CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

8757 Georgia Avenue • Suite 850 • Silver Spring, MD 20910• Tel: 301.565.4800• Fax: 301.565.4824 • Website: www.cliniclegal.org

Submitted via Regulations.gov

January 18, 2022

Regulatory Coordinator
Visa Services
Bureau of Consular Affairs
Department of State
600 19th Street NW
Washington, DC 20006

Re: Comment in Response to Visas: Ineligibility Based on Public Charge Grounds, Docket No. DOS-2021-0034, RIN 1400-AE87

The Catholic Legal Immigration Network, Inc (CLINIC) submits the following comments urging the Department of State (DOS) to rescind the interim final rule (IFR) published on October 11, 2019 that attempted to change the long-standing interpretation of the public charge ground of inadmissibility. The regulation at 22 CFR § 40.41 should be allowed to revert to the language that existed prior to the IFR. This regulation has been substantially the same since 1997 when the agency implemented the 1996 statutory changes adding the affidavit of support requirements.

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to more than 430 diocesan and community-based programs in 48 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. Through its affiliates, CLINIC advocates for the just and humane treatment of noncitizens by providing legal services to low-income immigrants and creating and disseminating educational materials for their local communities. CLINIC supports these efforts by conducting trainings, producing written materials, and providing in-depth technical assistance to member organizations regarding family-based immigration, including the public charge ground of inadmissibility.

A. DOS's Role in Interpreting the Public Charge Ground of Inadmissibility

DOS has been the leading federal agency in implementing and interpreting the public charge ground of inadmissibility, both before and after the 1996 statutory changes. For example, the agency issued over two dozen memos and cables during the two-year period from January 1997 through December 1998. On December 29, 1997, the agency published an interim rule adding section 40.41, the regulatory language defining public charge after the 1996 statutory change. The regulation was amended in 2000 to authorize DOS to charge a fee for reviewing affidavit of support

submissions and in 2006 to replace the reference to the Attorney General with that of the Department of Homeland Security. On May 25, 1999, the agency consolidated the interpretive memos described above into the Foreign Affairs Manual (FAM) at 9 FAM 40.41.

During this same time period the Immigration and Naturalization (INS) published the following: a General Counsel legal opinion on July 8, 1997, defining domicile for sponsorship eligibility; interim regulations on October 20, 1997, adding 8 CFR Part 213a; an interpretive memo on Dec. 16, 1997, explaining that adjustment of status applicants do not need to repay public benefits; and a clarification on May 18, 1998, to the interim regulations. While the interim regulations were an important step in defining statutory terms and establishing the protocol for completing and filing the forms, they did not provide any helpful guidance to INS adjudicators, practitioners, or applicants as to how the new requirements were to be incorporated into the public charge assessment. That guidance didn't come until later when the INS published Chapter 20.5, Enforceable Affidavits of Support, in its Adjudicator's Field Manual (AFM).

The reason for DOS's productivity and prolificity on this issue was rooted in its role as primary gatekeeper for those seeking permanent residence based on a family-based petition. The majority of those applicants either resided abroad or needed to depart the United States to seek an immigrant visa at a U.S. consulate. They were applicants who either had no prior residence in the United States or who had likely been employed here only in low-paying jobs due to their lack of work authorization or lawful immigration status. Many of them did not have formal job training, advanced degrees, identifiable employment skills in need in the United States, or English language proficiency. Their counterparts applying for adjustment of status based on a family relationship, however, numbered far fewer and brought different qualifications: they had previously applied for and received a nonimmigrant visa, resided here in lawful immigration status, had a history of paying U.S. taxes, and had likely been working with INS employment authorization. Those seeking adjustment of status based on an approved employment-based petition posed an even lower risk of becoming a public charge.

Beginning December 19, 1997, the immediate need for consular officers was to understand how to adjudicate immigrant visa applications that contained the new multi-page Form I-864 and supporting tax returns. Differing interpretations and general confusion as to how to complete, supplement, file, and evaluate the affidavits of support resulted initially in a very high refusal rate that was eventually remedied through more practitioner and consular experience, as well as publication of further instructions. But the first three years after implementation of the affidavit of support requirements saw a large spike in consular refusals based on a finding of either section 212(a)(4) [public charge] or 221(g) [documentary inadequacies]. Most of these initial refusals were later reversed after the applicant submitted amended or additional I-864s or supporting documents.

The new burden on consular officials of analyzing and evaluating affidavits of support was finally ameliorated when the National Visa Center (NVC) essentially took over the task of determining their legal sufficiency. No immigrant visa interviews were scheduled nor application packets forwarded to the consulate unless the I-864 and supporting documents had been vetted and positively assessed—a practice that was eventually softened when the NVC's verdicts became recommendations. The NVC routinely instructed applicants of the need to submit updated tax

returns, letters from employers, further documentation supporting income estimates, or an affidavit from a joint sponsor. While the NVC officially played a rather limited advisory role as evaluator rather than adjudicator of these forms, that distinction was lost on most applicants.

Meanwhile, consular officials were glad to cede authority to the NVC, and most assumed that affidavits of support they received evidenced income that satisfied the necessary percent of poverty threshold. Foreign service nationals at some consulates still served as "document checkers" and noted any obvious errors or omissions in the I-864s, but the number of initial refusals soon plummeted. The job of consular officials in determining potential public charge inadmissibility was soon reduced to requesting and reviewing updated proof of the sponsor's current income or more recent tax returns.

B. Five Statutory Factors

Neither the USCIS AFM, USCIS Policy Manual, 1999 INS interim field guidance, nor current DHS regulations define or explain how the five statutory factors enumerated at INA § 212(a)(4)(B)(i)—the applicant's age; health; family status; assets, resources, and financial status; and education and skills—are to be factored into the public charge analysis. All of that analysis has focused on the sixth factor: the affidavit of support under section 213A.

Nor are these five factors defined in the 1997 DOS regulations (amended in 2000 and 2006) or current FAM. DOS writes in 9 FAM 302.8-2(B)(1)(a)(3) that "no single factor, other than the lack of a qualifying affidavit of support, in accordance with INA 213A, if required, will determine whether an individual is a public charge." Later, in 9 FAM 302.8-2(B)(3)(a)(1)-(2), DOS lists the five factors and states that the officer "must consider them at a minimum" since they help make up the "totality of the circumstances" analysis that must be applied. But this statement runs almost counter to the next sentence, which repeats an earlier holding that "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 circumstance' analysis."

The five factors, the FAM goes on to explain, should be considered only in "an unusual case in which a Form I-864 has been submitted and should be considered in cases where a Form I-864 is not required." Such "unusual cases" presumably include situations where the applicant "appears likely to have significant health-related costs and likely is unable to work, for example, because the person is of advanced age or has a serious medical condition." 9 FAM 302.8-2(B)(2)(b). The five factors are also identified in 9 FAM 302.8-2(B)(3)(c)-(g), but again, should not be taken into account absent "unusual" circumstances.

The introduction of the mandatory affidavit of support was intended to strengthen the ability of both sponsored immigrants and state or federal benefits agencies to enforce the sponsor's obligations. Weeks earlier Congress had passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193), which eliminated or delayed lawful permanent residents' eligibility to access most federal means-tested programs. Together, the two laws made it nigh-impossible for these immigrants to "become a public charge,"

The introduction of the affidavit of support requirements, at the same time, reduced the need to predict the intending immigrant's future earning potential. The focus shifted to the sponsor and the test became whether his or her "current individual annual income" satisfied the 125 percent of poverty level for the sponsor's household size. Consular officers were freed from requiring immigrant visa applicants to establish their future self-sufficiency and analyzing potential employers' job offers. The five statutory factors were only employed in rare situations where the applicant would be an obvious burden to the sponsor, and even then necessitated only a deeper examination of the sponsor's financial abilities.

The DHS has recently published an Advance Notice of Proposed Rule Making seeking comments on how public charge should be defined and what role, if any, the five statutory factors should play. Please see CLINIC's comments to that ANPRM. CLINIC urges DOS to abstain from defining this term through regulation, but rather use the FAM and policy memoranda for this purpose. Should the DOS elect to publish a new proposed regulation, CLINIC requests the agency to delay until after USCIS has published its final rule.

C. State Department Regulations

DOS regulations interpreting grounds of inadmissibility are traditionally concise and broad in nature. They provide the essential framework; the practical details and instructional guidance are set forth in the FAM or policy memos.

Regulations interpreting the grounds of inadmissibility are located at 22 CFR Part 40. More specifically, the regulations begin at 22 CFR § 40.11 and extend to 40.41. Most of the grounds and subsections are actually marked as "reserved." For those grounds that are covered and defined, the definition typically consists of only two or three paragraphs. In fact, the regulatory text for all the grounds of inadmissibility combined, except for public charge, would total approximately four pages. In contrast, current section 40.41 defining public charge consists of 73 paragraphs and 12 pages of text. In short, it is grossly out of balance with the agency's standard practice.

The purported justification for the Trump administration's deviation from custom—where the details are set forth in the FAM and revised as needed—was to make it more difficult to reverse the agency's new radical interpretation of public charge. DOS needs to return to its prior practice and align the public charge regulation with those defining other grounds of inadmissibility.

D. DOS and INS/DHS Collaboration

While the DOS has endeavored to mirror its interpretation of public charge with that of the INS or the Department of Homeland Security (DHS), it hasn't always succeeded. In fact, the goal of perfect alignment is unrealistic and even inappropriate, given the different characteristics of applicants for adjustment and those for an immigrant visa.

Both DOS and DHS control the approval of applicants for permanent residency and/or their entry into the United States—at the consular processing and at the border inspection stages—and should be applying similar standards. As explained, during the period from 1997-1999, the DOS published numerous policy memos, as well as updated the FAM, which provided consular officials with guidance on how to interpret the new public charge statutory changes. Both agencies also

published interim regulations during that period. While the agencies apparently collaborated so that their guidance reflected similar analysis and understanding, they were not marching in lockstep. The FAM employed language that specifically limited consideration of the five statutory factors and emphasized the importance of the affidavit of support; the AFM didn't even mention the five factors but provided detailed advice to adjudicators on how the I-864 and related forms should be completed and analyzed.

Consistency and uniformity are worthy goals that should apply with the two agencies' interpretation of all the grounds of inadmissibility, not just public charge. Otherwise, as DOS notes, DHS might deny admission to an applicant after the consulate has granted the immigrant visa and determined the applicant is not inadmissible on those same facts. But the review that CBP performs of an immigrant visa grantee seeking admission at the border is of an elementary nature: Was the applicant in a category eligible for an immigrant visa? Did the applicant remain in that category after being granted the visa (e.g., hasn't gotten married, divorced, or aged out)? Has he or she been convicted of any crimes in the interim? Has the petitioner or principal beneficiary died? CBP officers do not review affidavits of support and make independent assessments of the likelihood that the person will become a public charge. This doesn't happen for a variety of practical reasons, including the fact that CBP officers are not trained or experienced in spotting potential public charge.

In fact, there have been numerous situations where the two agencies have developed differing interpretations, including on the following: whether acts inconsistent with a nonimmigrant visa trigger a presumption of misrepresentation (the DOS "90-day rule"); the age below which a child lacks the mental or legal capacity to make a false claim of citizenship; the effect of a DUI conviction or arrest and the triggering of a health ground of inadmissibility. At the moment, DHS has determined—correctly—that providing a false name or nationality during processing for voluntary return after an arrest at the border does not form the basis for a finding of misrepresentation; DOS has reached the opposite conclusion.

They don't even agree on some fundamental public charge-related issues. DOS takes the position that the sponsor's household member must be in lawful immigration status in order to complete a Form I-864A, while the DHS regulation at 8 CFR § 213a.2(c)(2)(i)(C)(1) states exactly the opposite. Some consulates during the Trump era routinely asked for written proof of the "credibility" of a joint sponsor if he or she was not closely related to the immigrant visa applicant; USCIS never did that since the credibility of the signer of a legally-enforceable contract should be irrelevant.

But even those divergences did not result in immigrant visa recipients being denied admission by CBP. So while the two agencies have agreed for the most part on how the public charge ground of inadmissibility should be interpreted and applied, any differing opinions have not and would not pose an existential problem.

DHS is now applying the interpretation and public charge standard set forth in the 1999 interim guidance. Should DOS rescind its current regulation at 22 CFR § 40.41, it would be returning to the one it published in 1997 (updated in 2000 and 2006). The prior language of 22 CFR § 40.41

consists of six paragraphs and explains that in order to comply with the statutory requirements of INA § 213A and not be found inadmissible under INA § 212(a)(4), the immigrant visa applicant must submit an affidavit of support that satisfies the requirements set forth by DHS. This is undisputed and fundamental. It is elemental analysis that reflects the agency's practice when drafting regulations. It frees DOS to then flesh out through the FAM how the public charge rule should be interpreted and implemented by its consular officials, which it has already done.

E. Chilling Effect of IFR

The language in 22 CFR § 40.41—albeit currently enjoined and not enforced—remains on the books and acts to discourage low income persons from seeking needed health care and other public benefits to which they are entitled. The affected community includes U.S. citizens and lawful permanent residents, nonimmigrants, applicants for various immigration programs and benefits, persons allowed to remain here due to humanitarian factors, and even those without any lawful immigration status. Most of them reside in "mixed status" households. Numerous studies have been conducted and reports generated establishing the chilling effect that the Trump administration's public charge rules had on those who would otherwise have sought these services. In the time of a global pandemic, such forbearance has negatively impacted everyone, given the lightning speed and ease with which the latest covid variant is spreading. CLNIC is simply joining the chorus of national and local organizations requesting that this regulation be erased from the books so it no longer poses a public health threat.

F. 22 CFR § 40.41 Mimics Vacated DHS Rule

The DHS 2019 public charge regulation was a product of the Trump administration's effort to reduce overall immigration to the United States by applying a "wealth test" that would seemingly prevent working class applicants or those from developing countries from qualifying. It invented a new public charge definition—and the requirement that applicants submit evidence of their employment history, income (measured against 125 percent of U.S. poverty levels), assets, job skills, age (between 18-62), health and able-bodiedness, education, health insurance, credit rating, and English proficiency—that would weed out all but those who could assume or resume a middle-class lifestyle upon immigrating. It granted broad discretionary powers to adjudicators when applying a complicated, multi-factored, and ill-defined balancing test. In short, since only the wealthy need apply, lawful permanent residence would have been reserved for those who were already living the American Dream, not those seeking to find it.

The administration also used public charge as a back-door way of redirecting immigration priorities away from those based on family relationships and toward a "point system" where applicants would be measured and graded based on their age, education, job training, job offers, and prior "extraordinary achievements." Congress had rejected this proposal, so the Trump administration was simply trying another tactic.

The courts soundly rejected this new public charge definition as an obvious overreach and departure from congressional intent; the regulation was enjoined, vacated, and erased from the Code of Federal Regulations.

DOS published its interim rule in October 2019 in an effort to emulate at the consular level what DHS was intending to do for adjustment of status applicants. In fact, DOS had already moved ahead of DHS when it modified the FAM in 2018 to strip out language stressing the importance of a legally sufficient affidavit of support and adding language shifting the focus onto the intending immigrant's age, health, family size, financial status, education, and job skills. The 2018 FAM also emphasized the broad discretionary power of consular officers to make a finding of public charge notwithstanding the strength of the affidavit of support or the qualifications of the applicant.

The DOS public charge interim final regulation is substantively identical to the DHS rule that was found unlawful, vacated and withdrawn. Both the DOS IFR and the 2018 FAM changes were preliminarily enjoined. CLINIC is requesting simply that this DOS regulation be stricken from the books.

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

Sincerely,

Anna Gallagher
Executive Director