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Department of Homeland Security

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

The undersigned [NUMBER] national, state and local organizations in [ALL 50 STATES AND DC] are writing to share our support for, as well as recommendations to improve on, the public charge notice of proposed rulemaking (NPRM) published in the Federal Register on February 24, 2022.

Safety net programs for health, nutrition, housing, and other basic needs help nearly half of Americans to make ends meet at some point in their lifetime. In an economy where, for millions, working full-time isn't enough to pay the rent, take the children to the doctor, or put food on the table, getting help doesn't make a person – citizen or not – a public charge. It makes them part of a typical family.

The public charge ground of inadmissibility is an antiquated policy reflecting centuries of racial and class bias. We are committed to working with Congress to strike it from the law. We also recognize, however, that at present it remains a provision of the Immigration and Nationality Act (INA), and the Department of Homeland Security (DHS) must administer the law. To that end, we urge DHS to move quickly to improve and finalize the proposed rule.

Finalizing a responsible public charge policy is critical to ensuring that immigrants who qualify for safety net programs can be confident that seeking health care, food and nutrition assistance, housing or other help will not put future immigration applications at risk. This proposed rule is an important step mitigating the damage of the 2019 public charge policy.

The proposed regulation restores and improves upon the public charge policy that was in use from the late-1990s through the late 2010s, and that was consistent with longstanding public charge policy. Importantly, the NPRM recognizes that use of core health, nutrition, and housing assistance programs should in no way be linked to the INA's public charge provision. They represent our country's policy choices about how to help all workers and families succeed. This is a common sense foundation on which to build.

We commend DHS for proposing significant improvements to the 1999 guidance. These improvements – especially proposed definitions and instructions for adjudicating officers – will reduce the bias and harm resulting from the application of the INA's public charge provision. "Primarily dependent" is the appropriate standard for a public charge determination and we support its use. We also recommend that if a person uses any programs considered in a public charge determination to overcome hardships caused by a temporary situation, that use should not be considered an indication of primary dependence. Examples include the use of such programs by survivors of domestic violence, serious crimes, disasters, accidents, or by children, pregnant or recently pregnant persons. Similarly, we support DHS's proposal to clarify that an individual's use of safety net programs while in an exempt immigration status will not be considered.

The proposed rule also improves on the 1999 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 to apply for benefits, or being in a household or family with someone who receives benefits does not count as receipt of benefits. This reform is crucial to ensure the administrability of the public charge rule and to mitigate the "chilling effect" of the 2019 public charge policy, especially on U.S. citizen children in mixed-status households.

We support DHS's decision not to define the five statutory factors described in the INA: the applicant's age; health; family status; assets, resources, and financial status; and education and skills. We support the rule's favorable consideration of the affidavit of support. We recommend that, consistent with longstanding 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. Placing a focus on the affidavit of support to mitigate issues arising under the statutory factors is the most administrable approach. Defining the statutory factors would necessarily result in far more complexity and discretion, unnecessarily adding administrative burdens and opening the door to bias. In addition, we recommend that DHS retain the proposed language regarding the term "totality of the circumstances," where no one factor other than an insufficient affidavit of support, if required, should be the sole criterion for determining whether an applicant is likely to become a public charge.

We also support the enumeration of 29 categories of immigrants–beginning with refugees and asylees and ending with Syrian nationals under the Syrian Adjustment Act and others exempt under federal law–to whom the public charge ground of inadmissibility does not apply. We also urge that DHS update the USCIS policy manual to reflect any additional exempt groups. Such a comprehensive and responsive list can simplify communications and reduce the chilling effect against use of benefits for those who are clearly exempt.

However, the proposed rule falls short in several key areas and must be strengthened. The improvements detailed below are critical to ensure an equitable public charge rule consistent

with President Biden's direction that DHS and other federal agencies eliminate "barriers that prevent immigrants from accessing government services available to them."

The only two programs that should be relevant in determining whether a person is "likely at any time to become primarily dependent on the government for subsistence" are Supplemental Security Income (SSI) and Temporary Assistance for Needy Families program (TANF) cash assistance (non-cash services and short term benefits under TANF should not be considered as cash assistance). The Immigration and Naturalization Service's 1999 Field Guidance indicated that both of these programs should be considered in a public charge determination and in a 2022 letter to DHS, the U.S. Department of Health & Human Services agreed. Consideration of an applicant's use of these programs should be qualified in two essential ways. First, the rule should make clear that receipt of SSI or TANF will not automatically result in a public charge determination, but will simply be considered along with other factors in the totality of the circumstances. Second, only the applicant's current use of SSI or TANF should be considered—a person who has received benefits in the past but is not currently using benefits has had a change in circumstances that may make them unlikely to need safety net programs in the future. Past use of benefits should not be considered in public charge determinations.

No other benefits should be considered as part of the public charge determination. Specifically, we urge DHS to revise the proposed rule to exclude:

- State, Tribal, territorial, or local safety net programs, including programs providing cash assistance for income maintenance. DHS should define cash assistance as limited exclusively to cash assistance for income maintenance under the two federal cash assistance programs (TANF or SSI) and exclude all other programs, including state, Tribal, territorial, or local programs. Failure to exclude all non-federal programs, including cash assistance programs, would undermine states' efforts to mitigate social problems and inequity, as well as complicate messages about the policy, undermining nationwide efforts to combat the persistent chilling effect.
- Long-term institutionalization at government expense. Allowing any type of Medicaid coverage to be considered in a public charge determination causes confusion and perpetuates the chilling effect caused by the 2019 public charge rule. It also discriminates against people with disabilities and older adults because only people with disabilities and older adults experience long-term institutionalization. If federal long-term institutionalization is considered in a public charge determination, DHS should clarify that state, Tribal, territorial or locally funded institutionalization is excluded.

DHS should strengthen the scope of protection for vulnerable immigrants such as VAWA 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.

We appreciate DHS's invitation to provide input on "how to communicate to parents of U.S. citizen children that the receipt of benefits by such children would not be considered part of the

public charge inadmissibility determination for the parents." We recommend the inclusion of a non-exclusive list of exempted benefits within the text of the regulations. Beyond the rule itself, a broad, government-wide outreach and engagement campaign would be the most effective way to meet DHS's goals, especially its stated desire to limit the negative effects of public charge policy on children, including children in mixed-status households. Materials and messages developed for the campaign should be multilingual and include a clear statement that benefits used by a child or other person in the applicant's household would not be treated as received by the applicant. This would be accomplished most effectively in partnership with states, cities and community-based organizations.

The social and economic consequences of the COVID-19 pandemic demonstrate why the final public charge regulation must be crystal clear. The complicated and confusing nature of the 2019 public charge policy significantly increased the damage it did to the nation. For example, it deterred immigrant families from applying for not only Medicaid and SNAP, which could be considered in public charge determinations under the 2019 regulation, but also CHIP and WIC, which remained excluded. This policy not only deterred eligible immigrants from using safety net programs, it has also deterred U.S. citizens in immigrant families from getting the health care and help they need during the pandemic. To eliminate "barriers that prevent immigrants from accessing government services available to them," DHS's final regulation must be clear and easy to explain.

The changes described above are critical in encouraging millions of persons in immigrant families to get the help and care they need, so they can power the pandemic recovery and build a healthier, stronger future for the United States. We urge DHS to act quickly to issue a final rule that makes these essential improvements.