James L. Madara, MD
CEO, EXECUTIVE VICE PRESIDENT
james.madara@ama-assn.org

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The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
2707 Martin L. King Avenue, SE
Washington, DC 20528

Samantha Deshommes
Chief
Regulatory Coordination 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 20588-0009

Re: DHS Docket No. USCIS-2021-0013, Comments in Response to Proposed Rulemaking, Public Charge Ground of Inadmissibility

Dear Secretary Mayorkas and Chief Deshommes:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to comment on the Public Charge Ground of Inadmissibility proposed rule.[1] The AMA opposes any regulations or policy that would deter immigrants and/or their dependents from utilizing non-cash public benefits, including but not limited to Medicaid, Children's Health Insurance Program (CHIP), Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and Supplemental Nutrition Assistance Program (SNAP). Current public charge regulations have cast a chilling effect on these individuals and families seeking access to public benefits at a time when our nation is struggling to overcome a global pandemic, undermining general population health. We believe that it is necessary for the public charge rule to be updated so that the immigrant community no longer fears being deported or that they are jeopardizing their future chances at permanent residency by accessing vital health, nutrition, and housing programs. We therefore applaud the Department of Homeland Security (DHS) for some of the proposed changes in the notice of proposed rulemaking (NPRM) and provide comment on additional improvements that can be made to the NPRM.

The AMA commends the improvements that the NPRM would make to the 1999 Interim Field Guidance.

Society has an obligation to make access to an adequate level of health care available to all its members, regardless of ability to pay or immigration status. However, the lead up to, and short-term change of, the public charge rule had a far-reaching chilling effect on the immigrant population and caused eligible individuals to not access benefits during a time when they were most needed, the COVID-19 public health emergency (PHE).[2] The proposed regulation restores and attempts to improve the public charge policy that was in effect prior to the previous Administration. Importantly, the NPRM recognizes that use

[1] https://www.federalregister.gov/documents/2022/02/24/2022-03788/public-charge-ground-of-inadmissibility.
[2] https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763.

of core health, nutrition, and housing assistance programs should in no way be linked to the Immigration and Nationality Act's (INA's) public charge provision.

Moreover, the proposed rule improves on the 1999 Interim Field Guidance by defining "receipt" of safety net benefits for the purpose of public charge determinations. Under the proposal, applying for benefits, being approved for benefits in the future, assisting another applying for benefits, or being in a household or family with someone who receives benefits does not count as receipt of benefits. This clearer definition will likely help to mitigate the "chilling effect" of the 2019 public charge policy which caused children's participation in Medicaid between 2016 and 2019 to fall twice as quickly among U.S. citizen children with noncitizen household members as it did among children with only U.S. citizens in their household, even though eligibility did not change during this time.[3] Hopefully, this change will also help to reenroll the approximately 260,000 children that were removed or disenrolled from Medicaid under the previous administration.[4] Moreover, this additional clarity will provide reviewing officers with a clear guideline which will make administration of the rule simpler and hopefully more accurate.

An additional step that this proposed rule takes to help mitigate the damage of the 2019 public charge rule is to revert to the "primarily dependent" standard for making public charge determinations. This definition is based on the 1999 Interim Field Guidance and states that a public charge is an immigrant that is likely to become "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" unless they fall under an exempted category.[5] However, some refinement to this rule would be extremely beneficial in helping to determine who is considered a public charge and would help to ensure that those individuals who are eligible for benefits are not afraid to access them. We believe that all individuals should be able to receive access to health care without fear of deportation. Moreover, if DHS must consider use of cash assistance under Temporary Assistance for Needy Families (TANF) and Supplemental Security Income (SSI), only current receipt and not past receipt should be considered in the "primarily dependent" determination. Moreover, if these programs are considered, DHS should make clear that even use of these two programs still must be evaluated under the totality of the circumstances test which states that "the existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge." Instead, the determination of whether an individual would become primarily dependent on the government for subsistence is based on all the combined factors and is determined on a case-by-case basis. Therefore, receipt of SSI or TANF is just one factor within the totality of the circumstances and even if it is considered in the "primarily dependent" determination should not be the sole, or even most important, factor considered.

Finally, any changes that are made to the public charge determination should be made in an identical manner by the Department of State (DOS) in the Foreign Affairs Manual.

The AMA supports the expansion of the immigration categories that are exempt from the public charge rule and believes that administrative statuses should be added to the exempt categories.

Enjoyment of the highest attainable standard of health, in all its dimensions, including health care, is a basic human right and the provision of health care services as well as optimizing the social determinants

[3] https://protectingimmigrantfamilies.org/wp-content/uploads/2021/08/Research-Documents-Harm-of-PublicCharge-Policy-During-the-COVID-19-Pandemic-2.pdf.
[4] https://www.healthaffairs.org/doi/10.1377/hlthaff.2021.00920.
[5] https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf.

of health is an ethical obligation of a civil society. As such, the AMA supports proposed 8 CFR § 212.23 which specifies exemptions and waivers for 29 listed categories of immigrants, including refugees, to the public charge rule. Benefits received while in an exempt status will not be considered in an adjudication to which the public charge ground of inadmissibility applies which will allow these individuals to access important food, housing, and health care services without fear of deportation.

The AMA recognizes the unique health needs of refugees and encourages the exploration of issues related to refugee health and supports legislation and policies that address the unique health needs of refugees. Therefore, we also support the exemption of immigrants who are eligible for resettlement assistance, entitlement programs, and other benefits typically reserved for refugees from the public charge determination. The expansion of the exempt categories appropriately applies not only to survivors of trafficking and Afghan Special Immigrant Visa holders or evacuees, but to other humanitarian immigrants who are eligible for these benefits. However, DHS should strengthen the scope of protection for vulnerable immigrants such as Violence Against Women Act self-petitioners, qualified battered immigrants, and individuals who have applied for or obtained U or T status, by adding language clarifying that, consistent with the statute, they are exempt from a public charge determination, regardless of their pathway to adjustment of status. This provision will provide these marginalized populations with safer access to the benefits they may need to recover from the conditions that qualified them for humanitarian protection.

Furthermore, additional exempt categories should be added to the list that DHS is currently proposing including administrative statuses, such as Deferred Enforced Departure (DED), Deferred action for Childhood Arrivals (DACA), and deferred action. Additionally, it should be explicitly stated in the USCIS Policy Manual, and on the Public Charge website that the circumstances that allowed a protected immigrant to secure a benefit covered by proposed §212.22(d) may not be negatively considered in a public charge determination. The language of proposed §212.22(d) is unambiguous in its directive that the benefits "will not be considered" however, the proposed rule should be equally clear on the fact that adjudicators should not be allowed to consider the underlying reasons for which the immigrant received the benefit. Therefore, agency guidance is warranted to ensure that application of this provision is enacted in a manner that will provide real relief for these exempted immigrants.

The AMA supports the proposed rule's decision to not define age, health, family status, assets, resources and financial status, and education and skills.

Receiving public benefits does not automatically make an individual a public charge. There are two tests that immigration officials use to assess public charge, as outlined in the Immigration and Nationality Act (INA). The first test is a "totality of the circumstances" test, which considers several factors listed at INA § 212(a)(4)(B) including a noncitizen's: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills.[6] Under the totality of the circumstances test "the existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge." Instead, the determination of whether an individual would become primarily dependent on the government for subsistence is based on all the combined factors and is determined on a case-by-case basis. As such, based on the totality of the circumstances test, a "healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance

[6] https://www.ilrc.org/sites/default/files/resources/total_circum_assess_pub_charge_inadmis-20190503.pdf.

in case of an emergency."[7] The AMA believes that any effort to define the five statutory public charge factors would necessarily result in a far more complicated and discretionary determination and one that is both unnecessary and potentially harmful.

The second test requires certain applicants to submit a contract signed by the petitioner, Form I-864 Affidavit of Support, and, if necessary, an affidavit by an additional joint sponsor. We support the rule's favorable consideration of the affidavit of support. We recommend that, consistent with long-standing Department of State instructions, a valid affidavit of support be deemed sufficient to overcome a public charge test, unless "significant public charge factors" are present, under the totality of the circumstances. The positive weight given to an Affidavit of Support is an encouraging step that will help to provide additional worthy immigrants with a path to citizenship and a relief from the public charge rule.

In terms of administration of the totality of the circumstances test, DHS should not change the initial evidence that adjustment of status applicants currently must provide with the Form I-485. Nor do we recommend that any new questions be added to the form with respect to the five statutory factors. Certain information, such as the applicant's age, employment history, past receipt of public benefits, and nuclear family size is already captured on the I-485. Health-related factors—if they exist—will appear on the results of the medical examination, Form I-693, which is required from every applicant. If the adjudicating officer believes that there are significant public charge factors present that are not remedied with the submitted affidavit of support, or with an additional one from a joint sponsor, the officer can issue a Request for Evidence. But the unusual case where additional information is required should not control the initial documentary requirements.

Finally, if an applicant is denied, DHS should retain the proposed language requiring every denial decision to be in writing, reflect consideration of each of the five statutory factors, as well as the affidavit of support, and articulate a reason for the determination. This practice will reduce the risk that the adjudicator is applying the wrong standard and will require the adjudicator to justify the decision. It will also be helpful to the applicant seeking any reopening or reconsideration of the denial.

The AMA opposes the inclusion of state, tribal, territorial, or local benefits, including programs providing cash assistance for income maintenance, as negative factors in public charge determinations.

Our AMA recognizes the ability for state and local initiatives to provide coverage to immigrants without regard to immigration status. Programs funded by state and local government—including any cash assistance that they choose to provide—are an exercise of the powers traditionally reserved to the states. States and localities have a compelling interest in promoting health and safety, which includes their ability to provide benefits at their own expense without barriers caused by federal policies. The Attorney Generals of 19 states collectively commented on the public charge ANPRM advocating that any type of state cash assistance, whether filling a gap for people ineligible for TANF, or cash for specific, supplemental purposes, should not count in a public charge determination, stating: "The undersigned States are charged with safeguarding the public health and promoting the welfare of the people in their jurisdictions. To that end, States make independent public policy determinations, including with respect to providing public benefits to all individuals within their jurisdictions regardless of immigration status." Additionally, the administration of programs provided by Indian tribes should be respected as part of

[7] *Matter of Martinez-Lopez*, 10 I&N 409, 421–422 (AG, Jan. 6, 1964).

tribal sovereignty and self-determination and should not count against individuals applying for citizenship.

States continue to experiment with new ways to support their residents, including U.S. citizens, immigrants, and their family members. In 2021 alone, more than 20 localities piloted guaranteed income programs. In addition, at least seven states and many localities provided disaster cash for immigrants excluded from federal assistance, and five new states expanded their earned income tax credit to reach certain immigrants. Several states are exploring alternatives to unemployment insurance for excluded workers, and with the federal advance child tax credit expiring, some states are considering providing monthly advance payments of state credits. DHS can distinguish these types of programs from "cash assistance for income maintenance" in the regulation and should do so if it does not adopt the above recommendation to only count SSI and TANF. However, whether or not DHS decides to include state and local cash assistance for income maintenance, it will still be critical for DHS to differentiate other federal, state, and local programs from federally funded-cash assistance such as TANF or SSI.

Accessing Medicaid should not be included in public charge determinations.

The public charge determination states that an immigrant will be considered primarily dependent on the government if they are institutionalized "for long-term care at government expense."[8] Although the 1999 Interim Field Guidance counted only Medicaid for long-term institutionalization, evidence shows that immigrants were nonetheless deterred from enrolling in and using other Medicaid services. In 2019, half of the immigrant families surveyed stated that they had avoided using Medicaid, CHIP, or SNAP.[9] Moreover, using Census Bureau data, researchers have found that during the public health emergency "the public charge policy likely caused 2.1 million essential workers and household members to forgo Medicaid" during a time when 52.1 percent were worried about being able to pay for medical costs. The AMA opposes federal and state legislation denying or restricting legal immigrants Medicaid and immunizations. The AMA believes that health disparities affecting immigrants, refugees, or asylees should be eliminated. Therefore, excluding Medicaid from the public charge determination is necessary to reduce the chilling effects of enrollment in Medicaid.

Moreover, including federal long-term institutionalization in public charge determinations discriminates against people with disabilities and older adults. The Rehabilitation Act prohibits discrimination against qualified individuals with disabilities by any program or activity receiving federal financial assistance, or by any program or activity conducted by a federal executive agency. The public charge rule is no exception. If anything, public charge should serve as an early example for new arrivals that we are a nation of laws that apply regardless of one's immigration status. The AMA has long-standing policy opposing discrimination based on a person's disability. The vast majority of people with chronic conditions are able to live and work independently as contributing members of society. For those individuals who do need additional assistance the Supreme Court has held that the Americans with Disabilities Act's "integration mandate" requires public entities to administer services to people with disabilities in the most integrated setting appropriate to their needs.[10] "In states that have invested significantly in home and community-based services since that decision, more individuals will be able to remain at home and in their communities. Other states, however, have not developed robust HCBS

[8] https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf.
[9] https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_2.pdf.
[10] *Olmstead v. L.C.*, 527 U.S. 581 (1999).

programs, causing more individuals to seek care in institutional settings."[11] Additionally, it has been found that there is "unequal minority access to home and community-based alternatives, which are generally preferred for long-term care," which adds another layer of bias to which this community is subject.[12] Thus, immigrants with the same medical conditions and the same needs could be institutionalized in one state, but able to receive services at home in another. Immigrants with special needs should not be punished because their state chose not to offer adequate community-based services for the disabled, as required by federal law, or due to their race. By considering long-term institutionalization in public charge determinations, a factor that is most commonly used by those with disabilities and older adults, disability and age are adversely considered multiple times in the totality of the circumstances test and as such long-term institutionalization should not be considered in the public charge rule. If DHS proceeds with including institutionalization, we urge DHS to make the definition as narrow as possible and clarify that "long-term" means "permanently."

Finally, the AMA supports federal policy that allows physicians to treat immigrant children, regardless of legal status. We also support federal policy that ensures appropriate care for pregnant immigrants and policies that do not deny or restrict legal immigrants' access to and coverage of vital medical services regardless of immigration status. As such, there should be an extension of Medicaid and CHIP eligibility for pregnant and postpartum non-citizen immigrants. Most importantly though, it is imperative that the definition of public charge explicitly states that any form of Medicaid and other health insurance and health care services will not be considered for public charge purposes. A blanket policy concerning access to health care will help to ensure that there is less confusion in the immigrant community and hopefully guarantee that more individuals are provided with proper medical care.

The AMA believes that adequate language services, multiple communication platforms, and use of community institutions and people should be utilized to convey information about the public charge rule to the public and families.

It is imperative that there is extensive and accurate outreach to immigrant populations to explain any changes that have been made and to provide individualized guidance to ensure that eligible individuals do not forgo the use of much needed benefits. Immigrants trust government sources, with U.S. Citizenship and Immigration Services being the most trusted source at 66.1 percent "followed by legal professionals (63.0 percent), state government agencies (55.6 percent), and local government agencies (50.7 percent). However, very small shares [of immigrants] reported getting information on the public charge rule from these sources; most reported getting information on the rule from the media or personal networks, which they trust less."[13] As such, since the government is the most trusted and accurate source of information, we would encourage the Administration to provide ample communications concerning any changes that are made to the public charge rule.

Meeting families where they are is a first step to effectively communicating with parents, especially when working with many individuals from diverse backgrounds. Understanding that many families are faced with structural barriers that obscure the rules and regulations that govern their ability to access certain benefits can be helpful when ascertaining where to begin. Inadequate language services provided by

[11] https://healthlaw.org/resource/nhelp-comments-on-public-charge-anprm/; https://psycnet.apa.org/record/2021-52584-001.
[12] https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2011.0126.
[13] https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_2.pdf.

public agencies can pose serious challenges for families as they acclimate themselves to their new environment. The AMA has highlighted that families who are English language learners (ELL) face barriers to health care service access, experience lower quality care, and suffer worse health outcomes.[14] Another key factor to consider is that not all parents communicate in the same way, that many have different contact preferences from email, text messaging, phone, or standard mail. Social media is another way in which some individuals retrieve information or communicate with others and should be considered as an avenue for disseminating information. Lastly, it is important to consider that systems are not in place to provide equitable access for all families to certain devices or internet capabilities, so communication channels such as email, text, or even phone access may be limited or nonexistent. While mail may be another option, working closely with community institutions and people, such as social workers, community centers, and school and religious leaders could help bridge the communication gap.

Training will be critical to the successful implementation of the Rule.

A long-standing complaint of the public charge rule is the lack of consistency in how it is applied. The NPRM would undo many of the changes made by the previous administration and expand the number of immigrants that are exempt from public charge. This, coupled with the number of changes made to public charge over the past 4 years, has increased confusion surrounding the implementation and administration of the public charge rule for immigrants, advocates, and governmental employees. In order to ensure the proposals in the NRPM are applied consistently, USCIS should invest significantly in training and retraining frontline immigration agents and case workers. This will ensure that all immigrants are treated equally under the law and, hopefully, remove much of the fear and misunderstanding that has pervaded the immigrant community.

Our nation's immigration policies should not discourage immigrants and their family members from seeking physical or mental health care, nutrition, or housing benefits for which they are eligible. We appreciate the positive proposed changes that DHS has made and ask that DHS carefully consider any future alterations to the public charge regulation so that all individuals, regardless of immigration status, have access to health care without a fear of deportation. If you have any questions, please contact Margaret Garikes, Vice President for Federal Affairs, at margaret.garikes@ama-assn.org, or by calling 202-789-7409.

Sincerely,

James L. Madara, MD

[14] https://journalofethics.ama-assn.org/article/how-should-clinicians-respond-language-barriers-exacerbate-health-inequity/2021-02.