Oct. 22, 2021

Andrew Parker
Branch Chief
Residents and Admissibility Branch
Residents and Naturalization Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
DHS, 5900 Capital Gateway Drive
Camp Springs MD 20746

Re: **Public Charge Ground of Inadmissibility, Advance Notice of Proposed Rulemaking, DHS Docket No. USCIS– 2021–0013, RIN 1615–AC74 (Aug. 23, 2021)**.

Dear Chief Parker:

The Consortium for Citizens with Disabilities (CCD) Rights, Health, and Long-Term Services and Supports Task Forces submit the following comments in response to the above-captioned ANPRM. 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.

Introduction

We appreciate the opportunity to comment on the Department's Advance Notice of Proposed Rulemaking concerning its public charge rule. We note at the outset that the public charge rule reflects an ugly history of xenophobia, racism, and prejudice against people who are impoverished, and it is at odds with the founding principles of the United States. While elimination of the rule is a matter for Congress, we urge DHS to adopt the narrowest possible interpretation of the rule within its authority, to avoid needless harms to our immigrant communities, including immigrants with disabilities.

As you know, the public charge rule has been of grave concern to the disability community because it has been used inappropriately to target immigrants for adverse treatment based on their disabilities. Under the prior Administration, the changes to the rule were so draconian in

their treatment of people with disabilities--both in terms of the heavy weighing of disability-related factors and the consideration of receipt of critical public benefits that enable people with disabilities to live and work--that the rule impermissibly discriminated based on disability. As the Seventh Circuit Court of Appeals observed, "the Rule disproportionately burden[ed] disabled people and in many instances ma[de] it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge."[1]

While the current Administration's decision to return to the 1999 Field Guidance on a temporary basis was an important move to avoid the most dramatic forms of discrimination, there is still more that the Department must do in its new rulemaking to avoid the public charge rule from being administered in a way that discriminates on the basis of disability.

DHS Should Narrow its Reading of the Health Factor

First, the statute's "health" factor must be construed more narrowly than it was in the 1999 Field Guidance. Having a disability does not equate with having poor health, and many people with disabilities live healthy lives and support themselves. Further, Congress has made it clear that it did not intend the public charge provision to discriminate based on disability. In 1990, the same Congress that enacted the Americans with Disabilities Act, a sweeping, landmark civil rights law prohibiting disability-based discrimination, also amended the public charge provision by deleting provisions that had specifically allowed public charge determinations to be based on mental disabilities. Immigration Act of 1990, Pub. L. No. 101-649, Section 601.

While the 1999 Field Guidance limits consideration of health to past or present long-term institutionalization at government expense, this is still a discriminatory criterion. Singling out people who are or have been institutionalized as the only group to receive adverse consideration for health reasons inappropriately targets people based on disability or age. Only people with disabilities and older adults experience long-term institutionalization; yet they are not the only people who may benefit from significant government health resources. Perhaps most concerning, people with significant disabilities may be inaccurately viewed as likely candidates for long-term institutionalization in the future, given pervasive stereotypes and lack of understanding of modern disability services. The officials charged with making public charge determinations do not have the expertise to predict future institutionalization, and continuing to include this as part of the health factor invites inappropriate public charge determinations for people with significant disabilities.

Even considering people who are currently institutionalized, many are institutionalized not based on a clinical need but based on the lack of available community-based services. For many immigrants this is particularly common; many remain needlessly in nursing facilities, psychiatric hospitals, and institutions for people with intellectual and developmental disabilities at the expense of states because their ineligibility for Medicaid prevents them from transitioning to community services. These individuals should not be penalized and considered to be a public

[1] *Cook County v. Wolf*, 962 F.3d 208, 228 (7th Cir. 2020).

charge because of states' choices to pay for their care in institutions rather than in community settings.

DHS must also take into consideration significant legal developments that have occurred since the 1999 Field Guidance. The 1999 Guidance predates by several months the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). That decision held that the Americans with Disabilities Act's "integration mandate" requires public entities to administer services to people with disabilities in the most integrated setting appropriate to their needs. Individuals with disabilities should not be penalized for the failure of a public entity to offer community-based services in accordance with federal law.

If DHS does continue to consider long-term institutionalization, it should not consider such institutionalization unless DHS can demonstrate that the individual had a meaningful, affordable and available option to receive home and community-based services instead of institutionalization. That is the most feasible way to ensure that the public charge rule is implemented in a manner that does not conflict with the integration mandate of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

In addition, DHS should ensure that the institutionalization is truly long-term by requiring that its duration be at least five years. Only current institutionalization should be considered. The fact that a person was institutionalized in the past does not suggest a likelihood of future institutionalization. Past institutionalization may reflect a medical issue that has since been resolved, a lack of access to community services that have since been provided, or any number of other factors that make future institutionalization unlikely. Nor is it possible to predict with any reasonable accuracy the likelihood that a person may be institutionalized on a long-term basis in the future.

DHS may permissibly interpret the health factor to apply to communicable diseases that are express grounds for inadmissibility under the Immigration and Nationality Act. 8 U.S.C. Section 1182(a)(1)(A).

DHS Should Narrow Its Consideration of Public Benefits

DHS should also limit the consideration of public benefits to avoid discrimination based on disability. In accord with this principle, it should avoid consideration of Medicaid and SSI.

Consideration of Medicaid benefits would amount to disability-based discrimination. Medicaid benefits are essential to many people with significant disabilities. Indeed, Medicaid is the only source of coverage for disability-related long-term services and supports, as these services are typically not covered by commercial insurance. These services, far from creating primary dependence on the government, enable many people with disabilities to work and be self-sufficient. In fact, the Medicaid Buy-In program is specifically designed to ensure that people with disabilities can work without sacrificing the health services that they need. In addition to services such as personal care, home health, and peer support that enable people with disabilities to go about their daily lives, Medicaid also covers services such as supported employment that are specifically designed to help people secure and maintain work. It is also a critical supplement

to more than 12 million people with disabilities and older adults on Medicare. Considering Medicaid benefits would have a severely disproportionate effect on people with disabilities and would not be a meaningful indicator of long-term primary dependence on the government for subsistence.

DHS should also avoid consideration of benefit programs that specifically target people with disabilities, such as Supplemental Security Income (SSI). Consideration of such disability-based benefits targets people for adverse consideration on the basis of their disability.

DHS should avoid considering receipt of healthcare, housing or nutrition assistance. Nearly half of U.S.-born citizens received one of the benefits included in the 2019 rule in their lifetime,[2] and thus these benefits are hardly an indicator that a person will be primarily dependent on the government for subsistence on a long-term basis.

To the extent that DHS does consider receipt of public benefits, it should consider only the current receipt of such benefits. Past receipt of these benefits does not indicate a likelihood that a person will need or receive them in the future. Indeed, some benefits such as TANF are time-limited or expire after a period of time unless an individual is able to meet work requirements. Moreover, consideration should only be given to federal benefits. The focus of the public charge rule was protecting federal government rather than state resources, and in any event, state and local benefit programs are too varied and complex for DHS to undertake meaningful determinations about whether they should count for purposes of a public charge determination.

We also offer the following responses to questions posed in the ANPRM:

Background:

1. **How can DHS address the potential for perceived or actual unfairness or discrimination in public charge inadmissibility adjudications, whether due to cognitive, racial, or other biases; arbitrariness; variations in outcomes across cases with similar facts; or other reasons?**

In addition to narrowing the considerations for public charge determinations in the ways that we have proposed, DHS should collect accurate data from consular officers and other decision makers when admissibility or status change is denied on the basis of public charge. The data should identify, among other things, how many of these denied individuals have disabilities, including the specific type of disability, and the role if any that the person's disability played in the public charge determination. The data should also identify other demographic factors

[2] Danilo Trisi, Administration's Public Charge Rules Would Close the Door to U.S. to Immigrants Without Substantial Means, November 11, 2019, available at: https://www.cbpp.org/research/immigration/administrations-public-charge-rules-would-close-the-door-to-us-to-immigrants.

including age, race, gender, primary language, and national origin. The data should be published and shared publicly. Such data collection is essential to ensure that trends can be identified, that the role of disability and other demographic factors may play in public charge determinations can be analyzed and understood, and that public accountability is possible.

2. **What potentially disproportionate negative impacts on underserved communities (e.g., people of color, persons with disabilities) could arise from the definition of "public charge" and how could DHS avoid or mitigate them?**

Any definition of public charge that encompasses a broad consideration of the "health" factor including disability-related factors (such as the ones used by the prior Administration's public charge rule as well as long-term institutionalization) will have an outsized negative impact on people with disabilities. Similarly, a definition that considers receipt of Medicaid and/or SSI benefits will disproportionately render people with disabilities inadmissible or preclude them from status adjustments. Additionally, as people with disabilities are overrepresented among communities of color, such a definition would also have a disproportionate negative effect on people of color. One in four Black Americans have a disability, one in five white Americans have a disability, one in six Hispanic Americans have a disability, one in ten Asian Americans have a disability, and three in ten American Indians/Alaskan natives have a disability.[3] Absent a reason to believe that this data is significantly different among non-citizens seeking admission to the U.S. or a change in alien status, we urge DHS to avoid these disproportionate effects by adopting a narrow definition of public charge that does not disadvantage people based on their disabilities and, by extension, based on race or ethnicity.

Age:

1. **How should an applicant's age be considered as part of the public charge inadmissibility determination?**

Being a child or a senior should never be a negative factor in a public charge determination. Consistent with our child labor laws, children under age 19 should not be expected to support themselves and therefore they should never be denied admission on account of their age. Rather, sponsorship should be the only factor.

Being an older adult and not working in the formal economy also should not be viewed as a negative. Many older adults support their households without bringing in income. For example, older adults often provide care for grandchildren, children and disabled family members. This allows other household members to work outside the home. In addition, an older adult who has a family sponsor is unlikely to become primarily and permanently dependent on the government.

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[3] Centers for Disease Control and Prevention, Adults with Disabilities: Ethnicity and Race (last updated Sept. 16, 2020), https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html.

We are particularly concerned that older age, if considered as a negative factor, would unfairly disadvantage people with disabilities because more older adults have disabilities. Forty percent of adults aged 65 and older have a disability, compared to 26 percent of all adults nationwide.[4] Older adults who are Black, Indigenous, and other People Of Color (BIPOC) are disproportionately more likely to have disabilities than white older adults.[5]

Therefore, we urge DHS to clarify that an applicant's age should only be used as a positive factor to overcome any factors of concern in the absence of an affidavit of support. For example, if an applicant is of working age, that could be considered in assessing their ability to support themselves.

Health:

1. **How should DHS define health for the purposes of a public charge inadmissibility determination?**

Health must be defined narrowly for purposes of making public charge determinations. For the reasons discussed above, DHS should limit the consideration of health to the types of communicable diseases that are grounds for inadmissibility under 8 U.S.C. Section 1182(a)(1)(A). For the reasons described above, DHS should eliminate its consideration of long-term institutionalization. If it does continue to consider this factor, it should ensure that the institutionalization is current, that it has lasted for at least five years, and that DHS can demonstrate that the person had a meaningful, affordable, and available option to receive community services instead of institutionalization.

2. **Should DHS consider disabilities and/or chronic health conditions as part of the health factor? If yes, how should DHS consider these conditions and why?**

Disability equates neither to poor health nor long-term primary dependence on the government for subsistence. Moreover, Congress did not intend public charge determinations to focus on disability. The public charge rule was amended in 1990--by the same Congress that enacted the Americans with Disabilities Act--to remove specific references to disabilities that would result in a determination that a person was a public charge.

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[4] Okoro CA, Hollis ND, Cyrus AC, Griffin-Blake S. Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults — United States, 2016. MMWR Morb Mortal Wkly Rep 2018;67:882–887. DOI: http://dx.doi.org/10.15585/mmwr.mm6732a3external icon.

[5] *Id.*; *see also* Joint Center for Housing Studies of Harvard University,Projections & Implications for Housing A Growing Population: Disabilities Among Older Adults (2016), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_housing_growing_population_2016_chapter_3.pdf; Alzheimer's Ass'n, "Fact Sheet: Race, Ethnicity, & Alzheimer's" (March 2020), https://www.alz.org/aaic/downloads2020/2020_ Race_and_Ethnicity_Fact_Sheet.pdf.

As the Seventh Circuit observed, the public charge health factor and avoidance of disability discrimination "can live together comfortably"[6] if the relevance of disability is limited to the communicable diseases that are grounds for inadmissibility in the INA and to long-term institutionalization. For the reasons above, we believe that long-term institutionalization should not be considered, but if it is, should be limited in the ways that we describe.

3. **How should the Rehabilitation Act of 1973's prohibition of discrimination on the basis of disability be considered in DHS's analysis of the health factor? (Note that under Executive Order 12250, DOJ is charged with coordinating the implementation and enforcement by Executive agencies of Section 504 of the Rehabilitation Act.)**

The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability by federal executive branch agencies, including DHS. 29 U.S.C. Section 794(a). It prohibits DHS from excluding from participation in, denying the benefits of, or subjecting to discrimination under any federally funded program or activity a person with a disability solely by reason of disability. *Id.* "An agency violates the Act if it (1) intentionally acts on the basis of the disability; (2) refuses to provide a reasonable modification; or (3) takes an action or adopts a rule that disproportionately affects disabled people."[7]

The Seventh Circuit reached the "inescapable" conclusion that the prior Administration's public charge rule, in counting disabilities with certain projected outcomes as a heavily weighted negative factor and counting receipt of Medicaid, "penalizes disabled persons in contravention of the Rehabilitation Act."[8] The court observed that, even with these considerations being factors in a totality of the circumstances test rather than dispositive factors, "the Rule disproportionately burdens disabled people and in many instances makes it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge."[9]

The 1999 Guidance's consideration of long-term institutionalization, as well as any consideration of Medicaid or SSI benefits, would disproportionately burden disabled people and make it extremely likely that their disabilities would be the but-for cause of being deemed likely to become a public charge.

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[6] *Cook County v. Wolf*, at 228.

[7] *Id.*, at 227.

[8] *Id*. at 228.

[9] *Id.*

Education and Skills:

1. **Should DHS consider the varied access to educational opportunities afforded to applicants to avoid disparate impacts? If yes, how should DHS consider this limited access and why?**

We recommend that the "education and skills" mandatory factor be utilized and defined exclusively as a positively weighted factor in favor of admitting an applicant to the United States or adjusting their status, to the extent possible. Adjudicators should consider a broad range of experiences and abilities, including vocational training, apprenticeships, volunteer work, secondary education, hobbies and creative talents, and historical jobs held in the country of origin.

To minimize disparate impact on immigrants (especially immigrants with disabilities) who may have had differing or limited access to postsecondary education, DHS should not consider one particular type of education or set of skills (such as, for example, the equivalent of traditional four-year Bachelor's Degrees or Master's Degrees) "highly skilled" while considering all other types "unskilled." People with disabilities in general, according to the Bureau of Labor Statistics, are less likely to have completed high school and to have obtained a bachelor's degree than people without disabilities.[10] Nonetheless, individuals with disabilities may have obtained significant technical, social, academic, or creative skills through one of the other means listed above. Additionally, some individuals with intellectual and developmental disabilities (IDD) may have completed a certificate-granting or degree-granting postsecondary education program specifically for those with IDD that is nonetheless not considered by DHS adjudicators.[11]

Similarly, individuals who are members of BIPOC communities have experienced barriers to obtaining higher education in some countries due to systemic or past racism. In addition to any barriers present in their own countries, immigrants of color will encounter the racism faced by citizens - as well as cultural and language barriers - when they attempt to obtain credentials in the United States. In the United States, Black students for example- due to systemic racism - are less likely to graduate high school than white students of the same socioeconomic class, less likely to attend and complete college, and more likely to attend for-profit schools than nonprofit four-year institutions.[12] Nonetheless, just as all other immigrants do, BIPOC immigrants have

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[10] U.S. Bureau of Labor Statistics, *People with a disability less likely to have completed a bachelor's degree,* Economics Daily (Jul. 20, 2015), https://www.bls.gov/opub/ted/2015/people-with-a-disability-less-likely-to-have-completed-a-bachelors-degree.htm.

[11] U.S. Dep't of Educ., *Transition and Postsecondary Programs for Students with Intellectual Disabilities*, https://www2.ed.gov/programs/tpsid/index.html (last updated Nov. 12, 2015); College Consensus, *The Complete Guide to College for Students With Disabilities,* https://www.collegeconsensus.com/resources/college-life/guide-for-students-with-disabilities/ (last visited Oct. 14, 2021).

[12] Matt Barnum, *Race, not just poverty, shapes who graduates in America — and other education lessons from a big new study,* ChalkBeat (Mar. 23, 2018, 12:25PM),

significant education, skills, and abilities that may be weighted positively under the "education and skills" prong.

Therefore, CCD's proposal that DHS weight the "education and skills" prong only positively is intended to reduce the impact of the educational disparities described while nonetheless accounting for and acknowledging the life experiences and skills of all immigrants. To some extent, the access barriers described could deprive some immigrants of the majority of opportunities for personal development. DHS' examination of the "education and skills" prong for each immigrant should therefore also take into account the impact of any barriers on a case-by-case basis.

Public Benefits Considered:

1. **Should DHS consider the receipt of public benefits (past and/or current) in the public charge inadmissibility determination? If yes, how should DHS consider the receipt of public benefits and why?**

For the reasons described above, DHS should not consider receipt of Medicaid or SSI benefits; such consideration would amount to disability-based discrimination. Nor should DHS consider receipt of housing or nutrition assistance, as they are not indicators of a future likelihood that a person will be primarily dependent on the government for subsistence on a long-term basis. Further, counting receipt of these benefits and discouraging immigrants from seeking needed nutrition and housing assistance would be a highly problematic policy, contributing to greater healthcare costs and an already serious homelessness problem.

We also note that Congress made clear that the mere receipt of means-tested benefits does not make a person likely to become a public charge when it rejected a proposed amendment to the INA that would have defined public charge to cover "any alien who receives [means-tested public benefits] for an aggregate of at least 12 months."[13]

2. **Which public benefits, if any, should not be considered as part of a public charge inadmissibility determination?**

See the response to the previous question.

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https://www.chalkbeat.org/2018/3/23/21104601/race-not-just-poverty-shapes-who-graduates-in-america-and-other-education-lessons-from-a-big-new-stu; C.J. Libassi, *The Neglected College Race Gap: Racial Disparities Among College Completers,* Ctr. for American Progress (May 23, 2018, 9:39AM), https://www.americanprogress.org/issues/education-postsecondary/reports/2018/05/23/451186/neglected-college-race-gap-racial-disparities-among-college-completers/.

[13] 142 Cong. Rec. 24313, 24425 (1996).

3. **How should DHS address the possibility that individuals who are eligible for public benefits, including U.S. citizen relatives of noncitizens, would forgo the receipt of those benefits as a result of DHS's consideration of certain public benefits in the public charge inadmissibility determination? What data and information should DHS consider about the direct and indirect effects of past public charge policies in this regard?**

We reference but do not repeat here the extensive research catalogued in the comments submitted by the Protecting Immigrant Families coalition demonstrating the chilling effect that the prior Administration's public charge rule has had on immigrants who are eligible for, but have chosen to forgo Medicaid, SNAP and other public benefits. The effects of that policy continue even after it was rescinded by the current Administration. Not only does this chilling effect amount to appalling public policy--encouraging individuals to forgo help with basic nutrition, basic healthcare, and housing--but it also results in needless costs in the form of preventable physical and mental healthcare costs, repeated emergency room visits, hospitalizations, and shelter costs. We have decades of evidence demonstrating that the provision of housing assistance, preventative care, and nutrition assistance saves lives and saves costly crisis and late-stage care.

The continuation of the COVID-19 pandemic makes these public policy concerns even more significant. Discouraging eligible individuals from seeking needed help with housing, food and medical care increases their risk of infection and death, and puts everyone at risk. Further, it results in more individuals filling hospital beds at a time when resources are scarce in many places; we can ill afford to continue that policy. DHS should do everything in its power to ensure that eligible immigrants are encouraged to apply for benefits and that the public charge rule is sufficiently narrowed so that it ceases to serve as a significant deterrent to individuals seeking benefits to which they are entitled.

Sincerely,

American Association on Intellectual and Developmental Disabilities

The Arc of the United States

Association of University Centers on Disabilities

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Center for Public Representation

Disability Rights Education and Defense Fund

Epilepsy Foundation

Family Voices

National Association of Councils on Developmental Disabilities

National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)

National Disability Rights Network (NDRN)

National Down Syndrome Congress

RespectAbility

TASH

United Spinal Association

World Institute on Disability