



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

Dec. 10, 2018

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 Grounds,
DHS Docket No. USCIS-2010-0012, RIN 1615-AA22

Dear Ms. Deshommes:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) write to express our strong opposition to the above-captioned proposed rule. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We believe that the proposed rule would greatly harm immigrant families with an adult or child who has a disability by discouraging enrollment in needed services; would undermine the purpose of the public charge rule by increasing reliance on costly late-stage and emergency care; 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 inconsistent with Congressional intent and with federal anti-discrimination law; and fails to meet Administrative Procedures Act requirements.

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>.

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

The proposed rule, if adopted, would cause great harm to people with disabilities. In contrast to the current rule and Department of Homeland Security (DHS) guidance, which reflect a careful balance designed to ensure that people do not avoid or disenroll from critically needed medical services and housing assistance out of fear that these services might result in a public charge determination, the proposed rule would greatly increase the risks of such disenrollment or avoidance by dramatically expanding the types of assistance that would count against individuals in public charge determinations, significantly lowering the threshold for counting benefits against individuals, and heavily weighting the negative impact of such benefit receipt.

Abandoning the “Primarily Dependent” Standard

First, rather than focusing on whether a person is likely to become “primarily dependent on the government for subsistence,” as the government currently does (meaning that public benefits represent more than half of the person’s income and support)² the proposed rule would adopt a staggeringly low threshold of counting 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 to count 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.

Expanding the Types of Benefits Considered

Second, the proposed rule would vastly expand the types of benefits that count toward this ‘anything above nominal’ threshold. The current rule applied by the government, set forth by the INS (now the U.S. Citizenship and Immigration Services within the Department of Homeland Security) 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

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.

⁶ *Id.* at 51133.

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 its massive proposed change, DHS proposes to expand the consideration of benefits to include 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, Medicare Part D benefits, and possibly Children’s Health Insurance Program (CHIP) benefits.

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,⁹ but ignores the fact that these benefits were well-established and 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.¹⁰

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.”¹¹ This standard is broad

⁷ *Id.* at 51133, 51163-64.

⁸ *Id.* at 51133.

⁹ *Id.* at 51164.

¹⁰ *Id.* at 51292.

¹¹ *Id.* at 51182.

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.

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 heavily weighting of health impairments, 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.”¹²

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

Rather than limiting government spending on individuals who have immigrated to the U.S., the proposed changes to the rule are likely to have the opposite effect. The disenrollment of large numbers of individuals from needed health, housing, nutrition and other benefits (or their non-enrollment in such benefits) is likely to drive *up* health care costs. Removing access to medical care, housing, or 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 received far less costly preventive care and housing assistance. The costs of such emergency services and late-stage care would typically be borne by local, state and/or federal government assistance.

¹² 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>.

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.¹³ 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 weight 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.”¹⁴ 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 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.¹⁵ To the extent that the

¹³ 83 Fed. Reg. 51131-32.

¹⁴ *Id.* at 51132.

¹⁵ 29 U.S.C. § 794(a).

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 disabilities¹⁶ 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,"¹⁷ the proposed formula effectively authorizes blanket determinations that anyone with a significant disability is likely to become a public charge.

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,¹⁸ 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 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.

¹⁶ 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.

¹⁷ 83 Fed. Reg. 51184.

¹⁸ 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").

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.”¹⁹ Moreover, there is a presumption “against changes in current policy that are not justified by the rulemaking record.”²⁰ 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

We strongly oppose the proposed rule for the reasons identified above, and we urge DHS not to adopt the proposed modifications to the rule.

Sincerely,

ACCSES

Advocacy Institute

American Association of People with Disabilities

American Dance Therapy Association

American Music Therapy Association

American Network of Community Options and Resources

American Psychological Association

American Speech-Language-Hearing Association

The Arc of the United States

Association of University Centers on Disabilities

¹⁹ *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).

²⁰ *Motor Veh. Mfgs. Ass'n* at 42.

Autism Society of America

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Brain Injury Association of America

Center for Public Representation

Children and Adults with Attention-Deficit Hyperactivity Disorder

Council of Administrators of Special Education

Council of State Administrators of Vocational Rehabilitation

Council for Exceptional Children

Council for Learning Disabilities

Disability Rights Education and Defense Fund

Division for Early Childhood of the Council for Exceptional Children

Family Voices

Goodwill Industries International

Learning Disabilities Association of America

Lutheran Services in America-Disability Network

National Academy of Elder Law Attorneys

National Alliance on Mental Illness

National Association of Councils on Developmental Disabilities

National Association of State Head Injury Administrators

National Center for Learning Disabilities

National Council on Independent Living

National Disability Rights Network

National Down Syndrome Congress

National Multiple Sclerosis Society

National Respite Coalition

RespectAbility

School Social Work Association of America

TASH

United Spinal Association