December 7, 2018

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: Docket ID: USCIS-2010-0012- Public Comment Opposing Proposed Rule Changes Guiding Determinations of Inadmissibility on Public Charge Grounds, FR Doc. 2018-21106, Posted 10/10/2018, 83 Fed. Reg. 51114 – 51296.

Dear Ms. Deshommes:

I write to oppose the above-referenced proposed rule change guiding determinations of inadmissibility on "Public Charge" grounds (hereinafter the "proposed rule") and to request that it be withdrawn. I ask that any external resources that I cite or link to in this comment be incorporated by reference as integral to my comment.

I have represented the First District of Maine in the House of Representatives since 2009.

The proposed rule unnecessarily overturns decades of settled policy, allows for inconsistent and arbitrary discretionary decision-making, and is unduly burdensome, while aiming to solve a nonexistent problem. It impermissibly changes the standard of likely "to become a public charge" from reliance on public benefits in order to subsist, to the supplemental use of public benefits common in "working poor" households across the U.S. because their employment fails to provide a living wage or employee benefits such as health insurance. It thwarts bipartisan agreement by Congress in 1996 on how the public charge ground of inadmissibility should be applied in cases of immigrating family members of U.S. citizens and permanent residents. Its focus on public benefits is expected to chill access to public benefits by U.S. citizens and long-term permanent residents who have paid taxes for years, out of fear that such use will lead their immigrating family member to be denied residency, which will have negative repercussions on health and safety, and also will harm the U.S. economy. The proposed rule will also result in steep reductions in family-based immigration at a time when our labor force is shrinking, causing further negative economic damage.

The proposed rule makes fundamental changes to our nation's immigration system without involving Congress, and undermines our nation's values. The rule should be withdrawn in its entirety.

1. The rule overturns decades of settled policy to solve a non-existent problem.

The Department of Homeland Security (DHS) states that the proposed rule's purpose is "to better ensure that aliens subject to the public charge ground of inadmissibility are self-sufficient,

i.e. do not depend on public resources to meet their needs" and to "interpret the minimum statutory factors for determining whether an alien is inadmissible because he or she is likely to become a public charge" at any time. Executive Summary, 83 FR 51116.

The preamble to the rule shows a clear presumption by DHS that immigrants, particularly those immigrating through family or the diversity lottery[1] who may be low-income, will be unproductive and will drain our coffers by using public benefits, and therefore they should not gain admission or adjustment of status to the U.S. The proposed rule would then effectively turn that presumption into reality by dramatically changing the decades old standard from a determination of whether a person is likely to be dependent on public benefits at any time in the future, to a standard of whether a noncitizen might need public benefits as a supplement to their household income to improve their health, safety and standard of living.

A. Immigrants generally use public benefits at rates and amounts lower than U.S. citizens do.

To quote the *Cato Institute* from a May 2018 report:

> Overall, immigrants are less likely to consume welfare benefits and, when they do, they generally consume a lower dollar value of benefits than native-born Americans. Immigrants who meet the eligibility thresholds of age for the entitlement programs or poverty for the means-tested welfare programs generally have lower use rates and consume a lower dollar value relative to native-born Americans. The per capita cost of providing welfare to immigrants is substantially less than the per capita cost of providing welfare to native-born Americans. (Footnotes omitted)

Multiple studies have come to the same conclusion, as cited in this publication from the U.S. Chamber of Commerce.

Even the preamble to the proposed rule itself clearly indicates that noncitizens generally use public benefits at lower rates than native-born U.S. citizens. As DHS's own analysis of SIPP data regarding overall rates of benefits participation in 2013 notes:

> Table 11 also shows Medicaid participation rates were 16.1 percent (43,301,000) among native-born individuals and 15.1 percent (6,272,000) among foreign-born persons, while rates among noncitizens were 15.5 percent (3,130,000). Participation rates in SNAP among native-born, foreign-born, and noncitizen populations are 11.6 percent (31,308,000), 8.7 percent (3,605,000), and 9.1 percent (1,828,000), respectively. The rate of receipt of cash benefits was 3.5 percent among the native-born and foreign-born, and about 2 percent among noncitizens.[2]

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[1] As a practical matter, while the rule would increase the paperwork burden for those immigrating through employment or for nonimmigrants, it is unlikely to cause any increase in inadmissibility determinations for them. *See* Singer, Audrey, and Harrington, Ben, Immigration: Frequently Asked Questions about "Public Charge", Congressional Research Service Report R45313 version 2 (Sept. 19, 2018) (hereinafter CRS Report R45313 v.2).

[2] 83 Fed. Reg. 51161.

As Table 11 in the proposed rule's preamble makes clear, in 2013 foreign-born and noncitizens received public benefits at rates lower than or, at worst, on par with native-born citizens. But even that data is complicated. As the preamble notes, in the category breakdowns, "foreign-born" includes naturalized U.S. citizens, who may well have been paying taxes for decades before accessing the public benefits to which they are entitled. Furthermore, DHS explains that "noncitizen" includes refugees and asylees, whom Congress specifically made eligible for federal public benefits for their first seven years in the U.S. as they restart their lives. DHS statistics for the seven years from 2007 through 2013, show that the U.S. granted status to 612,036 refugees and asylees. Their presence is also indicated at Table 12[3]. While many of these refugees and asylees may have used public benefits for only a short time, their inclusion in the DHS data analysis undoubtedly skews the "noncitizen" benefits participation rate higher than it would otherwise have been. Finally, many noncitizens referred to in both Tables 11 and 12 may be permanent residents who have lived and worked and paid taxes in the U.S. for decades but have not yet obtained citizenship for a variety of reasons. They are eligible for public benefits if they need help, and DHS should not infer that because a noncitizen is receiving benefits in a given year, that that person has not already contributed and is contributing to our country and economy.

The additional tables in the proposed rule's preamble that break down benefits use by other categories such as age, education and English fluency have the same data challenges (inclusion of benefits-eligible refugees and asylees and of long-term permanent residents who may have paid taxes for decades before accessing public benefits), and point to the same conclusion: public benefits are not overused or abused by immigrants.

B. Congress already restricted access by new permanent residents to Public Benefits

Twenty-two years ago, with a bipartisan majority, Congress enacted the *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L 104-193, 110 Stat. 2105 (Aug. 22, 1996), which severely limited noncitizen eligibility for federal public benefits. Since that date, most[4] new permanent residents to the United States are ineligible for their first five years of residency for all but emergency (emergency Medicaid, FEMA disaster assistance) and public health (WIC, school lunch, vaccination) public benefits programs. While states can elect to provide state-funded substitute benefits during that period, fewer than half of states do so.

Under the current law, new permanent residents become eligible for public benefits when they either have naturalized to become U.S. citizens, or have had residency for over five years (typically accompanied by work and tax payments), or have acquired forty qualifying quarters of work. A bipartisan Congress determined that these were fair grounds for new residents to access benefits if they were to become disabled, or otherwise need income support.

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[3] 83 Fed. Reg. 51163.

[4] Certain classes of particularly vulnerable new permanent residents, such as those who gained status as refugees, asylees, or certain domestic violence, trafficking, or crime victims, are not subject to the five-year bar to public benefits eligibility.

The proposed rule's apparent goal of preventing benefit use by new permanent residents by simply making it impossible for them to gain residency in the first place ignores Congress's previous work on and disposition of the issue of immigrant access to public benefits.

C. DHS's proposed redefinitions of "public charge" and "public benefit" dramatically change decades-long policy and are overly restrictive

The proposed rule, at the new 8 CFR §212.21(a) defines "public charge" as "an alien who receives one or more public benefit". This is a radical departure from the current definition, which is a person 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.'"[5] Mere receipt of public benefits as supplemental income by the working poor is not an indicator that one is incapable of self-sufficiency.

Many U.S. citizens and noncitizens alike work in jobs that do not provide a living wage, and the federal minimum wage remains at only $7.25 per hour. Many workers in the U.S. can work a full-time job at well above the federal minimum wage and still be low-income enough to qualify for public benefits to stay healthy and safe. For example, in Maine in 2018, a single full-time working parent with a child could earn up to $30,044 annually, or $14.44 per hour, and remain eligible for SNAP benefits. That individual would not be "primarily dependent" upon SNAP, but the benefit would help the family avoid food insecurity. This in turn helps them progress at work and in school.

At new 8 CFR §212.21(b), the proposed rule would redefine "public benefit" to hold minimal amounts of benefits receipt against a person. For "monetizable benefits" (SSI, TANF, SNAP, General Assistance, etc.) receipt in one year of an aggregate value of benefits exceeding fifteen percent of the annual federal poverty level (FPL) would be sufficient to trigger a public charge finding. If the rule were in effect now, under the 2018 FPL, a mere $1821, or less than $5 per day, in benefits receipt would trigger a public charge finding.

For "non-monetizable benefits" receipt of benefits for 12 out of 36 months, or 9 of 36 months if the person also receives a monetizable benefit, would trigger the public charge finding. Receipt of more than one non-monetizable benefit in one month will count as an additional month. Because most working poor who qualify for SNAP may also qualify for Medicaid, as a practical matter we can assume that the 9 month limit will apply in most cases. This standard, like the one for monetizable benefits, is overly restrictive. For example, a person who received only five months of two non-monetizable benefits, plus SNAP benefits, would trigger a public charge finding under the proposed rule's formula.

The *Cato Institute* illustrates the impact and the absurdity of these overly restrictive definitions:

> For example, a family of four making 175 percent of the poverty line, or $43,925 annually in private income, but which received $2.50 per day per person in government

[5] CRS Report R45313 v.2, page 2. (Underline added.)

> aid would be receiving just 8.6 percent of their income from the government, **meaning that they are 91.4 percent self-sufficient**. Yet the rule would still consider a member of this family a "public charge" and ban them from the United States. (Emphasis added)

The current interpretation of the law, which looks at whether an intending immigrant will be primarily dependent on public benefits is the reasonable measure of public charge, and should not be changed.

II. The proposed rule contravenes standards set by Congress

A. New "negative factors" go far beyond Congressional Intent

Congress established at 8 USC §212(a)(4) the parameters of how the public charge ground of inadmissibility is to be applied. A totality of circumstances[6] test includes consideration of the noncitizen's age, health, family status, assets, resources, financial status, education, and skills.

As this test is applied currently, a noncitizen with a clear work history, who appears healthy, ready and willing to work, and who has a sufficient Affidavit of Support would typically be approved for admission and residency, even if the person has limited English and does not yet have a job because s/he is outside the U.S, or even if the person has a low-wage job if adjusting to resident status inside the U.S. The expectation is that the noncitizen, like generations of prior noncitizens, will get work and improve her/his English skills, job, and economic status over time.[7]

The proposed rule, at new 8 CFR §212.22(b), stretches these elements to an absurd point by creating specific new negative factors (as they are characterized in the proposed rule's preamble), such as lacking English proficiency, lacking at least a high school degree, being younger than 18 or older than 61, *having* children, among others. Lacking *private* health insurance would be a "heavily weighted" negative factor. 8 CFR §212.22(c)(1)(iv)(B)

These new negative factors fly in the face of our nation's values and centuries of immigration history, and defy logic.

For example, the preamble to the proposed rule explains that those under 18 are less likely to work since they will be in school, and therefore are more likely to become a public charge. However, those immigrating while under-18 typically learn English very quickly, integrate readily, and after completing their educations (often including higher education), they go on to work, contribute, and pay taxes in the U.S. for decades. Similarly, many over 61-year olds are able to, willing to, and do work after immigrating. However, many of them also immigrate to join their naturalized U.S. citizen children, and often provide childcare to grandchildren so that

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[6] CRS Report R45313 v. 2, p. 5, fn. 49.

[7] *See* The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities, George Washington University- Milken Institute School of Public Health (Nov. 15, 2018).

their U.S. citizen petitioner can participate more fully in the workforce, lifting the economic status of the entire family.

Moreover, Congress has never authorized imposing English proficiency standards on new immigrants, and this once again would be a fundamental change from our values and centuries of immigration history, where vast numbers of immigrants have learned English *after* immigrating to the U.S. The Immigration and Nationality Act (INA) requires English proficiency only when an immigrant wishes to naturalize to U.S. citizenship, and even then exceptions exist for elderly immigrants or those with certain disabilities. Making lack of proficient English a negative factor in the public charge analysis would also fly in the face of federal laws to prevent discrimination based on national origin and language.

Requiring private health insurance would clearly increase findings of public charge beyond Congressional intent. A person immigrating from abroad cannot be expected to already have private health insurance in the U.S. A person applying for residency from within the U.S. must depend on her/his employer's willingness to offer health insurance, which in fact many small businesses or low-wage jobs do not provide.[8] Congress passed the Affordable Care Act (ACA) precisely because private health insurance was so unattainable that forty-four million U.S. residents were uninsured. Permanent residents are eligible for health insurance through the ACA. The proposed rule effectively tells them that they should not sign up for health insurance and ACA subsidies to which Congress specifically said they were entitled.

These new negative factors will likely reduce the diversity of new immigrants by favoring immigrants from Europe, Canada, Oceania, and disfavoring immigrants from Latin America, Africa, Asia and the Caribbean[9]. Recognizing that the United States benefits from receiving immigrants from every region of the world, Congress in 1965 acted intentionally to end the "national origins" quotas imposed in 1924. This proposed rule would take us in the opposite direction.

B. The proposed rule effectively creates a new 250% FPL test, contrary to the statute and to Congress's specific language and intent

In 1996, a bipartisan Congress enacted a new requirement that any person immigrating as a relative of a U.S. citizen or permanent resident could not overcome the public charge ground of inadmissibility without an enforceable "Affidavit of Support" submitted by the sponsoring relative that demonstrated a household income above a certain level.[10] Congress considered

[8] As a reminder, nonimmigrants and undocumented individuals are ineligible for federal health programs such as Medicaid or insurance through the Affordable Care Act.

[9] "Gauging the Impact of DHS's Propose Public-Charge Rule on U.S. Immigration" page 9, *Migration Policy Institute*, Policy Brief (Nov. 2018)

[10] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, Div. C, Title V, Subtitle A, §551, 110 Stat. 3009-675 (Sept. 30, 1996), amending The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. Law 104-193, Title IV, Subtitle C, §423, 110 Stat. 2271 (Aug. 22, 1996). This requirement also applies to those immigrating through employment if a family member is sole or part owner of the business.

setting that level at 200% of the annual federal poverty level, but specifically rejected that as too high, reducing the level to 125% of the FPL.[11]

In the proposed rule at 8 CFR §212.22(c)(2)(i), the only "(h)eavily weighted positive" factor to overcome the negative factors would be having assets, resources, support, or earned income that exceeds 250% of the FPL.

The Migration Policy Institute has found that 69% of noncitizens[12] would have at least one negative factor, with many individuals having more than one. To overcome the negative factors, the proposed rule would require these individuals to exceed the 250% of the FPL threshold. Aside from the high percentage of native-born U.S. citizens who lack incomes and resources that high, the 250% of FPL standard is higher than the 200% standard that Congress specifically rejected, when it set the statutory threshold of 125% of the FPL.

If DHS disagrees with the 125% of the FPL standard established by Congress, it could ask Congress to rewrite the statute. What it cannot do is rewrite the law, without involving Congress, through regulations that contravene the INA and Congress's express language.

III. The proposed rule will chill access to public benefits by eligible U.S. citizens and permanent residents who fear that benefits use will result in denial of residency to their immigrant family member, harming individuals, and harming the economy.

I have heard from constituents that the proposed rule has already produced confusion and fear in "mixed status" families, causing some to not enroll or to dis-enroll for benefits for which they are eligible, out of fear that benefits receipt will result in denial of residency to their immigrating relative. Mixed status families comprise U.S. citizen adults and/or children, and noncitizens, including permanent residents and undocumented aspiring immigrants. In Maine, estimates are that there are approximately 21,000 to 38,000 people with an immigrant family member who could be chilled from seeking the help for which they are eligible.

This appears to be an intended effect of the proposed rule. As noted in the Family Assessment in the preamble to the proposed rule, "DHS has determined that the proposed rule may decrease disposable income and increase the poverty of certain families and children, including

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[11] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Conf. Rpt 104-828, Sec. 551 (September 24, 1996), at https://www.congress.gov/104/crpt/hrpt828/CRPT-104hrpt828.pdf (pp. 145-146). *See also* 142 Cong. Rec. S11712 (Sept. 28, 1996) at https://www.congress.gov/crec/1996/09/28/CREC-1996-09-28-pt1-PgS11711.pdf; 142 Cong. Rec. H12096 (Sept. 28, 1996) at https://www.congress.gov/crec/1996/09/28/CREC-1996-09-28-bk2.pdf; H.R. Rept. 104–469, Part I (March 4, 1996) pp. 94, 177 at https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf. Members of Congress objected to the 200% of the FPL threshold, stating that the "200% income requirement constitutes nothing less than 'class warfare,' and tells the world that immigration is only for the wealthy". *Id.* at 544.

[12] *See* MPI Nov. 2018 Policy Brief p. 8, *supra.*

U.S. citizen children.... however, DHS has determined that the benefits of the action justify the financial impact on the family."[13]

Given that many who receive public benefits work full-time but are not paid a living wage, as noted earlier in section 1.C, any governmental action that chills the "working poor" from getting benefits such as SNAP and Medicaid that will help them stay healthy and enable them to progress economically is not only cruel, but also short-sighted.

Rather than repeating what others have ably stated in detail about the impact that this chilling effect is likely to have on those who forego benefits, and also on our economy, I will incorporate by reference and ask you to study the following reports:

- Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use, Migration Policy Institute (June 2018)
- Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid, Kaiser Family Foundation (Oct. 11, 2018)
- Nearly 20 Million Children Live in Immigrant Families that Could Be Affected by Evolving Immigration Policies, Kaiser Family Foundation (April 18, 2018)
- Lower SNAP Participation by Immigrant Mothers with Young Children, Children's Health Watch (Nov. 2018)
- Medicaid Payments at Risk for Hospitals under Public Charge, Manatt (Nov. 16, 2018)
- The Economic Mobility of Immigrants: Proposed Public Charge Rule Could Foreclose Future Opportunities, George Washington University- Milken Institute School of Public Health (Nov. 15, 2018)

IV. The proposed rule will dramatically reduce family-based immigration, contrary to the INA and Congressional intent, and will harm the U.S. Economy

A. The proposed rule's impact will fall squarely on family-based immigrants.

In 1965, Congress reformed the nation's immigration laws to eliminate national origin quotas and to emphasize family unity, which has ultimately led to immediate family members of permanent residents or U.S. citizens amounting to about two-thirds of immigrants gaining residency annually.

The current administration has made no secret that it wants to gut the priorities set by Congress and enshrined in the INA that prioritize family-based immigration. The RAISE Act, (S. 1720) which the Administration endorsed when it was introduced in 2017, would have slashed family-based immigration by more than forty percent. In the budget negotiations in late 2017 and early 2018, when Congress and the Administration were trying to work towards a solution for the young adults at risk of losing their status as a result of the rescission of the Deferred

[13] 83 Fed. Reg. 51277.

Action for Childhood Arrivals (DACA) program, negotiations were scuttled when the Administration added sharp cuts to family based immigration to its calls for border wall funding.

Congress has refused to agree to cut immediate family immigration. The proposed rule is clearly an impermissible attempt by the Administration to do an end run around Congress to achieve that result, but the INA cannot be rewritten and fundamentally changed by a new regulation.

The proposed rule's impact would fall most firmly on immediate family immigrants.[14] Estimates are that as many as half of them would be denied residency under the proposed rule, were it to take effect. This would result in separated families or undocumented aspiring immigrants having to remain in the shadows, and lead to devastated and destabilized families, including U.S. citizen children.

This would also have a significant negative economic impact in Maine. Maine has the nation's oldest population, and deaths outpace births in all but two counties. As a result, from 2010 through 2016, Maine's population grew by only 3,118 people. During roughly the same period, from FY 2010 through FY 2016, approximately 6,600 family-based immigrants became new permanent residents in Maine. Had the proposed rule been in effect during FY 2010 – FY 2016, Maine would have experienced net population *loss*, instead of the slight gain. Family-based immigrants add about 1,000 individuals annually to Maine's population. With Maine's aging workforce and shrinking labor pool, the state cannot afford to lose the approximately 500 immigrants a year who would likely be found inadmissible under the proposed rule's extreme interpretation of "public charge." These immigrants become community members, consumers, taxpayers, workers and entrepreneurs. Maine needs them.

B. Cuts to family-based immigration will damage the economy.

The Administration appears to believe that those who enter as family members, or who are low income when they start their lives over in the U.S., do not contribute to our communities and our economy, despite centuries of evidence to the contrary. Once again, rather than repeat what experts have found, I ask that the following resources be incorporated by reference and included as integral to this comment regarding the numbers of prospective immigrants who would be denied residency and the negative economic impacts that would result:

- Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration, Migration Policy Institute (Nov. 16, 2018)
- Proposed Public Charge Rule Would Significantly Reduce Legal Admissions and Adjustment to Lawful Permanent Resident Status of Working Class Persons, Center for Migration Studies (November 2018)

[14] As noted previously, while the rule ostensibly would apply to nonimmigrants and to employment based immigrants, as a practical matter, while it would increase and complicate their paperwork burdens due to the new I-944 form the proposed rule creates, it would not likely lead to increased findings of "public charge" for them.

- Economic Impact of Proposed Rule Change: Inadmissibility on Public Charge Grounds, New American Economy (Oct. 31, 2018)
- Trump Administration's "Public Charge" rule is a backdoor attempt to cut legal immigration, FWD.us, (Sept. 24, 2018)
- New Trump Rule Isn't about Saving Taxpayer's Money – It's about Keeping Legal Immigrants Out, Cato Institute (Sept. 24, 2018)

V. Conclusion

The proposed rule is a violation of our nation's values and history that welcomes those who believe in the promise of safety, freedom and opportunity. Immigrants from every corner of the world and every educational and socio-economic level have proven repeatedly that even when they start with little, they go on to contribute greatly.

I strongly oppose this rule change, which contravenes the will of Congress and decades of policy, and request that it be withdrawn in its entirety.

Thank you for your consideration of this comment.

Sincerely,

Chellie Pingree
Member of Congress