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Via Federal eRulemaking Portal
Mark Phillips
Residence and Naturalization Chief
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Ave NW
Washington, DC 20529-2140

DHS Docket No. USCIS-2019-0023: Affidavit in Support on Behalf of Immigrants

Dear Chief Phillips:

The Immigration Reform Law Institute ("IRLI") respectfully resubmits[1] this public comment to U.S. Citizenship and Immigration Services ("USCIS"), in response to the agency's notice of proposed rulemaking ("NPRM") published in the Federal Register. 85 Fed. Reg. 62432 (October 2, 2020).

IRLI is a nonprofit public interest law firm that exists to defend individuals 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 ensure the efficacy of America's comprehensive immigration laws and regulations and the integrity of

[1] IRLI first submitted this comment on November 2, 2020, Comment ID No. USCIS-2019-0023-0229.

our nation's enforcement programs. IRLI serves the public interest by monitoring and holding accountable federal, state, and local government officials who undermine, fail to respect, or fail to comply with our national immigration and citizenship laws.

IRLI has provided expert immigration-related legal services, training, and resources to public officials, the legal community, and the general public since 1986.

I. In General

The concern over admitting aliens who would become dependent on public assistance predates the Constitution and is explicitly dealt with in the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1182(a)(4) ("Any alien who . . . at the time of application for a visa, or . . . at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible."). *See also* Cong. Res. Serv., Noncitizen Eligibility for Federal Public Assistance: Policy Overview, RL 33809 (Dec. 12, 2016) at 14 (internal quotations omitted) ("A bar against the admission of any person unable to take care of [themselves] without becoming a public charge was included in . . . the first general federal immigration law."). In 1996, Congress addressed both welfare and immigration with sweeping reforms, amending the INA to codify the use of Affidavits of Support as well as to set standards for sponsorship. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009 (1996) ("IIRIRA"); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, 110 Stat. 2105 (1996) ("PRWORA").

As the Government noted in the NPRM, these statutes "formalized [the] Affidavit requirement that had been in common use . . . since President Herbert Hoover directed widespread

adoption in 1929." 85 Fed. Reg. 62432, 62436. A key reason for such reform was that courts had held that the government could not legally enforce the reimbursement obligations of sponsors who executed these Affidavits, leaving the American taxpayers to foot the bill. *See, e.g., Dep't of Mental Hygiene v. Renel*, 173 N.Y.S. 2d 231, 235 (App. Term 1958) (discussing a Senate Judiciary Committee report that "stated that the usual sponsor affidavits are moral obligations only and are not enforcible [sic] as contracts."); *Tornheim v. Kohn*, 2002 U.S. Dist. LEXIS 27914, *12 (E.D.N.Y. Mar. 26, 2002) ("The mere fact that Congress passed the IIRIRA gives rise to the inference that the original statute did not mandate that an affidavit of support be treated as an enforceable contract. A brief survey of the case law . . . proves this inference correct."); 8 U.S.C. § 1183a(a)(1)(B) ("No affidavit of support may be accepted . . . unless such affidavit is executed by a sponsor of the alien as a contract that is legally enforceable against the sponsor").

In recognition of the fact that Congress acted to ensure that the Affidavit of Support is a legally enforceable obligation, the Department of Homeland Security ("DHS") has proposed rules that will bolster and improve all aspects of these contracts between the government and sponsors of immigrants seeking naturalization. The changes reflect reasonable and commonsense requirements and will ensure that American taxpayers are no longer burdened with the high cost of immigrant welfare use. IRLI supports all efforts to implement the legal requirements of the INA.

II. The proposed changes are reasonable requirements reflecting Congress's intent that Affidavits of Support and Contracts executed by household members be legally enforceable financial obligations.

As explained, the INA explicitly contemplates the enforcement of Affidavits of Support. 8 U.S.C. § 1183a(a)(1)(B). Furthermore, the proposed changes reflect reasonable requirements

that are no more burdensome than those of any standard financial obligation contract. It is in the best interest of the government, the American people, and immigrants that USCIS has sufficient reliable information to ensure that those agreeing to support sponsored immigrants have the means to do so and can be held legally accountable in the event that the sponsored immigrant uses means-tested public benefits during the sponsorship period.

The changes proposed by DHS clarify when joint sponsors are required, revise the definitions of household size and household income as they relate to sponsorship, and update evidentiary requirements potential sponsors must meet. 85 Fed. Reg. 62433. Additionally, the proposed rules enhance enforcement capabilities by updating and simplifying information sharing procedures and removing subpoena requirements for those seeking copies of Affidavits of Support for enforcement purposes. *Id.* IRLI agrees that these changes will "better ensure that sponsors . . . have the means to maintain income at the applicable income threshold and are capable of meeting their support obligations" and that they will "strengthen[] the enforcement mechanism . . . so that sponsors . . . are held accountable." *Id.*

a. The proposed changes ensure that the contractual obligations of sponsors to both the sponsored immigrant and public benefits agencies are enforced.

i. Joint Sponsors

Naturalization is a discretionary benefit for which Congress is empowered to establish rules and procedures. *See* 8 U.S.C. § 1182 (describing categories of aliens who are ineligible for admission to the United States). As explained, the public charge doctrine has existed, in one form or another, throughout American history. *See* 8 U.S.C. 1601(1) ("Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.").

The best way to prevent immigrants from relying on means-tested benefits is to ensure that the people who agree to provide financial support are actually able to do so.

The proposed changes expand joint sponsorship requirements by making potential sponsors who have either received means-tested public benefits within the preceding 36 months or who have previously defaulted on a support obligation ineligible to sign an Affidavit of Support. In the event that a proposed sponsor falls into either of these categories, the new rule requires a joint sponsor who has neither of these negative factors in his financial history, treating the original sponsor much like the sponsored immigrant because the use of means-tested public benefits or failure to pay a support obligation are indicators of financial issues that may interfere with the sponsor's ability to support the sponsored immigrant. Having two sponsors with the same financial problems does nothing to assist the sponsored immigrant in receiving the support he needs or to prevent the American taxpayer from funding welfare services for intending immigrants. Furthermore, the new rule comports with previous regulations issued by DHS updating the definition of "public charge" to include "an alien who receives one or more designated public benefits for more than 12 months in the aggregates within any 36-month period." 8 C.F.R. § 212.22.

ii. Evidentiary updates for sponsorship eligibility.

Because sponsors are agreeing to be financially responsible for immigrants who cannot support themselves, information regarding the finances of proposed sponsors is highly relevant to their ability to meet these support obligations. Their income, credit, and whether they have defaulted or received support are standard indicators of financial stability, or a lack thereof. Updating the rules now to require tax returns going back three years, as well as bank account

information and credit scores and reports, presents USCIS with a better "big picture" of a proposed sponsor's financial status.

The INA requires consideration of alien applicants' "assets, resources, and financial status" in order to determine whether such applicants are inadmissible because they are likely to become a public charge. 8 U.S.C. § 1182(a)(4)(B)(IV). Because the Affidavit of Support permits "the intending immigrant to overcome the public charge ground of inadmissibility," it is necessary to ensure that the person signing such Affidavit is actually capable of providing financial assistance sufficient to keep the intending immigrant off of welfare. 8 C.F.R. § 213a.2(c)(2). As DHS points out, the proposed changes ensure that "immigration officers and immigration judges will be able to *identify patterns* in the yearly income of sponsors, and thereby better establish not only whether the sponsor's income reached the required threshold in the year the Affidavit was filed, but also the sponsor's ability to maintain the required income over time." 85 Fed. Reg. 62466.

Finally, the proposed change requiring three years of tax returns is consistent with the plain language requirements of the INA. 8 U.S.C. § 1183a(f)(6)(A)(i) ("[A] demonstration of the means to maintain income ***shall*** include provision of a certified copy of the individual's Federal income tax return for the individual's 3 most recent taxable years") (emphasis added). Clearly, DHS is well within its authority to institute this change based on the explicit language of the INA.

These changes will assist USCIS in ensuring that sponsors are truly capable of supporting intending immigrants and will protect American taxpayers from the high costs of immigrant welfare use. *See* Jason Richwine, Center for Immigration Studies, *The Cost of Welfare Use by Immigrant and Native Households*, at 1 (May 2016), available at https://cis.org/Report/Cost-Welfare-Use-Immigrant-and-Native-Households ("The average household headed by an

immigrant (legal or illegal) costs taxpayers $6,234 in federal welfare benefits, which is 41 percent higher than the $4,431 received by the average native household.").

iii. Changes to Household Size and Household Income

It is clear that a large percentage of immigrant households access means-tested public benefits. *See* Steven A. Camarota and Karen Zeigler, Center for Immigration Studies, *63% of Non-Citizen Households Access Welfare Programs Compared to 35% of Native Households*, at 1 (Dec. 2018), available at https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs (finding that in 2014 "63% of households headed by a non-citizen reported use of at least 1 welfare program compared to 35% of native households."). Because "[w]elfare use tends to be high for both newer arrivals and long-term residents[,]" there is a strong possibility that both sponsors and sponsored immigrants eventually use some sort of means-tested public benefit. *Id.* at 2. In fact, the percent of immigrant households accessing means-tested public benefits actually increases for immigrants who reside in the U.S. for over a decade. *Id.* ("Of households headed by non-citizens in the United States for fewer than 10 years, 50 percent use one or more welfare programs; for those here more than 10 years, the rate is 70 percent.").

This high rate of welfare use supports DHS's proposed changes to revise household size and household income. Expanding household size to include other immigrants for whom the sponsor has executed an Affidavit of Support will provide USCIS with a more accurate picture of the proposed sponsor's other financial obligations. *See Stump v. Stump (In re Affidavit of Support (Form I-864))*, 2005 Dist. LEXIS 26022, at *13 (N.D. Ind. Oct. 25, 2005) ("As a sponsor's household size increases, so does the level of income required to demonstrate that he can meet his obligation."). The limits to household income will help ensure that money promised for a

sponsored immigrant's support is actually available and not just being used to meet statutory requirements. Because it is not possible to determine whether a proposed sponsor has sufficient income to support the intending immigrant without complete knowledge of his financial obligations and earning history, it is logical to limit what is included in household income to only that money that is actually available for the sponsored immigrant's support. Furthermore, accurate income is needed because "deeming and the affidavits of support upon which deeming is based are intended to implement the provision of the INA that excludes" applicants who are likely to need welfare benefits. Cong. Res. Serv., *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*, RL33809, at 19 (Dec. 12, 2016), available at https://crsreports.congress.gov/product/pdf/RL/RL33809).

iv. Information Sharing and Removal of Subpoena Requirement are necessary for effective enforcement of support obligations.

Data collection and information sharing are essential to effective enforcement and administration of immigration law. IRLI supports the changes to reporting procedures as well as the removal of the subpoena requirement for those seeking copies of Affidavits of Support and Contracts signed by household members for enforcement purposes.

It is clear that legal immigration and welfare are connected, as manifested by the INA's provisions ensuring that American taxpayers are not supporting immigrants who would be inadmissible as public charges absent the opportunity to submit an Affidavit of Support. Congress provided a mechanism to relieve this burden on taxpayers by ordering the government to seek reimbursement from sponsors for any means-tested public benefits the sponsored immigrant receives during the term of the Affidavit. 8 U.S.C. § 1183a(b)(1)(A) ("Upon notification that a sponsored alien has received any means-tested public benefit . . . the appropriate entity of the

Federal Government . . . *shall* request reimbursement by the sponsor.") (emphasis added). The high level of welfare use by immigrant households requires accurate and efficient information sharing to enable to government to seek such reimbursement.

Because the statute requires notification in order for an Affidavit to be enforced, USCIS has taken reasonable steps to ensure that the regulations reflect accurate and efficient procedures for such notification to take place. *Id.*, 85 Fed. Reg. 62,447 (emphasis added) ("revising the reporting provisions . . . to provide a *more efficient* mechanism for fulfilling the reporting requirements."). USCIS proposed requiring any household member who signs a contract of support to notify the agency of a change of address. *Id.* at 62433. This change is both reasonable and logical, as the government, as a party to the contract, needs accurate contact information for any signatories against whom it may seek enforcement. It will enable the government to obtain reimbursement because it ensures that the government has the proper contact information for all those who undertake a financial support obligation of a sponsored immigrant.

USCIS's decision to remove the subpoena requirement for those seeking a copy of an Affidavit of Support for enforcement purposes will also bolster the government's ability to obtain reimbursement for means-tested public benefits used by sponsored immigrants. As noted in the NPRM, requiring a subpoena is "burdensome, costly, and inefficient." 85 Fed. Reg. at 62447. Additionally, because both the Affidavits of Support and Contracts signed by household members contain a release authorization, it is not legally necessary to get a subpoena to obtain such information. *Id.* Such reasonable efforts to enhance reimbursement capabilities should be swiftly implemented.

III. Conclusion and Recommendation

Because immigrant-lead households generally use means-tested public benefits at higher rates than native-led households, it is both reasonable and necessary to implement the proposed changes to ensure that the INA is followed, that the government is reimbursed, and that the American people, already burdened by the effects of the global pandemic, are not footing the bill for the unenforced contractual obligations of sponsors. *See* Steven A. Camarota, Center for Immigration Studies, *Welfare Use in Immigrant and Native Households: An Analysis of Medicaid, Cash, Food, and Housing Programs*, pg. 1–2 (2015), available at *https://cis.org/Report/Welfare-Use-Immigrant-and-Native-Households* (last visited October 24, 2020) (finding, among other things, that "immigrant households use welfare at significantly higher rates than native households," with more than half of immigrant-headed households "report[ing] that they used at least one welfare program . . . compared to 30 percent of native households."). Therefore, the costs to the taxpayers for welfare benefits is higher for immigrant led households than for native households. Jason Richwine, Center for Immigration Studies, *The Cost of Welfare Use by Immigrant and Native Households*, pg. 3 (2016), available at *https://cis.org/Report/Cost-Welfare-Use-Immigrant-and-Native-Households* (last visited October 24, 2020) ("The average cost in immigrant-headed households is $6,234, compared to $4,431 in native-headed households. Immigrant households consume more cash, food, and Medicaid dollars than native households").

The proposed changes benefit both the government and the sponsored immigrant by implementing and enforcing laws enacted by Congress as part of IIRIRA and PRWORA. By holding sponsors to reasonable financial standards, DHS increases the likelihood that sponsored

immigrants will be adequately supported. Additionally, the changes comport with Congress's intentions regarding immigration and welfare policy because Congress has a "compelling interest to enact new rules for . . . sponsorship agreements in order to assure that aliens be self-reliant in accordance with national immigration policy." 8 U.S.C. § 1601 (5). Furthermore, the proposed changes will help advance the "compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits," and ensure effective enforcement of the INA. 8 U.S.C. § 1601(6).

Therefore, IRLI supports the implementation of the proposed regulations.

Respectfully submitted,

Immigration Reform Law Institute

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