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April 18, 2022

Via Federal eRulemaking Portal

The Hon. Alejandro Mayorkas
Secretary of Homeland Security
Department of Homeland Security
Washington, D.C. 20520

Re: *Public Charge Ground of Inadmissibility*, Notice of Proposed Rulemaking, 87 Fed. Reg. 10570 (Feb. 24, 2022), DHS Docket No. USCIS–2021-0013, RIN 1615–AC74

Dear Secretary Mayorkas:

The County of Santa Clara, California ("County") submits this comment in response to the February 24, 2022 Notice of Proposed Rulemaking (NPRM) published by the Department of Homeland Security (DHS or the "Department") concerning the public charge ground of inadmissibility at Section 212(a)(4) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(4).[1]

Background

The County provides and administers critical social safety-net services in one of the most populous and diverse counties in the nation. To promote the health and well-being of its 1.9 million residents, the County operates a health system made up of three hospitals and a network of clinics that offer comprehensive health care services. The County also provides and administers a wide range of public benefits and runs programs to identify, treat, and stop the spread of communicable and potentially lethal diseases in addition to other critical benefits and services.

Community trust and willingness to access health care and health-promoting benefits are key contributors to the success of the County's goals of safeguarding public health and ensuring

[1] Dep't of Homeland Security, *Public Charge Ground of Inadmissibility*, Notice of Proposed Rulemaking, 87 Fed. Reg. 10570 (Feb. 24, 2022).

the wellbeing of its residents. However, DHS's 2019 *Inadmissibility on Public Charge Grounds* rule ("2019 Final Rule")[2] seriously threatened those goals when it dramatically broadened the grounds upon which a noncitizen would be deemed likely to become a public charge. The 2019 Final Rule deterred eligible residents from accessing health care—particularly preventative care—and health-promoting public benefits, thereby harming large swaths of the community and forcing the County to shoulder the costs of expensive, last-minute emergency-department interventions.[3] The County also incurred substantial costs to mitigate the harms of the 2019 Final Rule, including costs incurred to educate residents about the 2019 Final Rule to allay residents' fears about the consequences of accepting government-funded aid and healthcare.

Attuned to these harms, the County was the first in the nation to sue to enjoin the 2019 Final Rule.[4] Through that suit, the County sought to preserve the effectiveness of its programs and services and to protect the health and well-being of its residents. The County obtained a district court order enjoining the 2019 Final Rule, which the Ninth Circuit affirmed on appeal.[5]

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[2] Dep't of Homeland Security, *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) ("2019 Final Rule"); *see also* 84 Fed. Reg. 52,357 (Oct. 2, 2019) (making corrections to 2019 Final Rule). As the NPRM points out, the 2019 Final Rule was vacated by a final judgment on the merits, *see Cook Cty., Illinois v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. 2020), after which DHS removed the 2019 Final Rule from the Code of Federal Regulations, *see* Dep't of Homeland Security, *Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 Fed. Reg. 14,221 (Mar. 15, 2021).

[3] In litigation challenging the 2019 Final Rule, the County submitted declarations from four County officials that describe in detail the County's healthcare and public assistance systems and programs, the effects that the 2019 Final Rule had on those systems and programs, and the extensive efforts the County undertook to allay the fears and counteract the confusion caused by the 2019 Final Rule. These declarations are attached hereto and incorporated by reference. *See* Decl. of Miguel Márquez, County of Santa Clara Chief Operating Officer (Aug. 28, 2019) (Attachment A), https://perma.cc/7T55-9LDC; Decl. of Sara Cody, County of Santa Clara Health Officer and Director of the County's Public Health Department (Aug. 28, 2019) (Attachment B), https://perma.cc/3N7V-XKRN ["Cody Decl."]; Decl. of Paul Lorenz, Chief Executive Officer of County of Santa Clara Health System (Aug. 27, 2019) (Attachment C), https://perma.cc/428C-TU8X ["Lorenz Decl."]; Decl. of Angela Shing, Director of the County of Santa Clara Department of Employment and Benefits Services (Aug. 28, 2019) (Attachment D), https://perma.cc/5T6W-REFW ["Shing Decl."]. The Northern District of California summarized these effects in a decision preliminarily enjoining the 2019 Final Rule. *City & Cty. of San Francisco v. USCIS*, 408 F. Supp. 3d 1057, 1121-25 (N.D. Cal. 2019) ["*CCSF I*"], *aff'd*, 981 F.3d 742 (9th Cir. 2020) ["*CCSF II*"]. The County also attaches hereto and incorporates by reference its public comment opposing the proposed rule that became the 2019 Final Rule, because that public comment likewise describes in detail the County's systems and programs and the ways that a restrictive public charge rule such as the 2019 Final Rule would undermine those systems and programs. *See* Cty. of Santa Clara, Ltr. to K. Nielsen at 16-23, (Dec. 10, 2018) (Attachment E), https://perma.cc/4TCS-M4MV, available with its attachments at https://www.regulations.gov/comment/USCIS-2010-0012-50890 ["2018 County Comment"].

[4] The County brought suit together with the City and County of San Francisco. *See* Compl., *City & Cty. of San Francisco v. USCIS*, No. 3:19cv4717 (PJH) (N.D. Cal. Aug. 13, 2019) (ECF No. 1).

[5] *CCSF I*, 408 F. Supp. 3d at 1130-31, *aff'd*, *CCSF II*, 981 F.3d 742.

Informed by the insight that the County earned through investigating and pursuing that litigation, the County is glad to have the opportunity to comment on DHS's NPRM.

The NPRM Offers Reasonable Interpretations of Key Terms

The County agrees that DHS's proposed interpretation of "likely to become a public charge" as "likely to become primarily dependent on the government for subsistence" is an appropriate interpretation of that phrase. Indeed, for more than a century—since the term "public charge" was first used by Congress in 1882, and until the 2019 Final Rule—"public charge" was broadly understood to mean a person primarily or entirely dependent on the government for subsistence.[6] Congress has left this settled meaning undisturbed, and the 2019 Final Rule reflected an aberrant interpretation of the term, which courts repeatedly invalidated.[7]

DHS has also offered a reasonable list of benefits for consideration in assessing the likelihood that a noncitizen will become a public charge: cash assistance and Medicaid-funded long-term institutionalization. DHS is correct to exclude non-cash benefits from the public charge assessment. As DHS acknowledges, and as benefits administering agencies confirm,[8] non-cash benefits short of institutionalization are supplemental in nature and thus cannot serve as the primary support for a person or family. Accordingly, they should not be part of a public charge assessment. Moreover, consideration of non-cash benefits would significantly increase the risk of chilling lawful benefits usage without improving the fidelity of public charge assessments.

Minimizing Confusion

As the NPRM acknowledges, the 2019 Rule caused widespread chilling of benefits usage.[9] A 2021 Urban Institute study found that even in the face of the hardships caused by the COVID-19 pandemic, 30% of adults in low-income immigrant families with children reported that they or a family member had avoided non-cash government programs or other assistance

[6] *CCSF II*, 981 F.3d at 756 ("From the Victorian Workhouse through the 1999 Guidance, the concept of becoming a 'public charge' has meant dependence on public assistance for survival."); *New York v. DHS*, 969 F.3d 42, 74 (2d Cir. 2020) ("In light of the judicial, administrative, and legislative treatments of the public charge ground from 1882 to 1996, we hold that … Congress intended the public charge ground of inadmissibility to apply to those non-citizens who were likely to be unable to support themselves in the future and to rely on the government for subsistence.").

[7] *CCSF II*, 981 F.3d 742; *New York v*, 969 F.3d 42; *Cook Cty*, 962 F.3d 208; *CCSF I*, 408 F. Supp. 3d 1057; *Cook Cty.*, 498 F. Supp. 3d 999.

[8] NPRM at 10608-11.

[9] NPRM at 10589-90

with basic needs because of concerns about the impact on their immigration status.[10] This chilling effect was compounded by the complexity of the 2019 Final Rule and the Trump Administration's rollout of it, so much so that these adults even avoided benefits not included within the 2019 Final Rule because that rule generated so much confusion and uncertainty about its scope.[11] This study, and others like it cited in the NPRM, reflect that families will forego public benefits they would greatly benefit from rather than risk the devastating consequences of a family member being deemed likely to be a public charge.

In the NPRM, DHS sought public input on how to minimize confusion around receipt of which benefits may factor into a public charge determination. In all public-facing communications about the public charge rule, DHS should clearly and prominently list the benefits that will be considered as part of public charge determination and emphasize that *no other benefits* will be taken into account. Which benefits are considered, rather than the technical definition of "likely to become a public charge," is likely to be the most useful and comprehensible information for members of the public seeking to understand the scope of a public charge assessment. Likewise, DHS should prominently state in its public-facing communications that only receipt of public benefits on one one's own behalf, and not benefits received on behalf of one's children, will factor into a public charge determination. Finally, DHS should emphasize the limited circumstances in which noncitizens who are eligible for public benefits will ever be subject to public charge assessments under INA Section 212(a)(4).

If this information is not prominently and simply provided, the public may struggle to understand the scope of public charge assessments. For example, while the NPRM is very detailed and thoughtful, lay people trying to understand how a public charge assessment would impact them would need to struggle though more than 40 dense pages of a technical document before arriving at the answer. DHS's final rule should begin with a simply worded executive summary or prominently placed description of which benefits are considered and not considered, and the limited circumstances in which noncitizens already in the United States are and are not subject to a public charge inadmissibility assessment. Likewise, DHS's public-facing communications regarding the public charge ground of inadmissibility should focus on communicating these facts in simple and clear terms. These steps will help to minimize confusion and chilling effects and ensure that community members access public benefits that can improve their lives.

Benefits of Increased Public Benefit Participation

Finally, the County wishes to emphasize the benefits of encouraging all individuals eligible for public benefits to enroll in those benefits. As acknowledged in the NPRM and as further detailed in the County's Comment on the 2019 Final Rule, broad access to public benefits by eligible individuals leads to better health outcomes for individuals and communities, while

[10] Jennifer M. Haley, et al., *Many Immigrant Families with Children Continued to Avoid Public Benefits in 2020, Despite Facing Hardships*, Urban Institute, at 2 (2021).

[11] *Id.* at 1.

minimizing costs of emergency care often borne by local governments, in addition to other positive outcomes.[12] Thus, an increase in federal transfer payments as a result of a renewed willingness of eligible persons to enroll in public benefits would not simply be a neutral indicator, as the NPRM suggests,[13] but would instead reflect *positively* on the rule's success in combatting confusion and chilling effects.

Moreover, ensuring that persons access public benefits for which they are eligible aligns with the Congressional purpose and objective of those benefits programs to promote wellbeing.[14] This is particularly true given that the vast majority of categories of immigrants eligible for public benefits are not subject to public charge assessments, and thus there is no Congressional policy disfavoring their use of any public benefit. Accordingly diminishing chilling effects among these groups of immigrants serves both the public welfare and Congressional intent.

* * *

The County is glad that DHS has proposed a lawful rule and that it is mindful of limiting chilling of benefits usage. The County looks forward to reviewing any final rule the Department may put forward regarding the public charge ground of inadmissibility at INA Section 212(a)(4).

Very truly yours,

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[12] NPRM at 10666; Attachment E at 12-20.

[13] NPRM at 10665.

[14] *See, e.g.*, 7 U.S.C. § 2011 ("It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households."); United States Housing Act of 1937, Pub. L. 75-412, at sec. 1, 50 Stat. 888, 888 (Sept. 1, 1937) (assistance under the Housing Act advances "the national policy of the United States to promote the general welfare" to help states and localities "remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation").