacement and refugee crisis since World War II.
- Over a six-month period, the administration formally terminated Temporary Protected Status (TPS) for six countries—Sudan, Nicaragua, Nepal, Haiti, El Salvador and Honduras—affecting over 300,000 people. Most of these immigrants have built strong ties to the United States over many years and have little or nothing to return to. The two largest populations of TPS holders, from El Salvador and Honduras, have been living in the United States for more than 20 years. An estimated 270,000 U.S. citizen children have parents who are TPS holders from just three countries: El Salvador, Honduras and Haiti. These terminations—when they take effect and are enforced—will leave TPS holders with a terrible choice: abandon their children and return to their home countries alone or relocate with them and subject them to high levels of crime, violence and poverty.
- In April 2018, the administration began a “Zero Tolerance” policy that led to the Department of Homeland Security (DHS) separating asylum-seeking parents from their children. This policy affected both families who presented themselves at a port of entry and those who entered between ports of entry. While the parents were being prosecuted for illegal entry, immigration authorities took their children from them, sometimes under false pretenses, and refused to tell them where they were going. In fact, the administration made little or no effort to keep track of where the children were being placed, which came to light after a court stepped in and ordered that the families to be

reunited. Approximately 3,000 children were separated from their parents during this humanitarian crisis created by the administration and an estimated 200 remain separated.

In addition, throughout his campaign and time in office, President Trump has made clear his intent to limit the number of immigrants from developing countries. He has made blanket statements regarding migrants arriving in the United States from developing countries: “[T]hey’re not sending their finest. We’re sending them the hell back.”² With respect to migrants fleeing humanitarian crises in Guatemala, El Salvador and Honduras and traveling north through Mexico, the president had these comments: “These are tough, tough people, and I don’t want them, and neither does our country.”

Shortly after President Trump’s inauguration in January 2017, the press published a leaked draft of an Executive Order titled “Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility.” The Executive Order instructed DHS to “rescind any field guidance” and “propose for notice and comment a rule that provides standards for determining which aliens are inadmissible or deportable on public charge grounds”—*i.e.*, if a non-citizen is “likely to receive” or does receive means-tested “public benefits.” Although the draft Executive Order was never officially released or signed by President Trump, it is now being implemented through this IFR.

It is against this policy backdrop that this administration proposed the DHS public charge rule and now this DOS IFR, which would change the way this ground of inadmissibility has been defined and interpreted since at least 1882. Based on this voluminous restrictive policy record, DOS’s stated rationales for changing this regulation, namely promoting self-sufficiency in immigrants and aligning its interpretation with DHS, pale in comparison to the rationale evident from this context: it is the latest effort to achieve the administration’s stated goal of reducing family immigration.

3. DOS’s “Public Charge” Definition Contradicts its Centuries-old Definition

The first federal statute precluding the admission of aliens based on potential public charge was passed by the 47th Congress and signed into law on August 3, 1882, three months after it had passed the infamous Chinese Exclusion Act. It authorized the boarding of vessels, the examination of passengers, and the denial of permission to land “if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge...” Notable, however, was the deletion by the Senate of language passed by the House that would have excluded “all foreign paupers, convicts, or accused persons of other than political offenses, or persons suffering from mental alienation, in the United States who are a public charge on their arrival in this country...” That language did not appear until 1891 when the federal government expanded the inadmissible classes to include “persons likely to become a public charge” and authorized the deportation of those who became a public charge within one year.

² See Katie Rogers and Jonathan Martin, ‘We’re Sending Them the Hell Back,’ *Trump says of Securing the Country’s Borders*, N.Y. TIMES, June 20, 2018, available at <https://www.nytimes.com/2018/06/20/us/politics/trump-minnesota-rally.html>.

This language—likely to become a public charge—was in fact modeled on existing immigration laws and policies developed in New York and Massachusetts years earlier. Those two states helped mold the legal and administrative frameworks of what later became the federal authority for excluding indigent persons. Representatives from those two states played a central role in developing our national immigration policy and in drafting the Immigration Act of 1882. The enactment of that statute was motivated by the Supreme Court’s declaring that state passenger laws—the imposition of head taxes and the exclusion and deportation of certain classes of entrants—were unconstitutional and that only the federal government could impose such restrictions.

Prior to that year, the regulation and control of immigrants lay largely within the jurisdiction of the states—not the federal government—and the enactment and enforcement of these laws took place at the local level. Statutes prohibiting the admission of poor and indigent immigrants date back to the colonies with the earliest laws being passed in Massachusetts in 1645. A law in 1700, for example, targeted “lame, impotent, or infirm persons, incapable of maintaining themselves.” That same colony enacted a law in 1722 that required the posting of a bond, not to exceed £100 and with a term of five years, that would be forfeited if the immigrant in question became a public charge.

Similar laws were passed at that time in other Atlantic seaboard states, in addition to laws allowing for the deportation of those who had become indigent. For example, New York State passed a law in 1847 that prohibited the landing of “any lunatic, idiot, deaf and dumb, blind or infirm persons...”

While anti-Irish nativism reached its peak in the mid-1800s, as evidenced by the Know-Nothing party and sporadic outbreaks of mob violence, the legislation that emerged from Massachusetts and New York at that time continued to expand for decades before it evolved into the statutory language at issue with this proposed federal rule change. Today’s targets, of course, are not the Irish Catholics but rather a wider swath of the world’s population who come from less developed countries, may possess only modest skills and education, may lack English proficiency or a formal credit rating, and seek only entry-level or manual labor positions in the economy. Catholic Church teachings opposed religious discrimination when the church itself was targeted, and it still opposes discrimination against those from developing nations as it conflicts with the Church’s support for the dignity of the human person.

As explained in these comments, what is being implemented by this IFR is a dramatic shift in purpose from its origins almost 300 years ago—from excluding the destitute, the famine-stricken, and those permanently relegated to almshouses—to a potential banning of those who simply lack formal educational degrees and whose income falls below the federal “affluence” level. What remains embedded in this history is a deep-rooted prejudice against those who comprise a certain racial, ethnic, or social underclass. What stands out now, however, is a demonstrated pattern carried out by this administration to reduce immigration levels from any countries that are not affluent.

4. DOS’s IFR Oversteps the Boundaries of Regulation, Taking a Legislative Posture

In the IFR, DOS is changing to the definition of public charge from “dependence” on three cash-assistance programs to “receipt” of any of eight cash and non-cash programs. The agency’s definition is at direct odds with legislative history, case law, and the ordinary meaning of the term.

Legislative History. The legislative history, as explained above, evidences a very narrow definition of public charge, rather than the broad one in the IFR.

Ordinary Meaning. The ordinary meaning of the term public charge follows the dictionary definition: “a person or thing committed or entrusted to the care, custody, management, or support of another.” In other words, someone who receives a noncash benefit intended to supplement their health or nutrition would not be understood to be “entrusted to the care” of the government. Indeed, an analysis of the history of the term for a prior proposed public charge regulation found that “[t]his primary dependence model of public assistance was the backdrop against which the “public charge” concept in immigration law developed in the late 1800s.”

Case Law. Case law has consistently applied a restrained approach and confined its application to those who are primarily dependent on the government for survival. The following is a brief summary of the more significant administrative cases interpreting the public charge ground of inadmissibility:

- *Matter of T*, where the BIA sustained the appeal of a mother and child who had been excluded on public charge grounds after their husband/father was excluded for having committed a crime involving moral turpitude. The mother and son sought permanent residence in the United States independent of the father but were denied. In reversing this denial, the BIA noted that the mother was “quite capable of earning her own livelihood independent of her husband,” and the child had training in a field that represented “a wide field of employment for this country.”
- *Matter of Martinez-Lopez*, where the Attorney General held that “[some] specific circumstances, such as mental or physical disability, advanced age, or other facts reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency.”
- *Matter of Harutunian*, where the BIA reaffirmed a “totality of the circumstances” test for grounds of inadmissibility, which included age, health, educational level, financial status, and family assets and support. This was consistent with the long-standing approach that considered an alien’s economic circumstances, as well as physical and mental conditions. Applying this test, the BIA found that immigration officials had properly determined that the applicant was ineligible for adjustment of status on public charge grounds. She was aged (70 years old), unskilled, uneducated, without family or other support, and had been on welfare since her arrival in the United States.

- *Matter of Vindman*, where the BIA examined “everything in the statutes, the legislative comments, and prior decisions” and found that they “point to one conclusion, that Congress intends that an applicant for a visa be excluded who is without sufficient funds to support himself, who has no one under any obligation to support him, and whose chances of becoming self-supporting decrease as time passes.” Applying this test, the Board found that the couple had properly been found excludable for public charge given their age (66 and 54 years old), their unemployment and lack of employment prospects, their dependence on Federal and state cash assistance programs for the last three years, and the absence of any family member who could contribute to their support.
- *Matter of A*—, where the BIA sustained an alien’s appeal of a decision finding her ineligible for adjustment of status on public charge grounds. The INS district director had determined that the alien was ineligible because the alien’s family had received “public cash assistance” for nearly four years, and neither the alien nor her spouse had worked for four years prior to filing the application for adjustment of status. The district director thus viewed the alien as “unable to support herself and her family without public assistance.” The Board, however, disagreed, noting that the alien was “young” and had no “physical or mental defect which might affect her earning capacity.” It also noted that the alien had recently begun working, and that during the time when she was absent from the workforce, she had been caring for her children.

Memoranda from the Department of State and legacy INS interpreting the statutory changes following the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) and the implementation of the new affidavit of support requirements are also illustrative. The following convey the agencies’ analysis and application of the public charge ground shortly after passage of IIRIRA:

- “In most cases, the public charge requirements will be satisfied by the submission of a verifiable Affidavit of Support that meets the 125 percent minimum income requirement...A finding of ineligibility in cases where the 125 percent minimum has been met must be well-documented and demonstrate a clear basis for the determination that the applicant is likely to become a public charge.”
- “If there is a sufficient Affidavit of Support and the applicant appears to be able to support him/herself and dependents, a public charge finding may not be appropriate notwithstanding the petitioner’s reliance on public assistance.”
- “It is important to note that public charge provisions are generally forward looking and findings of ineligibility should be based on the likelihood of the applicant becoming a public charge...There is no ground of ineligibility based solely on the prior receipt of public benefits...Thus in most cases, prior receipt of benefits, by itself, should not lead to an automatic finding of ineligibility. Prior receipt of public benefits is a factor which may be considered in making public charge determinations, along with evidence of the applicant’s current financial situation and the sponsor’s ability to provide support.”
- “Consular officers must base their determination of the likelihood that the applicant will become a public charge on a reasonable future projection of the alien’s present circumstances. Consular officers should point to circumstances which make it not merely possible, but likely that the applicant will become a public charge, as defined in N.1, above. Consular officers must not, however, refuse a visa by asking ‘What if’ type

questions, e.g., ‘What if the applicant loses the job before reaching the intended destination’, or ‘What if the applicant is faced with a medical emergency.’ Instead consular officers must assess only the ‘totality of the circumstances’ existing at the time of visa application.”

- “Except for the new requirements concerning the enforceable affidavit of support, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) has not altered the standards used to determine the likelihood of an alien to become a public charge nor has it significantly changed the criteria to be considered in determining such a likelihood. The law remains that all aliens seeking admission are inadmissible, and themselves subject to removal under the provisions of section 212(a)(4), if they are likely at any time to become public charges.”

In 1999, the Immigration and Naturalization Service (INS) published in the Federal Register a Notice of Proposed Rulemaking that defined the public charge ground of inadmissibility. At that time, INS determined that the rule was necessary to reduce public confusion about the meaning of public charge and noted that it had been contacted by “many State and local officials, Members of Congress, immigrant assistance organizations, and health care providers who are unable to give reliable guidance to their constituents and clients on this issue.” As the agency explained:

Although Congress has determined that certain aliens remain eligible for some forms of medical, nutrition, and child care services, and other public assistance, numerous legal immigrants and other aliens are choosing not to apply for these benefits because they fear the negative immigration consequences of potentially being deemed a “public charge.” This tension between the immigration and welfare laws is exacerbated by the fact that “public charge” has never been defined in statute or regulation. Without a clear definition of the term, aliens have no way of knowing which benefits they may safely access without risking deportation or inadmissibility.

INS stressed that when aliens are deterred or prevented from using a wide array of public benefits, local communities bear the costs. It explained:

According to Federal and State benefit-granting agencies, this growing confusion is creating significant, negative public health consequences across the country. This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children’s immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants’ fears of obtaining these necessary medical and other benefits are not only causing them considerable harm but are also jeopardizing the general public. For example, infectious diseases may spread as the numbers of immigrants who decline immunization services increase. Concern over the public charge issue is further preventing aliens from applying for available supplemental benefits, such as child care and transportation vouchers, that are designed to aid individuals in gaining and maintaining employment.

Rulemaking was necessary because, “[i]n short, the absence of a clear public charge definition is undermining the Government’s policies of increasing access to health care and helping people to become self-sufficient.” Legacy INS proposed to define “public charge” to mean an individual “who is likely to become ... primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense.”

This definition was consistent with the advice provided by federal benefit-granting agencies, including the Department of Health and Human Services, the Department of Agriculture, and the Social Security Administration. Each concurred that “receipt of cash assistance for income maintenance is the best evidence of primary dependence on the Government” because “non-cash benefits generally provide supplementary support ... to low-income working families to sustain and improve their ability to remain self-sufficient.”

In addition to publishing the proposed rule, legacy INS also published its Field Guidance on the public charge issue, “which both summarize[d] longstanding law with respect to public charge and provide[d] new guidance on public charge determinations.”

The Field Guidance was published alongside the 1999 proposed rule to “help alleviate public confusion over the meaning of the term ‘public charge’ in immigration law and its relationship to the receipt of Federal, State, and local public benefits” and to “provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations” and to “provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.” In promulgating the Field Guidance, legacy INS intended to adopt its definition of public charge “immediately, while allowing the public an opportunity to comment on the proposed rule.”

To that end, the Field Guidance adopted the same definition of public charge stated in the proposed rule. Specifically, INS defined a “public charge” as “an alien who has become ... or is likely to become primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”

In publishing the 1999 proposed rule and the Field Guidance, INS expressly took “into account the law and public policy decisions concerning alien eligibility for public benefits and public health considerations, as well as past practice by the Service and the Department of State.” Moreover, INS specifically acknowledged that its definition of public charge conformed to the policy “codif[ied] ... in the Foreign Affairs Manual,” and described it as “taking a similar approach.” Once again, INS defended its parallel interpretations as adopting “uniform standards.”

INS also clarified that “[i]t has never been Service policy that any receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge.” Instead, the agency stressed that “[t]he nature of the public program must be considered...For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, or receiving emergency

medical care would not make an alien inadmissible as a public charge, despite the use of public funds.”

Legacy INS gave four reasons for deciding to adopt the definition of public charge in both the 1999 proposed rule and the Field Guidance. First, it noted that “confusion about the relationship between the receipt of public benefits and the concept of ‘public charge’” had “deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive.” As it explained, this “reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare.”

Second, INS observed that non-cash benefits “are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family.” Thus, by focusing only on cash assistance for income maintenance, the Service could “identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests.”

Third, INS acknowledged that “federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient.” It therefore concluded that “participation in such non-cash programs is not evidence of poverty or dependence.”

Fourth, INS concluded that in light of the “complex” rules governing eligibility for federal, state, and local public benefits, “INS Officers are not expected to know the substantive eligibility rules for different public benefit programs.” Limiting the types of programs considered for public charge purposes would therefore produce “simpler and more uniform” public charge determinations, “while simultaneously providing greater predictability to the public.”

The agency did not anticipate that adopting the 1999 definition of “public charge” would “substantially change the number of aliens who will be found deportable or inadmissible as public charges” primarily because “under the stricter eligibility rules of the welfare reform laws, many legal aliens are no longer eligible to receive certain types of public benefits.”

INS instructed officers to “not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds.”

INS then provided a non-exclusive list of non-cash benefit programs and stated clearly that “past, current, or future receipt of these benefits should **not** be considered in determining whether an alien is or is likely to become a public charge.” That list included Medicaid, food stamps (SNAP), and housing benefits, which the DOS would now add in the IFR to the totality of the circumstances test.

As for the affidavit of support, INS acknowledged that the Form I-864 “asks whether the sponsor or a member of the sponsor’s household has received means-tested benefits within the past 3 years.” However, INS clarified that “[t]he purpose of this question is not to determine whether the sponsor is or is likely to become a public charge, but to ensure that the adjudicating officer has access to all facts that may be relevant in determining whether the 125-percent annual income test is met.” INS therefore specified that “[a]ny cash benefits received by the sponsor cannot be counted toward meeting the 125-percent income threshold,” but that the “receipt of other means-tested benefits, such as Medicaid, is not disqualifying for sponsorship purposes.”

As demonstrated above, the current implementation of public charge policy applies to those who are likely to primarily rely on the government for survival, intentionally excluding from consideration lesser amounts and non-cash benefits, which maintain public health and wellbeing, and assist people to maintain self-sufficiency. This current policy is supported by legislative history, case law, and the ordinary definitions of the terms in question.

5. Inclusion of Non-Cash Programs Would Harm Immigrants, Families, and the Public

The IFR adds six non-cash benefits that it would consider as part totality of the circumstances test, either received by the applicant or likely to be received in the future: nonemergency Medicaid, Premium and Cost Sharing Subsidies for Medicare Part D, SNAP, Section 8 Housing Assistance and Project-Based Rental Assistance, and Subsidized Public Housing.

CLINIC opposes the addition of these programs for the following reasons:

- The inclusion of Medicaid would jeopardize the health care safety net and undermine nation’s public health and patient access to care.
- The inclusion of three housing programs—Section 8 Housing Choice Vouchers, Section 8 Project Based Rental Assistance and Public Housing—would exacerbate an already critical problem in this country. Lack of access to affordable housing is one of the main barriers to economic stability. Access to affordable housing provides stability for families, including mixed-status families with U.S. citizen children who will achieve more and grow up healthier with housing security. It also increases self-sufficiency by facilitating residency near areas with more employment opportunities.
- The inclusion of SNAP would reverse a 20-year-old interpretation of public charge that specifically excluded this program as part of the totality of the circumstances analysis. The reasoning was sound at the time and should not be overturned now. In addition to harming low-income children and other family members, it would hurt local retailers. For instance, in 2017, more than \$22.4 million in SNAP benefits were spent at farmers markets. Many small farmers, farm workers, and their families are beneficiaries of SNAP, meaning they would be hit doubly hard.

As a Catholic organization, we reject the social disdain expressed by this proposed regulation that would force families to reject aid during difficult times, or else lose the inclusion, integration, and opportunities that come with improved immigration status. We are called to welcome the stranger, but this regulation would withhold that welcome from those who are not affluent.

6. DOS's Effort to Deemphasize Affidavits of Support Would Not Achieve the Goal of Immigrant Self-Sufficiency

A central premise of the agency's IFR is that the consulates have not placed enough weight on the five statutory factors set out in INA § 212(a)(4)(B) and have instead put too much emphasis on the affidavit of support. But the agency historically has had the power to examine—and in fact has examined—multiple factors in determining the likelihood that an adjustment of status applicant would become a public charge. The 1996 statutory change merely codified the agency's prior policy and practice. The IFR is not an attempt to flesh out and clarify these factors, but rather to impose additional requirements not intended by Congress. It is akin to DOS attempting to adopt a point system—giving certain weight to various factors—such as that used in Canada and other countries when evaluating eligibility to immigrate. Such a point system has so far been rejected by Congress.

The five factors that were added to the statute in 1996 were not new at that time and did not need to be explained or described more than they have been. They were lifted directly from prior INS instructions and the FAM. For example, the State Department FAM in 1991 enumerated the “Factors in Reviewing Public Charge Requirements.” They were listed as the applicant's: age; health; education; family status; financial resources; and personal income. In other words, when Congress in 1996 enacted INA § 212(a)(4)(B), Factors to be Taken into Account, it was simply repeating in statutory format what was already current practice. When it crafted the five statutory factors, it kept the words “age,” “health,” and “education” from the FAM; it added the words “and skills” to “education”; and it combined “financial resources” and “personal income” into “assets, resources, and financial status.”

After INS and the State Department implemented INA § 213A, which required the applicant to submit a legally-enforceable affidavit of support, it continued to consider the five factors set forth in 212(a)(4)(B). The affidavit of support was simply an additional requirement, albeit a mandatory one.

The DOS summarized its final regulation implementing the 1996 statutory change in the following way: “The rule makes clear that although Form I-864 is a necessary part of certain immigrant visa applications, it is not, in and of itself, wholly adequate to find that an applicant satisfies the public charge requirements. It is a threshold requirement necessary to begin public charge considerations, but it is not an end.” The addition of the five statutory factors appeared to add more complexity to the public charge, but in reality they added “no change in this respect ... since public charge determinations historically have contemplated numerous factors.”

The State Department guidance pre-IIRIRA confirms that the agency had been employing these statutory factors when weighing potential public charge inadmissibility. The pre-IIRIRA FAM included the following interpretation of what became the five statutory factors: “Consular officers should consider the marital status of the applicant and, if married, the number of dependents for whom he or she would have financial responsibility.”

The agency defined the “health” factor as follows: “Consular officers must take into consideration the panel physician's report regarding the applicant's health, especially if there is a

prognosis that might prevent or ultimately hinder the applicant from maintaining employment successfully.”

The agency defined the “family status” factor as follows: “Consular officers should consider the marital status of the applicant and, if married, the number of dependents for whom he or she would have financial responsibility.”

The agency defined the “age” factor as follows: “Consular officers should consider the age of the applicant. If the applicant is under the age of 16, he or she will need the support of a sponsor. If the applicant is 16 years of age or older, consular officers should consider what skills the applicant has to make him or her employable in the United States.”

The agency defined the “education and work experience” factor as follows: “Consular officers should review the applicant's job offer (if any). Consular officers should consider the applicant’s skills, length of employment, and frequency of job changes. Even if a job offer is not required, consular officers should assess the likelihood of the alien's ability to become or remain self-sufficient, if necessary, within a reasonable time after entry into the United States”

The agency defined the “financial resources” factor when an I-864 is required as follows: “An alien who must have Form I-864, Affidavit of Support Under Section 213(A) of the Act, will generally not need to have extensive personal resources available unless considerations of health, age, skills, etc., suggest the likelihood of his or her ever becoming self-supporting is marginal at best. In such cases, of course, the degree of support that the alien will be able and likely to provide becomes more important than in the average case.”

Because DOS had already established definitions and guidance surrounding the five factors and their balance with the affidavit of support after IIRIRA, and have been implementing this guidance for the past 20 years, the suggestion by the DOS IFR that this rule change is necessary to implement analysis of the five factors does not withstand scrutiny.

Conclusion

For the reasons described above, CLINIC strongly opposes the interim final rule in its entirety and requests that it be withdrawn. So long as the DHS public charge rule is enjoined, and until its legality is determined, DOS should not impose these harmful measures on immigrants trying to reunite with their families in the United States.

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please do not hesitate to contact Jill Marie Bussey, CLINIC's Advocacy Director, at jbussey@cliniclegal.org should you have any questions about our comments or require further information.

Sincerely,

A handwritten signature in blue ink that reads "Anna Gallagher". The signature is written in a cursive style with a large initial "A".

Anna Gallagher
Executive Director