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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, I respectfully submit these comments in opposition to the proposed rule related to inadmissibility on public charge grounds, DHS Docket No. USCIS-2010-0012. The BBA is a professional association with over 10,000 attorney members. Our mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, foster a diverse and inclusive professional community, and serve the community at large.

As an Association, we have for years spoken in opposition to practices that threaten the rights and well-being of immigrants and in support of measures that ensure the just, humane, and fair treatment of all individuals within our borders. Most recently, we tasked a working group with establishing a framework to guide the Association in responding to immigration policies and developments.[1] The resulting principles produced by the working group, and adopted by our board, are rooted in a recognition of the invaluable contributions immigrants of all income levels make to our communities and country. The principles inform our advocacy for immigration policies and practices that protect fundamental rights and human dignity, vindicate immigrants' established constitutional rights to due process and equal protection, and promote the ability of all people to meaningfully exercise their rights and access justice through the legal system. The continued public faith in our institutions and the health of our democracy depend on this approach, which is why we are deeply troubled that the proposed regulation fails these standards on multiple fronts.

[1] http://www.bostonbar.org/docs/default-document-library/bba-immigration-working-group-statement-of-principles.pdf?sfvrsn=2

The proposed rule would dramatically change the way in which the Department of Homeland Security (DHS) determines whether an immigrant is likely to become a "public charge," requiring a wide-ranging investigation of an immigrant's history and economic prospects. The proposal would also apply to those seeking non-immigrant employment and student statuses. If implemented as drafted, the proposed regulation would produce sweeping chilling effects, causing millions across the country to forgo important benefits to which they are legally entitled, and that serve as supports and bridges to economic stability and prosperity. In addition to the harms this will cause individual immigrants and their families, it will also create widespread public health burdens and costs, the loss of workers and talent necessary to maintaining strong local and national economies, and generally create unfair barriers to accessing benefits and processes to which individuals are otherwise entitled. We expand on those aspects that are especially worrisome below.

Fee Waivers for Immigration Benefits

We are concerned by the inclusion of consideration of "fee waivers for immigration benefits," as a negative factor in the public charge determination. Over a decade ago, the BBA endorsed an American Bar Association Resolution urging that fee levels not be so burdensome as to deter applications and for clearly defined policies and procedures to ensure that fee waivers are "reasonably available."[1] The inclusion of fee waivers as a factor in public charge determinations is misguided for several reasons. First, a fee waiver merely evidences financial need, a factor already considered in the public charge calculus, and thus double-counted under the proposed rule. Second, although DHS claims that receipt of fee waivers demonstrate a weak financial status, an inability to pay a specific fee, on a one-time basis, is only a small part of a person's overall financial situation. In addition, 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. Counting an action that brings an immigrant one step closer to self-sufficiency against her, or inhibiting an immigrant from taking this step by claiming it will count against them in future immigration matters, contradicts the stated purpose of the rule, "to ensure that applicants…are self-sufficient."[2]

Additionally, there is no detailed information provided as to the definition of "immigration benefit" in this provision. If, as it appears to, the proposed rule on fee waivers applies to administrative appeals from USCIS decisions, or efforts to obtain relief from removal or defend against removal before an immigration judge or the Board of Immigration Appeals, the rule 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. When access to legal remedies is based solely on one's level of income, there is no equal access to justice and our legal systems suffer as a result.

Widespread Chilling Effects

In addition to discouraging fee waiver applications, the proposed regulation would inhibit applications for benefits such as Medicaid, Medicare Part D prescription drug assistance,

[1] http://www.bostonbar.org/docs/default-document-library/aba-resolutions-on-immigration-re-fees-11-14-07.pdf?sfvrsn=2
[2] https://www.federalregister.gov/d/2018-21106/p-267

Supplemental Nutrition Assistance Program (SNAP), and housing support. As a result, millions of immigrants will likely choose not to enroll (or to disenroll) in programs that provide benefits vital to their basic needs, including housing security, food access and healthcare. This will affect immigrants and their U.S. citizen children, as well as many others who may technically be exempt from the regulations (such as refugees, asylees, and many other "humanitarian" statuses) but due to fear, confusion, and misinformation will not feel able to safely access these resources. These groups are some of the most vulnerable populations (e.g., unaccompanied minors, survivors of domestic violence and other trauma) and often those most in need of public benefits to achieve safety, independence, and self-sufficiency.

The chilling effects of this proposal are expected to be sweeping. Already, there have been thousands of reports across the country, including here in Massachusetts, of immigrants dropping or choosing not to pursue benefits based exclusively on rumors or leaked versions of the regulations. The Massachusetts Budget and Policy Center, for example, found that 24 million people in the United States could be impacted by the chilling effect, and that 500,000 people in Massachusetts, including 160,000 children (the vast majority of whom are U.S. citizens, could forgo receiving these important benefits).[3] In addition, the burden of this chilling effect may be borne most by people of color, immigrants and citizens alike, as these groups have disproportionate rates of poverty and health disparities, making supplementary health, food, and nutrition benefits more necessary to their wellbeing and economic stability.

The BBA's aforementioned immigration principles were drafted in part based on a "distress[] by the ways in which the current climate has enabled the exploitation of immigrants' fears of deportation to dissuade them from seeking legal assistance, redress of grievances, or the full protection of the law."[4] More specifically, the principle concerning access to justice states: "Similarly, immigrants are deterred from asserting their civil rights with respect to housing, healthcare, labor and employment, education, and public benefits when they fear that doing so may lead to immigration enforcement against them or their families or may negatively affect their future ability to pursue U.S. citizenship." The new public charge standards would do just that – deter millions of individuals, many of whom are already among our most marginalized, from accessing benefits to which they are, in fact, entitled. As a result of these significant equal treatment and access to justice concerns, the proposed regulation is simply not sound policy.

Anticipated Health and Economic Consequences

The policy, if adopted, will adversely affect the well-being of those individuals and their families who forgo benefits; it would also have widespread public health economic costs for our communities and the nation. For example, many families with an immigrant member may face separation. Nearly one-quarter of U.S. citizen children have an immigrant parent, many of whom would be at risk of failing the public charge test. According to the Boston Planning and Development Agency's (BPDA) Report, here in Boston, of the 19,400 residents who would possibly face deportation, 1,882 are minor children, 5,896 are married, and approximately 6,000 are caring for minor children.[5] Immigrant parents should not be required to seek housing, food,

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[3] http://www.massbudget.org/report_window.php?loc=A-Chilly-Reception-Proposed-Immigration-Rule.html
[4] http://www.bostonbar.org/docs/default-document-library/bba-immigration-working-group-statement-of-principles.pdf?sfvrsn=2
[5] http://www.bostonplans.org/getattachment/e856c564-bf0f-47d4-9a44-75b430903f82

and healthcare for their families at the cost of risking their the ability to remain in the U.S. with them.

In the published proposed rule, DHS itself identifies a number of negative health outcomes that will result from this anticipated chilling effect. They note this could lead to "worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence" and the "increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated." Additionally, the BPDA Report[6] on the impacts of the proposed rule identified the following:

- "[D]ecreased participation in nutrition assistance programs that will...likely result in delayed negative shock to maternal and childhood health and associated long term costs to the economy…."
- "[T]he spread of communicable diseases as a result of discontinuations of treatment, especially amongst those individuals with health conditions that require long-term medically-assisted management such as HIV/AIDS."
- "Disenrollment from immunization services … as well as other preventative services against communicable diseases … will have … potentially severe health consequences for both those disenrolling and the population at large."
- "Food insecurity is likely to exacerbate particular health conditions…"
- "Reduced care for serious psychiatric illnesses could result in higher rates of suicide and substance use with consequences for both those suffering acutely from mental conditions as well as for the population broadly."

These likely outcomes may be what led the government to issue guidance, in 1999, specifically explaining that the housing, healthcare, and nutrition benefits now included were not to be a part of a public charge determination because they demonstratively *helped* immigrants achieve economic stability. Those guidelines 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."[7] 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," yet they fail to adequately explain why suddenly the receipt, or likely receipt, of such benefits is no longer a step toward self-sufficiency but instead a signal that one is not or will soon not be self-sufficient.

The harmful outcomes of the chilling effects will carry significant costs for healthcare providers as well as local and state governments. The healthcare-related costs to the city of Boston alone are estimated to be between $14 million and $57 million a year. That same BDPA report highlighted the severe costs the above outcomes will have, including:

- "Disenrollment from public insurance will result in increased uncompensated care costs to the local hospitals and increased use of emergency care."
- "Decreased participation in [SNAP] will increase the overall costs to the economy by increasing the health care expenditure per person."

[6] http://www.bostonplans.org/getattachment/e856c564-bf0f-47d4-9a44-75b430903f82
[7] https://www.gpo.gov/fdsys/pkg/FR-1999-05-26/html/99-13188.htm

- The "incalculable" implications to the local economy of disenrollment from immunizations services and other preventive services against communicable diseases.
- Lost earnings from loss of productive and/or missed work due to health issues.

In addition, enactment of this proposed regulation would lead to the loss of workers and talents, as impacted individuals lose employment and school authorization, are detained and deported, and are unable to work due to increased health issues. That same BPDA report, for example, specifically highlights 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). Additionally, there could be a significant loss of talent, as roughly 4,000 college and university students and nearly 2,000 college-educated workers, could be impacted by the rule in Boson alone. Indeed, our Working Group highlighted in its report the fact that immigrants help make Boston a national leader in healthcare, technology, education, and a variety of other sectors. This proposed policy goes against the overwhelming evidence that shows the essential role that immigrants, including and especially working-class immigrants, play in building thriving cities and economies.

While DHS does spend time addressing some of the cost and benefits of the rule, it fails to adequately calculate and explain many of the costs outlined in brief above. For example, DHS estimates that roughly 350,000 people will be impacted by the rule; however, many studies conducted since the proposed rule's release, including the aforementioned Massachusetts Budget and Policy Center report, have estimate that the figure is closer to 25 million people.[8] DHS also fails to provide adequate estimates of the costs that will be incurred due to eventual public health implications of the rule and the loss of workers and talent. Any proposed regulatory changes that will likely have such sweeping nationwide impacts must be fully understood and explained, and we urge DHS to provide the public with a detailed explanation of these burdens before enacting any of the proposed changes.

Unclear Guidance and Application

Finally, we are concerned that the lack of clarity provided as to how the rule should be applied will result in unequal and inconsistent application of public charge determinations. The proposed regulation provides no guidance as to how much weight is to be given to the newly enumerated negative and positive factors in the totality of circumstances test, beyond those weighted "heavily." As a result, the assessment will be highly subjective, and there will likely be significant differences in how the test is applied depending on the government agent reviewing each set of circumstances. Such inconsistencies across the system could lead to bias-based decision making and unequal applications of the test. As adjudicators, just like ordinary people, often hold unconscious biases, this may compound the disproportionate impacts anticipated to be felt by people of color as a result of the chilling effect, outlined above. Moreover, it will make it difficult for immigration attorneys and others to advise clients, both in relation to the public

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[8] 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)

charge determination and in making decisions on matters like receipt of benefits, that could impact future determinations.

As attorneys, we understand how important it is to have clear and rational standards that can be applied equally and consistently, especially when it concerns matters with consequences as significant as family separation and possible eventual deportation. Without this clarity, we cannot provide equal access to justice for all, an essential element in maintain faith in our public institutions."

Conclusion

The BBA's Report cites the troubling history of many of our past immigration policies, noting that those "have not fared well in the verdict of history," and have shown that "departing from our core principles – promoting access to justice, equal protection, civil rights, and the rule of law – can have grave consequences." In that regard, it is worth briefly pausing to consider the history of public charge determinations. In the past, public charge determinations have been used to justify the exclusion of low-income Irish immigrations and Jews fleeing Nazi persecution.[9] We are concerned that this new proposal comes dangerously close to repeating these troubling moments in our history. Such a radical expansion of the public charge rule seems based not on sound policy narrowly-tailored to better evaluate whether immigrants will be dependent on the government, but instead on a desire to change the current nature of our immigration system and create significant barriers for certain low-income populations. We write now to urge you to not let history repeat itself.

In sum, the Boston Bar Association opposes the proposed rule related to inadmissibility on public charge grounds as it will create significant barriers to accessing justice, have harmful impacts on immigrants, their families, and our communities and economies, and may be applied unfairly and inconsistently. 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,

Jonathan Albano
President

[9] Hidetaka Hirota, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY (Oxford University Press) (2017); Barbara L. Bailin, The Influence of Anti-Semitism on United States Immigration Policy with Respect to German
Jews During 1933-1939 (CUNY Academic Works) (2011), available at:
http://academicworks.cuny.edu/cc_etds_theses/262.