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DHS Docket Number USCIS-2010-0012: Public Comment of the Immigration Reform Law Institute Regarding Inadmissibility on Public Charge Grounds

Dear Chief Deshommes:

The Immigration Reform Law Institute (IRLI) submits the following public comment to the U.S. Department of Homeland Security (DHS) in response to the Agency's notice of proposed rulemaking (NPRM), as published in the Federal Register. *See Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018).

IRLI is a non-profit public interest law organization that exists to defend individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful. IRLI works to monitor and hold accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws. IRLI also provides expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

The NPRM is a regulatory action of the highest importance to American immigration policy. It implements a statutory policy—the restriction on the immigration, permanent residence, and ultimately naturalization of paupers—that is unquestionably among the oldest and most significant immigration controls in United States law. "Strong sentiments opposing the immigration of paupers developed in this country long before the

advent of federal immigration controls." 5 Gordon et al., *Immigration Law and Procedure* ("ILP"), § 63.05[2] (Rel. 164 2018).

IRLI's comments are organized as follows:

I. Cost and Benefit Analysis.

DHS states that "the primary benefit of the proposed rule would be to help ensure that aliens who are admitted to the United States, or seek extension of stay or change of status, are not likely to receive public benefits and will be self-sufficient…." 83 Fed. Reg. 51229. Those aliens, who must by law be inspected for potential exclusion as economic undesirables, include most aliens who are not already lawful permanent residents, or exempted on humanitarian grounds.

A new analysis of Census Bureau surveys by the Center for Immigration Studies quantifies the scope of non-citizen welfare program use, by extrapolating from the number of households headed by aliens that have accepted assistance from major taxpayer-funded programs in recent years. Using the most recent Survey of Income and Program Participation ("SIPP") data, the Center found that 57.7 percent of non-citizen-headed households accessed public benefits in 2014, compared with 30.4 percent of native-headed households. These figures rise to 63 and 35 percent, respectively, if means-tested Earned Income Tax Credit ("EITC") payments are included. Camarota and Zeigler, *63% of Non-Citizen Households Access Welfare Programs*, at 1 and 5, CIS (Dec. 2018). Camarota and Zeigler use the same SIPP data endorsed by the NPRM to show that immigrants are chronic users of benefits used to assess public charge dependence. *See, e.g.*, Tables 11 and 12, 83 Fed. Reg. 51162-63.

The impact on taxpayer funds from aliens' use of welfare is great. DHS estimates that the NPRM will reduce direct transfer payments from federal and state governments by $2.27 billion annually, with a ten-year cumulative discounted reduction of between $15 and $19 billion, plus "additional transfer payment reductions that cannot be quantified." 83 Fed. Reg. 51228.

DHS estimates that roughly half of these savings will be from lower transfers from state and local governments, though it qualifies this as a conservative rough estimate, due to variations among state welfare laws. *Id.* Should DHS accept IRLI's recommendations in this comment to end various additional exemptions from the list of public charge-related benefits as proposed in new 8 C.F.R. §212.21(b), these transfer payment savings would increase significantly.

By contrast with these very large expected savings from reduced transfer payments, DHS estimates the ten-year direct costs of the proposed screening reforms will range between 0.4 to 1.3 billion dollars, including both agency adjudication costs and non-citizen applicant preparation and documentation. The cost-benefit ratio as proposed under the NPRM would thus be very favorable, between $14 to $37 in taxpayer saving for every dollar expended by the agency and the applicant to prepare and review documentation for a public charge determination.

II. The Regulation Must Implement the Historic and Current Statutory Mandate to Exclude Aliens who are or are Likely to Become Dependent on Public Funds for Support.

It is essential to the successful implementation of the proposed regulations to demonstrate that they constitute a scheme that is fully-grounded in plain statutory language, legislative history, and historic regulatory practice. The scope of the public charge exclusion has always been expansive. As long as the support received by an alien was public funds, the exclusion has been applied to both monetizable and non-cash support, and past as well as prospective support has been considered as evidence that an alien was not self-sufficient.

The main purpose of the very first categorical federal immigration exclusion was to prevent the immigration of convicts and prostitutes, thought likely to become dependent on the public coffers for support. Act of March 3, 1875, 18 Stat. 477 (Page Act). Exclusion and deportation statutes embodying the term "public charge" have been on the statute books for over 136 years, since the first comprehensive federal immigration law included a bar against the admission of "any person unable to take care of himself or herself without becoming a public charge." Immigration Act of 1882, 22 Stat. 214 (August 3, 1882). Congress continued to expand its exclusion of aliens who were public charges through the Progressive Era. *See, e.g.*, Act of Mar. 3, 1891, 26 Stat. 1084 (excluding "paupers"); 1903 Amendments, 32 Stat. 1213 (excluding "professional beggars"); Act of February 5, 1917, 39 Stat. 874 (excluding "vagrants").

Acceptance of a bond promising, in consideration of an alien's admission, that he will not become a public charge was authorized in 1903, reflecting earlier administrative practice. Act of March 3, 1903, Sec. 26; 32 Stat. 1220. The essential elements of the current immigration bond provision, INA § 213, have thus been in the law since 1907. *See* Act of February 20, 1907, § 26, 34 Stat. 907.

By 1990, the INA contained three separate exclusion grounds, which barred aliens who: (a) were "likely to become a public charge"; (b) were "paupers, professional beggars, [or] vagrants"; or (c) suffered from a disease or condition that affected their ability to earn a living. Former INA §§ 212(a)(7), (8), and (15).

The Immigration Act of 1990 deleted the second and third grounds. IMMACT 1990 § 601(a). By classifying economic undesirability, indigence, and disability under the remaining public charge ground, Congress intended to improve enforcement efficiency by eliminating obsolete terminology. 5 ILP § 63.05[4].

Growing public controversy over increasing rates of immigrant use of public benefits and welfare programs, programs which had themselves vastly expanded under the Great Society legislation of the 1960s, culminated in passage of the Personal Responsibility and Work Opportunity Act of

1996 ("PRWORA"), P.L. 104-193. PRWORA enacted definitive statements of national policy regarding non-citizen access to taxpayer-funded benefits. Congress intended that "[a]liens generally should not depend on public resources to meet their needs," and that "the availability of public benefits should not constitute an incentive for immigration to the United States." 8 U.S.C. § 1601(2). Significantly, Congress used a broader term—"resources" rather than "benefits"—to direct how federal policy should characterize the scope of taxpayer-provided support to which immigrants would not have access. Moreover,"[i]t is *a compelling government interest to enact new rules for eligibility* and sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601(5) (emphasis added). Consistent with this unambiguous congressional policymaking, PRWORA also defined "state or local public benefits" in very broad terms. 8 U.S.C. 1621(c).

While PRWORA allowed both qualified and non-qualified aliens to receive certain benefits, for example emergency benefits (all aliens) and the Supplemental Nutrition Assistance Program ("SNAP") (qualified alien children), Congress did *not* exempt receipt of such benefits from consideration for INA § 212(a)(4) public charge purposes. *See* Report of Comm. on Economic and Educational Opportunities, H.R. Rep. (Conference Report) No. 104-75, at 46 (Mar. 10, 1995) ("This change in law is intended to insure that the affidavits of support are legally binding and sponsors—rather than taxpayers—are responsible for *providing emergency financial assistance during the entire period between an alien's entry into the United States and the date upon which the alien becomes a U.S. citizen.*") (emphasis added).

A year and a half later, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), P.L. 104-108 (Sept. 30, 1996). IIRIRA codified the five minimum factors that must be considered when making public charge determinations, 8 USC § 1182(a)(4)(B), and authorized consular and immigration officers to consider an enforceable affidavit of support as a sixth admissibility factor, making it a mandatory factor for most family-based immigration. 8 USC § 1182(a)(4)(C); 8 USC § 1183A.

IIRIRA legislative history states that these amendments were designed further to expand the scope of the public charge ground for inadmissibility. H.R. Report (Conference Report) No. 104-828 at 240-41 (1996). This intent was behind Congress's mandate that both receipt of past benefits or dependence on public funds and the prospective assessment of likelihood that such dependence would reoccur should be considered. To comply with PRWORA, the Department of State developed a Public Charge Lookout System (PCLS) to identify and seek repayment of Medicaid payments made to non-immigrants during prior visits to the U.S. It used the system to identify prior Medicaid and Aid to Families with Dependent Children payments to immigrant visa applicants for use in public charge determinations.

Significantly, the PCLS did not distinguish between cash support benefits such as Supplemental Security Income ("SSI") and Temporary Assistance for Needy Families ("TANF"), and non-cash benefits such as Medicaid. Ten states were reported to have executed formal memoranda of understanding with consular posts regarding exchange of *both* cash and non-cash public benefits for public charge determination uses, at the encouragement of the State Department. Reported benefits typically included non-emergency Medicaid-covered benefits such as prenatal and childbirth expenses. *Affidavits of Support and Sponsorship Regulations: A Practitioners Guide*, (CLINIC June 1999) (citing Department of State Cable No. 97-State-196108 (May 27, 1997)).

III. The Regulatory Scheme Proposed in 1999 was Arbitrary and Capricious.

The current NPRM mentions a proposed May 1999 rule, never finalized, with accompanying administrative documentation. 83 Fed. Reg. 51123, citing *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999); *Field Guidance on Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999).

The State Department's PCLS was never restrained by the courts, and operated effectively well until late 1997. But as pressure from the "FIX 96" campaign by noncitizen interest groups seeking to roll back IIRIRA enforcement gathered steam, the Department of Health and Human Services ("HHS") and other federal and state benefit-dispensing agencies terminated cooperative reporting with consular officers and INS inspection and adjudication personnel. *See* Department of State Cable No. 97-State-228462 (December 6, 1997); Letters from HHS to state Medicaid and TANF directors (December 17, 1997); Memorandum from Paul Virtue, INS Associate Commissioner for Programs (December 17, 1997).

The early demise of public charge monitoring efforts other than the processing of 213A Affidavits of Support is a paradigmatic example of "deep-state" obstruction of the intent and direction of Congress. The 1999 NPRM (and accompanying interim Field Guidance) proposed to codify a novel meaning of public charge to mean "the likelihood of a foreign national becoming primarily dependent on the government for subsistence, as demonstrated by either: [a] receipt of public cash assistance for income maintenance; or [b] institutionalization for long-term care at government expense." 83 Fed. Reg. 51133 (quoting proposed 8 C.F.R. § 212.102 (1999)).

Interest groups representing the financial interests of non-citizens, organizations opposed to immigration enforcement on ideological grounds, and entities favoring increased transfers of public funds to low-income denizens regardless of citizenship status, all find the current NPRM highly threatening due to its clear potential to restrict immigration by other than self-sufficient aliens, and have grossly mischaracterized the 1999 NPRM as a standard or established construction of federal immigration law. *See, e.g.*, National Immigration Law Center, *Trump Administration's*

"Public Charge" Attack on Immigrant Families (April 2018), available at https://protectingimmigrantfamilies.org/resources/ ("Adoption of the draft proposed regulations would *mark an unprecedented departure from the current, longstanding interpretation* of the public charge rules") (emphasis added).

In fact, even a cursory comparison with the controlling statutory policies and provisions summarized above shows that the 1999 proposals were highly arbitrary administrative actions, taken by an agency and administration openly hostile to any limits on the receipt of public benefits and services based on immigration status.

The extraordinarily lenient 1999 NPRM was issued in reliance on two controversial theories. First, the INS claimed that the new rule implemented a supposed public policy that favors public access to non-cash entitlements, in particular health care. The INS policy justification in the 1999 NPRM asserted that the provision of public benefits other than SSI, general relief, and long-term institutionalization to aliens "serve[s] important public interests." 64 Fed. Reg. 28676. This claim directly conflicts with the express statutory public policy that recent immigrants should be excluded from eligibility for means-tested benefits, regardless of whether they are "subsistence" or "supplementary" in nature. 8 U.S.C. § 1601 *et seq.*

The plain language of the PRWORA welfare reform law and the IIRIRA requirement of an enforceable affidavit of support for § 213A alien applicants for admission or adjustment of status presumptively disqualified immigrant aliens from access to *all* "means-tested public benefits" for a lengthy period. PRWORA did not distinguish between cash versus non-cash, or subsistence versus supplemental benefits. "Federal benefits" denied to non-qualified aliens under the Act included both non-cash and earned benefits such as heath, disability, public housing, food assistance, unemployment benefit, and "any other similar benefit for which payments or assistance are provided... by an agency of the United States." 8 U.S.C. § 1611(c)(1). Other than "qualified aliens," noncitizens were made ineligible for any "means-tested benefit," including food stamps. Only emergency medical care, public health assistance for communicable diseases, and short-term "soup kitchen"-type relief were excepted. 8 U.S.C. § 1611(b)(1).

Under IIRIRA, the income and resources of aliens who require an affidavit of support as a condition of admissibility are deemed to include the income and resources of the sponsor whenever the alien applies or reapplies for *any* means-tested public benefits[1] program, without regard to

[1] "[E]ither a Federal means-tested public benefit, which is any public benefit funded in whole or in part by funds provided by the Federal Government that the Federal agency has determined to be a Federal means-tested public benefit under [PRWORA]..., or a State means-tested public benefit, which is any public benefit for which no Federal funds are provided that a State, State

whether the benefit is provided in cash, kind, or services. 8 U.S.C. 1631(a), (c). Certain exceptions apply for battered spouses and children.

Second, there was an alleged lack of precedent statutes or case law that would prohibit the Service from defining "public charge" very narrowly. In essence, the INS cherry-picked one of many meanings in the dictionary for "charge" to create, administratively, a new substantive legal meaning for "public charge." 64 Fed. Reg. at 28677.

For example, the 1999 INS Field Guidance interpreted its proposed rule to (1) ban consular officers and INS adjudicators from requiring or even suggesting that aliens, as a condition of reentry or adjustment of status to permanent legal resident, repay any benefits previously received, (2) disregard continued cash payments under the TANF program, on the theory that they are "supplemental assistance" and not "income-maintenance" cash payments, and (3) disregard the receipt of cash income maintenance benefits by a family member unless the payments are the "sole means of support" for that family. 64 Fed. Reg. 28689 (May 26, 1999).

The 1999 INS approach violated basic principles of statutory interpretation, which strongly favor the traditional definition over the novel INS theories. Where a term not expressly defined in a federal statute has acquired an accepted meaning elsewhere in law, the term must be accorded that accepted meaning. *Sullivan v. Stroop*, 496 U.S. 478 (1990). This is particularly true where an accepted meaning conflicts with a selected dictionary definition, as was the case in 1999. *FDIC v. Meye*r, 114 S. Ct. 996 (1994). The argument that there is a "public interest" in obtaining welfare benefits was also rejected in relevant litigation over prenatal care for illegal alien women. *Lewis v. Thompson*, 252 F.3d 567, 579-582 (2d Cir. 2001).

DHS has correctly based the current NPRM on unambiguous Congressional direction, and should firmly reject any suggestion that the 1999 NPRM policies were reasonable or legitimate.

IV. The Proposed Totality of the Circumstances Approach Best Reflects the Controlling Statutory Language and Legislative Intent.

DHS is correct in constructing the proposed regulations under a "totality of the circumstances" balancing standard. The INA does not articulate a test for determining public charge inadmissibility, but instead lists factors to be "taken into account." 8 U.S.C. § 1182(a)(4)(B) is a clear mandate by Congress that DHS use a balancing test for adjudication of public charge inadmissibility. DHS notes the origin of the totality of the circumstances formulation in regulations that implemented the IRCA legalization amnesty provisions. 83 Fed. Reg. 51126, citing 8 CFR §

agency or political subdivision of a State has determined to be a means-tested public benefit." 8 CFR 213a.1.

245a.3, 54 Fed. Reg. 29442 (Jul. 12, 1989). *See Matter of Pula*, 19 I. & N. Dec. 467, 471 (BIA 1987); *Matter of A-*, 19 I. & N. Dec. 867 (Cmn'r 1988) (holding that the totality of circumstances test for IRCA amnesty applicants included consideration of *past* cash assistance).

The totality of the circumstances approach is best suited for implementing the overarching congressional policy emphasis on self-sufficiency. As noted, case law strongly suggests that an alien's self-sufficiency—the alien's ability to meet his or her needs without depending on public resources—should play a critical role in the outcome of a public charge inadmissibility determination. 83 Fed. Reg. 51163, n.290.

In contrast to the aberrant 1999 proposed rule, the totality of the circumstances standard accurately reflects the current statutory language. For determinations by consular officials, the INA authorizes complete non-reviewable discretion. 8 U.S.C. §1182(a)(4)(A). It also delegates the highest degree of deference to DHS discretion (committing to "the opinion of the consular officer at the time of application for a visa, or [] the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, [whether an alien] is likely, at any time to become a public charge."). *Id.* "At a minimum," five factors must be considered, while "any affidavit of support under section 213A" … "*may*" be considered "for purposes of exclusion…." 8 U.S.C §1182(a)(4)(B) (emphasis added). Family-sponsored immigrants, with three narrow exceptions, *must* be the beneficiaries of a section 213A affidavit, as must employment-based beneficiaries whose classification petition was filed by a "relative" or "entity in which the relative has a significant interest." 8 U.S.C § 1182(a)(4)(C)-(D).

Nowhere in § 1182(a)(4) are the terms or concept of "primary support" or "cash" benefits, which first appear in the 1999 formulation, to be found. The 1999 guidance recited the INA "totality of the circumstances" standard but otherwise impermissibly ignored it. 64 Fed. Reg. 28676, at 28679 (May 26, 1999).

The listing in the current NPRM of five "minimum" but not exclusive assessment factors for all entrants, plus a sixth factor for most family-based and family-employed immigrants, in light of both the very wide administrative discretion regarding admissibility and the explicit exemptions for very specific classifications delegated by Congress, is in IRLI's view the only agency interpretation that would be consistent with the governing plain statutory language and established methods of statutory construction.

V. INA Statutory Policies and Provisions Provide a Functional Definition of "Public Charge," but Codification of that Definition in the NPRM is Inconsistent at Best.

While DHS is correct that the statutory ground for exclusion does not define "public charge," Congress has provided a cumulative functional standard in the statutory policies and conditions it

has enacted regarding eligibility for public benefits. It is important to keep in mind that the NPRM proposes procedures for public charge adjudication primarily for candidates for admission or adjustment of status. Rules applicable to consular determinations for visa applicants will continue to be made by the Department of State, while the Department of Justice, through the Executive Office for Immigration Review, will continue to adjudicate the public charge *deportabilit*y ground under 8 USC § 1227(a)(5). And, as the NPRM notes, the Department of State substantially revised its standard for visa applicants earlier in 2018, to more closely align with the DHS proposed totality of the circumstances approach. *See* 9 Foreign Affairs Manual ("FAM") 302.8 (2018).

DHS proposes a formal definition of a "public charge" as "an alien who receives one or more public benefits, as defined in paragraph (b) of this section." 83 Fed. Reg. 15289 (proposed 8 CFR §§ 212.21(a)). While this standard would be consistent with relevant statutory text on its own, IRLI is concerned that DHS then goes on to circumscribe the relevant statute, first in the additional definitional conditions in proposed 8 CFR §§ 212.21(c) (defining the phrase "likely at any time to become a public charge"), and second in the arbitrarily restrictive list of specific public benefits to be considered by DHS in proposed 8 CFR §§ 212.21(b).

A. The proposed definition must consider current and past acceptance of taxpayer-funded public resources.

DHS interprets "likely at any time to become a public charge" to mean "likely at any time *in the future* to receive one or more public benefits, as defined in 8 C.F.R. § 212.21(b), based on the totality of the alien's circumstances." 83 Fed. Reg. 51174 (citing proposed 8 C.F.R. § 212.21(c)). The NPRM states that DHS does not propose to establish a *per se* policy whereby an alien is likely to become public charge if the alien is receiving benefits at the time of the application of a visa, admission, or adjustment of status. *Id.*

The reasoning here is less than transparent, and appears to conflict with both pre-1999 practice and general canons of statutory interpretation. Congress could easily have added the phrase "in the future," but in more than a century of legislation has repeatedly declined to do so.

Nonetheless, in practice, this distinction may be more semantic than determinative. IRLI notes that DHS proposes to make both the current receipt of public benefits as well as past receipt within 36 months "strong indicators" that the alien is likely to become a public charge. 83 Fed. Reg. 51199-200. IRLI strongly endorses this treatment of current or past public benefits use as a heavily weighted negative factor. Proposed 8 C.F.R. § 212.22(c)(1)(ii) and (iii). Given the totality of the circumstances framework, this approach would appear sufficiently rigorous when applied.

IRLI reluctantly accepts the need for a transitional limit for APA compliance purposes on the retroactive treatment of the receipt of non-cash benefits as a negative factor prior to promulgation

of the final rule. 83 Fed. Reg. 51292, proposed 8 C.F.R. §212.22(d). Still, the final rule should clarify that, for future public charge determinations made after the end of the proposed 60-day transition and notification period, receipt of benefits received after that period will be assessed as a negative factor, regardless of whether such use occurred before the date of the § 1184(a)(4) determination.

B. The NPRM arbitrarily excludes too many applicants for admission from public charge review.

Proposed 8 CFR § 212.21 specifies, consistently with the statute, that an "applicant for admission" is subject to a public charge determination conducted by USCIS, "unless [] exempted under 8 CFR 212.23(a)." 83 Fed Reg. 511132.

The classification "applicant for admission" is clearly defined in the INA. 8 U.S.C. § 1225(a). The classification includes "an alien present in the United States who has not been admitted…," 8 U.S.C. § 1225(a)(1), and "all aliens" who have not been "inspected by immigration officers," 8 U.S.C. § 1225(a)(4). These classes of illegally present aliens are in general barred by statute from eligibility for most federal, state, and local public benefits. Nevertheless, the Center for Immigration Studies has demonstrated that the very high use of all welfare programs by non-citizens cannot be explained unless *at least half* of the non-citizens surveyed in the Census Bureau's SIPP and American Community Survey research programs on welfare use are "in the country illegally." Camarota and Zeigler, at 3 and n.10.

The NPRM Summary inexplicably fails to provide any guidance on how this enormous population of heavy users of public benefits would be assessed for public charge inadmissibility, as explicitly required by statute.

Other specific concerns concerning the screening of applicants for admission are addressed under the factor-by-factor analysis in part VII below**.**

C. Screening must include applicants for an extension or change of status.

IRLI strongly agrees that nonimmigrant applications for an extension or change of status should be subject to review for inadmissibility as a public charge. 83 Fed. Reg. 51135-36 (discussing proposed 8 CFR § 214.1(a)(3)(iv), (4)(iv)). While neither action is technically an admission or an adjustment of status for which a determination of public charge makes the alien *per se* inadmissible, a prohibition on the use of any public benefit may also be imposed by regulation, as a condition for extension of status. 8 USC §§ 1184(a)(1). Similarly, compliance with all conditions imposed at the time of admission is a statutory condition for a change of nonimmigrant classification. 8 U.S.C. 1258(a); *see also* 8 CFR §§ 214.1(c)(4), 248.1(a). DHS correctly invokes

the statutory policy statements set forth in PRWORA as supporting the need for determinations that nonimmigrant aliens establish and maintain self-sufficiency while in the United States. 83 Fed. Reg. 51136 (citing 8 U.S.C. § 1601).

IRLI concurs with the proposed screening approach of requiring disclosure on an extension or change of status application, under penalty of perjury, of receipt of any public benefit, with disclosure triggering a requirement also to submit the proposed Form I-944 (Declaration of Self-Sufficiency). The proposed procedure appears to be the best alternative to ensure that the alien is unlikely to receive public benefits. Under the totality of the circumstances standard, disclosure of receipt after entry of any public benefit should be required, not just the benefits to be listed in 8 CFR § 212.21(b). IRLI recommends that a warning about the adverse immigration consequences of a failure to disclose such benefits be included on the appropriate extension and change of status application forms.

D. The NPRM's treatment of monetizable and non-monetizable benefits needs improvement.

DHS proposes to codify a definition of public benefit as a specific list of cash aid and noncash medical care, housing, and food benefit programs, where either (1) the cumulative value of such benefits that can be monetized exceeds 15 percent of the Federal Poverty Guidelines (FPG), adjusted for household size, within a period of twelve consecutive months, and calculated using the per-month FPG for months when the benefits are received, or (2) for benefits that cannot be monetized, any receipt of a listed benefit for more than twelve months in the aggregate within a 36-month period. 83 Fed. Reg. 51158 (citing proposed 8 C.F.R. § 212.21(b)). Where an alien receives both monetizable benefits in an amount below the 15 per cent threshold *and* one or more non-monetizable benefits, the threshold would drop to an aggregate of nine months within the 36-month period. *Id.* (citing proposed 8 C.F.R. § 212.21(c)).

As discussed, IRLI believes that the NPRM's three-pronged categorization of public benefits into monetized, non-monetizable, and hybrid benefits best conforms to the controlling statutory scheme and legislative history. IRLI also accepts the explanation in the NPRM that the 15 percent and 12/9 month minimum use thresholds are acceptable proxies for benefits use. *See* 8 Fed. Reg. 51165 ("DHS lacks an easily administrable standard for assessing the monetary value of an alien's receipt of some noncash benefits.").

The 15 percent threshold is widely used and thus arguably more transparent than other alternatives. The NPRM, however, provides almost no explanation of how the 12/9 month threshold for non-monetizable benefits was finalized. A more detailed analysis of the non-monetizable benefits threshold in a final rule summary would go a long way to legitimizing this rulemaking. In particular, the DHS request for comments suggests that the minimum receipt periods in the 12/9

month threshold should be calculated in the aggregate for the 36-month screening period, dropping the requirement that use occur in one continuous period. This approach would best resolve some of the issues regarding calculation of the thresholds over varying time periods noted, *e.g.*, at 83 Fed. Reg. 51166.

For monetizable cash benefits that are received based on the alien's household unit, IRLI agrees that USCIS should calculate the amount of benefits attributable to the alien *pro rata*. 83 Fed. Reg. 51218. But the proposal to codify an exclusion from this algorithm of household-based benefits accessed by the alien but provided on the basis of another household member's eligibility is mistaken, and should be omitted from any final rule. *Id.* It would be arbitrary to attribute some household-based benefits to an alien on a *pro rata* basis, but not others.

IRLI strongly disagrees with the DHS statement that the PRWORA definition of public benefits is "too broad in some respects" for public charge calculations. 83 Fed. Reg. 51159. *See* 8 U.S.C. §§ 1611(c), 1621(c). Using the former INS's "individualized public assistance to the needy" characterization of appropriately considered public benefits—a rule of thumb accepted by both DHS and the BIA—a disturbing number of statutory public benefits have been excluded from the §212.21(b) list, for "administrative convenience" or no stated reason at all. *See Matter of Haratounian*, 14 I. & N. Dec. 583, 589 (INS Comm'r 1974).

For example, eligibility for federal as well as state retirement, health, disability, postsecondary education, and unemployment benefits is, with rare exceptions, determined using individualized adjudications of need, typically means-based. 8 U.S.C. §§ 1611(c)(1)(B); 1621(c)(1)(B). Yet all of these categories have been excluded from the codified list.

Similarly, although the "grant, contracts, loans" subset of PRWORA public benefits may in limited instances be "transactional in nature and may involve the exchange of government resources for value provided by the alien," as asserted in the NPRM, 8 Fed. Reg. 51159, that is certainly not true for these benefits in general. Individual aliens frequently access these public benefits through government grantees or services contractors, both commercial and nonprofit.

Failure to include these programs as listed benefits facially conflicts with the PRWORA definitions, which include benefits "provided by appropriated funds of the United States" or "a state or local government." 8 U.S.C. §§ 1611(c)(1), 1621(c)(1). The definition of the omitted benefits is just as unambiguous as the more limited list proposed by DHS. Detailed profiles of qualified alien recipients for all of these omitted categories of public benefit are readily available through the Department's Systematic Alien Verification for Entitlements (SAVE) program, so any marginal administrative and enforcement costs for screening should be minimal.

IRLI further recommends that public benefits provided by state and local governments to non-qualified aliens under authority of PRWORA, *see* 8 U.S.C. § 1621(d), be specifically included in the codified list. These benefits are indisputably provided from "appropriated funds" and with few exceptions are accessed on an individualized based using means-tested criteria.

To avoid a serious APA challenge to the codification of these arbitrary exclusions, DHS needs to include all of the statutory benefits that can be accessed individually by needy persons on the § 212.21(b) list.

VI. Application of the Totality of the Circumstances Standard for Assessment: Factor-by-Factor Comments.

Application of the totality of the circumstances standard in adjudicating public charge exclusion determinations will necessarily be a complex undertaking, given the large numbers of aliens who may become subject to such reviews, which USCIS intends to process on a case-by-case basis. Assessment of each of the factors is mandated. 8 U.S.C. § 182(a)(4)(B). IRLI finds the proposed definition of public benefit for purposes of public charge determinations in proposed 8 CFR § 212.21(b) to be arbitrarily restrictive.

A. Skills and education factor.

"Education and skills" is a mandatory factor to be taken into account in all public charge determinations. 8 U.S.C. § 1182(a)(4)(B)(i)(V).

DHS has proposed a very general standard for determining this factor. 83 Fed. Reg. 51189-96, proposed 8 C.F.R. § 212.22(b)(5). IRLI recommends that the evidentiary criterion for this factor be more specific, and that this factor thus be given greater weight in the proposed totality of the circumstances determination.

The Center for Immigration Studies uses SIPP data to show that "the primary reason" for high rates of welfare use among non-citizens is that their notably low levels of education directly correlate with low wages and incomes. Camarota and Zeigler (2018), at 2. A more predictive approach would thus be to modify proposed 8 C.F.R. § 212.22(b)(5)(ii)(B) to treat an education level below high school as a heavily weighted negative factor, with the obvious exception of minors who have yet to graduate. A high school education should have neutral weight. A bachelors degree or graduate degree from an accredited institution of higher education should be considered a favorable factor, which USCIS should treat as a heavily weighted positive factor if the degree is in a field of high occupational demand. Similarly, occupational skills, certifications, or licenses should be codified as favorable factors under 8 C.F.R. § 212.22(b)(5)(ii)(C), which should specify

that USCIS may treat holding one of these occupational qualifications as a heavily weighted positive factor if the applicant also presents evidence of employment of five years or more in a field where such a qualification was a prerequisite.

IRLI strongly concurs with the proposal to codify evidence of English language proficiency as an evidentiary factor. 8 C.F.R. § 212.22(b)(5)(ii)(D). But for the purposes of a public charge exclusion, it is not clear how evidence of "proficiency in other languages in addition to English" would be predictive of self-sufficiency, as proposed. After all, only a very insignificant number of aliens present in the United States are not "proficient" in at least their native language.

B. Age factor.

"Age" is a mandatory factor to be taken into account in all public charge determinations. 8 U.S.C. § 1182(a)(4)(B)(i)(I).

IRLI concurs with DHS's intent to assess age primarily in relation to employment or employability. 83 Fed. Reg. 51179. IRLI agrees with the proposed designation of the age range 18-61 as a positive factor, due to the strong correlation between this prime working age range and a much lower rate of use of public benefits, compared to juveniles under age 18 and persons who have reached minimum retirement age under the Social Security system. 83 Fed. Reg.51180. As noted, juveniles in particular face legal restrictions on their ability to work.

Given that both minor and elderly aliens, like their citizen counterparts, are more likely to be financially dependent on resources other than employment income, IRLI finds that the proposed procedures for assessing family status, education, and assets and resources will be adequate for the totality of the circumstances approach adopted by DHS.

C. Assets, resources, and financial status factor.

"Assets, resources and financial status" is also a mandatory factor. 8 U.S.C. § 1182(a)(4)(B)(i)(IV). The INA does not define these terms, but DHS has construed the phrase broadly to include information that would provide an overview of the alien's financial means and overall financial health. 83 Fed. Reg. 51186.

DHS proposes to consider whether an alien has a gross household income of at least 125 percent of FPG, adjusted for household size. 83 Fed. Reg. 51187. If less than this threshold, the alien must show assets and resources of at least five times the shortfall. DHS justifies this approach as comparable to provisions for evaluating assets for an affidavit of support under 8 CFR § 213a.2(c)(2)(iii)(B)(3).

IRLI strongly supports the inclusion of an alien's inability to demonstrate current employment, recent employment history, or a reasonable prospective of future employment as evidence "heavily weighted in favor of a finding that an alien is likely to become a public charge." Proposed 8 C.F.R. §212.22(c)(1)(i). The NPRM accurately notes the very strong link between being able to maintain gainful employment and self-sufficiency. 83 Fed. Reg. 51186-87.

DHS proposes a codified criterion of annual gross household income, excluding income from public benefits. 83 Fed. Reg. 51187, proposed 8 C.F.R. §212.22(b)(4)(ii). The proposed benchmark has a significant flaw, however: unlike the definition of income used by the Department of State, it fails to exclude income from illegal conduct. *See* FAM 40.41.

No alien may work in the United States without authorization, either by operation of law or by specific application. 8 U.S.C. § 1324a(a)(1), (h)(3). IRLI strongly recommends that income from unauthorized employment should be excluded from the calculation of gross annual household income, in the same manner as unlawful income from drug dealing, gambling, or smuggling. No evidence of irregular income that is not documented on a tax return or equivalent document, such as an IRS Form W-2 or 990, should be accepted. Income earned under a taxpayer identification number rather than a social security number should be presumptively unacceptable.

This change to the proposed regulation would streamline the adjudication of public charge determinations, by eliminating consideration of most evidence of income other than recognized IRS documentation.

IRLI also urges DHS to reconsider its apparent decision not to include the Earned Income Tax Credit (EITC) and Children's Tax Credit (CTC) programs in the list of specified government payments that form the definition of public benefit. 8 C.F.R. §212.21(b). Although these payments are employment-based subsidies, they are still clearly means-tested transfer payments for which aliens must individually qualify. They are, moreover, evidence that an alien is not self-sufficient without a government subsidy. At a minimum, payments under either program should be excluded from the definition of gross annual household income.

IRLI strongly supports DHS's proposal to assess whether an alien has private medical insurance. Proposed 8 C.F.R. §212.22(b)(4)(ii)(I). Evidence of valid insurance is a paradigmatic predictor that an individual is unlikely to fail to remain self-supporting due to a common kind of financial contingency. The current language, however, arbitrarily references elements of the medical exclusion standard under 8 U.S.C. § 1182(a)(1). As explained in the analysis of the Health Factor, that standard is legally a distinct analysis from that of public charge determinations. IRLI recommends that USCIS modify subclause (I), broadening its proposed insurance criterion to require coverage sufficient to pay "for reasonably foreseeable costs of hospitalization and medical care for urgent and chronic conditions" in general.

IRLI is skeptical about two other quantitative benchmarks proposed by DHS for agency review of evidence of financial self-sufficiency. First, DHS has provided only a vague explanation of how its benchmark of "5 times the difference between the alien's household gross annual income and

the Federal Poverty Guideline for the alien's household size" will have the required predictive value. Second, IRLI is skeptical that "net cash value of real estate holdings minus the sum of all loans secured by a mortgage … or other lien on the property" is in reality evidence of an asset "that can be converted into cash within 12 months." Such assets are typically the residence of the alien or his household, which cannot be readily liquidated without imposing offsetting new housing costs. If the asset is a commercial property, liquidation within twelve months is an unlikely prospect in most U.S. real estate markets. A better justification for these two benchmarks, or preferably their elimination from the final rule, would boost the rationality and credibility of this piece of a complex proposed rulemaking.

D. Family status factor.

"Family status" is also a mandatory evidentiary factor to be taken into account in all public charge determinations. 8 U.S.C. § 1182(a)(4)(B)(i)(III).

IRLI concurs with the proposed position of DHS that USCIS will consider the size of an alien's household as the primary element of the family status factor. 83 Fed. Reg. 51175. This factor appropriately involves the assessment of whether an alien has a household to support, or is being supported by another household, when calculating the alien's household size. 8 Fed. Reg. 51184.

IRLI generally concurs with the proposed definition of household at 8 CFR § 212.21(d). IRLI agrees with the decision to take into account individuals for whom an alien or an alien's parents provide at least 50 percent of financial support. 83 Fed. Reg. 51176. These expenditures have significant bearing on whether an alien has sufficient assets. The threshold of "at least 50 percent of financial support" is a reasonable criterion to determine who belongs in an alien's household, without regard to physical residence in the home.

The NPRM correctly notes research showing that receipt of non-cash benefits increases as family size increases. *Id.* IRLI agrees that the application of the totality of the circumstances approach requires DHS to consider whether aliens can support themselves and their household at 125 percent of the most recent FPG.

E. Health factor.

To meet its obligation to consider an "alien's health," 8 U.S.C. § 1182(a)(4)(B)(i)(II), under the totality of the circumstances that must be taken into account for public charge exclusion determinations, 83 Fed. Reg. 51181-84, DHS is proposing for evidentiary purposes to rely on elements and practices taken from statutes, principally 8 U.S.C. § 1182(a)(1), providing for exclusion on health related grounds.

IRLI believes that this is an appropriate approach for public charge purposes, so long as the inquiry is limited to whether aliens are likely to be able to pay for health-related expenses for themselves and any household dependents without the use of public resources. The cumulative fiscal impact

of health problems is a major national policy concern. As the NPRM notes, the Centers for Disease Control estimate that 86 percent of the United States's $2.7 trillion annual health care expenditures went for care for persons with chronic physical or mental health conditions, while SIPP data show that more than half of all non-citizens who describe their health as poor receive some form of cash or noncash public benefit. 83 Fed. Reg. 511200-201.

DHS proposes to use the medical examination program established under 42 C.F.R. § 34 to predict the likelihood of future dependence. 83 Fed. Reg. 51182 (USCIS Evidentiary Requirements). DHS notes that medical examination reports, including Form I-693 and "applicable DOS medical examination forms" are already required for State Department immigrant visa petition processing, USCIS adjustment of status applications, and certain other adjustment petitions. *Id.* Also, DHS has the discretionary authority to require a nonimmigrant to submit to a medical examination at a port of entry. *Id.* (citing 8 U.S.C. §1222(b)). Medical examiners may screen aliens for communicable diseases, physical or mental conditions that pose a threat to property or safety, and evidence of drug abuse or addiction. 8 U.S.C. § 1182(a)(1)(A).

Federal courts have long recognized that Congress was concerned about the financial burden posed by aliens' medical conditions. *See, e.g., U.S. ex rel. La Fata v. Williams*, 204 F. 848 (S.D.N.Y. 1913) (upholding exclusion of alien as likely to become public charge due to heart condition); *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (upholding exclusion of alien as likely to become public charges due to cardiac problem and senility); *U.S. ex rel. Markin v. Curran*, 9 F.2d 900 (2d Cir. 1925) (upholding exclusion of alien as likely to become public charge because of syphilis and blindness in one eye); *U.S. ex rel. Minuto v. Reimer*, 83 F.2d 166, 168 (2d Cir. 1936) (affirming exclusion of "woman seventy years old with an increasing chance of being dependent, disabled, and sick."); *Matter of Harutunian*, 14 I. & N. Dec. 583 (BIA 1974) (holding alien who received state old-age assistance in California excludable as a public charge).

In 1952, however, the INA restructured public charge law to separate concerns that an alien posed a health risk to the community from the inquiry about whether an alien with health problems would become a public charge. P.L. No. 82-414, 212 (1952). The 1952 public charge provision separated exclusions for physical or mental disability that affected the ability to earn a living, exclusion of "paupers, professional beggars or vagrants," and exclusion of other persons likely to become a public charge. *Id.*

Current regulations provide for two levels of health exclusion: Class A and Class B Medical Certificates. 42 C.F.R. 34.4. Class A certificates document mandatory exclusions on pure medical grounds, while a Class B medical certificate is issued if there are "other physical and mental abnormalities that bear on the likelihood of an alien becoming a public charge." 42 C.F.R. 34.4(b).

DHS proposes to treat issuance of a Class A or B medical certificate and an alien's inability to obtain medical insurance as two distinct heavily weighted negative health factors. *See* 83 Fed. Reg. 51181, 51201, 8 C.F.R. § 212.21(c)(1)(iv). The two factors are legally distinct, and should be

weighed separately in the codified final procedure. IRLI agrees strongly that this approach best integrates the medical and financial aspects of the health factor within a totality of the circumstances assessment. IRLI further recommends that evidence of inadmissibility-creating drug abuse or addiction be expressly included as a heavily weighted negative factor under both 8 C.F.R. § 212.21(c)(1)(iv)(A) and (B).

IRLI agrees that provision of a Medicare Part D low-income subsidy to an individual can impose substantial costs on multiple levels of government, and is a strong indicator of a lack of ability to remain self-sufficient in meeting the basic need for medical care. 83 Fed. Reg. 51172.

IRLI strongly recommends that receipt of Children's Health Insurance Program (CHIP) benefits be included on the § 212.21(b) list of public charge-related benefits. 83 Fed. Reg. 51173. CHIP is an individualized means-tested cash payment program, and one of the largest benefit programs utilized by applicants for admission or permanent residence.

IRLI is sympathetic to the proposal in earlier drafts of the NPRM to consider healthcare subsidies provided under the Affordable Care Act (ACA). Yet IRLI accepts the apparent decision not to list ACA subsidies at this time, since payment of premiums by the insured remains the dominant source of funding for most ACA insurance coverage. As ACA coverage expands, however, serious consideration should be given to adding subsidies that underwrite more than 50 percent of premium costs to the § 212.21(b) list.

DHS states that it will consider a disability if, in an individual alien's circumstances, it impacts the likelihood of the alien becoming a public charge, 83 Fed. Reg. 51184, but proposes to codify the exclusion of all Medicaid-funded services or benefits to the disabled under the Individuals with Disabilities Education Act (IDEA) as listed benefits. 83 Fed. Reg. 51169. IDEA requires schools to provide services to all children with disabilities, the costs of which are reimbursed to states and school districts. IRLI opposes this categorical exclusion. All disabilities should be individually assessed under the totality of the circumstances standard, particularly for applicants for admission. IRLI agrees that adoptees with disabilities whose citizenship is granted by operation of law under INA §§ 320 or 322 should be *per se* excluded. But the high cost of individualized programs of special education cannot be legally distinguished from the prospective costs of other chronic conditions requiring ongoing individualized public support that are grounds for mandatory exclusion under 8 U.S.C. § 1182(a)(1).

IRLI also opposes the categorical exclusion of Medicaid-funded or non-reimbursed assistance for emergency medical conditions, in particular assistance provided via hospital emergency rooms. 83 Fed. Reg. 51169. While emergency room services are logically provided to all aliens regardless of status under PRWORA, the failure of an alien to provide financially for this universally foreseeable contingency, primarily through private insurance coverage, is a strong indicator that the alien is not self-reliant and will become a public charge. Moreover, the *per se* exclusion of emergency medical care from the § 212.21(b) list of public benefits will surely function as an inducement for

the continued routine reliance by uninsured aliens on emergency rooms for unreimbursed primary, natal, and urgent care, an issue of the highest concern to hospitals nationwide. This is an especially chronic problem for illegally present applicants for admission and adjustment of status.

F. Affidavit of support factor.

The existence of an affidavit of support is an optional factor, but becomes mandatory for most applicants for admission or adjustment of status holding family-based immigrant visas, or certain employment-based immigrant visas where the sponsor is a family-controlled entity. 8 U.S.C. § 1182(a)(4)(B)(ii), (C), and (D).

In general, IRLI believes that failure by a beneficiary or a sponsor to comply with conditions of a valid § 213A Affidavit of Support contract should be codified as a negative factor. For example, the law currently provides for civil penalties for failure of a sponsor to notify USCIS of a change of address during the validity period of an affidavit. 8 U.S.C. § 1183a(d).

IRLI concurs with the DHS proposal to consider failure to submit a "213A" affidavit of support when required as the only factor that would, on its own, establish that an alien is inadmissible on public charge grounds. 83 Fed. Reg. 51178.

DHS accurately notes that "submitting a sufficient affidavit of support does not guarantee that the alien will not receive benefits in future." 83 Fed. Reg. 51197. DHS explains that this uncertainty has led it to consider a sufficient affidavit as but one favorable factor in the totality of the circumstances. 83 Fed. Reg. 51198. DHS vaguely undertakes to "assess *inter alia* the likelihood that the sponsor would actually provide financial support to the alien" by looking at "how close of a relationship the sponsor has to the alien … whether the sponsor lives with the alien … [and] whether the sponsor has submitted an affidavit with respect to other individuals." *Id.*

IRLI suggests that a second more specific alternative element could be integrated into this factor that would significantly facilitate DHS's stated goal that "aliens in the admission and permanent residence processes are not likely to receive public benefits and will be self-sufficient." 83 Fed. Reg. 51229. Currently, beneficiaries have the option, but not the obligation, to initiate a private legal action against a sponsor who fails to fulfill their contract obligations to support the alien financially. *See* 8 U.S.C. §§ 1183a(a)(1)(B) (enforceability by sponsored alien), 1183a(b)(2) (actions to compel reimbursement), and 1183a(c) (legal remedies available to sponsored alien). For an alien beneficiary of an affidavit of support who has received a listed public benefit, failure by the beneficiary to sue for reimbursement of listed public funds received could also be codified as a single sufficient ground for exclusion on public charge grounds. The sponsored beneficiary could also meet this obligation if the sponsor was sued for reimbursement by the funding government agency.

Codifying this obligation would not impose any unfair burden on low-income beneficiaries. The 213A statute expressly provides for "payment of legal fees and other costs of collection, and includes corresponding remedies available under State law." 8 U.S.C. § 1183a(c). The alien would not be compelled to reimburse government agencies directly for past use of public funds, a requirement that some federal courts have considered to be *ultra vires*. In practice, IRLI foresees a reimbursement litigation requirement as promoting efficiency in public charge reviews, as the alien who has received a listed public benefit that a sponsor committed to fund will have every incentive to promptly take action to obtain reimbursement under the statutory scheme.

VII. The Proposed Use of Public Charge Bonds Should be Clarified.

In new 8 C.F.R. § 213.1, DHS is proposing to "outline a process under which USCIS could in its discretion offer public charge bonds to applicants for adjustment of status who are inadmissible only on public charge grounds." 83 Fed. Reg. 51125 (citing 8 U.S.C. 1183, 8 C.F.R. §§ 103.6, 213.1). DHS has broad authority to prescribe forms of bonds as deemed necessary for carrying out the Secretary's general authority under the INA. 8 U.S.C. § 1103(a)(3). IRLI agrees that IIRIRA has clarified that a public charge bond is authorized in addition to, and not in lieu of, the affidavit of support and the deeming requirements under 8 U.S.C. § 1183A. 83 Fed. Reg. 51133, H.R. Conf. Report No 104-828, 243 (1996).

DHS has proposed some reasonable limitations on its absolute discretion to accept a bond to waive a determination of public charge inadmissibility for an individual alien. IRLI endorses the following as essential to deter abuse of the bonding process:

Bonds should be accepted only for an individual, not for a family unit or any class of two or more persons. USCIS should accept only surety bonds, not cash or equivalents, until the effectiveness of the bonding process can be assessed in practice. IRLI agrees that bonds must be underwritten by a surety company that is jointly and severally liable for the face amount in case of a breach. Proposed 8 C.F.R. § 103.6(e). IRLI recommends that only limited-duration bonds be accepted, at least initially. A periodic bond renewal process would provide valuable private sector monitoring of the alien's compliance, especially where the time period between bond acceptance and eligibility for cancellation extends over multiple years.

IRLI strongly concurs with DHS that aliens whose public charge review reveals any heavily-weighted adverse factor should be *per se* ineligible for waiver of inadmissibility through bonding. 83 Fed. Reg. 51221.

Among the proposed conditions for bond acceptance, IRLI concurs that no right of appeal by the alien or an obligor of the amount of bond required exists, including appeals to the BIA or Administrative Appeals Office, 83 Fed. Reg. 51221; that the alien must agree not to receive public benefits and to commit to comply with any other conditions imposed, 83 Fed. Reg. 51223; and that failure by an obligor to notify DHS within thirty days of any change in the obligor's or alien's address would constitute a breach of the bond.

If bond is breached, IRLI concurs that USCIS may not thereafter mitigate the impact by canceling the bond. 83 Fed. Reg. 51223. The NPRM also appropriately proposes that there be no prerequisite that the government demand repayment of a benefit before finding a breach. 83 Fed. Reg. 51219.

The scope of aliens whom DHS proposes to make potentially eligible for admission under bond, however, is unacceptably vague. DHS has suggested that it will accept bonds from otherwise ineligible applicants for adjustment of status if adjustment would offer the United States "national security benefits or be justified for exceptional humanitarian circumstances." 83 Fed. Reg. 51221.

IRLI believes bonds should be available only if two conditions are met: (1) The alien has obtained and will maintain a private medical and hospitalization policy until the bond is cancelled, and (2) the alien is a member of an existing family unit, whose only reason for separation would be an adverse public charge determination. The analysis in the leading treatise appears to be consistent with this approach, as it notes that the effect of admission under bond circumvents "the family separation issues found in inadmissibility on health-related grounds." 5 ILP § 63.05[2].

In other situations where DHS or DOJ exercises discretion in order to prevent family separation arising from immigration status violations, an "extreme hardship" or even "exceptionally extreme and unusual hardship" finding is required, for example 8 U.S.C. §§ 1182(a)(9)(B), 1182(h)(1)(B), 1229b(b)(1)(D. IRLI urges DHS to codify an appropriately similar showing of hardship as a prudent limitation on agency discretion to accept a public charge bond.

Bonding for vague national security reasons does not make sense, as such persons would normally enter in a classification—for example, as a refugee, or parolee for more than one year—that is generally exempt from public benefit ineligibility or public charge determinations to begin with.

DHS proposes to set the minimum value of an immigration bond at $10,000, but provides no explanation of how it arrived at this amount, or, more importantly, how it determined that a redeemable interest-bearing bond set at this amount would, in practice, deter aliens applying for adjustment of status to permanent residence from accepting public charge-linked benefits. The NPRM appears to attach no adverse consequence to breach beyond forfeiture. In the current global migrant-smuggling economy, many aliens willingly pay the above sum just for illegal entry into

the United States. DHS should be very concerned that, as is the current practice with illegal entrants, indigent aliens will rationally choose to finance a bond through unregulated or even criminal networks. DHS should expect a significant number of applicants to treat a public charge bond as a sunk cost, paid in exchange for the much more valuable benefit of an American "green card," and with little to no additional consequences for subsequent use of public benefits by the unscrupulous.

VIII. Conclusion

IRLI believes that the NPRM is a long-overdue step in the right direction of restoring the traditional, statutorily-grounded approach to public charge determinations that was virtually eviscerated by the arbitrary and unlawful proposed 1999 rule.

Because, however, the NPRM, in the ways identified above, often fails to pursue this direction consistently and rigorously, it would benefit from the revisions suggested herein. As DHS has persuasively documented, implementation of the NPRM will likely result in very large reductions in improper transfer payments to applicants for admission and for extension, change, or adjustment of status that will far out-weigh the costs of compliance for both the government and non-citizens. Should the detailed factor-by-factor recommendations in this public comment be adopted in the final rule, the long-term benefits to the American citizenry of reduced transfers of public funds to undeserving non-citizens, and increased transparency and efficiency in excluding economic undesirables from national immigrant inflows, will be even greater.

Respectfully submitted,

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