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Submitted via 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 Avenue NW
Washington, DC 20529-2140

Re: DHS Docket No. USCIS-2010-0012

Dear Ms. Deshommes:

On behalf of the Boston Bar Association's (BBA) Immigration Law Section, we respectfully submit these comments in opposition to the proposed regulations related to Public Charge determinations, DHS Docket No. USCIS-2010-0012.[1] The BBA's Immigration Law Section draws enthusiastic, committed lawyers working in a wide range of legal environments and looking to expand their expertise on the complex, evolving issues confronting a successful immigration practice. Led by a Steering Committee of attorneys in private and public interest practice, the Committee provides programing for Bar members and members of the public and advises BBA Government Relations staff on public policy matters that impact immigration law.

The proposed rule seeks to implement standards that require a broad review of factors relating to financial status, and to give discretion to USCIS to understand, analyze and apply these financial factors in determining whether immigrants and non-immigrants are admissible. We are deeply concerned by this vast expansion of the definition of public charge, including the proposed consideration of an array of housing, healthcare, and nutrition benefits and the expansion of a public-charge-like determination to non-immigrant employment and student status changes and extensions. We write in opposition as the provisions in the proposed regulation fail to address, and in many ways contradict, the stated purpose provided, do not adequately explain and define the costs and benefits of the rule, and provide standards that are too broad and amorphous to be applied fairly and predictably. In addition, if enacted, the proposed rule will greatly harm the health and well-being of immigrants, their families, and our communities as whole, burden our healthcare and housing systems and our local and national economies, and hinder the ability of immigration law attorneys to provide accurate and consistent advice, in addition to threatening family-based immigration overall and thwarting access to justice principles important to this Section, and the profession as a whole.

Misaligned purpose and provisions

According to DHS, the stated purpose of the rule is to better ensure that "aliens subject to the public charge inadmissibility grounds are self-sufficient."[2] However, many of the benefits included in the proposed regulation, including Medicaid, Medicare Part D prescription drug

[1] Please note that the following comment does not reflect a position of the Boston Bar Association and is instead being in submitted on behalf of the interested section.
[2] https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds

assistance, the Supplemental Nutrition Assistance Program (SNAP), and housing benefits, are intended to, and ultimately lead to self-sufficiency. Indeed, in 1999 the government offered guidance on public charge determinations that made this exact point. That guidance specifically noted that these types of benefits "are often provided to low-income working families to sustain and improve their ability to remain self-sufficient."[3]

The government has also recognized the role these types of benefits play in preventing, not predicting, dependency on government benefits in other contexts. For example, U.S. Department of Housing and Urban Development is on record stating, "[q]uality, stable housing, which housing assistance makes possible, is a foundation for self-sufficiency."[4] Outside research further supports this understanding: a recent report by the Center for Budget and Policy, for example, found that "Programs like SNAP (food stamps), the EITC and CTC, and Medicaid support millions of low-income working families and help *promote work.*"[5]

DHS fails to adequately explain why, contrary to previous government guidelines, including guidance on the very rule being addressed, receipt, or likely receipt, of public housing, health, and nutrition benefits is no longer a step toward self-sufficiency but instead a signal that one is or will soon not be self-sufficient. The most apparent explanation is that DHS has based the proposed regulation on ill-informed assumptions about low-income immigrants coming to America with the intention of relying only on public assistance.

This approach appears even more illogical when considered in light of the substantial body of research which indicates that both non-citizen adults and children have lower rates of public benefit use than U.S.-born citizens and that the average value of that benefit use per recipient is almost always higher for citizens.[6] Plus, in the data DHS supplies about the use of benefits by foreign nationals, they fail to explain what percentage of that is being collected by the listed immigrant categories specifically excluded from the public charge determination, including those seeking asylum or entering as refugees. In addition, immigrants contribute much more than they use in public benefits.[7] Undocumented immigrants are not even eligible for most benefits, including SNAP, Medicaid, CHIP, and housing assistance and yet they contribute billions of dollars to these very benefit programs each year.[8]

Finally, DHS and the government seems intent on making it more difficult for immigrants to obtain economic independence through employment. Obtaining employment authorization in the United States for foreign nationals has recently been taking an unprecedented amount of time. Even for those who are clearly entitled to it, obtaining employment authorization can take so long that it hinders an individual's ability to work and support themselves. For example, highly educated H-1B visa holders who come to work in the U.S. and provide much needed skilled work, are told that absent very limited circumstances, their spouses cannot work in the U.S. They are effectively limited to a one-income household, which many Americans cannot live by. Additionally, the current processing times for employment

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[3] https://www.gpo.gov/fdsys/pkg/FR-1999-05-26/html/99-13188.htm
[4] https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_112315.html
[5] https://www.cbpp.org/research/various-supports-for-low-income-families-reduce-poverty-and-have-long-term-positive-effects (emphasis added)
[6] https://object.cato.org/sites/cato.org/files/pubs/pdf/workingpaper-13_1.pdf ; https://www.cato.org/blog/immigrants-their-children-use-less-welfare-third-higher-generation-americans
[7] https://journals.sagepub.com/doi/abs/10.1177/0020731418791963?journalCode=joha& ; https://www.newamericaneconomy.org/issues/taxes-&-spending-power/
[8] https://econofact.org/do-undocumented-immigrants-overuse-government-benefits

authorization are now 1 to 19.5 months. This again effectively eliminates employment authorization for many individuals. The proposed regulations seek to limit immigration status changes and extensions for those who utilize public benefits, but the same agency has also effectively prevented many foreign nationals from obtaining employment authorization that would obviate the need for those benefits.

In sum, while the purported purpose of the rule is to ensure that immigrants are self-sufficient, the proposed regulation has not provided any evidence that refutes that the types of public benefits that will now be considered in the public charge determination are actually intended to bolster self-sufficiency and DHS elsewhere has deployed policies and practices that actually make it more difficult for immigrants to become independent. Nor has DHS acknowledged how the proposed regulations will achieve its purpose when it is a well-documented fact that foreign nationals generally come to the United States to work and that immigrants contribute much more than they use in benefits.

Inadequate Cost-Benefit Analysis

At the outset, the proposed regulation analyzes the costs and benefits to implementation of the public charge rule, and estimates that immigrants would unenroll in benefits they would otherwise be eligible for, resulting in a reduction in $2.27 billion of funds spent on these benefits annually. Incentivizing or frightening immigrants into voluntarily giving up benefits may result in an immediate reduction of funds spent on certain benefits, but experience and history has shown that reducing these types of benefits costs society as a whole significantly more in the long run. DHS fails to adequately assess and analyze what the actual costs of this proposed rule may be.

For example, DHS fails to thoroughly consider the increased costs that will result when individuals no longer have access to benefits. They acknowledge the potential consequences, including "worse health outcomes," "increased use of emergency rooms...as a method of primary health care," "increased prevalence of communicable diseases," "increases in uncompensated care," increased rates of poverty and housing instability, and "reduced productively and educational attainment," but do little to adequately analyze the scope or scale of this burden.

A recent example from a member of Section highlights just how costly lack of access can be, even for one individual case. The matter involved a foreign national who had a traumatic brain injury and could not live on his own. He was housed in a state hospital where the cost to care for him was over $1.6 million dollars for room and board alone for a period of just over 5 years. He was eligible for certain social benefits which would allow him to move to a group home, significantly reducing the cost to the government, and also providing services that would allow him to work and support himself – in other words the benefits would cause him to become largely self-sufficient. However, because of his immigration status he was unable to utilize the benefits and his only option was to remain at the hospital at a tremendous expense.

The costs of lack of access to benefits will be especially high due to the anticipated chilling effect of the proposed regulation. For fear of future negative immigration consequences, it is estimated that millions of immigrants will drop or choose not to pursue these benefits. Due to misinformation and confusion, many who are technically exempt from the rule like asylees and refugees, who also happen to be among our most vulnerable, are also expected to forgo critical assistance. And already, despite the rule not yet being in effect, immigrants are being impacted by this chilling effect, as is illustrated in the below fee waiver anecdote.

Again, DHS fails to adequately address the scope of the impact in the provided cost-benefit analysis. For example, DHS estimates that roughly 350,000 will be impacted by the rule; however, many studies conducted since the proposed regulations' release have positioned that figure closer to 25 million.[9] Additionally, the cost-benefit analysis does not adequately discuss the fact that where foreign born individuals refrain from using needed public benefits, their U.S. born children also lose the benefit and the associated cost to citizens with that loss.

As alluded to above, DHS further fails to fairly consider or weigh the benefits of providing services to immigrants and non-immigrants. The benefits now included assist families; prevent individuals from becoming homeless; clothe, educate and feed children; and provide other social services and benefits to help individuals and families reach economic stability, and DHS does not offer estimates of the value these things add, often in money saved to state and local economies. And while the proposed regulation provides financial information and statistics in Tables 10, 11 and 12 indicating the number of participants in public benefits, the percentage of foreign nationals, and the cost, there is no discussion of the above-mentioned research which shows the contributions of immigrants to these benefit programs.

Finally, the proposed rule, especially as it now applies to non-immigrant statuses, will also result in the loss of workers and talent. The Boston Planning and Development Agency has expressed special concern about this impact, highlighting that affected immigrants contribute $500 million annually to the income of Boston residents and that Boston could lose approximately 12,000 workers (who support the jobs of an additional 5,600 workers).[10] In addition, roughly 4,000 college and university students and nearly 2,000 college-educated workers could be impacted by the rule in Boson alone. DHS fails to provide an adequate estimate of the costs that will be incurred due to these worker and talent losses.

Overall, with such sweeping public health, economic, and immigration consequences, DHS must adequately explain and analyze the full and actual anticipated costs before enacting any of these proposed changes.

Inadequate Standards and Guidance

In addition to its misaligned purpose and inadequate cost-benefit analysis, the proposed regulation does not include a set of standards that can be applied predictably, uniformly, and fairly. The broad, amorphous, and discretion-dependent approach to public charge determinations may very well lead to unequal and inconsistent application of the rule.

Discretionary power

The "totality of circumstances" standard referenced in the proposed regulation gives broad discretionary power to the adjudicating office to an issue that has been much more structured in the past. The proposed regulation recognized there is a "scarcity of legislative guidance and case law defining public charge." However, in the proposed regulation, reference is made to a Senate Judiciary Report from 1950 which specifically discouraged establishing a strict definition of the term public charge by law because of the tendency to vary case by case. The

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[9] http://fiscalpolicy.org/public-charge (estimating that 24 million people, including 9 million children, would be potentially chilled by the rule change); https://www.manatt.com/insights/articles/2018/public-charge-rule-potentially-chilled-population (estimating that 26 million people, including 9.2 million children would be potentially chilled by the rule change); https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/ (showing that between 2.1 to 4.9 million Medicaid/CHIP enrollees could disenroll)

[10] http://www.bostonplans.org/getattachment/e856c564-bf0f-47d4-9a44-75b430903f82

report recommended that the determination be at the discretion of the consular officer and the Commissioner. To rely on a report from 1950 does not seem to take current economic factors into consideration. Economics, immigration, and the world in general has changed so much so that a 1950 report regarding public charge determination may no longer be relevant in many respects. Prior to implementing such a measure, more current economic and immigration factors should be reviewed. Troublingly, such broad discretion will likely result in inconsistent and unequal application of the rule, and adjudicating officers may be more likely to rely on bias, conscious or unconscious, in making these determinations. The fact that the factors listed for consideration and for heavily weighed negative consideration are more negative than positive will make it even more difficult for adjudicators to apply a fairly balanced approach to these adjustment of status and admissions decisions. We are also deeply concerned that the rule will consequently result in significantly more denials of family-based adjustment of status applications,[11] a core area of practice for our members.

The unpredictability and unbalanced set of factors in the rule, as well as the resulting reduction in family-basd adjustment cases approved, will make it riskier and likely more costly, with the new forms and RFEs that are to be expected, given so much new complexity, for the solo practitioner and small firms who frequently represent clients in these matters to take their cases. Undoubtedly, more immigrants will have no representation, counter to our professional and organizational aspirations to ensure that more people, including low-income immigrants, are represented.

Broad factors

The proposed regulation lists many factors to be taken into consideration: age, health, family status, assets, resources and financial status, and education and skills. The inclusion of many of these factors is misplaced as they are simply not clear indicators of an immigrant's likelihood of becoming dependent on the government.

For example, use of a credit score is not an accurate predictor of eventual government dependency. First, any consideration of a credit score would require a definition of how that credit score would be calculated since they are done in numerous different ways. Even when applying for a simple bank loan, there are often numerous incorrect items in a person's credit report are allowed to be refuted or explained. Consideration of this then, would require an underwriting team to address challenges to the proposed score. DHS simply does not have the capacity or expertise to competently review credit scores.

Similarly, DHS does not have the ability to adequately evaluate occupational skills, certifications, or licenses, and many occupations do not require them. In the simple context of an H1-B where a certificate or license is directly tied to a job, DHS proposes to still require Requests for Evidence (RFEs) and detailed explanations to understand how each state, and state agency administers the licensure. A parallel result in the public charge context is likely to additionally cause a great burden on employers and agencies who must comply with these new requests, further compounding the loss of workers and talents discussed above.

The ability to speak English has long been a requirement for those seeking to become naturalized citizens of the United States. The proposed regulation seeks to include that as a factor for determining whether an individual has a likelihood of becoming a public charge. This

[11] Jeanne Batalova, Michael Fix, & Mark Greenberg, Migration Pol'y Inst., *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule* (Aug. 2018)

would effectively create an English language requirement to nonimmigrant visas, and family-based and employment-based visas. This applies a blanket requirement of speaking English, even in contexts where language is already a consideration or where language is irrelevant. For example, an individual who seeks to enter the United States as a student has already complied with the English language requirements of the school they have been accepted to. English should not be required for that student to adjust status via family-based procedures later. A U.S. citizen who is bringing their only remaining elderly parent to the U.S. so that they can provide care and support for that parent does not have any need for the parent to speak English. English language requirements have their place in immigrant and non-immigrant visas, but not in the context of public charge.

As a whole, the broad range of factors DHS now includes in the public charge determination are not clearly or rationally linked to actual predictions of public charge. Their inclusion, given that they are so numerous and often poorly defined, will also exacerbate the inconsistent decision-making highlighted above.

Fee Waivers

Also concerning is the inclusion of the receipt of a fee waiver for an immigration benefit as a negative factor. First, in the proposed rule fee waivers offer evidence of weak financial status, however, an inability to pay a specific fee, on a one-time basis, is a small part of a person's overall financial situation and the receipt of the fee waiver would be based on matters that would already a part of the public charge determination thereby double-counting the same financial status evidence.

Plus, certain fee waivers, for example waivers to adjust status so an immigrant can be employed would, in reality, serve as a step toward self-sufficiency and decrease the likelihood that the immigrant would become dependent on government assistance. A member of our section recently had a client applying for family based adjustment of status, who was considering requesting a fee waiver for an I-765 application for employment authorization.[12] The client chose to re-file the I-765 and pay the $495 filing fee rather than take the chance, even though the proposed regulation is not yet in effect, that applying for a fee waiver might lead to a determination of public charge under this proposed rule. This, in addition to illustrating the chilling effect mentioned above, reveals the barrier inclusion of fee waivers may present to self-sufficiency, in contradiction to the purported purpose of the rule

Finally, DHS fails to adequately define what is meant by "immigration benefit." If, as it appears to, the receipt of a fee waiver applies to administrative appeals from USCIS decisions, or efforts to obtain relief from removal or defend against removal before an Immigration Jude or the Board of Immigration Appeals, this raises significant access to justice concerns. Immigrants, based simply on a fear that receipt of any such fee waiver may hurt them in future immigration status determinations, may be unable to defend or challenge these legal decisions.

Calculation of Household

The "Calculation of Household" in the proposed regulation seeks to include many family members that have not been considered in the past, and without concrete metrics for determining

[12] USCIS failed to accept the application without a fee due to their own error. If the application was receipted by USCIS at the time it was received, concurrently with the application for adjustment of status, there would be no fee associated with the I-765. However, in this case, USCIS erroneously separated the applications and then rejected the application due to the fact that no fee was submitted with it.

which members would be included. For example, the proposal would include an individual's "other" children, not physically residing with the alien for whom the alien is required to provide at least 50% of financial support as evidenced by an agreement/order. Most agreements/orders do not specify any information to determine whether a potential amount is 50% of the financial support of the child. As such, these children should be left out of the household calculation.

The above points reveal the likelihood that the proposed provisions will not be applied uniformly and fairly. With poorly defined provisions, a great deal of factors to consider, and broad amounts of discretions, outcomes will be dependent on the particular agent making the decision. As immigration law attorneys, we are especially concerned that this lack of predictability will make it nearly impossible for us to adequately advise our clients, both in relation to the determination and in relation to what behavior may impact a possible future determination.

For these reasons, we write in strong opposition to the proposed regulation. Thank you for your careful consideration of these comments. If you would like additional information, please contact BBA Legislative and Public Policy Manager Alexa Daniel at adaniel@bostonbar.org.

Sincerely,

BBA Immigration Law Section Steering Committee