Comments submitted to the Department of Homeland Security in the Matter of:

INADMISSIBILITY ON PUBLIC CHARGE GROUNDS

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INTRODUCTION

On October 10, 2018, the Department of Homeland Security (DHS) issued a notice in the Federal Register (83 Fed. Reg. 51114) proposing to prescribe how it determines whether an alien is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act (INA) because he or she is likely at any time to become a public charge and requested comments on or by December 10, 2018.

Niskanen Center Interest

The Niskanen Center is a nonprofit, nonpartisan organization that works to promote the passage of pragmatic immigration reforms that make America a safer, more prosperous, and more welcoming nation. We approach immigration policy in a measured way, looking to occupy the space between the far-left and the far-right.

We appreciate the opportunity to comment and intend to show: (I) that the proposed policy changes would create highly subjective, arbitrary outcomes and (II) that there is insufficient justification for the proposed changes.

Proposed Policy Changes Would Create Highly Subjective, Arbitrary Outcomes

In 1999, the U.S. Citizenship and Immigration Services (USCIS) agency issued field guidance that defined public charge as "a person primarily supported by the public." The agency noted that the receipt of public benefits is only relevant to the enumerated factors as evidence that the beneficiary's income is below the statutorily prescribed 125 percent of the Federal Poverty Guidelines (FPG). The agency also noted that the legislature considered and purposefully excluded non-cash benefits at income levels above the statutory 125 percent of the poverty level for purposes of "public charge" provisions.[1] Congress has never defined the term 'public charge.'

The threshold issue is whether an immigrant applicant is likely to become a public charge. The traditional test applied to determine whether a noncitizen may become a public charge is 'a prediction based on totality of the circumstances' as presented in each individual case.[2] The existence or absence of a particular factor should never be the sole criterion for determining if an alien is likely to become a public charge.[3]

Although the test is prospective, immigration officials have considered evidence of receipt of prior public assistance as a factor in making the public charge determination. Past receipt of cash income-maintenance benefits does not automatically make an alien inadmissible as likely to become a public charge, nor does past institutionalization for long-term care at public expense. Rather, these types of conditions must be one of many factors considered. Other factors that have been considered are the noncitizen's age, capacity to earn a living, health, family situation, work history, affidavits of support, and other relevant factors.[4] All factors must be considered in their totality.[5]

According to USCIS, although it has never been policy that the receipt of any public service or benefit must be considered for public charge purposes — the nature of the program is important:

> For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, such as WIC, obtaining immunizations, and receiving public emergency medical care typically do not make a person inadmissible or deportable. Non-cash benefits, such as these and others, are by their nature supplemental and frequently support the general welfare. By focusing on cash assistance for income maintenance, the Service can identify those individuals who are primarily dependent on the Government for subsistence without inhibiting access to non-cash benefits that serve important public interests. Certain Federal, State, and local benefits are increasingly being made available to families with incomes far above the poverty level,

[1] Federal Register Publications (CIS, ICE, CBP) \ Federal Register Publications (Legacy INS) - 1999 \ FEDERAL REGISTER NOTICES - 1999 \ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds [64 FR 28689] [FR 27-99].
[2] Matter of A-, 19 I. & N. Dec. 867, 869 (BIA), Interim Decision 3097, 1988 WL 235475.
[3] Federal Register Publications (CIS, ICE, CBP) \ Federal Register Publications (Legacy INS) - 1999 \ FEDERAL REGISTER NOTICES - 1999 \ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds [64 FR 28689] [FR 27-99].
[4] 8 U.S.C. § 1182(a)(4)(B).
[5] Matter of A-, 19 I. & N. Dec. 867, 869 (BIA), Interim Decision 3097, 1988 WL 235475.

> reflecting broad public policy decisions about improving general health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. . . . Thus, participation in such programs is not evidence of poverty or dependence."[6]

Although no case has specifically identified the types of public benefits that can give rise to a public charge finding, a definition based on primary dependence on the Government is consistent with the facts found in the deportation and inadmissibility cases.

1. Proposed additional factors make determinations highly subjective.

Whether a noncitizen will become a public charges has been a particularly controversial provision of the law because it requires consular officers to make highly speculative predictions.[7]

Without question, consular officers are well trained and highly competent; most officers have had special training in the visa process and are familiar with the characteristics and traits of the local culture.

"On the other hand, to err is human and any exercise of discretion is potentially fallible."[8] Consular interpretation of such terms as "public charges" and "reason to believe" are necessarily subjective, and guidelines are not always effective in promoting uniformity or consistency, particularly when the regulatory guidance is unclear.

Even experts with abundant information — but who are not trained in probabilistic forecasting — can give highly uncalibrated predictions of the kind required in a likelihood determination. Such cognitive biases notwithstanding, officers have little time to carefully investigate documents and employment letters and may rely heavily on poor heuristics that consider income, property, and other guidelines without undertaking a more effective, case-by-case appraisal of applicants that begins with base rates of the reference class instead of the details of the individual alien. Similarly, supervising officers often do not have enough time to review each visa denial thoroughly.

For example, the government suggests that the receipt of monetizable public benefits, "even in a relatively small amount or for a relatively short duration would in many cases be sufficient to render a person a public charge."[9] Such an analysis upends decades of "totality of the circumstances" evaluation and allows officers to apply subjective, internal rules to a decision-making process that is highly susceptible to abuse.

The litany of factors identified in the proposed rule significantly expand the analysis to determine public charge, and includes credit scores, the length of time an applicant has had a credit card, whether an individual has health insurance, applied for a fee waiver, or has a professional certification or license, with no guidance as to how these factors will be weighed.[10]

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[6] Federal Register Publications (CIS, ICE, CBP) \ Federal Register Publications (Legacy INS) - 1999 \ FEDERAL REGISTER NOTICES - 1999 \ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds [64 FR 28689] [FR 27-99] \ Repayment of Public Benefits.

[7] James A. R. Nafziger, ARTICLE: REVIEW OF VISA DENIALS BY CONSULAR OFFICERS., 66 Wash. L. Rev. 1, 18 (1999).

[8] Id at 54.

[9] 83 Fed. Reg. at 51,164.

[10] 83 Fed. Reg. at 51,188-193.

The Department must establish a review process that provides for uniform decision-making, consistency in application of totality of the circumstances, and due process. An adequate review process should seek to maximize three values typically served by legal constraints on administrative discretion.

To the extent that errors are avoidable, the prospect of review would also encourage accountability. It would encourage consular officers to maintain a high level of care and commitment to applying the law correctly.

The need for uniformity or consistency of decisions justifies either greater regulatory control over consular discretion or review of consular decisions; but the former might help alleviate the need for the latter.[11] Regulation is direct, less costly, and potentially helpful to the consular officers in making decisions.[12] Less arbitrary guidelines and more information about weighted factors would assist officers in different consulates to reach consistent decisions, thus establishing uniform interpretations of national immigration policy and law.

2. *Proposed benefit thresholds are arbitrary.*

Any inference about the likelihood of an *individual* alien becoming a public charge from information about *household* participation will necessarily be tentative. Such evidence should not be treated as more significant than it is, and more granularity in thresholds can be the basis for more reliable inferences. The smaller the size of the household, the stronger the correlation between household receipts of public benefits in absolute dollar terms and the likelihood that one member of that household will become a public charge can be assumed to be.. For a given level of receipt, a larger household is more likely to be self-sufficient.

The threshold for monetary receipt of public benefits set at a constant percentage of FPG for a household of one is insufficient to make consistent determinations across household sizes. A more consistent threshold would be set at a given percentage not of the FPG for a household of one, but of the FPG for a household of the size of the household of the alien.

The designation of 15 percent and 12-month thresholds for monetary benefits and non-monetary benefits respectively is also arbitrary and unjustified. Three major reasons would justify a higher threshold for monetary benefits and a shorter threshold for non-monetary benefits. First, such thresholds better recognize the distinction between public charges and safety-net beneficiaries. Over 23 percent of the total population was in a household with a family member who used benefits from TANF, SNAP, or SSI.[13]

Few would say that a quarter of the U.S. population consists of public charges. On the contrary, a looser threshold better allows for legitimate temporary use by those who can and will return to self-sufficiency. As it stands, present use is quite far from a perfect indicator of future use, required in a determination.[14] Second, looser thresholds strike a better balance between encouraging self-sufficiency and the social benefits associated with a safety-net.

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[11] *See* 66 Wash. L. Rev. at 55.
[12] Id.
[13] US Department of Health and Human Services, "Welfare Indicators and Risk Factors, Seventeenth Report to Congress."
[14] Shelley K. Irving and Tracy A. Loveless. "Dynamics of Economic Well-Being: Participation in Government Programs, 2009-2012: Who Gets Assistance." *Household Economic Studies*. US Census Bureau. https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf

For instance, in the long-run, childhood access to food stamps increases the likelihood of self-sufficiency as an adult.[15] Looser threshold for a mixed-status household could therefore *increase* self-sufficiency. Looser thresholds can also potentially reduce crime.[16]

Third, looser thresholds better keep with the prudence dictated by the precautionary principle. Significantly tightening the public benefits threshold from the old primary dependence paradigm will entail unanticipated consequences and ought to be conducted slowly.

Toward an Improved Determination Process

The likely public charge determination process emerges naturally from Section 212(a)(4)(A), which establishes the inadmissibility of aliens who are determined "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."

The determination process is a classic binary classification test. Given an alien, the process determines one of two discrete binary outcomes: the alien is determined likely to be public charge, or the alien is not determined likely to be a public charge. Binary classifiers can be evaluated with a number of different metrics, which treat various tradeoffs differently. But, the requirements of the statute give criteria to evaluate any proposed determination process. The statute circumscribes the determination process in at least three ways:

1) It applies to the individual ("any alien who");
2) It establishes a positive determination ("is likely" [emphasis added]); and
3) It follows a "likely" (i.e., a greater than 50 percent chance) standard. that these three criteria establish that a valid determination process is one in which the positive predictive value is slightly greater than .5, or in other words, one in which the majority of aliens found likely to be public charges would have become public charges.[17]

One implication of this is that the ultimate totality of the circumstances determination must be designed to keep the rate of false positives less than half the total rate of positives, but does not have to be designed so as to minimize the rate of false negatives. This will decidedly impact how strong different kinds of evidence are for inference about the likelihood of any given alien becoming a public charge, as well as the appropriate levels for various thresholds.

To ensure consistency, objectivity, and more accurate determinations that are consistent with the criteria established in the INA, DHS should provide guidance on how a totality of the circumstances likelihood determination should be reached using evidence-based methods, namely using a base rate as a prior probability which can be updated based on the evidence about a given alien. Starting from the "inside view" of the evidence about a given alien rather than the "outside view" of base rates about the reference

[15] Hilary Hoynes, Diane Whitmore Schanzenbach, and Douglas Almond, "Long-Run Impacts of Childhood Access to Safety Nets," *American Economic Review* 2016 106(4):903-934.
[16] Yang, C. S. (2017). Does Public Assistance Reduce Recidivism? American Economic Review, 107(5)
[17] Criterion 1 implies that a determination process is interested in the post-test probability of an individual alien being a public charge. Criterion 2 implies that the determination process is interested in positive, rather than negative, predictive value. Criterion 3 implies that the cutoff for predictive value is 50 percent.

class of all aliens would likely lead DHS to significantly more false positive determinations.[18] DHS should estimate a base rates—both before the rule takes effect and again after a sufficiently long interval to account for disenrollment—for the proportion of aliens non-exempt from public charge inadmissibility who would be considered public charges. This base rate should then be considered the prior probability that an alien is likely to become a public charge. DHS should also estimate average levels of receipts, durations, and other kinds of evidence in the totality of the circumstances so that officials may compare any given alien's evidence to average levels and make appropriate updates in the right direction.

Lack of Justification for Proposed Policy Changes

Under the Administrative Procedures Act (APA), courts may "hold unlawful and set aside agency action … found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[19] According to the Court's analysis in *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co*., the principle case that applied the reasoned decision making requirement to an agency's proposed rule, an agency must reasonably explain any changes in position the agency makes with a rational explanation, without which, a proposal constitutes an arbitrary and capricious action.[20]

The proposed rule critically departs from the definition of public charge that has developed over decades, and increases the scope of factors to consider without justification or explanation. For example, justifying the new consideration of monetizable public benefits that exceed 15 percent of FPG, DHS writes that the threshold is a reasonable approach, absent any evidence, data, or factual support for such a determination.

CONCLUSION

The Niskanen Center believes that the proposed rule will profoundly affect immigrants and their families in a negative way. It would alter the public charge test dramatically, defining a "public charge" as anyone who receives assistance with health care, nutrition, or housing beyond excessively tight thresholds.

If this rule is finalized, immigration officials could consider a much wider range of government programs in the "public charge" determination. These programs include most Medicaid programs, housing assistance programs and vouchers, SNAP (Supplemental Nutrition Assistance Program) benefits, and even assistance for seniors who have amassed the work history needed to qualify for Medicare and need help paying for prescription drugs.

Alarmingly, the Department of Homeland Security (DHS) provides no justification for the change in policy, nor demonstrates a necessity for the change in policy. Finally, DHS provides almost not objective

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[18] See Kahneman, Daniel. *Thinking, Fast and Slow*. New York: Farrar, Straus and Giroux, 2011 and Tetlock, Philip E., and Dan Gardner. 2015. *Superforecasting: the art and science of prediction.*

[19] 5 U.S.C. § 706 (2)(A).

[20] Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 42-43 (1983); see also Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1778 (2007) (stating that in State Farm "the Court further elaborated the reasoned decision-making requirement and applied it to notice-and-comment rulemaking"). The reasoned decision-making requirement is also known as the hard look doctrine. See, e.g., id. at 1777. The requirement is generally justified because "it promotes rationality, deliberation, … accountability… . [and] encourages agencies to perform a thorough and logical analysis … ." Id. at 1778.

standards for determining future "likelihood" or for weighting highly subjective factors. Without more objective criteria, will almost certainly lead to arbitrary outcomes for similarly situated immigrants.