Disability Rights Education & Defense Fund

Dec. 10, 2018 *Via Electronic Submission to* www.regulations.gov

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

Re: Notice of Proposed Rulemaking: Inadmissibility on Public Charge 0Grounds, DHS Docket No. USCIS-2010-0012, RIN 1615-AA22

Dear Ms. Deshommes:

Disability Rights Education and Defense Fund (DREDF) thanks you for the opportunity to submit comments on the Department of Homeland Security's proposed rule to change how inadmissibility on public charge grounds will be assessed (proposed rule). DREDF is a national cross-disability law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and development of legislation and public policy. We are committed to increasing accessible and equally effective healthcare for people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives.

We believe that the proposed rule would greatly harm immigrants with disabilities and their families, as well as minor citizen children with disabilities who have non-citizen parents, by discouraging enrollment in critical healthcare, food and housing services for which they are eligible. The result would leave immigrants less healthy and less capable of achieving the "self-sufficiency" that is the stated goal for the proposed changes, would increase state and federal healthcare costs by fostering delayed health treatment and use of costly emergency care, and would increase the risk of public health concerns such as decreased vaccination and wellness among vulnerable groups. Moreover, DHS's proposed rule contradicts the reasoned analysis of multiple federal agencies with relevant expertise supporting the rules laid out in the Immigration and Naturalization Service's (INS's) 1999 interim guidance concerning public charge determinations,[1] is

[1] U.S. Dep't of Justice, Immigration and Naturalization Service, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* (May 26, 1999), and U.S. Dep't of Justice, Immigration and Naturalization Service, *Memorandum of Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, for All Regional Directors* (May 20, 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.

inconsistent with Congressional intent and established federal anti-discrimination law; and fails to meet Administrative Procedures Act requirements.

1. The Proposed Rule Would Harm People with Disabilities and Lead Many to Avoid Using Needed Services

The proposed rule significantly changes DHS interpretation and practice on the public charge provisions. Current interpretation deliberately takes a narrow view of the *kinds* of benefits that will trigger public charge review, *how much* use of public benefits will trigger a review, the weight that will be placed upon benefit use in "the totality of the circumstances" in any individual case, and *who* will be caught by the review. DHS's proposal to abandon current practice privileges short-sighted fiscal savings above the well-being of both those immigrants who are directly affected by the proposed rule as well as immigrants such as refugees and asylum seekers who are **not** intended to ne caught within the rule change.

Abandoning the "Primarily Dependent" Standard

First, the proposed rule reinterprets "primary dependence" to a virtually any use of a wide range of public benefits. The proposed new public charge review would no longer look for whether public benefits represent more than half of the person's income and support,[2] but would use an exceedingly low threshold that counts all monetizable benefits with a combined value that exceeds 15% of the Federal Poverty Guidelines for a household of one within 12 months (just over $1800), or for non-monetizable benefits, receipt of such benefits for at least 12 months within a 3-year period.[3] Despite acknowledging that the current approach is straightforward and easy to administer,[4] DHS proposes a dramatic change that is far more difficult to understand and explain, and will result in counting anything above a "nominal"[5] level of benefits without any specific evidence demonstrating why this change is necessary or justifying the particular threshold of 15% of the Federal Poverty Guidelines. Such minimal use of public benefits for a temporary period points equally to the inherent uncertainty and exigencies of life, which can occur if a sponsoring company goes out of business or with the occurrence of a heart attack or a child developing a disability, rather than an indication of ongoing dependence on public benefits.

Expanding the Types of Benefits Considered

Second, the proposed rule would vastly expand the types of benefits that count in a public charge determination. The current rule applied by the government, set forth by the INS (now the U.S. Citizenship and Immigration Services within the Department of

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[2] Dep't of Homeland Security Notice of Proposed Rulemaking, 83 Fed. Reg. 51114, 51163 (Oct. 10, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-10-10/pdf/2018-21106.pdf.

[3] *Id.* at 51158, 51164.

[4] *Id*. at 51164.

[5] *Id.* at 51165.

Homeland Security, or USCIS) after extensive consultation with other federal agencies with relevant expertise (including the Department of Health and Human Services, the Social Security Administration, and the U.S. Department of Agriculture), counts only cash benefits for income maintenance (such as Temporary Aid to Needy Families and Supplemental Security Income) and long-term institutionalization at government expense in considering the "resources" factor in public charge determinations.[6] These agencies agreed that receipt of cash benefits and long-term institutionalization were the "best evidence" of whether a person is primarily dependent on the government for subsistence, and that other benefits should be excluded.[7]

In particular, the INS "sought to reduce negative public health and nutrition consequences generated by the confusion [about public charge determinations]" and aimed to stem the fears that were causing noncitizens to refuse limited public benefits, such as transportation vouchers and child care assistance, so that they would be better able to obtain and retain employment and establish self-sufficiency.[8]

Without specific evidence justifying such a damaging expansion of public charge benefits, DHS proposes to include within the public charge determination a slew of benefits and services commonly used by people with disabilities, including Medicaid, Supplemental Nutrition Assistance Program benefits (SNAP or Food Stamps), Section 8 housing vouchers and project-based rental assistance, and Medicare Part D benefits. Healthcare, housing, and nutrition are key social determinants of health widely acknowledge by healthcare and public health professionals as necessary to the maintenance of good health. Many persons with disabilities have a thinner margin of good health to lose, and are already subject to health and healthcare disparities because of inaccessibility as well as income levels.[9] An immigrant with disabilities who is trying to avoid applying for or using needed healthcare, food, and housing benefits to increase his or her chances of achieving permanent residency could well be damaging his or her capacity to succeed in school, hold and job, and gain the very self-sufficiency lauded by the proposed rule. These damaging implications will only be multiplied if Children's Health Insurance Program (CHIP) benefits were included among the public charge determinations, as children with disabilities usually need timely early interventions to maximize their functional capacity and success as they grow.

The proposed rule correctly notes that the "wide array of limited-purpose public benefits now available did not yet exist" at the time that the public charge rule was developed in the 19th century,[10] but ignores the fact that these benefits were well-established and

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[6] *Id.* at 51133.

[7] *Id.* at 51133, 51163-64.

[8] *Id.* at 51133.

[9] Silvia Yee, et al., Compounded Disparities: Health Equity at the Intersection of Disability, Race, and Ethnicity, Nat'l Acads. Sci., Eng'g, & Med. (2017), http://nationalacademies.org/hmd/Activities/SelectPops/HealthDisparities/Commissioned-Papers/Compounded-Disparities.

[10] Dep't of Homeland Security Notice of Proposed Rulemaking, 83 Fed. Reg. at 51164.

considered when the INS and other agencies determined that most of them should be excluded in public charge determinations.

Heavily Weighting Receipt of Benefits as a Negative Factor

The proposed rule also specifies that receipt of or approval for benefits would now be considered a "heavily weighted negative factor" in determining whether a person is likely to become a public charge.[11] Age, either being older or being younger, is another negative factor weighing against an individual applicant. This is yet another link to disability, since older family members are often sponsored for immigration by a family member who seeks their assistance with personal care for themselves or for children with disabilities. Furthermore, the fact that youth is already counted against an individual is another reason that speaks against adding CHIP benefits to the list of public charge programs. The double negative impact would enforce stereotypical assumptions about youth with disabilities' limited prospects for independence and self-sufficiency, and there is absolutely no indication that USCIS agents will receive training or education to help them overcome their own assumptions about disability when they wield discretion in the public charge determination.

Modifying the "Health" Factor

The proposed rule would also add new language to the current regulation describing how an individual's health is to be considered in making public charge determinations. The new language would specify that, when considering an individual's health, DHS will consider "whether the alien has any physical or mental condition that . . . is significant enough to interfere with the person's ability to care for him- or herself or to attend school or work, or that is likely to require extensive medical treatment or institutionalization in the future."[12] This standard is broad enough to sweep in virtually every person with any type of significant disability and, depending on how it is construed, many individuals with disabilities that are less significant. Some might even read it to apply to any child with an Individualized Education Plan (IEP), or any person who needs reasonable accommodations to work.

The proposed rule would also heavily weight against a person the presence of a health condition likely to require extensive medical treatment or interfere with the ability to provide for oneself, work, or attend school if the person has no prospect of securing private insurance and no means to pay for reasonably foreseeable medical costs. Again, this raises grave concerns for DREDF about the unchecked influence of pervasive social myths that link disability and public benefit use in the mind of the general public, as well as among healthcare professionals.

Expanding Who is Covered

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[11] *Id*. at 51292.

[12] *Id.* at 51182.

The proposed rule would broaden the application of the public charge determination beyond applications for permanent residence to include applications to extend a non-immigrant visa or to change the status of a current visa, such as a student visa to an employment visa. This again further expands the potential of catching individuals, such as graduate students who either have disabilities themselves or family members with disabilities, who may apply for and receive a limited period of public benefits while transitioning between the end of studies and the beginning of a career in the U.S. based on their unique skills.

These Changes Would Cause Great Harm to People with Disabilities

The combination of dramatically expanding the benefits that count against a person in a public charge determination, lowering the threshold to consider all benefits above a "nominal" amount, and heavily weighting receipt of these benefits against a person, along with negatively weighting the existence of health conditions and age factors, would effectively place virtually anyone with a significant disability in serious jeopardy of being deemed likely to become a public charge.

In addition to the harms that may be caused by actually finding an adult or child likely to become a public charge and preventing them from obtaining lawful permanent resident status, the proposed rule would cause precisely the type of damage that led the INS to exclude consideration of most of these benefits previously: it would lead many people to decline needed health and other services, creating "negative public health and nutrition consequences" and making it more difficult for people to secure employment. Indeed, there is evidence that even before reports of the contents of the proposed rule surfaced, "families were already experiencing growing fears of participation in health, nutrition, and other programs that led them to disenroll or avoid enrolling themselves and their children."[13] DHS itself acknowledges many potential "unintended consequences" of the proposed rule, which extend to broad public health, educational, and economic deficits that will extend to the general public and people with disabilities and not only immigrants directly targeted by the proposed rule,[14] but the Department mystifyingly seems willing to overlook these problems as mere "collateral damage."

2. The Proposed Rule Would Undermine the Purpose of the Public Charge Rule by Driving Up Public Costs

Even if limiting government spending on individuals who have immigrated to the U.S. would have the temporary short-term effect of reducing program expenditures at the federal level, the proposed changes to the rule are likely to have an increasingly opposite effect as time passes. The disenrollment of large numbers of individuals from needed health, housing, nutrition and other benefits (or their non-enrollment in such benefits) will force those individuals to forego preventive care and ongoing health

[13] Henry J. Kaiser Family Foundation, Proposed Changes to "Public Charge" Policies for Immigrants: Implications for Health Coverage, https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage.

[14] Dep't of Homeland Security Notice of Proposed Rulemaking, 83 Fed. Reg. at 51270.

maintenance. In the end, this will drive *up* health care costs. Removing access to key social determinants of health such as health coverage, housing, and food assistance can be expected to lead to increased use of costly emergency department services, temporary hospitalizations, and complex late-stage treatment that could have been avoided if individuals had earlier sought less costly preventive care, adequate nutrition, and housing assistance. For children there will also be negative educational implications and increased need for educational interventions. The costs of emergency services and urgent last-minute care will be on the backs of local and state budgets, and will also directly drag on federal government assistance.

3. The Proposed Rule is Inconsistent with Congressional Intent

As DHS observes in the preamble to the proposed rule, Congress provided in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) that all "aliens," including nonimmigrants and undocumented immigrants, would be eligible for certain public benefits due to the importance of those benefits—for example, emergency Medicaid, crisis counseling, certain types of housing assistance, mental health and substance use disorder treatment, and other services.[15] Certain immigrants would also be eligible for additional important benefits, such as SNAP, Head Start, and school lunch. When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) shortly after PRWORA, adding the five public charge determination factors that DHS is now interpreting, it made no change to the PRWORA provisions affording certain public benefits to immigrants.

DHS acknowledges that there is overlap between benefits that Congress required to be provided to all aliens and the benefits it now proposes to weigh heavily against individuals in public charge determinations. It contends, however, that "[t]here is no tension between the availability of public benefits to some aliens as set forth in PRWORA and Congress's intent to deny visa issuance, admission, and adjustment of status to aliens who are likely to become a public charge."[16] According to DHS, Congress "must have recognized that it made certain public benefits available to some aliens who are also subject to the public charge grounds of inadmissibility, even though receipt of such benefits could render the alien inadmissible as likely to become a public charge."

This interpretation strains credulity and is simply not a reasonable interpretation of the statutes, as required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Congress afforded certain public benefits to immigrants because of its concern about their importance and the impact of individuals not receiving those services when needed. That concern is wholly inconsistent with DHS's proposal to afford those services to certain immigrants only on pain of jeopardizing the ability to secure permanent resident status. Contrary to DHS's interpretation, the enactment of the two statutes close in time suggests that Congress assumed that

[15] 83 Fed. Reg. 51131-32.

[16] *Id.* at 51132.

receipt of these benefits would *not* be counted against a person in determining whether the individual is likely to become a public charge.

4. The Proposed Rule Improperly Construes the Statute in a Manner Inconsistent with Federal Anti-Discrimination Law

Section 504 of the Rehabilitation Act prohibits disability-based discrimination in any program or activity of a federal executive branch agency, including DHS.[17] To the extent that the Immigration and Nationality Act (INA) applies to federal agency programs and activities regulated by Section 504, it must be read *in pari materia* with Section 504. Accordingly, the INA's provisions concerning public charge determinations must be read in a manner that aligns with Section 504's prohibition on disability-based discrimination.

The proposed rule's breathtakingly broad reading of the statutory "health" and "resources" factors for public charge determinations are inconsistent with Section 504's prohibition on disability-based discrimination. As noted above, together these modifications would likely result in virtually all people with any type of significant disability being considered a public charge. These determinations would be made based on heavily weighting benefits such as Medicaid that are essential for large numbers of people with disabilities[18] as well as directly considering individuals' disabilities and adversely treating any significant disability. Contrary to DHS's argument that these determinations are individualized and would merely consider disability as part of the "totality of circumstances,"[19] the proposed formula effectively authorizes blanket determinations that anyone with a significant disability is likely to become a public charge and does nothing to overcome the presence of disability assumptions and prejudice among decision-makers who continue to have wide personal discretion to interpret the totality of the circumstances.

This reading of the public charge statute is not only inconsistent with the intent of the Immigration and Nationality Act, which was previously amended to ensure that individuals were not determined inadmissible based simply on their disability status,[20] but is also inconsistent with Section 504's bar on disability-based discrimination in DHS's programs and activities. DHS states that it is not singling out people with

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[17] 29 U.S.C. § 794(a).

[18] For many individuals with disabilities, Medicaid is the only possible source of coverage for the home and community-based services that they need to live and work in their communities. Commercial insurance generally does not cover services such as attendant care, skill-building services, peer support, crisis services, respite care, and employment services. Medicare also does not cover home and community-based services, and it generally does not even cover institutional long-term care.

[19] 83 Fed. Reg. 51184.

[20] Shortly after passage of the Americans with Disabilities Act, the Immigration and Nationality Act was amended to eliminate provisions that made individuals inadmissible on the basis of having certain disabilities. Immigration Act of 1990, PL 101-649, 104 Stat 4978, sections 601-603 (Nov. 29, 1990) (deleting and replacing language excluding "[a]liens who are mentally retarded," "[a]liens who are insane," "[a]liens who have had one or more attacks of insanity," "[a]liens afflicted with psychopathic personality, or sexual deviation, or a mental defect," and "[a]liens who are … chronic alcoholics").

disabilities because other factors must be considered as well, but between the proposal to adversely consider any significant disability under the health factor, the proposal to give heavy negative weight to receipt of benefits used by large numbers of people with significant disabilities, and the proposal to give heavy negative weight to having such a disability without private insurance coverage or the means to pay independently for medical costs, these provisions undoubtedly single out people with disabilities. It is immaterial that other factors besides disability are considered if the consideration of these factors all but predetermines a negative outcome for anyone with a significant disability. When all the factors are looked at together, there is really only one factor that is truly a positive one and that is the factor of income. The fact that an income level above 250% of federal poverty level can lead to a positive public benefits outcome for some small number of applicants with disabilities does not, in itself, cancel out the existence of discrimination on the basis of disability against every individual who does not reach that income level.

5. The Proposed Rule Does Not Meet Administrative Procedures Act Requirements

The Administrative Procedures Act (APA) requires a federal agency conducting a notice and-comment rulemaking to "examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."[21] Moreover, there is a presumption "against changes in current policy that are not justified by the rulemaking record."[22] DHS offers no relevant data or other evidence to explain why the interpretation used by the federal government for the last twenty years is inappropriate or to justify why the particular articulation of the resources and health factors that it proposes is necessary. Much more is required in order to justify this massive change in the agency's interpretation of federal law.

Conclusion

The proposed rule actually quotes from the Americans with Disabilities Act: ''[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to. . . contribute to society; pursue meaningful careers; and enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society.''[23] But the analysis that follows clearly misapprehends what those words mean and what the ADA stands for. Federal disability rights law affirms the proposition that the presence of a disability is not determinative of an individual's capacity, promise, and future accomplishment. The proposed changes in the public charge rule in essence reduce immigrants with disabilities to their disability.

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[21] *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). *See also* Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 477-489 (4th ed. 2006).

[22] *Motor Veh. Mfgs. Ass'n* at 42.

[23] Dep't of Homeland Security Notice of Proposed Rulemaking, 83 Fed. Reg. at 51184
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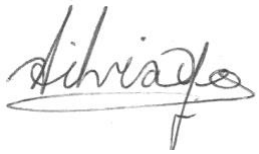
Like disability, being "self-sufficient" is another component of life that is a natural part of the human experience. At times we have all experienced a lack of self-sufficiency as circumstances from natural disasters to individual accidents to events such as giving birth, divorce, acquiring a medical condition, or a spouse's death radically affect our own resources and human capacity. Public programs such as Medicaid, food stamps and Section 8 housing benefits are intended to help us weather different life circumstances as individuals and as a community. No American, and no immigrant, can guarantee a lifetime of being "self-sufficient." Placing that weight on immigrants with and without disabilities lessens all of us.

For the foregoing reasons, DREDF opposes the proposed rule and strongly changes that will not force people with and without disabilities to choose between meeting basic survival needs as healthcare, housing and food, or the opportunity to become a permanent resident. Please feel free to contact me if you have any questions or comments concerning the above.

Sincerely,



Silvia Yee
Senior Staff Attorney