



December 10, 2018

Samantha Deshommes, Chief
Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

Submitted via www.regulations.gov

Re: DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds

Dear Ms. Deshommes:

I am writing on behalf of Asian Americans Advancing Justice | AAJC in response to the Department of Homeland Security's (hereinafter "DHS," or "the Department") Notice of Proposed Rulemaking (hereinafter "NPRM" or "proposed rule") to express our strong opposition to the changes regarding "public charge," published in the Federal Register on October 10, 2018. The proposed rule would devastate many immigrant families, and DHS provides no justification for why such drastic changes are needed. We urge the Department to withdraw this proposed rule in its entirety, and long-standing principles clarified in the 1999 field guidance should remain in effect.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national non-profit organization founded in 1991 dedicated to advancing civil and human rights for Asian Americans. We strive to empower Asian American and Pacific Islander communities across the country by bringing local and national constituencies together and advocating for federal policy that reflects the needs of Asian Americans and promotes a fair and equitable society for all. Advancing Justice | AAJC is the leading national advocate for immigration policy on behalf of the Asian American community, and in this capacity, we work to reunite and keep immigrant families together.

As an organization dedicated to serving Asian American and Pacific Islander communities, we are deeply troubled by the impact the proposed rule will have on our communities. In recent years, three out of every ten individuals obtaining permanent residence status in the U.S. are

from Asia and Pacific Island nations.¹ And forty percent of the millions of individuals and families waiting in long backlogs for family-based immigration are from Asia and Pacific Island nations.² Family-based immigration is a vital pathway for the reunification of Asian American families, as almost two-thirds of Asian Americans are foreign-born.³ The proposed rule threatens to severely restrict the number of immigrants granted lawful permanent residence (i.e., a green card), and the reductions would fall most heavily on immigrants sponsored by immediate U.S.-citizen relatives.⁴

The proposed rule would make fundamental and deeply damaging changes to the criteria for lawful permanent resident status that would disproportionately impact immigrants of color, particularly women, the elderly, and those with limited English proficiency. By elevating wealth and other financial indicators over more traditional criteria such as work and family, the rule threatens to exclude low-wage workers and mothers and grandparents caring for children in the home, among others. Additionally, the proposed rule would chill immigrant families from accessing health, food, and housing supports for which they qualify, degrading community health and wellbeing.

Advancing Justice | AAJC strongly objects to the proposed changes that will result in significant, if not insurmountable, barriers to family reunification and community wellbeing, and we urge DHS to withdraw its proposed rule on public charge. The proposed rule is unjustified, contrary to available research, and beyond the scope of DHS’s authority and Congressional intent. For more than half a century, family reunification has formed the cornerstone of U.S. immigration law and policy. Family unity is a core American value and our family-based immigration system has helped to create the strong, vibrant and diverse American communities that make the United States the country that it is today. Rather than making it more difficult for families to stay together or reunify, we should celebrate our nation’s diverse immigrant heritage by expanding opportunities for American families to thrive together.

I. The proposed rule represents a radical restructuring of our traditional family-based immigration system that exceeds DHS’ authority and contravenes Congressional intent.

The proposed rule makes two massive, unprecedented changes to current U.S. immigration law and policy. First, the proposed rule would dramatically alter the traditional understanding of “public charge” in such a way as to greatly increase the share of green-card applicants at risk of

¹ Department of Homeland Security, Yearbook of Immigration Statistics (2016), <https://www.dhs.gov/immigration-statistics/yearbook/2016>.

² Department of State, Annual Report of Immigrant Visa Applicants (2017), https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2017.pdf.

³ Asian Americans Advancing Justice, *A Community of Contrasts: Asian Americans, Native Hawaiians and Pacific Islanders in the South*, 2014, 63.

⁴ Immediate relatives of U.S. citizens comprise the largest admissions group not capped by legislation, and therefore the group most vulnerable to sharp decreases in green card issuance that could result from the proposed rule. In Fiscal Year 2017, approximately 520,000 green cards were issued to immediate relatives of U.S. citizens. See Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

denial. Second, the proposed rule would likely result in a drastic demographic shift in the origins of immigrants granted green cards, thereby enacting a sweeping overhaul of future legal immigration without Congressional input and in conflict with the immigration system Congress created in the Immigration and Nationality Act. Both changes would contradict our nation's historic commitment to welcoming and integrating immigrants from all socioeconomic backgrounds.

A. The proposed rule would drastically increase denials of family-based green card applicants.

Under current policy, a public charge is defined as a person who is “likely to become primarily dependent on the government for subsistence.”⁵ According to guidelines established in 1999, the current public charge test considers only government benefits such as cash assistance for income maintenance or long-term institutionalization due to poor health or disability when determining whether a person is or is likely to become a public charge.⁶ Cash benefits considered under the current rule include Supplemental Security Income (SSI), for low-income elderly and disabled people, and Temporary Assistance for Needy Families (TANF), for low-income families with children. In addition, under the current test, immigration officers consider an immigrant's “totality of circumstances,” such as age, education, and other characteristics, when determining whether an immigrant is likely to become *primarily dependent* on the government for support.⁷ Under current policy, a sponsor's affidavit of support is sufficient to satisfy the public charge test.

The proposed rule radically expands the definition of public charge to include any immigrant who simply “receives one or more [specified] public benefits” or is “likely” to receive such a public benefit in the future. Specifically, the proposed rule would consider a much wider range of government programs in the “public charge” determination, many of which typically go to working families, including non-emergency Medicaid programs; food stamps under the Supplemental Nutrition Assistance Program (SNAP); housing assistance such as Section 8 housing vouchers and public housing; and the Medicare Part D Low-Income Subsidy for seniors who need help paying for prescription drugs. Moreover, the proposed rule expands upon the “totality of circumstances” test by specifying positive and negative factors to consider when determining an applicant's green-card eligibility. Specifically, the proposed rule would consider many demographic and socioeconomic characteristics, including age, education, health, income, and assets and resources. Alarming, the proposed rule also considers factors never before relevant in the public charge determination, such as credit scores, English proficiency, and whether an immigrant has ever applied for or received a fee waiver on an immigration benefit application. Furthermore, the proposed rule would only consider the affidavit of support as one factor in the totality of the circumstances, rather than a sufficient factor.

Most concerning, the proposed rule would give immigration officials broad discretion to deny the green-card applications of any individuals deemed “likely” to use specified public benefits in the future. Thus, immigrants who have never received public benefits may still be denied a

⁵ U.S. Immigration and Naturalization Service, “Inadmissibility and Deportability on Public Charge Grounds,” *Federal Register* 64, no. 101 (1999): 28676-88, <https://www.gpo.gov/fdsys/pkg/FR-1999-05-26/pdf/99-13188.pdf>.

⁶ *Id.*

⁷ *Id.*

green card based on their demographic and socioeconomic circumstances alone. The factor test within the proposed rule threatens to exclude the greatest percentage of green-card applicants, since most immigrants in the U.S. who do not yet have green cards are generally ineligible for public benefits, and since many green-card applicants are applying from abroad and thus are unlikely to have used U.S. public benefits.

Although DHS purports to utilize a factor-balancing test, most of the factors listed in the proposed rule are assigned negative weight. For example, negative factors include being very young or elderly (defined as under age 18 or over 61); having a large family; not having a high school diploma; having an income below 125 percent of the federal poverty level; having a treatable medical condition; and limited English proficiency. In fact, there is only one heavily weighted positive factor in the proposed public charge determination: income at or above 250 percent of the federal poverty level. Moreover, while some factors are said to weigh more heavily than others, the proposed rule is silent on exactly how much weight to afford each factor, and on how many negative factors are required to deny a green card application. Such ambiguity opens the door for arbitrary and inconsistent decision-making on the part of individual immigration officials. The factors as listed in the proposed rule overwhelmingly tip the scales in favor of the wealthy, and would disproportionately exclude family-based immigrants and low- and moderate-wage workers from gaining permanent legal status in the U.S.

In fact, most recent green card recipients would have been at risk of denial if the rule had been in effect at their time of their applications for lawful permanent residence. Between 2012 and 2016, 69 percent of green card recipients had at least one negative factor under the proposed criteria, and 43 percent had at least two negative factors.⁸ And if the proposed public charge test were applied to the approximately 940,000 green card recipients admitted to the U.S. in fiscal year 2017, about 650,000 of them would have been at risk of denial for having at least one negative factor, and about 400,000 for having at least two.⁹ Only about 370,000, or 39 percent, of green card recipients admitted in 2017 had incomes at or above 250 percent of the federal poverty level—the only heavily weighted positive factor in the rule.¹⁰ In that same year, immigrants sponsored by relatives comprised 66 percent of all green card recipients, making family-based immigrants the group most at risk under the proposed public charge rule.¹¹ By way of comparison, if the current public charge rule were applied to U.S.-born citizens, one in twenty people would likely be excluded.¹² Under the criteria in the proposed rule, however, more than six times as many people, or one in three U.S.-born citizens, would likely fail the test.¹³

⁸ Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Danilo Trisi, “One-Third of U.S.-Born Citizens Would Struggle to Meet Standard of Extreme Trump Rule for Immigrants,” Center on Budget and Policy Priorities (Sept. 2018), <https://www.cbpp.org/blog/one-third-of-us-born-citizens-would-struggle-to-meet-standard-of-extreme-trump-rule-for>.

¹³ *Id.*

B. The proposed rule would shift future immigration patterns away from Asia and other diverse world regions and towards Europe, without Congressional input.

If implemented, the proposed rule would have staggering consequences for family reunification in the U.S., with a disproportionate impact on immigrant families of color. Research shows that immigrants from Mexico and Central America, as well as Asia, are the most likely to have negative factors under the proposed public charge test. 81 percent of recent immigrants from Mexico and Central America, and 69 percent of recent immigrants from Asia, had one or more negative factors under the proposed rule.¹⁴ By excluding immigrants of color en masse, the proposed public charge rule ignores Congressional intent and threatens to send our nation back to the darkest chapters in U.S. history.

The origins of the public charge test are rooted in anti-immigrant prejudices. New York became the first state to pass a public charge law in 1847, motivated mainly by cultural prejudice against the Catholic Irish who often arrived in the U.S. without the financial resources to support themselves.¹⁵ By the 1880s, the proportion of immigrants relative to the U.S.-born population was about 13%—similar to today¹⁶—and those demographic changes led to heightened xenophobia towards immigrants, including towards Asian immigrants who had come to the U.S. in search of work. The first federal statute precluding the admission of immigrants based on potential public charge was passed by the 47th Congress and signed into law on August 3, 1882,¹⁷ three months after passage of the Chinese Exclusion Act.¹⁸ The Chinese Exclusion Act barred immigration by Chinese laborers and was the first law in the U.S. to restrict immigration based on race and nationality.¹⁹ The public charge provision was later used to exclude European Jews seeking to escape genocide at the hands of the Nazi regime.²⁰ The current proposed rule on public charge seeks to target immigrants of color who come from less developed countries, possess modest skills and education, lack English proficiency, and seek primarily low-wage positions in the economy. Shifting immigration patterns away from Latin America and Asia and toward Europe would not only reduce the diversity of immigration to the United States, it would disproportionately increase family separation among immigrants of color – and U.S. citizens - already residing in the U.S.

The proposed rule is an attempt to attack our family-based immigration system through backdoor methods. President Trump has consistently denigrated immigrants of color, and his

¹⁴ Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

¹⁵ Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy*, Oxford University Press (2017), 2, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780190619213.001.0001/acprof-9780190619213>.

¹⁶ Migration Policy Institute, *U.S. Immigrant Population and Share over Time, 1850-Present*, <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time>.

¹⁷ Immigration Act of August 3, 1882, 22 Stat. 214, “Fees for execution and issuance of passports; persons excused from payment,” <https://www.law.cornell.edu/uscode/text/22/214>.

¹⁸ Immigration Act of May 6, 1882, 22 Stat. 58, https://www.law.cornell.edu/wex/chinese_exclusion_act.

¹⁹ Paul Yin, *The Narratives of Chinese-American Litigation during the Chinese Exclusion Era*, 19 Asian Am. L.J. 145 (2012).

²⁰ Barbara Bailin, *The Influence of Anti-Semitism on United States Immigration Policy With Respect to German Jews During 1933-1939*, City University of New York (2011), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1261&context=cc_etds_theses.

administration has campaigned against family-based immigration. President Trump has disparaged immigrants from Mexico and Latin America as “criminals, drug dealers, [and] rapists”²¹ and he called for “a total and complete shutdown of Muslims entering the United States,”²² which he partially realized by implementing a ban on millions of people from predominantly Muslim countries entering or reentering the United States, including Asian immigrants from Syria, North Korea, Iran, and Yemen.²³ As part of its bid to limit legal immigration, the Trump administration pejoratively labeled family reunification as “chain migration.”²⁴ President Trump’s racist rhetoric also targets low-income individuals: he stated that 40,000 Nigerians, once seeing the United States, would never “go back to their huts” in Africa.²⁵ President Trump has also made statements that reflect his animus towards Asian Americans, such as using broken English to impersonate Asian negotiators,²⁶ mimicking Asian leaders,²⁷ and suggesting that all students from China are spies.²⁸ On January 11, 2018, President Trump explicitly expressed his view that America should not be a haven for “people from shithole countries,” but should accept more immigrants from countries like Norway—which is overwhelmingly white.²⁹

When Congress adopted our current family-based immigration system in 1965, it rejected discriminatory national origin quotas, thereby opening the U.S. to immigrants from all over the world.³⁰ Congress chose to prioritize a primarily family-based system over a system that selected people based on their employment, income, age, or other factors. Recent legislative measures to roll back family-based immigration in Congress have failed, and the proposed rule represents a backdoor attempt by this administration to restrict family-based immigration without

²¹ Hunter Walker, “Donald Trump Just Released an Epic Statement Raging Against Mexican Immigrants and ‘Disease,’” *Business Insider* (July 6, 2015), <https://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7#ixzz3fF897EIH>.

²² Tessa Berenson, “Donald Trump Calls For ‘Complete Shutdown’ of Muslim Entry to U.S.,” *Time Magazine* (Dec. 7, 2015), <http://time.com/4139476/donald-trump-shutdown-muslim-immigration/>.

²³ Exec. Order No. 13780, 82 FR 13209 (2017).

²⁴ Brian Bennett, “Trump Throws a Wrench Into Any Immigration Deal, Saying ‘Chain Migration’ Can’t Be Included,” *Los Angeles Times* (Sept. 15, 2017), <https://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-says-chain-migration-can-t-be-1505483310.htmlstory.html>.

²⁵ Michael D. Shear & Julie Hirschfeld Davis, “Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda,” *The New York Times* (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>.

²⁶ Ben Kamisar, “Trump Impersonates Asian Negotiators,” *The Hill* (Aug. 25, 2015), <https://thehill.com/blogs/ballot-box/gop-primaries/251969-trump-impersonates-asian-negotiators>.

²⁷ Maya Oppenheim, “Donald Trump Appears to Mock Asian Leaders’ Gestures During Speech on Tax Reform,” *The Independent* (Nov. 30, 2017), <https://www.independent.co.uk/news/world/americas/donald-trump-appears-to-mock-asian-leaders-gestures-during-speech-donald-trump-asian-leaders-a8084281.html>.

²⁸ Elizabeth Redden, “Did Trump Call Most Chinese Students Spies?,” *Inside Higher Ed* (Aug. 9, 2018), <https://www.insidehighered.com/news/2018/08/09/politico-reports-trump-called-most-chinese-students-us-spies>.

²⁹ Josh Dawsey, “Trump Derides Protections for Immigrants from ‘Shithole’ Countries,” *The Washington Post* (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.7fc895490993.

³⁰ Muzaffar Chishti, Faye Hipsman, and Isabel Ball, “Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States,” *Migration Information Source* (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states>.

Congressional action. In 2017, the Trump administration endorsed³¹ the RAISE Act,³² a bill that would have cut overall green card admissions by over 60 percent through the elimination of certain family-based admissions preferences created by the 1965 law, and by eliminating the diversity visa program.³³ The bill only received support from three Senators and was never even heard in committee.³⁴

Furthermore, Congress has had several opportunities to amend the public charge law but has instead only affirmed the existing administrative and judicial interpretations of the law.³⁵ For example, in 1986, Congress enacted a “special rule” for overcoming the public charge exclusion as part of the legalization program “if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.”³⁶ The implementing regulation published in 1989 defined “public cash assistance” as “income or needs-based monetary assistance,” such as programs like SSI, but specifically excluded “in kind” assistance, like food stamps and public housing, or other non-cash benefits, including medical assistance programs, such as Medicaid.³⁷

The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) limited eligibility for “federal public benefits” to “qualified immigrants” and limited eligibility of many lawful permanent residents for “means-tested public benefits” during their first five years or longer in the U.S., but Congress did not amend the public charge law to change what types of programs should be considered.³⁸ Instead, that same year, in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress merely codified the case law interpretation of public charge by adding to the statute the “totality of circumstances” test to consider the applicant’s age, health, family status, financial status, assets, resources, education, and skills.³⁹ In addition, Congress made the affidavits of support legally enforceable contracts.⁴⁰ If Congress wanted to conform the public charge law with its recently enacted welfare reform package, it could have done so when it amended the public charge statute through IIRIRA. The fact that Congress did not suggests that it did not want to add non-cash benefits to the public charge consideration. Accordingly, DHS’ current attempt to radically expand the scope of public

³¹ “President Donald J. Trump Backs RAISE Act,” The White House (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-backs-raise-act/>.

³² “S.1720 - RAISE Act,” U.S. Congress, August 2, 2017, <https://www.congress.gov/bill/115th-congress/senate-bill/1720>.

³³ Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

³⁴ “S.1720 - RAISE Act,” U.S. Congress, August 2, 2017, <https://www.congress.gov/bill/115th-congress/senate-bill/1720>.

³⁵ Immigration courts adjudicating the public charge issue have adhered to a narrow definition of public charge as a person who is completely or nearly completely dependent on the government. The Board of Immigration Appeals (“BIA”) has held that noncitizens may not be deemed inadmissible under public charge grounds even if they have received several government services or have been unemployed for many years. See *Matter of A*, 19 I. & N. Dec. 867, 867 (BIA 1988); *Matter of T*, 3 I. & N. Dec. 641 (BIA 1949).

³⁶ INA §245A(d)(2)(B)(iii).

³⁷ See 8 CFR §245a.1(i).

³⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (110 Stat. 2105).

³⁹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (110 Stat. 3009); INA §212(a)(4).

⁴⁰ *Id.*

benefits considered under the proposed rule, and its devaluation of the traditional affidavit of support, find no support within the legislative history.

Since the 1996 welfare reform law that overhauled immigrant eligibility for programs and the 1999 guidelines on public charge, Congress has passed several laws that explicitly loosened or created new eligibility for means-tested programs for immigrant populations. For example, the Farm Security and Rural Investment Act of 2002 restored access to what was then called Food Stamps (now the Supplemental Nutrition Assistance Program, or SNAP) to immigrant children, immigrants receiving disability benefits, and any qualified noncitizen living in the U.S. for more than five years.⁴¹

Finally, Congress has clearly articulated a system in which immigrants may qualify for public benefits. Public benefits are available to lawful permanent residents who have been living in the U.S. for five years. If Congress did not want to admit immigrants who would use these public benefits in the future, they would not have granted them access to these benefits.

II. The proposed rule is overly broad, impermissibly vague, and would cause major harm to Asian immigrant communities, especially women, the elderly, and those with limited English proficiency.

Through its long list of factors and ambiguous balancing formula, the proposed rule forms a web carefully designed to trap mostly low-income people of color and deny them access to permanent legal status in the U.S. The proposed rule is silent on the relative importance to be given to different factors in the public charge determination, and it also fails to explain how many negative factors would result in the denial of an application. As a result of this vague formula, individual immigration officers will be left with broad discretion to decide who gets denied, with little guidance to ensure uniformity of results. For example, the proposed rule provides no guidance on a situation in which one family member passes the public charge test individually, but the other family members fail it. Thus, the risk of inconsistent and arbitrary application of the public charge test under the proposed rule is intolerably high.

In particular, the proposed rule would have a profoundly negative impact on Asian American and Pacific Islander families. Asian Americans and Pacific Islanders are among the fastest growing populations in the U.S.,⁴² due in large part to the 1965 immigration law that established the family-based immigration system and finally repealed restrictions on Asian immigration dating back to the Chinese Exclusion Act of 1882. In recent years, three out of every ten individuals obtaining permanent residence status are from Asia and Pacific Island nations.⁴³ Forty percent of the millions of individuals and families waiting in long backlogs for family-based immigration

⁴¹ Farm Security and Rural Investment Act of 2002, H.R. 2646, PL 107-171, 116 Stat. 134, May 13, 2002, Title IV, Section 4401.

⁴² U.S. Census Bureau, The Asian Population: 2010 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf>. See also U.S. Census Bureau, The Native Hawaiian and Other Pacific Islander Population: 2010 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>.

⁴³ Department of Homeland Security, Yearbook of Immigration Statistics (2016), <https://www.dhs.gov/immigration-statistics/yearbook/2016>.

are from Asia and Pacific Island nations.⁴⁴ If the proposed rule were implemented, all of these potential new Americans would be scrutinized under its highly restrictive and arbitrary standard, and many families would be deterred out of fear from participating in vital health and other support programs for which they are eligible.

A. The proposed rule would disproportionately harm Asian immigrant communities, especially women, the elderly, and those with limited English proficiency.

Overall, the majority of Asian immigrants would be at risk under the proposed rule, with 69 percent of recent immigrants from Asia having one or more negative factors, and with 41 percent having two or more negative factors.⁴⁵ Yet research shows that certain groups within the Asian immigrant community would fare much worse than others under the proposed public charge test. For example, 42 percent of recent Asian immigrants granted green cards were neither employed nor in school at the time of admission, with women comprising 70 percent of those in this situation.⁴⁶ Asian women are highly disadvantaged under the proposed rule because the rule devalues labor typically performed by women, such as childcare. Low-income immigrant families are often unable to afford childcare and many immigrant women do not work outside the home due to childcare responsibilities.⁴⁷

Fifty-seven percent of recent green card recipients from China and Hong Kong, and 52 percent of recent green card recipients from Vietnam, had two or more negative factors under the proposed rule.⁴⁸ For recent green card holders from Bangladesh, more than half had two or more negative factors, and 46 percent had incomes less than 125 percent of the federal poverty level.⁴⁹ Recent green card recipients from India and Korea would have fared better overall under the proposed rule, but more than 30 percent of recent immigrants from those countries would still have been at considerable risk of denial with two or more negative factors.⁵⁰ And, in terms of English proficiency, 62 percent of recent Vietnamese green card recipients, and 59 percent of recent green card recipients from China and Hong Kong had limited English proficiency.⁵¹

Unsurprisingly, immigrants from Europe, Canada, and Oceania (primarily Australia and New Zealand) are the least likely to be affected by the proposed changes to the public charge rule as

⁴⁴ Department of State, Annual Report of Immigrant Visa Applicants (2017), https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2017.pdf.

⁴⁵ Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

⁴⁶ *Id.*

⁴⁷ Maki Park, Margie McHugh, and Caitlin Katsiaficas, “State Sociodemographic Portraits of Immigrant and U.S.-Born Parents of Young Children,” Migration Policy Institute (2016), <https://www.migrationpolicy.org/research/state-sociodemographic-portraits-immigrant-and-us-born-parents-young-children-two-generation>; D’Vera Cohn, Gretchen Livingston, and Wendy Wang, “After Decades of Decline, A Rise in Stay-at-Home Mothers,” Pew Research Center (2014), <http://www.pewsocialtrends.org/2014/04/08/after-decades-of-decline-a-rise-in-stay-at-home-mothers/>.

⁴⁸ Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

such immigrants are generally wealthier, more educated, and more likely to speak English. In fact, immigrants from those regions with predominantly white populations have the highest proportion of recent green card recipients with family income above 250 percent of the federal poverty level.⁵²

The proposed rule would particularly harm U.S. citizens who wish to reunite with older parents, with such admissions accounting for almost 30 percent of all family-based applications.⁵³ Asian Americans are more likely to live in multigenerational households than any other racial group.⁵⁴ Given that the proposed rule negatively weighs age over 61 years, many Asian families may be irreparably divided and harmed if parents cannot reunite with their children, and if grandparents cannot see their grandchildren grow up. Seventy-two percent of adults over 61 who recently received green cards had two or more negative factors under the proposed rule,⁵⁵ placing them at enhanced risk of denial if the proposed rule had been in effect. Congress chose to classify parents of U.S. citizens as immediate relatives not subject to the per-country visa caps for humanitarian reasons. Congress was aware that these parents were likely to be older and more likely to have illnesses or low incomes, but it chose to prioritize this category so that U.S. citizens could care for their aging parents. This proposed rule seeks to circumvent that clear goal and separate families by excluding elderly parents and grandparents.

In addition to the hundreds of thousands of Asian immigrants who could be denied green cards and separated from their families as a result of the proposed rule, many more current green card holders would be impacted if they stay outside of the U.S. for over six months because they will be subject to the public charge test upon seeking readmission. More than any other racial group, Asian American and Pacific Islander immigrants in the U.S. believe that caring for parents is expected of them; many spend extended time in their home countries to take care of family members.⁵⁶ Under the expansive proposed rule, many current green card holders could be prevented from returning home to their families in the U.S.

The proposed rule would also harm Asian families by exacerbating wait times for green cards. Millions of Asian and Pacific Islander families are already harmed by the significant backlogs in the family visa system, with many families already waiting decades to reunite.⁵⁷ If implemented, the proposed rule would likely prolong already lengthy immigration benefit processing delays, further harming Asian immigrant families suffering prolonged separation. DHS proposes to

⁵² *Id.*

⁵³ Dept. of Homeland Security, Office of Immigration Statistics, “2017 Yearbook of Immigration Statistics, Table 7”, <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>.

⁵⁴ D’Vera Cohn and Jeffrey S. Passel, “A Record 64 Million Americans Live in Multigenerational Households,” Pew Research Center (Apr. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/>.

⁵⁵ Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

⁵⁶ Belden Russonello & Stewart, “In the Middle: A Report on Multicultural Boomers Coping With Family and Aging Issues,” AARP Research (July 2001), https://www.aarp.org/relationships/family/info-2001/aresearch-import-789-D17446_1.html.

⁵⁷ Asian Americans Advancing Justice | AAJC, “America’s Broken Family Immigration System and its Impact on Asian Americans,” <https://advancingjusticeaaajc.org/sites/default/files/2016-09/Asian%20Americans%20and%20the%20Familybased%20Immigration%20System.pdf>.

require all applicants to fill out Form I-944, Declaration of Self-Sufficiency. Recent research shows that the direct paperwork costs of the proposed rule could reach \$13 billion each year—100 times greater than DHS’s estimate of \$130 million per year.⁵⁸ By requiring vastly more paperwork regarding factors such as assets, debts, and credit scores, the proposed rule would impose significant burdens on both green card applicants and immigration officers. DHS has dramatically underestimated the costs associated with this proposed rule, including lost wages, legal fees, and time commitment required for individuals and businesses to complete complex new filing requirements.⁵⁹ The expense of applying for a green card could deter many individuals from applying at all, and the significantly more complex and time-consuming process for both applicants and immigration officers would likely lengthen application processing times. Rather than exacerbating the prolonged separation of families, DHS should make it easier for families to reunite.

B. The proposed rule exerts a widespread chilling effect, scaring many Asian immigrants away from utilizing public benefits for which they qualify.

The fear propagated by the proposed rule would extend far beyond any individual who may be subject to the public charge test, harming entire communities. The proposed rule would deter many Asian Americans and Pacific Islanders from continuing to participate in programs such as Medicaid, SNAP, and government-assisted housing. Indeed, fear and anxiety caused by the leaked draft of the proposed rule, and by the proposed rule itself, have already led to drops in benefits enrollment. For the first half of this year, confusion over the proposed rule has resulted in higher than normal rates of disenrollment (10%) from SNAP nationwide.⁶⁰

The chilling effect of this proposed rule will have a significant impact on the Asian American and Pacific Islander community. A recent study estimating the scope of the potential chilling effect found that, nationwide, 22.2 million noncitizens and a total of 41.1 million noncitizens and their family members currently living in the U.S. (12.7% of the total U.S. population) could potentially be impacted as a result of the proposed rule.⁶¹ Of these, 4.8 million noncitizens and 7.4 million noncitizens and their family members are Asian.⁶² Subgroups that are particularly at risk of poverty, such as Marshallese (41% poverty rate), Burmese (38%), Hmong (26.1%) and Tongans (22.1%), would be particularly hard-hit by losing vital health, nutrition, and housing supports.⁶³

⁵⁸ Boundless Immigration, “Unlawful ‘Public Charge’ Immigration Rule Would Cost Up to \$13 Billion and Separate Thousands of Families Each Year” (Dec. 10, 2018), <https://www.boundless.com/blog/unlawful-public-charge-immigration-rule/>.

⁵⁹ *Id.*

⁶⁰ American Public Health Association, “Study: Following 10-Year Gains, SNAP Participation Among Immigrant Families Dropped in 2018,” Children’s HealthWatch (Nov. 12, 2018), <http://childrenshealthwatch.org/study-following-10-year-gains-snap-participation-among-immigrant-families-dropped-in-2018/>.

⁶¹ Manatt, “Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard” (Oct. 11, 2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>.

⁶² *Id.*

⁶³ American Community Survey, 2015 Five Year Estimates, table DP03.

Nationwide, 1.4 million Asian American and Pacific Islander non-citizens receive Medicaid.⁶⁴ Since the passage of the Affordable Care Act, progress has been made to equalize the disparities in uninsured rates between Whites and Asian Americans and Pacific Islanders through the expansion of Medicaid and the establishment of health insurance marketplaces.⁶⁵ However, if families disenroll from benefits out of fear, then much of this progress could be lost. Studies show that confusion and fear surrounding the proposed rule would likely prompt immigrant parents to withdraw their citizen children from benefits out of fear that it will jeopardize their chances of getting a green card. Researchers estimate that between 875,000 and 2 million citizen children will be disenrolled from health coverage despite remaining eligible.⁶⁶ More than 10 million U.S. citizen children have at least one non-citizen parent, more than one million of whom are Asian.⁶⁷

Finally, the proposed rule would also impact Compact of Free Association (COFA) migrants who are able to reside in the U.S. as “non-immigrants” under ongoing treaty obligations. While COFA migrants are not eligible for many federal benefits, they are eligible for government housing assistance, as well as some state and local programs. Additionally, in many states, COFA migrant children and pregnant women are eligible for Medicaid. If this rule is finalized, many COFA migrants may disenroll from these types of programs, and others would likely be blocked from entering or reentering the U.S., separating them from their families. Given the fact that many COFA families move to the U.S. for better employment, this would have a devastating impact on COFA families with U.S. citizen children and directly undermine their ability to provide financial stability for their families.

III. No justification exists for the massive, unprecedented changes to U.S. immigration policy contained in the proposed rule.

Changing the public charge rule to restrict noncitizens’ use of public benefits is simply unnecessary. No evidence demonstrates that immigrants subject to the public charge determination participate in benefits programs in any significant way. In fact, immigrants consume 39 percent fewer welfare benefits relative to U.S.-born individuals and 27 percent fewer benefits relative to U.S.-born individuals with similar incomes and ages.⁶⁸

⁶⁴ Jeanne Batalova, Michael Fix, and Mark Greenberg, “Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use,” Migration Policy Institute (2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

⁶⁵ Park et al., “Health Insurance for Asian Americans, Native Hawaiians, and Pacific Islanders Under the Affordable Care Act,” JAMA Internal Medicine (April 30, 2018), <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2678830?redirect=true>.

⁶⁶ Samantha Artiga, Rachel Garfield, and Anthony Damico, “Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid,” Kaiser Family Foundation (Oct. 11, 2018), <https://www.kff.org/report-section/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicare-appendices/>.

⁶⁷ Samantha Artiga, et al., “Potential Effects of Public Charge Changes on Health Coverage for Citizen Children,” Kaiser Family Foundation (May 18, 2018), www.kff.org/report-section/potential-effects-of-public-charge-changes-on-health-coverage-for-citizen-children-issue-brief/.

⁶⁸ Alex Nowrasteh and Robert Orr, “Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs,” Cato Institute (May 10, 2018), <https://www.cato.org/publications/immigration-research-policy-brief/immigration-welfare-state-immigrant-native-use-rates>.

Nothing in the legislative history or judicial record endorses such a broad reworking of the public charge rule. The factor-test laid out in the proposed rule is inconsistent with the plain meaning of the statutory “totality of the circumstances” test because it deeply disadvantages workers, families, and elderly persons who are not wealthy. Moreover, the factors undermine statutory intent by creating a few select ways to pass the public charge test, and many more ways to fail. In 1917, a federal appeals court held that Congress had intended for the public charge provision to keep out the poorest of the poor—“persons who were likely to become occupants of almshouses”⁶⁹—not working families. Yet under the proposed rule, nearly half of recent green card recipients who worked full-time had one or more negative factors that would have put them at risk of denial.⁷⁰ Likewise, excluding grandparents based on public charge fails to account for their contributions to the household, because an estimated half of grandparents provide childcare support.⁷¹

The proposed rule includes arbitrary income thresholds as well as factors such as credit scores and English-language proficiency that are unrelated to the original public charge statute. A standard of 250 percent of the federal poverty level is nearly \$63,000 a year for a family of four—more than the median household income in the U.S.⁷² A single individual who works full-time year round—who does not miss a single day of work due to illness or inclement weather—but is paid the federal minimum wage would fail to achieve the 125 percent of the federal poverty level threshold. Congress clearly did not envision excluding persons such as this when it directed DHS to deny permanent status to those at risk of becoming a public charge. Furthermore, the proposed rule could prevent half of all foreign-born spouses of U.S. citizens from obtaining green cards, forcing nearly 200,000 couples a year to either leave the U.S. together or live apart indefinitely.⁷³ This is because more than half of foreign-born spouses are either unemployed at the time of application or employed in low-wage jobs.⁷⁴

Credit scores are another arbitrary factor that have no place in the public charge determination. Neither credit reports nor credit scores were designed to provide information on whether a consumer is likely to rely on public benefits or on the character of the individual.⁷⁵ DHS offers no evidence to support its claim that a low credit score is an indication of lack of future self-sufficiency. Using credit reports and credit scores to determine public charge status is inappropriate because many

⁶⁹ Noah Lanard, “An Old Anti-Irish Law Is at the Heart of Trump’s Plan to Reshape Legal Immigration,” Mother Jones (Sept. 6, 2018), <https://www.motherjones.com/politics/2018/09/an-old-anti-irish-law-is-at-the-heart-of-trumps-plan-to-reshape-legal-immigration/>.

⁷⁰ Randy Capps, Mark Greenberg, Michael Fix, and Jie Zong, “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” Migration Policy Institute (Nov. 2018), <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

⁷¹ Lina Guzman, “Grandma and Grandpa Taking Care of the Kids: Patterns of Involvement,” Child Trends (July 2004), <https://www.childtrends.org/publications/grandma-and-grandpa-taking-care-of-the-kids-patterns-of-involvement>.

⁷² Kayla Fontenot, et al., “Income and Poverty in the United States: 2017,” U.S. Census Bureau (Sept. 2018), <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

⁷³ Boundless Immigration, “Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year,” (Sept. 24, 2018), <https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/>.

⁷⁴ *Id.*

⁷⁵ Consumer Financial Protection Bureau, “Data Point: Credit Invisibles” 7 (May 2015), https://files.consumerfinance.gov/f/201505_cfpb_data-point-credit-invisibles.pdf.

immigrants will not even have a credit history for DHS to consider, and studies show that even when immigrants do have credit histories, their credit scores are artificially low.⁷⁶ Additionally, by considering English-language proficiency, the proposed rule appears to run afoul of U.S. Supreme Court precedent finding that discrimination on the basis of language or English proficiency is a form of national origin discrimination.⁷⁷

The proposed rule itself even acknowledges the great harm it would likely cause to individuals, families, and communities, yet it fails to quantify this harm and therefore largely ignores it. The proposed rule ignores the fact that public benefit programs are often used as work supports that empower future self-sufficiency. Using benefits can help individuals and their family members become healthier, stronger, and more employable in the future. Receipt of benefits that cure a significant medical issue or provide an individual with the opportunity to complete their education can be highly significant positive factors that contribute to future economic self-sufficiency. In fact, most working-age Asian Americans and Pacific Islanders who use benefits are employed.⁷⁸ Immigrants in benefits-receiving families have higher rates of employment (63 percent for noncitizens and 66 percent for naturalized citizens) than U.S.-born working-age adults (51 percent), which indicates immigrants use benefits as work supports.⁷⁹

Moreover, evidence shows that an immigrant's income upon admission is not indicative of their future socioeconomic status, or that of their children. Yet, the rule fails to consider evidence that not only do immigrants improve their economic status over time, they demonstrate substantial economic mobility. When immigrants first arrive to the United States, they have less social capital, and their job skills and experience may not align perfectly with the American job market.⁸⁰ Over time, however, immigrants' social capital increases and job skills and experience improve, increasing their income to eventually catch up to non-immigrants.⁸¹ Additionally, immigrants with low education close the immigrant to U.S.-born income gap *even faster*, catching up with similar U.S.-born counterparts within seven years.⁸² The proposed rule completely ignores the upward mobility of immigrants, denying immigrants future opportunities and stalling our nation's progress.

⁷⁶ Nat'l Consumer Law Center, "The Wrong Tool for the Wrong Purpose: Why the Credit Scoring Provision in the Immigration Public Charge Proposal is Illogical and Ill-Advised" (October 2018), <https://www.nclc.org/issues/wrong-tool-wrong-purpose-credit-scoring-ill-advised.html>.

⁷⁷ See, e.g., *Lau v. Nichols*, 414 U.S. 564–69 (1974); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116–17 (9th Cir. 2009) (concluding that "discrimination against LEP individuals was discrimination based on national origin"); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995) (en banc) (noting that "language is a close and meaningful proxy for national origin"), *vacated on other grounds sub nom, Arizonans for Official English v. Ariz.*, 520 U.S. 43 (1997).

⁷⁸ Jeanne Batalova, Michael Fix, and Mark Greenberg, "Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use," Migration Policy Institute (2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

⁷⁹ *Id.*

⁸⁰ Leighton Ku and Drishti Pillai, "The Economic Mobility of Immigrants: Public Charge Rules Could Foreclose Future Opportunities," SSRN (Nov. 15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3285546.

⁸¹ *Id.*

⁸² *Id.*

Research also shows that access to lawful permanent residence and citizenship can help lift families out of poverty and create economic prosperity for immigrants and their children.⁸³ Lawful status and citizenship can help parents secure better paying jobs, pulling families out of poverty, and reduces the stress associated with living without legal status. These benefits are passed down to children—especially when parents can obtain legal status early in their child’s life—leading to better educational and workforce outcomes when their children reach adulthood.⁸⁴ Requiring immigrants to post a public charge bond to secure permanent lawful status is unreasonable and would place an impossible financial burden on working families. Studies show that bonds cause long-term hardship and increase the likelihood of financial instability.⁸⁵ Including public charge bonds is yet another way the proposed rule privileges the wealthy.

Rather than promoting economic self-sufficiency, the proposed rule seems aimed at changing America’s system of family-based immigration to grant preference to the wealthy, in ways that Congress has already rejected.

IV. Conclusion

The proposed public charge rule would punish immigrants seeking vital healthcare and other services and make it harder for Asian immigrants and other immigrants of color to gain lawful permanent residence, particularly women, the elderly, low-wage workers, or those with limited English proficiency.

The proposed rule has two illegitimate purposes: (1) to scare people away from receiving public benefits that they are legally allowed to receive; and (2) to circumvent Congress and reduce the number of people who can be sponsored through our family reunification system.

We must not let racism and xenophobia dictate our immigration policies. America’s strength comes from our ability to work together – to knit together a landscape of people from different places and of different races into one nation. Efforts to decrease immigration and shrink the number of immigrants and people of color in the United States would only make us weaker.

We appreciate your consideration of these comments. Due to the impact and consequences detailed in these comments, we urge DHS to immediately withdraw this proposed rule. Furthermore, we ask that DHS please review and consider all citations included in this letter as included in the comments themselves. Please contact Megan Essaheb, Director of Immigration


⁸³ Demetrios G. Papademetriou, Madeleine Sumption, and Will Somerville, “The Social Mobility of Immigrants and Their Children,” Migration Policy Institute (June 2009), <https://www.migrationpolicy.org/research/social-mobility-immigrants-and-their-children>.

⁸⁴ Lisa A. Keister, Jody Agius Vallejo, and E. Paige Borelli, “Mexican American Mobility,” Stanford Center on Poverty and Inequality (April 2013), https://inequality.stanford.edu/sites/default/files/media/_media/working_papers/keister_agius-vallejo_borelli_mexican-american-mobility.pdf.

⁸⁵ “Pretrial Justice: How Much Does It Cost?”, Pretrial Justice Institute (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd&forceDialog=0>.

Advocacy (messaheb@advancingjustice-aajc.org) or Hannah Woerner, NAPABA Law Foundation Community Law Fellow (hwoerner@advancingjustice-aajc.org) with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Hannah Woerner".

Hannah Woerner
NAPABA Law Foundation Community Law Fellow