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FAIR is a nonprofit public interest organization working to end illegal immigration and to set levels of legal immigration that are consistent with the national interest.



FEDERATION FOR AMERICAN IMMIGRATION REFORM

October 22, 2021

Mr. Andrew Parker
Branch Chief, Residence and Admissibility Branch
Residence and Naturalization Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive,
Camp Springs, MD 20746

RE: DHS Docket No. USCIS-2021-0013; Comments on Public Charge Ground of Inadmissibility

Dear Mr. Parker,

The Federation for American Immigration Reform (“FAIR”) respectfully submits the following public comments to the Department of Homeland Security (“DHS”) in response to the Department’s request for information, as published in the Federal Register on August 23, 2021. *See Comments on Public Charge Ground of Inadmissibility* (DHS Docket No. USCIS-2021-0013).

FAIR is a national, nonprofit, public-interest organization comprised of millions of concerned citizens who share a common belief that our nation's immigration laws must be enforced, and that policies must be reformed to better serve the national interest. Our organization examines trends and effects, educates the public on the impacts of sustained high volume immigration, and advocates for sensible solutions that enhance America’s environmental, societal, and economic interests today, and into the future.

I. Background

Under INA § 212(a)(4), an alien who is an applicant for a visa, admission, or adjustment of status is inadmissible if he or she is likely at any time to become a public charge. The public charge ground of inadmissibility, therefore, applies to any alien applying for a visa to come to the United States temporarily or permanently, for admission, or for adjustment of status to that of a lawful permanent resident. While the term “public charge,” is not defined



in statute, the INA specifies that when determining if an alien is likely at any time to become a public charge, officers must consider at least the alien's age; health; family status; assets, resources, and financial status; and education and skills.¹

Additionally, INA § 212(a)(4) permits the consular officer, immigration officer, or an immigration judge to consider any affidavit of support submitted under INA § 213A on the applicant's behalf when determining whether the applicant may become a public charge.² With very limited exceptions, aliens seeking family-based immigrant visas and adjustment of status, and a limited number of employment-based immigrant visas and adjustment of status, must have a sufficient affidavit of support or will be found inadmissible as likely to become a public charge.³

Public charge restrictions to immigration have been a part of U.S. immigration law for over a century and self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.⁴ It continues to be the immigration policy of the United States that aliens arriving to the United States not depend on taxpayer-funded public benefits to meet their needs. Rather, through INA § 212(a)(4), Congress has sought to ensure that immigrants rely on their own capabilities and the resources of their families, sponsors, and private organizations and that the availability of public benefits not constitute an incentive for immigration to the United States. Indeed, as recently as 1996, Congress clearly declared in its policy statement in PRWORA that self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes and that it should continue to be a governing principle in the United States.⁵

In 1999, then- Immigration and Nationality Services (“INS”) issued interim field guidance (“1999 Interim Field Guidance”) and a proposed rule to define the term “public charge” in response to the enactment of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”) and Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), which restricted the availability of public benefits to aliens in the United States.⁶ INS never finalized its proposed

¹ See INA § 212(a)(4)(B)(i).

² See INA § 212(a)(4)(B)(ii)

³ See INA § 212(a)(4)(C), (D)

⁴ U.S. Citizenship and Immigration Services, “Public Charge Provisions of Immigration Law: A Brief Historical Background” (Aug. 14, 2019), available at <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/public-charge-provisions-of-immigration-law-a-brief-historical-background>.

⁵ See 8 U.S.C. 1601.

⁶ Public Law 104-208, div. C, 110 Stat 3009-546; Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Public Law 104-193, 11 Stat. 2105, which included a statement of national policy regarding immigration and welfare generally. The statement provides, among other things, that “it continues to be the immigration policy of the United States that aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the

regulation, but the 1999 Interim Field Guidance remained operative until the DHS promulgated a new public charge regulation in 2019, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (“2019 Public Charge Rule”). The 1999 Interim Field Guidance, which DHS currently implements following the Biden Administration’s refusal to defend the 2019 Public Charge Rule,⁷ defined “public charge” as an alien “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”⁸ Neither the proposed rule nor 1999 Interim Field Guidance sufficiently described the mandatory factors or explained how to weigh these factors in the public charge inadmissibility determination.

As explained below, the 1999 Interim Guidance has been an ineffective in accomplishing the legislative aims in maintaining the public charge statute. As a result, DHS has permitted substantial welfare use among immigrants to the United States so long as such dependency was not determined to be “primarily dependent” on public benefits, and DHS’s public charge determinations under the 1999 Interim Field Guidance arbitrarily excluded consideration of non-cash assistance.

FAIR urges DHS to enforce the public charge statute consistently with Congress’s intent that applicants for admission and adjustment of status who are subject to the public charge ground of inadmissibility should be self-sufficient and should not depend on the government to meet their needs. FAIR generally supports DHS’s 2019 Public Charge Rule, which improved upon the 1999 Interim Field Guidance aligning public charge policy with the self-sufficiency principles set forth in PRWORA.

FAIR strongly recommends, however, further strengthening the policies promulgated in the 2019 regulation by requiring officers to consider receipt of all means-based public benefits without regard to a distinction between cash and non-cash benefits, require officers to consider means-based public benefits received by an alien’s dependents, and require officers to give more weight to factors that are more predictive of whether an alien will become a public charge.

resources of their families, their sponsors, and private organizations, and the availability of public benefits not constitute an incentive for immigration to the United States.” *See* 8 U.S.C. 1601.

⁷ U.S. Department of Homeland Security, “DHS Secretary Statement on the 2019 Public Charge Rule,” Mar. 9, 2021, available at <https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule>.

⁸ 64 Fed. Reg. 28689 (May 26, 1999).

II. Purpose and Definition of Public Charge

How should DHS define the term “public charge”?

FAIR urges DHS to adopt the definition of public charge initially proposed by DHS in 2018 as an “alien who receives one or more public benefits.”⁹ DHS must consider receipt of past and future receipt of public benefits in order to determine whether an alien meets the definition of “public charge.”

FAIR agrees with DHS’s statement that the policy goals articulated in PRWORA and IIRIRA should inform its administrative implementation of the public charge ground of inadmissibility.¹⁰ There is no conflict 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. Further, FAIR agrees with DHS’s belief that Congress, in enacting PRWORA and IIRIRA very close in time, 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.¹¹

Additionally, in 2018, DHS proposed to make both the current receipt of public benefits as well as past receipt within 36 months “strong indicators” that the alien is likely to become a public charge.¹² FAIR strongly endorses this treatment of current or past public benefits use as a heavily weighted negative factor in making this determination.¹³ DHS should apply the totality of the circumstances framework sufficiently rigorous when applied to the appropriate set of public benefits. Further, FAIR recommends the following reforms to this system:

1. DHS must expand the list of public benefits covered in a public charge determination.

FAIR strongly urges DHS to consider receipt of all public benefits when determining whether an alien is likely to become a public charge, without regard to whether the public benefit is a cash or non-cash benefit. There is no meaningful distinction between dependency and “partial dependency” when it comes to defining a public charge, and there is no basis for limiting consideration of non-cash benefits when conducting a public charge determination. Accordingly, FAIR urges DHS to expand the list of public benefits

⁹ 83 Fed. Reg. 51114.

¹⁰ 83 Fed. Reg. 51114, 51133.

¹¹ *Id.*

¹² 83 Fed. Reg. 51199- 200.

¹³ Proposed 8 C.F.R. § 212.22(c)(1)(ii) and (iii).

that may be considered in a public charge determination to include any means-based form of public assistance. For example, eligibility for federal or state retirement, health, disability, postsecondary education, and unemployment benefits is, with rare exceptions, determined using individualized adjudications of need and is typically means-based.¹

FAIR also urges DHS to specifically include the Earned Income Tax Credit (EITC) and Children’s Tax Credit (CTC) programs in the list of specified government payments that form the definition of public benefit.¹⁴ Although these payments are employment-based subsidies, they are still means-tested transfer payments for which aliens must individually qualify and are evidence that an alien is not self-sufficient without a government subsidy. At a minimum, payments under either program should be excluded from the definition of gross annual household income.

FAIR further recommends that public benefits provided by state and local governments to nonqualified aliens under authority of PRWORA,¹⁵ be specifically included in the codified list. These benefits are indisputably provided from “appropriated funds” and with few exceptions are accessed on an individualized based using means-tested criteria.

2. Public benefits used by an alien’s dependents must be included in a public charge determination.

An analysis of an alien’s financial status and therefore likelihood of becoming a public charge is incomplete without assessing any public benefits that are used by the alien’s dependents. An alien is not self-reliant if he or she must depend upon public benefits to support his or her children or other family members who depend upon them for support. For the same reason income and family size are mandatory factors to be considered in a public charger determination, the public benefits a dependent utilizes should be considered as well. Any program for children benefits the parents who are otherwise responsible for them.

What data or evidence is available and relevant to how DHS should define the term “public charge”?

Data shows that a high proportion of immigrants to the United States are dependent on safety-net public benefits.¹⁶ According to a 2015 study conducted by the Center for Immigration Studies (“CIS”), over half of all immigrant-led households used at least one

¹⁴ 8 C.F.R. §212.21(b).

¹⁵ See 8 U.S.C. § 1621(d).

¹⁶ Jeanne Batalova, Michael Fix and Mark Green berg, “Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefit Use,” Migration Policy Institute, June 2018, available at [file:///C:/Users/obrienm/Downloads/ProposedPublicChargeRule_FinalWEB%20\(1\).pdf](file:///C:/Users/obrienm/Downloads/ProposedPublicChargeRule_FinalWEB%20(1).pdf).

welfare program – compared to only thirty percent of native households.¹⁷ The same CIS report showed that forty-eight percent of households headed by immigrants who have been in the country for more than two decades continue to access at least one welfare program.¹⁸

A December 2, 2018 follow-up study found that there has been a slight increase in the use of safety-net benefits by non-citizen households. According to CIS, 63 percent of non-citizen households accessed welfare programs, compared to 35 percent of native households.¹⁹ And, according to data from the Census Bureau’s Survey of Income and Program Participation (“SIPP”), by the year 2030, more than 13 million immigrants will use public benefits and 7.5 million immigrants will be enrolled in Medicaid – placing a major strain on an already ailing program.²⁰

The 2014 SIPP data indicated that approximately 50 percent of households headed by an immigrant used some form of welfare for either the head of household or another person residing in the household. The survey also indicated that approximately 90 percent are likely to remain on some form of welfare after 20 years, based on historical numbers.²¹ For Medicaid alone, the same SIPP survey suggests that nearly 80,000 new immigrants enroll in the program each year. The average annual cost-per-enrollee for Medicaid was \$5,736 in Fiscal Year 2014, according to the Kaiser Family Foundation.²²

If DHS were to defend and implement the 2019 Public Charge Rule within two years, the United States could see up to 858,000 fewer immigrants enrolled in Medicaid by 2030, based on current population trends. Considering the average cost-per-enrollee, that could lead to a gross savings as high as \$4.9 billion in the same time period. These cost savings could increase exponentially if other popular welfare programs are considered.

While it is important to note that statistics include data from immigrants in the United States both legally and illegally, it is clear that 1999 Interim Field Guidance has

¹⁷ Steven A. Camarota, “Welfare Use by Immigrant and Native Households: An Analysis of Medicaid, Cash, Food, and Housing Programs,” Center for Immigration Studies, September 10, 2015, *available at* <https://cis.org/Report/Welfare-Use-Immigrant-and-Native-Households>.

¹⁸ *Id.*

¹⁹ Steven A. Camarota and Karen Zeigler, “63% of Non-Citizen Households Access Welfare Programs,” Center for Immigration Studies, December 2, 2018, *available at* <https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs>.

²⁰ U.S. Census Bureau, “2014 Survey of Income and Program Participation,” *available at* <https://www.census.gov/programs-surveys/sipp/data/2014-panel.html>.

²¹ U.S. Census Bureau, “Survey of Income and Program Participation,” *available at* <https://www.census.gov/programs-surveys/sipp/data/2014-panel.html>.

²² Kaiser Family Foundation, “Medicaid Spending per Enrollee (Full or Partial Benefit),” *available at* <https://www.kff.org/medicaid/state-indicator/medicaid-spending-per-enrollee/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22,%22asc%22%7D>.

accomplished little in identifying which aliens subject to the public charge statute are likely to become a public charge in the United States. Accordingly, FAIR strongly recommends adopting the “public charge” definition proposed above and the system created by the 2019 Public Charge Rule to increase self-reliance and reduce the immigration systems strain on U.S. taxpayers.

How might DHS define the term “public charge”, or otherwise draft its rule, so as to minimize confusion and uncertainty that could lead otherwise-eligible individuals to forgo the receipt of public benefits?

FAIR comments that facilitating the use of public benefits generally by immigrants, even those who may be eligible by the benefits’ authorizing statutes, directly conflicts with Congressional intent in enacting the public charge statute. In 1996 Congress declared “a compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that aliens *be self-reliant* in accordance with national immigration policy” (emphasis added).²³ “Self-reliant” is unambiguous, and there is no meaningful distinction between dependency and “partial dependency” when it comes to defining a public charge.

Accordingly, FAIR urges DHS to adopt a public charge rule that considers receipt of all public benefits as part of its totality of the circumstances determination regarding whether an alien is likely to become a public charge. In promulgating its 2019 Public Charge Rule, DHS was correct to strike the “primarily” qualifier from its definition of a public charge²⁴. Allowing any public benefit use at all is unnecessary, will be difficult to administer, and is not supported by Congressional intent.²⁵

III. Prospective Nature of the Public Charge Inadmissibility Determination

Which factors (whether statutory factors or any other relevant factors identified by the commenter) are most predictive of whether a noncitizen is likely (or is not likely) to become a public charge? To the extent that data exist on this question, how can DHS use such data to improve public charge policymaking and adjudication?

FAIR strongly believes that an alien’s education and income levels are the most reliable predictors of whether an alien is likely to become a public charge. Data from the Survey of Income and Program Participation (SIPP) analyzed by CIS shows that 81 percent of

²³ 8 U.S.C. § 1601, Statements of National Policy Concerning Welfare and Immigration, *available at* https://www.law.cornell.edu/uscode/pdf/uscode08/lii_usc_TI_08_CH_14_SE_1601.pdf.

²⁴ See 84 Fed. Reg. 41292.

²⁵ See IIRIRA, Public Law 104-208, div. C, sec. 531, 110 Stat. 3009-546, 3009-674 (Sept. 30, 1996) (amending INA section 212(a)(4), 8 U.S.C. 1182(a)(4)); H.R. Rep. No. 104-828 at 240-41 (1996) (Conf. Rep.) (“This section amends INA section 212(a)(4) to expand the public charge ground of inadmissibility. . . Self-reliance is one of the most fundamental principles of immigration law.”).

households headed by aliens with only a high school diploma or less utilize public benefits, while only 37 percent of households headed by aliens with at least some college use welfare.²⁶ Additionally, of non-citizen households receiving public benefits, 93 percent have at least one working member, as do 76 percent of native households receiving public benefits.²⁷ When evaluating the totality of an applicant's circumstances, income should be the emphasis rather than employment in the context of public-charge.

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?

DHS must improve its public messaging in order to address the potential for perceived unfairness or discrimination in the public charge inadmissibility adjudications. For example, on March 9, 2021 DHS issued a press release that “the government will no longer defend the 2019 Public Charge Rule as doing so is *neither in the public interest nor an efficient use of limited government resources*” (emphasis added).²⁸ The 2019 Public Charge Rule, however, provided a significant improvement from the *status quo* under DHS’s 1999 Interim Field Guidance. The rule ensured with greater efficacy that immigrants subject to the public charge statute would be self-reliant in the United States, thereby protecting including vulnerable citizens that depend on the availability and quality of public assistance and furthering Congressional intent.²⁹

To the extent that implementation of the public charge statute specifically or disproportionately affects those of a particular age or those with lower incomes, less education, limited English proficiency, or poor health, FAIR reminds DHS, as it has acknowledged itself in the 2019 Public Charge Rule, that Congress requires DHS to consider, among other factors, an applicant's age, assets, resources, financial status, education, and skills as part of the public charge inadmissibility determination.³⁰

This administration’s messaging, however, is entirely counterproductive in addressing the potential for perceived unfairness or discrimination and commits a great disservice to the

²⁶ Steven A. Camarota and Karen Zeigler, “63% of Non-Citizen Households Access Welfare Programs”, Center for Immigration Studies, December 2, 2018, Table 3.

²⁷ *Id.* at Table 6.

²⁸ U.S. Department of Homeland Security, “DHS Secretary Statement on the 2019 Public Charge Rule,” Mar. 9, 2021, available at <https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule>.

²⁹ See IIRIRA, Public Law 104-208, div. C, sec. 531, 110 Stat. 3009-546, 3009-674 (Sept. 30, 1996) (amending INA section 212(a)(4), 8 U.S.C. 1182(a)(4)); H.R. Rep. No. 104-828 at 240-41 (1996) (Conf. Rep.) (“This section amends INA section 212(a)(4) to expand the public charge ground of inadmissibility. . . Self-reliance is one of the most fundamental principles of immigration law.”).

³⁰ See INA § 212(a)(4)(B)(i); 84 Fed. Reg. 41292, 41309.

many DHS employees who worked tirelessly to develop the rule consistent with the law, Congressional intent, and interests of the American public. To correct course, FAIR recommends implementing clear guidance so the public can understand the requirements of the law and educating the public on the history and rationale of the public charge statute, including reference to other countries who impose similar self-sufficiency-based restrictions on immigration.

Should DHS give any more or less consideration to any one or more of the statutory factors, the Affidavit of Support Under Section 213A of the INA, or any additional factors DHS may add through the rulemaking process in a public charge inadmissibility determination?

As explained in detail above, FAIR strongly recommends DHS to give significant weight to the education and income in determining whether an alien is likely to become a public charge. Prioritizing higher education and income levels in our immigration process would help reduce the likelihood that a large number of immigrants will end up utilizing public benefits and becoming public charges.³¹

Those immigrants with a high school education or less should be required to demonstrate that the applicant holds a skill(s) that is in high demand and can be expected to earn a high enough salary that it largely eliminates the possibility of qualifying for any welfare program. The possession of a marketable job skill should reasonably ensure that that a particular immigrant will earn at least three times the federal poverty rate for the foreseeable future, keeping him or her from needing taxpayer-funded assistance.

Additionally, as explained above, DHS must prioritize consideration of an alien's total income, not just employment. Since employment alone is not an accurate indication of one's ability to support himself or herself or their family, it should not be the primary deciding factor in whether or not an immigrant is likely to become a public charge.³² Instead, the primary focus should be on whether or not an immigrant can demonstrate an ability to earn a wage equal to at least three times the federal poverty level.

To this end, FAIR recommends DHS raise the income threshold by including provisions that require applicants to show their income be high enough that neither they nor their dependents will qualify for need-based public benefits. The current public charge guidelines, which use 125 percent of poverty as the point at which someone is likely to become a public charge, are too low. Many individuals with incomes above 125 percent

³¹ Steven A. Camarota and Karen Zeigler, "63% of Non-Citizen Households Access Welfare Programs", Center for Immigration Studies, December 2, 2018, Table 3.

³² U.S. Department of State, "9 FAM 302.8 (U) PUBLIC CHARGE - INA 212(A)(4)," *available at* <https://fam.state.gov/fam/09fam/09fam030208.html>.

of poverty still qualify for many means-tested welfare programs.³³ Additionally, individuals who make below 250 percent of poverty typically pay little or no federal income tax.³⁴ As a result, FAIR recommends DHS implement guidelines that consider an income below three times the federal poverty rate to be a heavily weighted negative factor.

FAIR also recommends that evidence of inadmissibility-creating drug abuse or addiction be expressly included as a heavily weighted negative factor. Evidence of drug abuse and addiction properly weighed against the totality of circumstances would provide DHS information relevant to an alien's ability to maintain employment, income, and health factors provided by the alien to demonstrate self-reliance.

IV. Statutory Factors

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

An alien's age is a mandatory factor that must be considered when determining whether an alien is likely to become a public charge in the future.³⁵ FAIR agrees with DHS's 2019 assessment that evaluating an applicant's age as part of the public charge inadmissibility determination does not constitute discrimination based on age or disability.³⁶

As DHS explained in its 2018 Public Charge NPRM, a person's age may impact his or her ability to legally or physically work and is therefore relevant to being self-sufficient, and the likelihood of becoming a public charge.³⁷ FAIR supports evaluating an alien's likelihood of becoming a public charge based on the totality of the alien's circumstances. If an alien's positive factors outweigh the negative factors, then the alien would not be found inadmissible as likely to become a public charge.

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

In DHS's 2019 public charge rule, DHS used the medical examination program established under 42 C.F.R. § 34 to predict the likelihood of future dependence.³⁸

³³ See Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Housing and Human Services, "2020 Poverty Guidelines" (2021), available at <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2021-poverty-guidelines>.

³⁴ *Id.*

³⁵ See INA section 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

³⁶ 84 Fed. Reg. 41292, 41404-5.

³⁷ 83 Fed. Reg. 51114, 51180-1.

³⁸ 83 Fed. Reg. 51182.

Medical examination reports, including Form I-693 and “applicable DOS medical examination forms” are already required for State Department immigrant visa petition processing, USCIS adjustment of status applications, and certain other adjustment petitions.³⁹ Also, DHS has the discretionary authority to require a nonimmigrant to submit to a medical examination at a port of entry.⁴⁰ Medical examiners may screen aliens for communicable diseases, physical or mental conditions that pose a threat to property or safety, and evidence of drug abuse or addiction.⁴¹

Additionally, current regulations provide for two levels of health exclusion: Class A and Class B Medical Certificates.⁴² Class A certificates document mandatory exclusions on pure medical grounds, while a Class B medical certificate is issued if there are “other physical and mental abnormalities that bear on the likelihood of an alien becoming a public charge.”⁴³

FAIR agrees with the scheme created under DHS’s 2019 Public Charge Rule to treat issuance of a Class A or B medical certificate and an alien’s inability to obtain medical insurance as two distinct heavily weighted negative health factors.⁴⁴ The two factors are legally distinct, and should be weighed separately. FAIR also recommends that evidence of inadmissibility-creating drug abuse or addiction be expressly included as a heavily weighted negative factor. FAIR believes that this is an appropriate approach to defining and evaluating health for public charge purposes, so long as the inquiry is limited to whether aliens are likely to be able to pay for health-related expenses for themselves and any household dependents without the use of public resources.

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?

Yes, FAIR believes DHS must consider an alien’s disabilities or chronic health conditions as a part of the mandatory health factor. Any analysis on an alien’s health, as it pertains to their likelihood of becoming a public charge, is incomplete without evaluating whether disabilities or chronic health conditions are present. DHS should consider the existence of a medical condition in light of the effect that such medical condition is likely to have on the alien’s ability to attend school or work, and weigh such evidence in the totality of the circumstances.

DHS should also consider whether the alien has the resources to pay for associated medical costs. FAIR believes an alien is at high risk of becoming a public charge if he or

³⁹ *Id.*

⁴⁰ *Id.* (citing 8 U.S.C. § 1222(b)).

⁴¹ 8 U.S.C. § 1182(a)(1)(A).

⁴² 42 C.F.R. § 34.4.

⁴³ 42 C.F.R. § 34.4(b).

⁴⁴ *See* 83 Fed. Reg. 51181, 51201, 8 C.F.R. § 212.21(c)(1)(iv).

she does not have the resources to pay for reasonably foreseeable medical costs, including costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work.⁴⁵

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?

FAIR disagrees with the comments stating DHS's 2019 Public Charge Rule discriminated against individuals with disabilities or those with specific medical conditions. As DHS itself explained in its 2018 Public Charge NPRM, in enacting INA § 212(a)(4), Congress required DHS to consider an alien's health as part of the public charge inadmissibility determination.⁴⁶ Further, Congress has not prohibited the application of the public charge inadmissibility ground to aliens with disabilities who receive, or are likely to receive, disability benefits for which they are eligible.

The cumulative fiscal impact of health problems is a major national policy concern. As the DHS has already reported, the Centers for Disease Control estimate that 86 percent of the United States' \$2.7 trillion annual health care expenditures went for care for persons with chronic physical or mental health conditions, while SIPP data show that more than half of all non-citizens who describe their health as poor receive some form of cash or noncash public benefit.⁴⁷

Further, if DHS were to implement a system similar to the one created by the 2019 Public Charge Rule, an alien's health should not be outcome determinative. As with any other medical condition identified in the alien's application and supporting documentation, the alien's disability should be considered in the totality of the circumstances framework.

In other words, as with any other mandated factor and consideration in the public charge inadmissibility determination, DHS should look at each of the mandatory factors, and the affidavit of support, if required, as well as all other relevant factors in the totality of the circumstances. Therefore, consideration of a disability in the context of the totality of circumstances does not violate the Rehabilitation Act's prohibition on denying a benefit "solely by reason of [an applicant's] disability."⁴⁸

⁴⁵ See 83 FR 51114, 51182.

⁴⁶ See INA § 212(a)(4)(B)(i).

⁴⁷ 83 Fed. Reg. 511200-201.

⁴⁸ 29 U.S.C. § 794(a).

Should DHS account for social determinants of health to avoid unintended disparate impacts on historically disadvantaged groups? If yes, how should DHS consider this limited access and why?

No, FAIR does not believe adding exceptions where social determinants of health exist to avoid unintended disparate impacts on historically disadvantaged groups is consistent with Congress's intent to ensure immigrants are self-sufficient. Social determinants of health are only relevant to the determination of whether an applicant is likely to become a public charge in that the existence of such may increase the likelihood that an individual will become a public charge. As a result, FAIR believes that applying a case-by-case analysis approach for each individual will result in the fairest system that is also most consistent with the legislative aim of the public charge statute.

How should DHS define and consider family status for the purposes of a public charge inadmissibility determination? How should an applicant's household size be considered as part of the family status factor? What definition of an applicant's household size should DHS use for the public charge inadmissibility determination?

“Family status” is also a mandatory evidentiary factor to be taken into account in all public charge determinations.⁴⁹ FAIR generally agrees with the definition of household used in DHS's 2019 Public Charge Rule and recommends DHS maintain this definition. Research and data have shown that the number of household members may affect the likelihood of receipt of public benefits.⁵⁰ However, the number of household members may also positively affect the financial status and household, depending on the alien's and household's circumstances, include other member's employment and financial contributions to the household. USCIS should take into account individuals for whom an alien or an alien's parents or guardians provide at least 50 percent of financial support.⁵¹ These expenditures have significant bearing on whether an alien has sufficient assets. The threshold of “at least 50 percent of financial support” is a reasonable criterion to determine who belongs in an alien's household, without regard to physical residence in the home.

Further, FAIR concurs with the DHS's position in the 2019 Public Charge Rule that USCIS should consider the size of an alien's household as the primary element of the family status factor.⁵² This factor appropriately involves the assessment of whether an alien has a household to support, or is being supported by another household, when calculating the alien's household size.⁵³

⁴⁹ 8 U.S.C. § 1182(a)(4)(B)(i)(III).

⁵⁰ See 83 Fed. Reg. 51114, 51176-51178, 51184.

⁵¹ 83 Fed. Reg. 51176.

⁵² 83 Fed. Reg. 51175.

⁵³ 83 Fed. Reg. 51184.

How should DHS consider an applicant's education and skills in making a public charge inadmissibility determination? What education and skills should DHS consider in making a public charge inadmissibility determination?

As explained above, FAIR strongly suggests DHS consider an applicant's education level has a heavily weighted factor. An alien's education level is a strong indicator of whether the alien will become a public charge. Data shows that while 37 percent of households headed by noncitizens with at least some college use welfare, 81 percent for households headed by noncitizens with only a high school diploma or less.⁵⁴

Because data shows that aliens without a high school diploma are significantly more likely to become a public charge than those with post-secondary education, FAIR strongly suggests DHS should require aliens without at least some college experience to bear a significant burden in proving they will not become public charges. In lieu of evidence of sufficient education levels, FAIR recommends possession of a marketable job skill should reasonably ensure that a particular immigrant will earn at least three times the federal poverty rate for the foreseeable future, keeping him/her from needing taxpayer-funded assistance.

V. Affidavit of Support Under Section 213A of the INA

How should DHS consider a sufficient Affidavit of Support Under Section 213A of the INA in the public charge inadmissibility determination? What weight should DHS give to a sufficient Affidavit of Support Under Section 213A of the INA in comparison to the mandatory statutory factors in the public charge inadmissibility determination?

FAIR supports DHS's decision in the 2019 public charge rule to consider failure to submit a "213A" affidavit of support when required as the only factor that would, on its own, establish that an alien is inadmissible on public charge grounds.⁵⁵ DHS accurately noted that "submitting a sufficient affidavit of support does not guarantee that the alien will not receive benefits in future"⁵⁶ and explained that this uncertainty has led it to consider a sufficient affidavit as but one favorable factor in the totality of the circumstances.⁵⁷

In order to ensure that aliens in the admission and permanent residence processes will be self-sufficient, FAIR recommends adding provisions to require an alien beneficiary of an

⁵⁴ Steven A. Camarota and Karen Zeigler, "63% of Non-Citizen Households Access Welfare Programs", Center for Immigration Studies, December 2, 2018, Table 3.

⁵⁵ 83 Fed. Reg. 51178.

⁵⁶ *Id.*

⁵⁷ *Id.*

affidavit of support who has received a public benefit to sue the sponsor for reimbursement of the public benefits received. Current regulations give beneficiaries the option, but not the obligation, to initiate a private legal action against a sponsor who fails to fulfill their contract obligations to support the alien financially.⁵⁸ For an alien beneficiary of an affidavit of support who has received a listed public benefit, failure by the beneficiary to sue for reimbursement of listed public funds received could also be codified as a single sufficient ground for exclusion on public charge grounds. The sponsored beneficiary could also meet this obligation if the sponsor was sued for reimbursement by the funding government agency.

Creating this obligation would not impose an unfair burden on low-income beneficiaries. The 213A statute expressly provides for “payment of legal fees and other costs of collection, and includes corresponding remedies available under State law.”⁵⁹ The alien would not be compelled to reimburse government agencies directly for past use of public funds, a requirement that some federal courts have considered to be ultra vires. This requirement will, however, promote efficiency in public charge reviews, as the alien who has received a listed public benefit that a sponsor committed to fund will have strong incentives to promptly take action to obtain reimbursement under the statutory scheme.

VI. Conclusion

FAIR generally supports the common sense, long overdue changes to the public charge rules created by the 2019 Public Charge Rule. FAIR recommends DHS strengthen this rule by including additional welfare programs used by immigrants, consider the receipt of public benefits by an alien’s dependents, and place additional weight on factors, such as education and income levels, that are proven to be reliable indicators of an alien’s likelihood of becoming a public charge. These changes will not only strengthen the integrity of the immigration system and ensure immigrants are self-sufficient, but protect taxpayers and vulnerable Americans who depend on the availability of safety-net public benefits.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dan Stein', written in a cursive style.

Dan Stein
President
Federation for American Immigration Reform (FAIR)

⁵⁸ See 8 U.S.C. §§ 1183a(a)(1)(B), 1183a(b)(2), and 1183a(c).

⁵⁹ 8 U.S.C. § 1183a(c).