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December 7, 2018

Submitted via www.regulations.gov

U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

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

Dear Sir/Madam:

On behalf of the Asian American Bar Association of New York, we appreciate the opportunity to provide comments in response to the Proposed Inadmissibility on Public Charge Grounds (the "Proposed Rule").

AABANY is a professional membership organization of attorneys concerned with issues affecting the Asian American community. Incorporated in 1989, AABANY seeks not only to encourage the professional growth of its members but also to advocate for the Asian American community as a whole. Today, AABANY has more than 1,100 active members throughout New York. AABANY is also an affiliate of the National Asian Pacific American Bar Association ("NAPABA"), which serves as a national network for its members and affiliate organizations.

The Asian American Bar Association of New York believes that this rule change will cause irreparable harm to our community. Many of AABANY's members are immigrants, or children of immigrants, and are personally impacted by this rule. The Proposed Rule changes the rules of the system in midstream and are directly intended to prevent immigrants from becoming American citizens.

AABANY hosts a monthly legal referral clinic that serves communities speaking various Asian Languages. We have already observed that the proposed rule change has caused significant confusion for our community members and would require significant resources to train volunteer attorneys and interpreters to correctly advise our community members of the public charge implications.

Many of our members are attorneys who represent immigrants who will be impacted by this rule. The proposed rule will fundamentally change the legal immigration system in midstream and erect barriers targeting immigrants with limited English proficiency, working-class immigrants, elderly immigrants, and immigrant women. The proposed rule is inconsistent with existing law, policy, and practice in interpreting the public charge law. The proposed rule also underestimates its own potential harm to the immigrant communities. By stigmatizing and imposing a penalty for using government programs and tax credits, it will enforce a rigid good/bad immigrant dichotomy, place extreme financial restraints on new immigrant households, and cause significant harm to the health and welfare of immigrants and their families.



I. AABANY opposes the proposed DHS Rule as it underestimates the harms and overall cost

A. The Proposed Rule underestimates the harm to communities

1. Impact on New York City and New York State

New York is one of the most generous states in terms of providing government resources and is also one of the most ethnically diverse. In New York City, over 3 million residents are foreign born, one-quarter arrived in 2000 or later.¹ Asian Americans have the highest poverty rate in New York, with an estimated 24.1 percent living below the poverty threshold in 2016.² Additionally, because many of the programs under attack provide for families who earn up to 400% of the federal poverty level, an even higher percentage of Asian immigrants in New York City qualify for and receive public benefits that are included in the Public Charge rule.

2. Impact on Asian Americans

This rule clearly is aimed at deterring family reunification, or what some have referred to as “chain-migration” by legal immigrants. It thus will have a huge impact on immigrants from Asia, who account for a large portion of immigrants who enter in the U.S. through family reunification.³ In recent years, three out of every ten individuals obtaining permanent residence status are from Asia and Pacific Island nations.⁴ Forty percent of the millions of individuals and families waiting in long backlogs for family-based immigration are from Asia and Pacific Island nations.⁵ All of these potential new Americans would be scrutinized under the new proposed rule and many would be deterred from participation in programs that they are eligible for and need to improve their health and well-being and the health and well-being of their families. Below is an estimate of Asian immigrants who obtained legal permanent resident status through a family-based visa:⁶

¹ New York City Department of City Planning, Population Facts, <https://www1.nyc.gov/site/planning/data-maps/nyc-population/population-facts.page> (last visited Nov. 1, 2018).

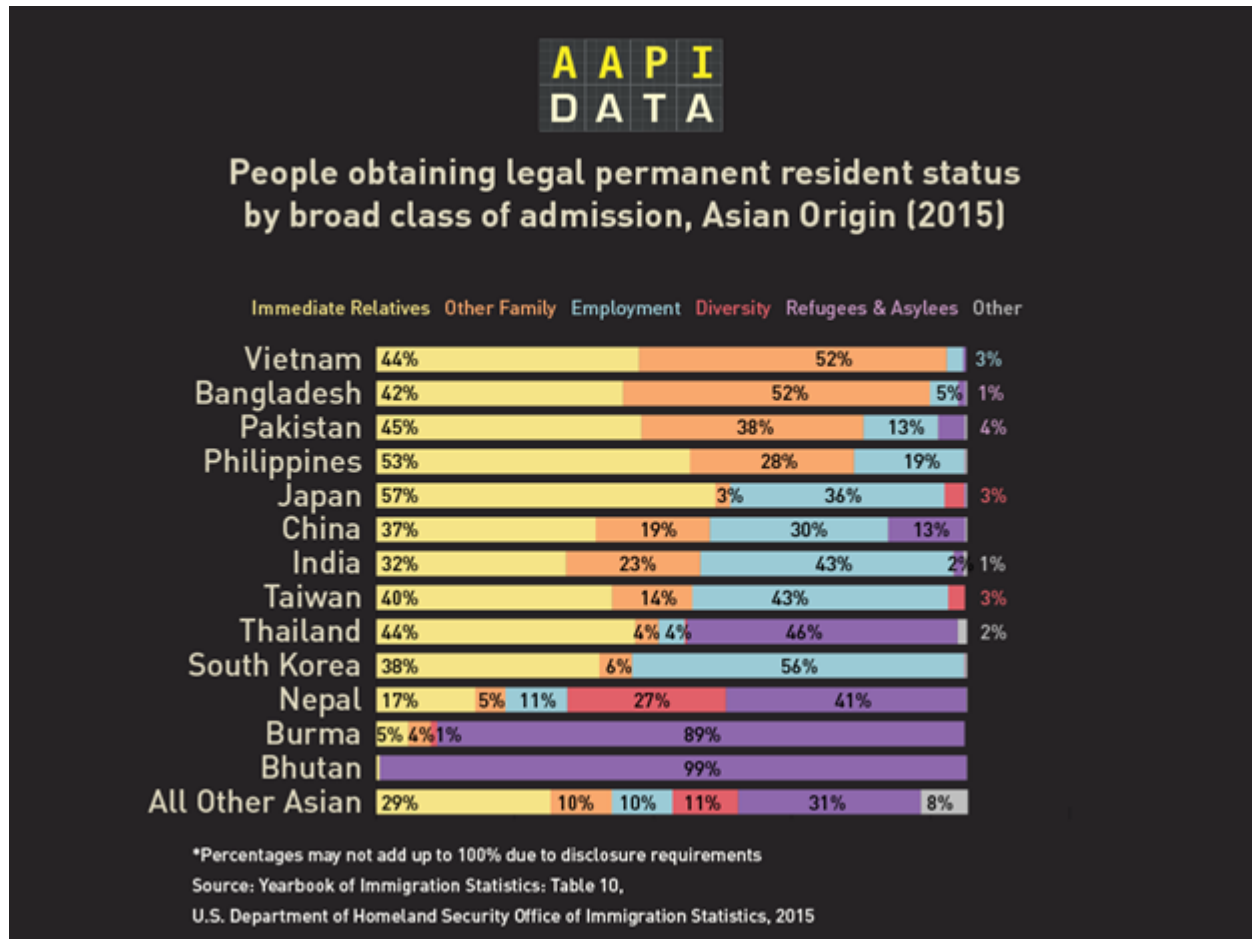
² New York City Office of the Mayor, New York City Government Poverty Measure 2005-2016, April 2018, http://www1.nyc.gov/assets/opportunity/pdf/18_poverty_measure_report.pdf.

³ AAPI Data, “Chain-migration” created today’s Asian America, Jan. 31, 2018, <http://aapidata.com/blog/chain-migration-created-todays-asian-america/>

⁴ Department of Homeland Security, Yearbook of Immigration Statistics 2016, <https://www.dhs.gov/immigration-statistics/yearbook/2016>

⁵ Department of State, Annual Report of Immigrant Visa Applicants (2017) https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2017.pdf

⁶ AAPI Data, *supra* note 3.



Furthermore, the Census estimates that approximately 17.8% of people who participate in government assistance programs are Asians or Pacific Islanders.⁷ This definition only includes Medicaid, SNAP, Housing, SSI, and TANF. While there is no evidence that the utilization of any government programs by Asian Americans and Pacific Islanders is higher than other populations, the proposed rule would deter many of these individuals and families from continuing to participate in these programs. Progress made since the passage of the Affordable Care Act that had partially equalized the disparities in uninsured rates between Whites and Asian Americans and Pacific Islanders through the expansion of Medicaid and establishment of health insurance marketplaces could easily be wiped out.⁸

⁷ U.S. Census Bureau, *21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month* (May 28, 2015) available at <https://www.census.gov/newsroom/press-releases/2015/cb15-97.html>.

⁸ 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>



3. Impact on low-wage workers

Despite the millions of jobs created in the private sector since the most recent recession in 2009,⁹ most of them were in occupations characterized by low-wages, unpredictable schedules, and few benefits.¹⁰ About 65 million Americans are low-wage workers,¹¹ of whom two-thirds are women.¹² A recent analysis found that up to 30 percent of Americans work in jobs with pay that would barely lift a family above the poverty line, even if they were working full-time, year-round.¹³ Further, contrary to popular belief, low-wage workers are older, full-time employees, with children, and holds at least a high school diploma.¹⁴

Low-wage workers turn to SNAP, Medicare, and Housing Assistance to supplement low and fluctuating pay and to help them get by during spells of unemployment.¹⁵ Additionally, these benefits can lift low-wage families out of poverty by making available cash to pay bills or purchase other necessities.¹⁶

Workers Participating in SNAP by Major Occupation Groups, and the Most Common Occupations Within Them

How to read this table: 4,669,000 workers participating in SNAP work in service occupations, most commonly as cooks, home health aides, and janitors or building cleaners.

Workers Participating in SNAP (000s)	Most Common Occupations Among Workers Participating in SNAP in This Major Occupation Group
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⁹ U.S. Gov't Accountability Office, *GAO-17-677, Low-Wage Workers: Poverty and Use of Selected Federal Social Safety Net Programs Persist among Working Families* (Sep 22, 2017) available at <https://www.gao.gov/products/GAO-17-677>.

¹⁰ Irina Ivanova, *For millions, low-wage work really is a dead end*, CBS News, Apr. 20, 2018, <https://www.cbsnews.com/news/low-wage-work-really-is-a-dead-end-for-millions/>.

¹¹ *Id.*

¹² Kayla Patrick, *Low-Wage Workers are Women: Three Truths and a Few Misconceptions*, Nat'l Women's Law Ctr., <https://nwlc.org/blog/low-wage-workers-are-women-three-truths-and-a-few-misconceptions/>

¹³ Brynne Keith-Jennings et al., *SNAP Helps Millions of Low-Wage Workers: Crucial Financial Support Assists Workers in Jobs with Low Wages, Volatile Income, and Few Benefits*, Ctr. on Budget and Policy Priorities, May 10, 2017, <https://www.cbpp.org/research/food-assistance/snap-helps-millions-of-low-wage-workers>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Steven Carlson et al., *SNAP Works for America's Children*, Ctr. on Budget and Policy Priorities, Sept. 10, 2016, <https://www.cbpp.org/research/food-assistance/snap-works-for-americas-children>; see also Arloc Sherman et al., *Various Supports for Low-Income Families Reduce Poverty and Have Long-Term Positive Effects On Families and Children*, Ctr. on Budget and Policy Priorities, July 30, 2013, <https://www.cbpp.org/research/various-supports-for-low-income-families-reduce-poverty-and-have-long-term-positive-effects>.



Service occupations	4,669	Cooks Nursing, Psychiatric, and Home Health Aides, Janitors, and Building Cleaners
Office and administrative support occupations	1,902	Customer Service Representatives, Stock Clerks and Order Fillers, Secretaries and Administrative Assistants
Sales and related occupations	1,774	Cashiers, Retail Salespersons, First-Line Supervisors of Retail Sales Workers
Professional and related occupations	1,453	Teacher Assistants, Registered Nurses, Elementary and Middle School Teachers
Transportation and material moving occupations	1,383	Driver/Sales Workers and Truck Drivers, Laborers and Freight, Stock, and Material Movers, Hand Packers and Packagers
Production occupations	1,195	Miscellaneous Production Workers, Including Semiconductor Processors, Miscellaneous Assemblers and Fabricators Inspectors, Testers, Sorters, Samplers, and Weighers
Construction and extraction occupations	1,049	Construction Laborers, Carpenters, Painters, and Paperhangers
Management, business, and financial occupations	838	Miscellaneous Managers, Including Funeral Service Managers, and Postmasters and Mail Superintendents, Food Service Managers, Accountants, and Auditors
Installation, maintenance, and repair occupations	434	Automotive Service Technicians and Mechanics Maintenance and Repair Workers, General Heating, Air Conditioning, and Refrigeration Mechanics and Installers
Farming, fishing, and forestry occupations	214	Miscellaneous Agricultural Workers, Including Animal Breeders, Graders and Sorters, Agricultural Products, Logging Workers
Total	14,911	

Note: “Workers participating in SNAP” refers to workers who live in households that report participating in SNAP at any time in the last year.

Source: CBPP Analysis of 2015 American Community Survey data.



4. Impact on small business owners

Asian American entrepreneurs have found countless small businesses, which in turn have served to help them move up the economic ladder. Entrepreneurs face many barriers to entry, including credit constraints and uninsured risk. Yet, small businesses make up:

99.7 percent of U.S. employer firms,
64 percent of net new private-sector jobs,
49.2 percent of private-sector payroll,
46 percent of private-sector output,
43 percent of high-tech employment,
98 percent of firms exporting goods, and
33 percent of exporting value.¹⁷

In 2010, there were 27.9 million small businesses in America. There were nearly 550,000 small businesses in the State of New York in 2016.¹⁸

A 2016 Harvard Study found that newly-eligible SNAP households were 20 percent more likely to own a business because of the SNAP expansion in the mid-2000s, driving up new firm births by 12 percent.¹⁹ According to the study, entrepreneurs/small business owners are more capable of opening and maintaining a high-quality business when their risk exposure are reduced; i.e. food, housing, and medical needs are met.²⁰ Thus, federal benefits such as SNAP, Medicare, and Housing Assistance are important to the security of small business owners and to maintaining the economy.

5. Impact on children

One in six children in the United States face hunger, and 20 million of those children rely on the food they get from SNAP.²¹ As many as 1.5 million families caring for three million kids live on less than \$2 per person, per day, in cash income.²² In a given year, one in every 30 children in the

¹⁷ U.S. Census Bureau, SUSB, CPS; International Trade Administration; Bureau of Labor Statistics, BED; Advocacy-funded research, Small Business GDP: Update 2002-2010, www.sba.gov/advocacy/7540/42371.

¹⁸ U.S. Census Bureau, *Geography Area Series: County Business Patterns by Employment Size Class* (Apr. 19, 2018) available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=BP_2016_00A3&prodType=table.

¹⁹ Gareth Olds, *Food Stamp Entrepreneurs*, Harvard Business School, Working Paper 16-143, https://www.hbs.edu/faculty/Publication%20Files/16-143_2cf7ba14-5bfa-4c34-85d9-0edc0ddc7ce6.pdf.

²⁰ *Id.* See also Kimberly Weisul, *How Food Stamps Fuel Entrepreneurship*, Inc., Sept. 26, 2014, <https://www.inc.com/kimberly-weisul/the-surprising-connection-between-welfare-and-entrepreneurship.html>.

²¹ Christy Felling, *Five Facts: How SNAP Helps Kids*, No Kid Hungry, Feb. 28, 2018, <https://www.nokidhungry.org/blog/five-facts-how-snap-helps-kids>

²² Annie Lowrey, *How America Treats Its Own Children*, The Atlantic, June 21, 2018, <https://www.theatlantic.com/ideas/archive/2018/06/how-america-treats-children/563306/>.

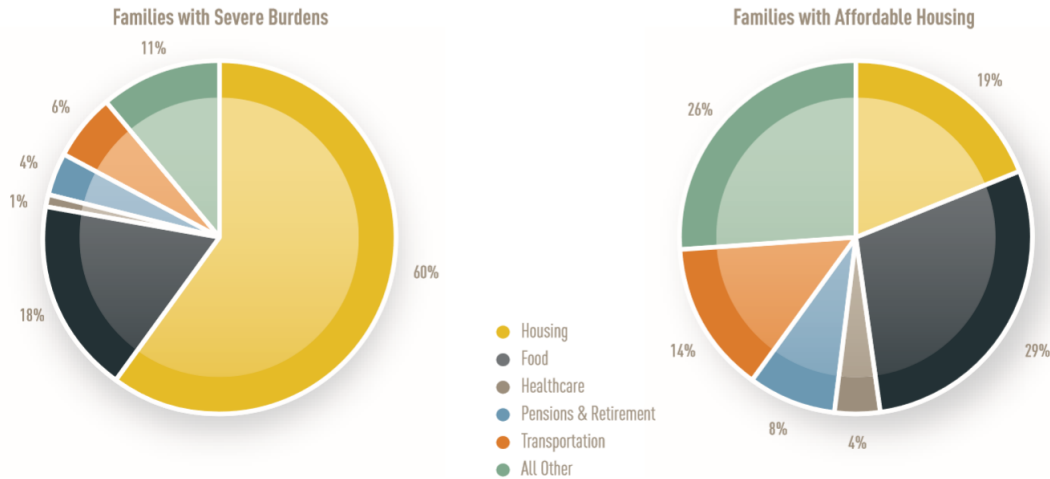


United States experience homelessness, a statistic that translates to 2.5 million kids.²³ Food and housing insecurities can negatively affect a child’s physical and mental well-being.²⁴

Offsetting the high cost of housing can help families avoid the trade-off between food or shelter, as well as among other basic needs like transportation and health care.²⁵ While subsidized housing assistance is not limited to single-parent families, it is one of the most common rental assistance programs available to single mothers and their children.²⁶ As previously stated, low-income families are typically single mothers with at least one child in the household. Further, SNAP can positively affect children’s health and learning.²⁷ For example, SNAP kept about 10.3 million people out of poverty in 2012, including about 4.9 million children.²⁸

Low-Income Families with Severe Cost Burdens Have Much Less to Spend on Other Necessities than Those with Affordable Housing

Share of Average Monthly Expenditures for Bottom-Quartile Families with Children



Notes: Expenditure quartiles are equal fourths of all households ranked by total spending. Families with affordable housing (severe burdens) devote less than 30% (more than 50%) of monthly expenditures to housing.

Source: JCHS tabulations of US Bureau of Labor Statistics, 2011 Consumer Expenditure Survey.²⁹

²³ *Id.*

²⁴ U.S. Dep’t of Housing and Urban Dev., *The Impact of Housing Quality on Health*, https://www.hud.gov/sites/documents/PMS17_OLHCHH_SS.PDF; see also Felling *supra* note 18.

²⁵ Felling *supra* note 18. See e.g. Susan J. Popkin et al., *Can housing assistance help protect children from hunger?*, Urban Institute, Feb. 3, 2014, https://www.opportunityhome.org/wp-content/uploads/2018/04/urban_org.pdf; Ctr. on Budget and Policy Priorities, *SNAP Helps Millions of Children*, Apr. 26, 2017, <https://www.cbpp.org/research/food-assistance/snap-helps-millions-of-children>; Metrofocus, *The Homeless Children Epidemic*, Mar. 13, 2018, <https://www.thirteen.org/metrofocus/2018/03/homeless-children-epidemic/> (“One in every ten public school students here in New York were caught up in the City’s shelter system.”).

²⁶ Jennifer Wolf, *Housing Assistance Programs for Single Mothers*, Verywell Family, Nov. 1, 2018, <https://www.verywellfamily.com/housing-assistance-programs-for-single-mothers-2997420>.

²⁷ Steven Carlson et al., *SNAP Works for America’s Children*, Ctr. on Budget and Policy Priorities, Sept. 10, 2016, <https://www.cbpp.org/research/food-assistance/snap-works-for-americas-children>.

²⁸ *Id.*

²⁹ Joint Center for Housing Studies, *The State of the Nation’s Housing: 2013*, Harvard University, 2013, <http://www.jchs.harvard.edu/sites/default/files/son2013.pdf>.



B. DHS analysis underestimates the costs of implementation for the Proposed Rule

Beyond the social, political, and cultural impact on communities, the Proposed Rule would impose tremendous financial burdens on the Department of Homeland Security (DHS), as well as applicants for permanent resident (green card) status or individuals seeking to change or extend their temporary status and other stakeholders.

1. Costs to Applicants

For applicants to change immigration status, the costs imposed by the Proposed Rule would be prohibitive. According to the DHS's own cost analysis, the total new costs to applicants of the Proposed Rule will range from approximately \$45 million to \$129 million annually.³⁰ With an estimated 382,264 applicants annually, the average cost per applicant is \$119. This cost is calculated from the opportunity costs of the time it would take for applicants to complete the administrative forms required for change of status, as well as the filing fees for forms and the cost of requests for evidence.

For the purposes of calculating opportunity costs, the DHS assumes the federal minimum wage of \$7.25 per hour. If this assumption is correct, if only for a majority of applicants, \$119 is a prohibitive sum of money for those making the federal minimum wage. Because of opportunity costs of time, the \$119 figure increases when adjusted for areas where the local minimum wage is higher than the federal minimum wage.

Furthermore, immigrants to the United States tend to be concentrated around major metropolitan areas.³¹ In many of these areas, the federal minimum wage is not an adequate living wage. For instance, Los Angeles County and Miami-Dade County, two of the metropolitan areas with the highest concentration of immigrants, the cost of living is significantly higher. According to the Massachusetts Institute of Technology's Living Wage Calculator, the living wage for a single adult in Los Angeles County and Miami-Dade County are \$13.54 per hour and \$12.29 per hour, respectively, in 2017.³² Even assuming each county's minimum wage (\$11 per hour and \$8.25 per hour, respectively), the disparity between the minimum wage and the living wage is such that the opportunity costs, filing fees, and administrative costs of applying for a change of status are prohibitive even for applicants living on the minimum wage.

³⁰ Proposed Rule, 8 C.F.R. §§ 103, 212 to 214, 245, 248 (2018) available at https://www.dhs.gov/sites/default/files/publications/18_0921_USCIS_Proposed-Rule-Public-Charge.pdf.

³¹ Migration Policy Institute, *U.S. Immigrant Population by State and County*, <https://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-state-and-county> (last visited October 14, 2018).

³² Amy K. Glasmeier and the Massachusetts Institute of Technology, *Living Wage Calculation for Los Angeles County, California*, <http://livingwage.mit.edu/counties/06037> (last visited October 14, 2018); Amy K. Glasmeier and the Massachusetts Institute of Technology, *Living Wage Calculation for Miami-Dade County, Florida*, <http://livingwage.mit.edu/counties/12086> (last visited October 14, 2018).



In addition to prohibitive opportunity costs, the elevation of the public charge bond regime, under which the applicant or the applicant's sponsor would be required to post at minimum a \$10,000 bond for admission, is a similarly insurmountable obstacle. Even for a family of four earning \$63,000 annually,³³ who could avoid scrutiny under the public charge test, \$10,000 is a prohibitive cost. For those applicants who earn below 250 percent of the Federal Poverty Guidelines and who therefore would actually face scrutiny under the public charge test, \$10,000 is an impossible amount to post as a bond, and the potential loss of that bond for using public benefits would be disastrous.

2. Administrative Burdens

The Proposed Rule would furthermore impose significant administrative burden on both government agencies and all organizations and individuals "associated with regulatory familiarization with the provisions" of the Proposed Rule.

For DHS, there will be a marked increase in time and labor required for the agency to evaluate adjustment of status applicants based on the new public charge determinations. This will include but is not limited to the time and labor associated with retraining and familiarizing personnel with the parameters of the Proposed Rule, preparing training materials for such, and updating and rewriting all guidance materials and forms used by both applicants and DHS personnel. As DHS analysis itself contemplates, there will be time and labor costs associated with preparation and retraining "[a]t each level of government."³⁴ Finally, due to an increase in factors considered in determining who is likely to become a public charge, there will be a corresponding increase in time required for adjudicating and processing applications, which is not necessarily captured in the cost-benefit analysis published by DHS.

The rule will impose a substantial new workload on U.S. Citizenship and Immigration Services (USCIS). It requires the agency to conduct public charge inadmissibility determinations as well as process Form I-944, Declaration of Self-Sufficiency, in connection with an estimated 382,264 adjustment of status applications annually. It also compels public charge assessments of an estimated 511,201 applications for extension or change of nonimmigrant status each year.³⁵ However, the cost analysis in the rule only addresses the costs to the public, not the administrative costs to DHS of implementing this rule.

All these operational demands will be levied on an agency that has already experienced profound capacity shortfalls for over a decade. A review of data just since FY 2017 indicates lengthening processing times for applications for green cards, employment authorization, travel documents, and green card replacements, among others.³⁶ By the end of FY 2017, 5,606,818

³³ Proposed Rule, *supra* at note 7, at 430.

³⁴ *Id.* at 370.

³⁵ This includes an estimated 336,335 requests for extension of status or change of status through Form I-129, and an estimated 174,866 through Form I-539.

³⁶ See *generally* historical processing time data available at: <http://www.aila.org/infonet/processing-time-reports>.



applications and petitions remained adjudicated by USCIS—23% more than one year earlier.³⁷ In February 2018, DHS conceded that “USCIS continues to face capacity challenges.”³⁸

These case processing delays upend the lives of immigrants and U.S. citizens alike. They often threaten applicants’ ability to work,³⁹ depriving families—including families with U.S. citizen children—of income essential to meeting basic necessities like food and housing. Adjudication delays also lead to expiration of driver’s licenses,⁴⁰ which immigrants rely upon to access banking, medical treatment, and other indispensable services, as well as for transportation to school and work. In addition, slowdowns prolong the separation of families dependent on case approval for their reunion. Overseas family members awaiting processing may face danger in their home countries,⁴¹ while stateside children may endure lengthy parental absences. In still other instances, processing delays defer students’ education and graduation.⁴²

In short, the proposed rule will deepen the agency’s case processing delays and make an operational crisis appreciably worse. Individuals and families throughout the United States will suffer the consequences.

As far as government agencies, these costs extend far beyond DHS. Indeed, any federal agencies that provide benefits that fall within the new regime of the Proposed Rule will incur similar costs in updating guidance materials and forms, as well as retraining agency personnel. DHS analysis states that DHS is “unable to quantify” such costs,⁴³ but given how much the Proposed Rule extends the regulatory regime of what constitutes a public charge, it is likely that such agency costs would be extraordinary.

Other stakeholders, including but not limited to immigration attorneys and advocacy groups, health care providers, non-profit and non-governmental organizations, and religious organizations, will similarly incur direct and indirect costs.⁴⁴ DHS analysis estimates 8 to 10 hours per person is necessary to read the Proposed Rule,⁴⁵ which does not capture the time required to familiarize oneself and one’s organization sufficiently with the Proposed Rule in order to incorporate that knowledge into professional practice. It similarly fails to capture costs of the ensuing confusion upon implementation

³⁷ *Id.*

³⁸ DHS, *Annual Performance Report: Fiscal Years 2017-2019* (Feb. 5, 2018); https://www.dhs.gov/sites/default/files/publications/DHS%20FY%202017-2019%20APR_0.pdf.

³⁹ See *Deconstructing the Invisible Wall*, American Immigration Lawyers Association (Mar. 19, 2018); <http://www.aila.org/infonet/aila-report-deconstructing-the-invisible-wall>.

⁴⁰ See *Letter to Director Rodriguez on USCIS Processing Delays*, American Immigration Lawyers Association (Mar. 11, 2016), <http://www.aila.org/advo-media/aila-correspondence/2016/letter-director-rodriguez-uscisprocessing-delays>.

⁴¹ See, e.g., U.S. Citizenship and Immigration Services Ombudsman, *Annual Report 2016* (Jun. 29, 2016); https://www.dhs.gov/sites/default/files/publications/CISOMB%20Annual%20Report%202016_2.pdf.

⁴² See *Letter to Director Rodriguez on USCIS Processing Delays*, American Immigration Lawyers Association (Mar. 11, 2016), <http://www.aila.org/advo-media/aila-correspondence/2016/letter-director-rodriguez-uscisprocessing-delays>.

⁴³ *Id.*

⁴⁴ *Id.* at 16-17.

⁴⁵ *Id.*



of the Proposed Rule: the amount of time and money that will be spent correcting errors made in compliance with the current rule, which would then be outdated.

Even assuming as correct the 8-to-10-hour figure, the impact on immigration attorneys alone would be substantial. For the 15,000 members of the American Immigration Lawyers Association alone⁴⁶—which of course captures only a small fraction of all immigration attorneys in the United States—there would be 120,000 to 150,000 hours spent simply reading the Proposed Rule. Further assuming that these 15,000 attorneys also make the federal minimum wage, the associated opportunity cost of time of reading the Proposed Rule is \$870,000 to \$1,087,500. Again, this number captures only a very, very small portion of the individuals who would incur costs, as a result of the Proposed Rule, and captures only a very small portion of the costs those individuals would incur.

C. The Proposed Rule is inconsistent with history and congressional intent

1. History of the Public Charge Rule

The public charge rule is steeped in U.S. history, dating back to when the term first appeared in the Immigration Act of 1882. “Public charge” has historically referred to a non-citizen who is likely to become primarily dependent on the government for subsistence. Benefits that are considered in the public charge test include cash assistance for income maintenance (“SSI” and “TANF”), food stamps (now known as Supplemental Nutrition Assistance Program or “SNAP”), and government-funded long-term institutional care. Although the public charge rule was used to refuse admission to non-citizens at U.S. ports of entry, until about the 1940s, the public charge rule was used sparingly.

The current public charge rule, which applies to those who are applying to enter the United States and those who are adjusting their status within the U.S. to become lawful permanent residents (“LPRs”), includes sufficient safeguards to prevent an individual who would become primarily dependent on government benefits for survival from entering the United States. The Proposed Rule on the other hand would affect a wide swath of not only those without any means to support themselves but also moderate-income families who need only occasional access to certain public benefit programs to meet basic needs.

The public charge rule largely remained the same when the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”) became law on August 22, 1996.⁴⁷ This was the first of two statutory guidelines enacted in 1996. PRWORA made LPRs ineligible for a range of federal public benefits during their initial five years in the country but also introduced guidelines for different groups of immigrants that should not be subject to public charge. The second statutory guideline was the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), published that same

⁴⁶ American Immigration Lawyers Association, *About*, <https://www.aila.org/about> (last visited October 14, 2018).

⁴⁷ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, as amended by the Balanced Budget Act of 1997, Pub. L. 105-33.



year on September 30, 1996.⁴⁸ The IIRIRA provided that any non-citizen determined by a consular or immigration officer at any time to become a “public charge” was excludable, *i.e.*, ineligible for admission or adjustment of status.

There were a set of factors to consider in making a determination of whether an individual fell under the public charge rule. Applying a “totality of circumstance” test, these factors included age, health, family status, assets, resources, financial status, education and skills. In order to demonstrate that an individual was not excludable as a public charge, a family-sponsored immigrant and certain employment-sponsored immigrants need to find a sponsor willing to provide an affidavit of support stating that she would provide support to maintain the sponsored immigrant at an annual income at or above 125% of the federal poverty guidelines. Neither of these laws modified the applicable law with regard to deportability based on the likelihood of becoming a public charge. Under the Immigration and Nationality Act of 1965 (“INA”), any immigrant who, “within five years after the date of entry [became] a public charge from causes not affirmatively shown to have arisen since entry [was] deportable.”⁴⁹

In 1999, the legacy Immigration and Naturalization Service (INS) issued field guidance and proposed a rule addressing public charge with regard to inadmissibility and deportability.⁵⁰ That proposed rule was never finalized, but the guidance is still currently applied. An individual is subject to public charge if she “primarily depend[s] 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.”⁵¹ The rule goes on to clarify that a person must be “primarily dependent” on public cash assistance and that receiving cash assistance is not sufficient. Insurance and non-cash benefits or services are not considered, with the exception of institutionalization for long-term care. Any determination is based on the use of public benefits by an individual, and not other household members or dependents. The receipt of public benefits is not the sole determining factor but one of many factors considered, including age, health, family status, assets, resources, financial status, education and skills. The criteria for public charge also apply to grounds for deportation. Those who receive some type of government-funded long-term care may face deportation if they receive a means-tested benefit from a government agency, the agency seeks reimbursement, and the debt is not repaid.

In January 2018, a revised version of the Foreign Affairs Manual (“FAM”) included updated instructions for conducting a public charge determination for non-citizens who apply for permanent or temporary visas to come to the United States. The instructions allow officials to consider the use of non-cash benefits when assessing whether an applicant would be likely to become a public charge.

⁴⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter IIRIRA), Pub. L. 104-28.

⁴⁹ Immigration and Nationality Act of 1965 (“INA”), Pub.L. 89-236, § 237(a)(5), as amended by IIRIRA § 305(a)(2) available at <https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-10948.html-0-0-0-1571>.

⁵⁰ “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 Fed. Reg. 28689 (May 26, 1999) available at <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html>.

⁵¹ *Id.* at 28689.



2. History of family-based immigration

The proposed rule would have a dramatic impact on Asian American and Pacific Islander families. Asian Americans and Pacific Islanders are among the fastest growing populations in the U.S.,⁵² in large part to changes in U.S. immigration law in the 1960s that finally repealed restrictions on Chinese immigration dating back to the decades before and including the time of Chinese Exclusion Act of 1882. Ironically, the original “public charge” exclusion was enacted in that same year, seeking to restrict Irish immigrants fleeing the potato famine.⁵³

The Immigration Act of 1965 ended the Immigration Law of 1921 which mandated quotas based on national origins. This Act had a profound effect on the flow of immigrants to the U.S. over the next 50 years and changed the demographics of this country.

The 1965 Act introduced a preference for family relationships over other factors and prioritized immigrants with family already in the United States. Since then, family reunification has served as a basis for admitting new immigrants into the United States. Citizens and lawful permanent residents (LPRs) have historically used family ties to bring their close family members to the United States. As a result, both Asian and Latino/a immigrant populations grew. Both of these groups were able to flourish and establish roots in this country.

Following leaked drafts of the Proposed Rule to change the definition of public charge, immigrant community members, including permanent residents, asylees, and refugees who are not even affected by the public charge rule have been reported to be terminating or disenrolling from their current public benefits plans. Many feared that staying in these programs would subject them to a high risk of ineligibility to become a permanent resident or even risk of deportation.

The Trump administration supported the Republican-sponsored Reforming American Immigration for Strong Employment Act of 2017 (RAISE). This bill would drastically reduce the number of family-sponsored immigrants and favor individuals under a merit-based, skills-based system. It would shift the focus away from family ties and would prioritize education, English proficiency, and job skills. This is unfortunate. Studies have shown that family immigration is good for the economy because it provides a flexible workforce that will adapt to current and future labor demand.

⁵² U.S. Census Bureau, The Asian Population: 2010 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf> and U.S. Census Bureau, The Native Hawaiian and Other Pacific Islander Population: 2010 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>

⁵³ Green E. First, “They Excluded the Irish,” The Atlantic. (February 2, 2017) <https://www.theatlantic.com/politics/archive/2017/02/trump-poor-immigrants-public-charge/515397>



3. Program history

The government-funded programs that immigrants have access to include, among others, Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and long-term institutionalized care. These programs have been available to immigrants for almost as long as public charge and family-based immigration have existed. Historically, not all immigrants who used these programs were considered to be subject to public charge. The “totality of circumstances” test will help determine if any one person is subject to public charge.

There are a number of people and programs that are exempt from the public charge rule. Those programs include, but are not limited to, education benefits like Head Start, Children's Health Insurance Program (CHIP), Affordable Care Act subsidies or subsidized insurance, SNAP, Women, Infants, and Children assistance (WIC), housing benefits (Section 8), Low Income Home Energy Assistance Program (LIHEAP), and transit vouchers. While the public charge rule generally affects immigrants seeking to become lawful permanent residents, those who are currently not affected include refugees and asylees, special immigrant juveniles (many of them unaccompanied minors), trafficking victims (T visa), domestic violence survivors (VAWA), crime victims (U visa), LPRs, naturalization applicants, people who became permanent residents under the Cuban Adjustment Act (CAA), Nicaraguan Adjustment and Central American Relief Act (NACARA) or Haitian Refugee Immigration Fairness Act (HRIFA).

The proposed rule would reverse more than a century of existing law, policy, and practice in interpreting the public charge law, when the receipt of non-cash benefits has never been the determining factor in deciding whether an individual is likely to become a public charge. That case law also includes numerous examples where even decades-long past receipt of cash benefits did not result in a public charge finding due to the “totality of circumstances” test that was used in the applicant’s favor, including showing changes in employment history and other life circumstances. For almost two decades, U.S. immigration officials have explicitly reassured, and immigrant families have relied on that reassurance, that participation in programs like Medicaid and SNAP (formerly food stamps) would not affect their ability to become lawful permanent residents.⁵⁴

Whenever Congress has had several opportunities to amend the public charge law, it has only affirmed the existing administrative and judicial interpretations of the law. 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.”⁵⁵ The implementing regulation published in 1989 defined “public cash assistance” as “income or needs-based monetary assistance,”

⁵⁴ United States Citizenship and Immigration Services, “Public Charge” available at <https://www.uscis.gov/greencard/public-charge>.

⁵⁵ INA §245A(d)(2)(B)(iii). IRCA also created a waiver of the public charge exclusion for applicants who were aged, blind, or disabled (and might be in need of long-term institutional care), INA §245A(d)(2)(B)(ii)(IV).



including programs like SSI, but specifically excluding food stamps, public housing, or other non-cash benefits, including medical assistance programs such as Medicaid.⁵⁶ This special rule and its implementing regulation is consistent with the case law on public charge.

II. Conclusion

The Asian American Bar Association of New York opposes this drastic policy change in the interpretation of public charge because it will cause irreparable harm to our community. For all the reasons outlined above, AABANY objects to implementation of the Proposed Rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Y. Chen', written over a horizontal line.

Yang Chen
Executive Director

⁵⁶ See 8 CFR § 245a.1(i); there was a similar regulatory interpretation for special agricultural workers, 8 C.F.R. § 210.3(e)(4).