FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

April 22, 2022

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 February 24, 2022. *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

Public charge restrictions have been around for over a century and self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. It continues to be the immigration policy of the United States that immigrants must 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 the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("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.

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 a consular officer, an 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]

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 PRWORA, which restricted the availability of public benefits to aliens in the United States.[4] INS never finalized its proposed regulation, but the 1999 Interim Field Guidance remained operative until the Department of Homeland Security ("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").

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[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] 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 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.

The 1999 Interim Field Guidance, which DHS now applies following the Biden Administration's refusal to defend the 2019 Public Charge Rule,[5] 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."[6] Neither the proposed rule nor 1999 Interim Field Guidance adequately explains how to weigh these factors in the public charge inadmissibility determination.

Alarmingly, this proposed rule reverts the government's definition of public charge to the flawed 1999 Interim Field Guidance model. As explained below, the 1999 Interim Field Guidance does not accomplish 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 amend the proposed rule to enforce the public charge statute consistently with Congress's intent. 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 the scheme created by 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 2019 by requiring officers to consider receipt of all means-tested 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.

II. Definitions Created by the Proposed Rule

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. FAIR respectfully reminds DHS that Congress made clear the immigration policy of the United States that "the availability of public benefits not constitute an incentive for immigration to the United States."[7] As a result, the proposed rule, which significantly raises the threshold of permissible means-tested public benefits usage for purposes of public charge inadmissibility determinations, should be

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[5] 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.

[6] 64 Fed. Reg 28689 (May 26, 1999).

[7] 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.

withdrawn. The proposal operates on the misguided motive to maximize public benefits usage by eligible aliens in the United States and reverts public charge policy to the ineffective status quo established by the 1999 Interim Field Guidance. Accordingly, FAIR urges DHS to:

- Reform its definition so "likely at any time to become a public charge" to include consideration of all means-tested public benefits;
- Expand the proposed rule's definition of "receipt (of public benefits)" to include any means-tested public benefits received by an alien's dependents;
- Define "alien's household" to include individuals for whom an alien or an alien's parents or guardians provide at least 50 percent financial support; and
- Maintain the proposed rule's definition of "government," which includes Federal, State, Tribal, territorial and local governments.

A. DHS's Proposal to Define "Likely at Any Time to Become a Public Charge" Fails to Execute the Public Charge Statute.

FAIR strongly urges DHS to require officers 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, or [degree of dependence]. FAIR recommends that DHS adopt the definition of public charge initially proposed by DHS in 2018 as an "alien who receives one or more public benefits."[8] 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."

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 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.[9]

FAIR also urges DHS to specifically include the Earned Income Tax Credit ("EITC") and Child Tax Credit ("CTC") programs in the list of specified government payments that form the definition of public benefit.[10] 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,

[8] 83 Fed. Reg. 51114.
[9] 8 C.F.R. § 212.21(b).
[10] *Id*.

payments under either program should be excluded from the definition of gross annual household income.

The policy goals articulated in PRWORA and IIRIRA should inform its administrative implementation of the public charge ground of inadmissibility.[11] 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.[12]

Data shows that a high proportion of immigrants to the United States are dependent on safety-net public benefits.[13] According to a 2015 study conducted by the Center for Immigration Studies ("CIS"), over half of all immigrant-led households used at least one welfare program – compared to only thirty percent of native households.[14] 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.[15]

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.[16] 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.[17]

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

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[11] 83 Fed. Reg. 51114, 51133.
[12] *Id.*
[13] 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.
[14] 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.
[15] *Id.*
[16] 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.
[17] U.S. Census Bureau, "2014 Survey of Income and Program Participation," *available at* https://www.census.gov/programs-surveys/sipp/data/2014-panel.html.

to remain on some form of welfare after 20 years, based on historical numbers.[18] 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.[19]

If DHS were to implement this definition 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 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. In promulgating its 2019 Public Charge Rule, DHS was correct to strike the "primarily" qualifier from its definition of a public charge[20]. Allowing any public benefit use at all is unnecessary, will be difficult to administer, and is not supported by Congressional intent.[21]

FAIR further recommends that the proposed rule requires officers to consider means-tested public benefits provided by state and local governments to nonqualified aliens under authority of PRWORA. These benefits are indisputably provided from appropriated funds and with few exceptions are accessed on an individualized-basis using means-tested criteria.

B. DHS Must Expand the "Receipt (of Public Benefits)" Definition to Include Receipt of Benefits Received by the Alien's Dependents.

DHS must amend the proposed rule to include an alien's dependent's receipt of public benefits when making a public charge determination. In the proposed rule, DHS defines "receipt (of public benefits)," separately from its definition of "likely at any time to become a public charge." Here, DHS proposes "receipt (of public benefits)" to mean when a public

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[18] U.S. Census Bureau, "Survey of Income and Program Participation," *available at* https://www.census.gov/programs-surveys/sipp/data/2014-panel.html.

[19] 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%7D.

[20] *See* 84 Fed. Reg. 41292.

[21] *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.").

benefit-granting agency provides public benefits to an [alien], but only where the [alien] is listed as a beneficiary.

An analysis of an alien's financial status and 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.

C. DHS Should Define "Alien's Household" to Include Individuals for Whom an Alien or an Alien's Parents or Guardians Provide At Least 50 Percent Financial Support.

FAIR recommends DHS add a definition of "alien's household" and generally agrees with the definition of household used in DHS's 2019 Public Charge Rule. Accordingly, an alien's household should include:

- The alien;
- The alien's spouse, if physically residing with the alien;
- The alien's children, as defined in INA § 101(b)(1), physically residing with the alien;
- The alien's other children, as defined in INA § 101(b)(1), not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided to the alien;
- Any other individuals (including a spouse not physically residing with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support, or who are listed as a dependent on the alien's federal income tax return; and
- Any individual who provides to the alien at least 50 percent of the alien's financial support, or who lists the alien as a dependent on his or her federal income tax return. FAIR recommends DHS revive this definition as the final rule.

If the alien is a child as defined in INA § 101(b)(1), the alien's household should include:

- The alien;
- The alien's children, as defined in INA § 101(b)(1), physically residing with the alien;
- The alien's other children, as defined in INA § 101(b)(1), not physically residing with the alien, for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement, a

custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;

- The alien's parents, legal guardians, or any other individuals providing or required to provide at least 50 percent of financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
- The parents' or legal guardians' other children, as defined in INA § 101(b)(1), physically residing with the alien;
- The parents' or legal guardians' other children, as defined in INA § 101(b)(1), not physically residing with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and
- Any other individuals to whom the alien's parents or legal guardians provide or are required to provide at least at least 50 percent of the individuals' financial support, or who are listed as a dependent on the parents' or legal guardians' federal income tax return.

"Family status" is a mandatory evidentiary factor to be taken into account in all public charge determinations. Research and data have shown that the number of household members may affect the likelihood of receipt of public benefits. 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. 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. 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.

D. DHS Must Define "Government" to Include Federal, State, Tribal, Territorial, and Local Governments for Purposes of the Public Charge Ground of Inadmissibility.

FAIR supports the proposed rule's definition of "government" at new 8 C.F.R. § 212.21(e), which includes Federal, State, Tribal, territorial, and local governments, for public charge determination purposes. As DHS accurately notes, for much of the time that the concept of public charge has been part of our immigration statutes, States, Tribes, territories, and localities provided much of the taxpayer-funded support available to citizens and aliens. The proposed definition supports Congress's ultimate goal in minimizing immigration's burden on U.S. taxpayers and pubic benefit programs generally.

Including public benefits provided by State, Tribal, territorial, and local governments is also consistent with Congress's scheme in limiting alien's access to public benefits. By enacting 8 U.S.C. § 1632, Congress authorized States to provide for attribution of sponsors income and resources to an alien with respect to the alien's use of State programs. Additionally, the INA § 213 is intended to protect "States, territories, counties, towns, municipalities, and districts" of the United States from an "alien becoming a public charge" and allow any "State, territory, district, county, town, or municipality" to recover the costs of public benefits that they have provided. Further, INA § 213A(b)(1) provides that if a sponsored "alien" receives any means-tested public benefit, "the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor."

FAIR recommends DHS maintain this definition in its final rule to include consideration of all means-tested public benefits funded by U.S. taxpayers. The definition for public charge is tied to these types of benefits that are indicative of whether an alien is dependent upon services paid for at U.S. taxpayer's expense.

III. The Public Charge Inadmissibility Determination

A. DHS Should Amend the Proposed Rule to Require Officers to Give More Weight to the Education and Income Level Factors.

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.[22]

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 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.[23] Additionally, of non-citizen

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

households receiving public benefits, 93 percent have at least one working member, as do 76 percent of native households receiving public benefits.[24] When evaluating the totality of an applicant's circumstances, income should be the emphasis rather than employment in the context of public-charge.

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.

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.[25] 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 of poverty still qualify for many means-tested welfare programs.[26] Additionally, individuals who make below 250 percent of poverty typically pay little or no federal income tax.[27] 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.

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[24] *Id.* at Table 6.
[25] 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.
[26] *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.
[27] *Id.*

B. DHS Must Consider an Alien's Disabilities and Chronic Health Conditions for Purposes of Evaluating the Mandatory Health Factor.

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 are 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 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.[28]

FAIR disagrees with the comments arguing that considering an alien's disabilities is unlawfully discriminatory against individuals with disabilities or those with specific medical conditions. In enacting INA § 212(a)(4), Congress requires DHS to consider an alien's health as part of the public charge inadmissibility determination.[29] 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.[30]

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

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[28] *See* 83 Fed. Reg. 51114, 51182.
[29] *See* INA § 212(a)(4)(B)(i).
[30] 83 Fed. Reg. 511200-201.

circumstances does not violate the Rehabilitation Act's prohibition on denying a benefit "solely by reason of [an applicant's] disability."[31]

C. DHS Should Amend the Proposed Rule to Ensure Sufficient Affidavits of Support and Require Sponsors to Uphold Their Legal Obligations.

FAIR opposes DHS's proposal to omit the requirement that officers assess the likelihood that the sponsor will actually provide financial support to the alien by looking at "how close of a relationship the sponsor has to the alien….whether the sponsor lives with the alien…[and] whether the sponsor has submitted an affidavit with respect to other individuals."[32] The existence of an affidavit of support is an optional factor, but becomes mandatory for most applicants for admission or adjustment of status holding family-based immigrant visas, or certain employment-based immigrant visas where the sponsor is a family-controlled entity.[33] Ensuring that sponsors, who pledge to reimburse the government for an alien's public benefit use, are both likely and able to live up to their obligations before USCIS accepts an Affidavit of Support will mitigate abuse and will further Congress's goal to mitigate the fiscal impact of immigration on U.S. taxpayers.

FAIR supports DHS's decision 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.[34] DHS accurately noted that "submitting a sufficient affidavit of support does not guarantee that the alien will not receive benefits in future"[35] and explained that this uncertainty has led it to consider a sufficient affidavit as but one favorable factor in the totality of the circumstances.[36]

Additionally, 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 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.[37] 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.

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[31] 29 U.S.C. § 794(a).
[32] 83 Fed. Reg. 51198.
[33] INA § 212(a)(4)(B)(ii), (C), and (D).
[34] 83 Fed. Reg. 51178.
[35] *Id.*
[36] *Id.*
[37] *See* 8 U.S.C. §§ 1183a(a)(1)(B), 1183a(b)(2), and 1183a(c).

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."[38] 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.

D. DHS Must Consider Receipt of Public Benefits While in a Public Charge-Exempt Status as a Part of the Totality of the Circumstances Analysis.

As explained above, INA § 212(a)(4) requires officers to consider, at minimum, specific factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge.[39] These factors include an alien's assets, resources, and financial status, among other factors.[40]

While DHS correctly noted that the statute does not specify what evidence or information is relevant to each of the statutory minimum factors, the proposed rule would require DHS officers to ignore relevant information with significant evidentiary value by prohibiting officers from considering an alien's receipt of means-tested public benefits while in a public charge-exempt immigration status.

It is critically important to consider an alien's past and current use of public benefits, regardless of the alien's previous or current immigration status. DHS is operating under the mistaken presumption that because an alien may not be subject to a public charge determination, that the alien's public benefits usage is not relevant whether the alien is currently a public charge or will be likely to become a public charge in the future. Of course, an alien's need to receive means-tested public benefits is a function of the alien's assets, resources, and financial status, as well as from any private safety-net the alien may benefit and could inform an officer as to whether the alien will be able to provide for his or her own needs in the United States.

Additionally, FAIR recommends DHS impose a minimum five-year window for past benefit usage in the public charge analysis. FAIR agrees with commenters who reason that the five year period would be in line with PRWORA's five year waiting period required for an alien to become a "qualified alien" to obtain eligibility for most federal public benefits.[41]

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[38] 8 U.S.C. § 1183a(c).
[39] *See* INA § 212(a)(4)(B)(i).
[40] *Id*.
[41] Center for Immigration Studies, *Comment Re: Public Charge Ground of Inadmissibility* (Oct. 22, 2021), available at https://cis.org/sites/default/files/2021-10/USCIS-Public-Charge-ANPRM-submitted-10-22-2021).pdf.

E. The Proposed Rule Inappropriately Encourages Officers to Issue Negative Public Charge Determinations, Regardless of the Underlying Facts of an Alien's Case.

FAIR strongly urges DHS to amend new 8 C.F.R. § 212.22(c) to ensure that adjudicators are not provided an incentive by this rule to make a positive public charge determination. As currently proposed, 8 C.F.R. § 212.22(c) requires adjudicators to provide a written explanation to specifically articulate each factor considered in the public charge determination and the reasons for the officer's determination. No reciprocal requirement, however, is imposed for determinations that an alien is not subject to the public charge ground of inadmissibility.

USCIS has, however, recently announced initiatives to address the agency's backlog, which include imposing new internal cycle time goals on its officers to ensure efficiency in agency adjudications.[42] FAIR warns DHS that these policies together provide great incentives for immigration officers to provide positive public charge determinations for aliens who may not, given the totality of the circumstances, warrant such determination.

Accordingly, ensuring that positive and negative public charge determinations are given equal treatment and so not to sway immigration officers to make improper determinations, FAIR strongly recommends requiring officers to include written explanations for each determination in the alien's file. USCIS need only to provide the explanation of the public charge determination upon the request of the applicant or petitioner.

IV. Extension of Stay and Change of Status

DHS should amend the proposed rule to include a requirement that aliens seeking an extension of stay or change of status demonstrate that they have not, since obtaining nonimmigrant status they seek to extend or change, have become likely to become a public charge or currently receive public benefits sufficient to be determined to be a public charge. Imposing conditions on extension of stay and change of status applications is within DHS's authority, as Congress granted DHS the authority to regulate conditions and periods of admission of nonimmigrants and conditions for change of status, respectively.[43]

As discussed repeatedly above, Congress's primary goal in enacting and maintaining the public charge statute is to ensure that aliens who are present in the United States are self-sufficient, i.e., rely on their own financial resources, as well as the financial resources of the family, sponsors, and private organizations, and do not drain public resources.[44] Public

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[42] U.S. Citizenship and Immigration Services, *USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders* (Mar. 29, 2022), *available at* https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work.

[43] *See* INA § 214(a)(1); INA § 248(a); 8 C.F.R. § 214.1(a)(3)(i); 8 C.F.R. § 248.1(a).

[44] 8 U.S.C. § 1183a; 8 U.S.C. § 1601(1).

benefits use, including use of benefits beyond what DHS has proposed in its 2022 NPRM, distributes the financial burden from aliens to U.S. taxpayers, contrary to Congress's scheme. The procedures imposed by the 2019 Public Charge Rule will help to ensure that an alien is unlikely to receive public benefits consistent with Congress's goals.

Accordingly, FAIR urges DHS to revive the proposed screening approach of requiring disclosure on an extension of stay or change of status application, under penalty of perjury, of receipt of any public benefit, with disclosure triggering a requirement also to submit a *Declaration of Self Sufficiency*. Under the totality of the circumstances standard, disclosure of receipt after entry of any means-tested public benefit should be required. FAIR recommends DHS include a warning about the adverse immigration consequences for a failure to disclose such benefits on the appropriate extension of stay and change of status application forms.

V. Conclusion

FAIR strongly recommends that DHS reform the *Public Charge Ground of Inadmissibility* rule to require USCIS officers to consider all means-tested public benefits provided by Federal, State, Tribal, territorial, and local government agencies when evaluating whether an alien is likely to become a public charge. DHS should further strengthen the rule by:

- Requiring officers to include the receipt of benefits by an alien's dependents;
- Placing weight on factors, such as education and income levels, that are proven to be reliable indicators f an alien's likelihood of becoming a public charge;
- Ensuring officers have no administrative incentives to issue positive or negative public charge determinations;
- Ensure the submission of sufficient affidavits of support;
- Requiring officers to consider an alien's receipt of public benefits regardless of the alien's immigration status; and
- Applying public charge requirements to extension of stay and change of status requests.

These changes will not only strengthen the integrity of our immigration system and ensure that immigrants are self-sufficient, but protect taxpayers and vulnerable Americans who depend on the availability of safety-net public benefits.

Sincerely,

Dan Stein
President of the Federation for American Immigration Reform (FAIR)