CLASP
The Center for Law and Social Policy

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

Submitted via www.regulations.gov

RE: USCIS-2021-004; Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input

The Center for Law and Social Policy submits this comment in response to the Department of Homeland Security's (DHS) Request for Public Input: Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services.

Established in 1969, CLASP is a national, non-partisan, non-profit, anti-poverty organization that advances policy solutions for people with low incomes. Our comments draw upon the work of CLASP experts in the areas of immigration and anti-poverty policies. As a national anti-poverty organization, we bring a deep commitment to families living with low incomes and knowledge of the challenges that they experience as a result and understand the critical importance of federal programs that support the health and economic well-being of families with low-incomes.

At CLASP, we recognize that children in immigrant families need good nutrition, high quality health care, a healthy living environment, and stable, nurturing caregivers—but harsh immigration policies and immigrant eligibility restrictions undermine these very foundations. In order to achieve equity and ensure that all children in the United States can thrive, we must address the needs of children of immigrants and urge policymakers to incorporate the following principles into their decision-making: (1) provide a clear path to citizenship; (2) advance the health, education success, and economic security of children and their families; and (3) promote family unity and child wellbeing in immigration policy.

In keeping with these principles to advance the wellbeing of children of immigrants, we are writing to share information about the enduring effects of the Trump-era public charge policies. Due to this lasting harm on immigrant families, we strongly encourage USCIS to take three main steps to fix it:

1. **Engage in an outreach and public education campaign.** Such a campaign would send a strong signal to noncitizens and their families that they can apply for immigration benefits even if a family member needs to rely on health care, nutrition, housing, or other assistance.
2. **Begin the process of rulemaking.** We believe that rulemaking will solidify the progress already achieved through the reinstatement of the 1999 Field Guidance and allow for important modifications that modernize and clarify this policy.

3. **Propose changes to a key USCIS form**. DHS should change the Application to Register Permanent Residence or Adjust Status (Form I-485) and its instructions to focus only on the programs that are relevant in a public charge determination.

Enduring Harm of the Trump-era Public Charge Regulations

We commend USCIS for removing the 2019 public charge rule from the Code of Federal Regulations and restoring the 1999 Field Guidance—however, there is more work to do to end the policy's lasting harm. Research has confirmed that the lead up to and rollout of the Trump-era public charge policy created a "chilling effect," with immigrants and their family members afraid to apply for immigration benefits and access critical health, nutrition, and economic supports for which they were eligible. The Trump policy took effect just weeks before the start of the COVID-19 pandemic in the United States, which amplified the health and economic harms of the pandemic.

The public charge test plays a considerable role in our nation's immigration system, serving as one of the criteria immigration officials take into account when determining who can obtain a green card to permanently live and work in the United States. The vast majority of people who obtain lawful permanent resident status in the U.S.—in most years, about 700,000[1] out of a total of 1 million[2]—are subject to the public charge ground of inadmissibility. Over the next decade, the public charge test could directly affect an estimated seven million people, shaping our family-based immigration system.[3] For example, after the Trump administration's State Department made radical changes to the public charge provisions of its Foreign Affairs Manual in 2018, denials of visas to Mexican nationals skyrocketed.[4] Following these changes to public charge policy, the State Department denied more than 5,300 immigrant visa applications from Mexican nationals on public charge grounds compared to seven denials in the last full fiscal year of the Obama administration.[5] Aside from Mexico, other countries, including India, Bangladesh, Haiti, and the Dominic Republic, experienced a significant increase in visa denials on public charge grounds.

As the COVID-19 pandemic began, research confirmed that the chilling effects of the public charge policy are real. The Migration Policy Institute analyzed American Community Survey data for 2016 through 2019 and found that participation in TANF, SNAP, and Medicaid declined far more rapidly for noncitizens than U.S. citizens. This trend held for both the overall and low income populations. In addition, the share of children receiving benefits under TANF, SNAP, and Medicaid fell about twice as fast among U.S. citizen children with noncitizen household members as it did among children with only U.S. citizens in their

[1] More than 700,000 obtain LPR status as immediate relatives of U.S. Citizens or family-sponsored preferences, which requires that they undergo a public charge determination. U.S. Department of Homeland Security, "Table 6: Persons Obtaining Lawful Resident Status by Type and Major Class of Admission: Fiscal Years 2017 to 2019," available at: https://www.dhs.gov/immigration-statistics/yearbook/2019/table6

[2] About 1 million people obtain LPR status per year,U.S. Department of Homeland Security, "Table 1: Persons Obtaining Lawful Status: Fiscal Years 1820 to 2019," available at: https://www.dhs.gov/immigration-statistics/yearbook/2019/table1.

[3] Note that DHS data notes people obtaining lawful permanent resident status by type, but that even more than 1 million people apply, as many applicants are denied lawful permanent resident status.

[4] Ted Hesson, Exclusive: Visa Denials to Poor Mexicans Skyrocket under Trump's State Department," August 8, 2019, available at: https://www.politico.com/story/2019/08/06/visa-denials-poor-mexicans-trump-1637094

[5] ibid.

household. Eligibility for these programs did not change during this time period.[6] A similar pattern is apparent in the SNAP administrative data.[7]

The ability for DHS, USCIS and other federal agencies to move beyond the COVID-19 pandemic and into economic recovery may be limited if immigrants and their family members are afraid to apply for immigration benefits and access health care and other services designed to get the country back on track. Since the COVID-19 pandemic began, research continues to document that immigrant families are being chilled from accessing government programs and services because of public charge concerns. In 2020, the Urban Institute found that approximately one in seven adults in immigrant families (13.6%) reported that they or a family member had avoided public benefit programs because of concerns about future green card applications.[8] Further, based on research from the Kaiser Family Foundation, approximately one-third of unvaccinated Hispanic adults are concerned that getting a COVID vaccine may negatively affect their own or a family member's immigration status.[9]

Research illustrates the lasting harm of the Trump-era public charge regulations on immigrant families, including those with children. This research and evidence strongly supports the need for outreach efforts by DHS to make clear that it is safe for immigrant families to apply for immigration benefits and access needed health, nutrition, housing, and other economic support programs, swift rulemaking to build on the 1999 Field Guidance, and changes to key forms.

1. Engage in an Outreach and Community Education Campaign

In light of the pandemic and immigrant families' concerns applying for immigration benefits and accessing health care or nutrition benefits, urgent action from DHS to engage stakeholders is needed. We recommend that DHS issue a FAQ that multiple federal state and local agencies can use to answer common questions about the 1999 Field Guidance.[10] We further recommend that USCIS and other federal agencies conduct large-scale outreach and public education to help reverse the chilling effects and other harm of the Trump-era regulations. Below are some recommended messages for USCIS to communicate, as well as communications channels that we recommend USCIS employ.

Recommended message themes:

- The Biden Administration has permanently ended the Trump public charge policy.
- You can safely get the care and help you and your family need.

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[6] Randy Capps, Michael Fix, and Jeanne Batalova, Migration Policy Institute, "Anticipated 'Chilling Effects' of the Public Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families," December 2020. https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real.

[7] Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2019 | USDA-FNS

[8] Hamutal Bernstein, Michael Karpman, Dulce Gonzalez, and Stephen Zuckerman, Urban Institute, "Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis" February 2021 https://www.urban.org/sites/default/files/publication/103565/immigrant-families-continued-avoiding-the-safety-net-during-the-covid-19-crisis.pdf.

[9] Liz Hamel, Samantha Artiga, Alauna Safarpour, Mellisha Stokes, Mollyann Brodle, "KFF COVID-19 Vaccine Monitor: COVID-19 Vaccine Access, Information, and Experiences Among Hispanic Adults in the U.S." Kaiser Family Foundation, May 2021, https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-access-information-experiences-hispanic-adults/.

[10] The Center on Budget and Policy Priorities, the Center for Law and Social Policy, and the National Immigration Law Center have shared some questions received about the 1999 Field Guidance and draft responses with USCIS staff.

- COVID testing, vaccination, and care won't affect your immigration status or any future immigration status you may apply for, including applications for U.S. citizenship
- Getting help with health care (except for long-term care in a nursing home), food, or housing also won't affect your immigration applications.
- Healthcare and food programs serving your children or other members of your household won't affect your immigration application.
- Only use of on-going cash assistance programs that are intended to pay your daily living expenses, such as Supplemental Security Income and Temporary Assistance for Needy Families, and long-term institutional care at government expense are considered in the public charge test.
- Many categories of immigrants are exempt from public charge.

Since the public charge test plays a considerable role in our immigration system and the chilling effect is pervasive, encouraging people to apply for immigration benefits and access health, nutrition, and other support programs will take a large-scale effort. We recommend that DHS get the message out to its stakeholders by leveraging all communication channels available, including through public appearances and speeches, print and digital material, advertisements, media relations, educational events, and guidance, training, and technical assistance to state benefit granting agency staff, state and local governments, and community-based organizations.

2. Begin the Process of Rulemaking

Although DHS's 2019 public charge rule is no longer in effect and work to regain the trust of immigrants and their families is proceeding, we strongly urge the Biden Administration to quickly promulgate a new public charge rule which communicates clearly that an applicant's or family members' participation in health care, nutrition, housing and many other programs will not affect their ability to adjust their status or to become citizens.

The new rule would be based on the 1999 Field Guidance but update it in three key ways. It would 1) clarify key definitions and time periods in the totality of circumstances test; 2) articulate a finite list of benefits included and excluded as factors in a public charge determination; and 3) compile and update the immigration groups exempt from a public charge definition. We believe that rulemaking will solidify the progress already achieved and allow for important modifications to modernize and clarify this policy.

Clarify key definitions and time periods that are part of the totality of circumstances test.

Clarify definitions such as "primarily dependent" and "subsistence" so that a new administration can't issue guidance that improperly broadens the definitions. Primarily dependent should be defined to indicate that small amounts of cash benefits, cash or long-term care benefits received for a short time, or benefits received a long time ago are less predictive that a person will become primarily dependent. Subsistence should be defined to clarify that it can only be demonstrated by the "receipt of public cash assistance for income maintenance" or " institutionalization for long-term care at government expense." The rule should state clearly that supplemental benefits families use to support work – such as health care, nutrition, or housing assistance – are not considered benefits for subsistence. There are multiple reasons why this approach is justified: 1) it sends a clear message to immigrants and their family members, that helps address the fear of using services like health care, nutrition and housing; 2) it is consistent with Congressional intent and the role of government assistance in today's economy; and 4)

the standard is well known.

Set time periods for the forward- and backward-looking components of the totality of the circumstances test. USCIS should propose and seek comment on limiting the forward-looking part of the test to three or five years, the time it takes for a person with a green card to become eligible to apply for citizenship (three for a spouse of a U.S. citizen petitioner, and five for others). This creates a clear standard that is easy for USCIS to train on and for adjudicators to implement consistently. USCIS should also exempt children from the forward-looking test because a five-year-old or even a teenager would not be expected to be self-sufficient at age ten or even 18. USCIS should also propose a lookback period of two or three years, clarifying that outside of the lookback period the use of a benefit would not count. A sufficiently old use of benefits is not relevant to a prospective assessment, and having a lookback would also allow people to seek cash assistance without fear of long-term circumstances. Immigration attorneys and others could counsel people about this lookback period.

USCIS should provide a clear list of benefits that count as factors in a public charge determination and publish and update guidance that provides examples of the public benefits that do not count as factors.

Codify a clear and finite list of benefits included as factors in a public charge determination. A proposed rule should clearly identify the few programs that may be considered "public cash assistance for income maintenance" and "institutionalization for long-term care at government expense" in the CFR text, and ensure that the regulatory text is clear that no other benefits are relevant. These public cash assistance programs would include only: Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF). These are the same benefits listed in the 1999 Field Guidance. USCIS should *propose* that cash assistance or institutional long term care benefits exclusively funded by states and localities should be excluded and seek comment on whether states should be allowed to provide assistance at their own expense without federal immigration policy barriers. USCIS should also specify that: family member's benefit use is not considered; application for a benefit does not constitute receipt; and small amounts of cash assistance may be overcome by positive factors.

Provide a non-exclusive list of cash benefits that do not count as cash assistance for income maintenance in the preamble to a rule and a separate guidance that can be easily updated. For example, benefits used during the entire length of a public health emergency, earned benefits; veterans' benefits; tax credits or other benefits received from the Department of Treasury, disaster assistance, cash grants for a particular purpose and benefits provided without regard to income.

Provide a non-exclusive list of non-cash, non-long term care benefits that are not considered in a public charge determination in the preamble to a rule and separate guidance that can be easily updated. Many of these additional non-cash benefits are very similar to those listed in the 1999 Field Guidance but became law after the 1999 Field Guidance was published or are specific examples of categories listed in the 1999 Field Guidance (see Figure 1 in the Appendix). Specificity is needed to mitigate confusion in the aftermath of the 2019 USCIS rule.

Clarify that benefits received while in a status that is exempt from the public charge grounds of inadmissibility are never factors in a public charge determination. Under the 1999 Field Guidance and the statute, individuals who adjust their immigration status through certain pathways – including

survivors of domestic violence self-petitioning under VAWA, survivors of serious crimes adjusting via the U visa **pathway,** refugees, persons granted **asylum and** abused, abandoned, or neglected youth granted Special Immigrant Juvenile Status– are *exempt* from the public charge ground of inadmissibility. However, if they adjust through a non-exempt pathway, such as through an immediate relative or family preference petition, some of these individuals may be subject **to a** public charge determination. DHS should clarify that benefits an individual received while they were in a **status exempt** from public charge inadmissibility will not be considered in a public charge determination.

Update the immigrant groups exempt from and protected against a public charge determination.

Clearly identify all of the categories of immigrants to whom the public charge grounds of inadmissibility do not apply. DHS should list all exemptions enacted in laws passed after 1999, and all other immigration categories that are exempt from or otherwise protected from a public charge determination. USCIS should maintain and update a list of all the groups who are exempt or protected against a public charge determination.

Provide enduring protection from public charge inadmissibility when formerly exempt individuals seek to adjust status. DHS should clarify that some groups that are not subject to public charge when they apply for a status are also exempt from the public charge ground of inadmissibility *when they seek to adjust or are adjudicated for another status that is not exempt.*

Clarify that the public charge ground of inadmissibility does not apply to visa holders or nonimmigrants extending or changing their status. The 2019 DHS Rule required, for the first time, nonimmigrants seeking to extend or change their nonimmigrant status to undergo a public charge test.[11] Although few nonimmigrants qualify for the benefits considered under the rule, this requirement added to the fear and confusion that prevented eligible immigrants and family members from securing critical services. DHS should propose specific regulatory text clarifying that the public charge ground of inadmissibility does *not* apply to visa holders or nonimmigrants seeking to extend or change their statutes. A public charge test for visa holders and nonimmigrants would be duplicative of the visa eligibility process and would waste limited agency resources.

Identify the circumstances in which returning LPRs will not be penalized for lawful conduct prior to departure under the public charge inadmissibility ground. The 1999 Field Guidance indicated that most LPRs who have been outside the United States for 180 or fewer days are not subject to the grounds of inadmissibility because they are not applicants for admission under section 101(a)(13)(C) of the INA.[12] Although the public charge grounds of inadmissibility may apply to returning residents who leave the U.S. over 180 days, DHS should exercise its prosecutorial discretion in the investigative questioning process for these individuals. In particular, DHS should propose extending to returning LPRs protections that disregard the receipt of benefits by previously exempt immigrants who are applying to adjust their status. These LPRs frequently have longer and deeper family and community ties to the U.S., factors that

[11] Department of Homeland Security, Final Rule, "Inadmissibility on Public Charge Grounds," August 14, 2019, p. 41329, available at: https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds (at 8 CFR § 214.1 and 8 CFR § 248.1).
[12] *See* Department of Justice, "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 Fed. Reg. 28689, 28691, May 26, 1999, available at: https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf

are treated as warranting the favorable exercise of discretion in many other immigration law contexts.[13]

3. Propose Changes to a Key USCIS Form

DHS should change the Application to Register Permanent Residence or Adjust Status (I-485) and its instructions to focus only on the programs that are relevant in a public charge determination. The Current Application to Register Permanent Residence or Adjust Status (I-485) is used for people applying for lawful permanent resident status in the U.S. It includes two questions about "public assistance." Question 61 and 62 ask: "Have you received public assistance in the United States from any source, including the U.S. Government or any state, county, city or municipality (other than emergency medical treatment)?" and "Are you likely to receive public assistance in the future in the United States from any source, including the U.S. Government or any state, county, city or municipality (other than emergency medical treatment)?"

USCIS should conduct a Paperwork Reduction Act review of changes that ask only about the specific programs that are relevant to a public charge determination--cash assistance for income maintenance and institutional long term care at government expense – and provide clear definitions in the form instructions. Clarity on precisely which benefits must be reported will help reduce the administrative burden for USCIS, applicants and benefit granting agencies, as well as avoiding confusion and minimizing the chilling effect.

Conclusion

In conclusion, CLASP recommends that DHS immediately take the following three actions to reverse the harm of the Trump-era public charge regulations: (1) engage in an outreach and public education campaign; (2) issue regulations to build on the 1999 Field Guidance; and (3) propose changes to key USCIS forms.

Our comments include citations to supporting research and documents for the benefit of DHS in reviewing our comments. We request that these, along with the full text of our comments, be considered part of the formal administrative record.

Thank you for the opportunity to submit comments. Please do not hesitate to contact Elizabeth Lower-Basch at elowerbasch@clasp.org or Renato Rocha at rrocha@clasp.org if you have any questions or need any further information.

[13] See U.S. Citizenship and Immigration Services, "Chapter 10 - Legal Analysis and Use of Discretion," Updated April 27, 2021, available at: https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10#:~:text=If%20there%20is%20no%20evidence,officer%20generally%20may%20exercise%20favorable

Appendix

Figure 1: Clarity on Non-Cash Benefits Not Considered in a Public Charge Determination

The following list is an example of the types of benefits that USCIS should make clear are not part of a public charge determination. The benefits underlined are similar to benefits listed in the 1999 Field Guidance but became law after the 1999 Field Guidance was published or are specific examples of categories listed in the 1999 Field Guidance.

USCIS should also communicate that state and local programs that are similar to the federal programs listed below are excluded from consideration for public charge purposes. Please note that states may adopt different names for the same or similar publicly funded programs. In California, for example, Medicaid is called ‘‘Medi-Cal’’ and SNAP is called ‘‘CalFresh." It is the underlying nature of the program, not the name adopted in a particular state, that determines whether or not it should be considered for public charge purposes.

- **Medicaid and other health care services (other than long-term care):** (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases; use of health clinics, short-term rehabilitation services, and emergency medical services); Children's Health Insurance Program (CHIP); and health insurance Marketplace coverage, premium subsidies and cost-sharing reductions.
- **Nutrition programs**, including Supplemental Nutrition Assistance Program (SNAP, also known as “Food Stamps” or “EBT”), the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the National School Lunch and School Breakfast Program, Pandemic EBT and other supplementary and emergency food assistance programs.
- **Housing benefits,** such as subsidized housing, public housing, and Section 8 housing subsidies, and emergency rental assistance
- Child care services;
- Cash payments for a particular purpose, such as the Low Income Home Energy Assistance Program (LIHEAP);
- Emergency disaster relief, including federal, state or local disaster assistance paid in cash;
- Foster care and adoption assistance;
- Educational assistance, including benefits under the Head Start Act and aid for elementary, secondary, or higher education, Pell Grants, Student loans; student loan forbearance (suspended payments, stopped collections, and 0% interest), and Higher Education Emergency Relief Funds
- Job training programs;
- Employment-related benefits including (Pandemic Unemployment Assistance (PUA), unemployment insurance or state equivalents, paid family or medical leave, or worker’s compensation)
- Transportation vouchers or non-cash transportation services;
- Non-cash benefits or non-recurring cash benefits under the Temporary Assistance For Needy Families Program (TANF);
- Tax credits, including the Earned Income Tax Credit (EITC) and Child Tax Credit (CTC); and Economic Impact Payments (also known as “stimulus checks”),
- Benefits provided without regard to income (for example the Alaska Permanent Fund Dividends, child allowances, or basic income payments).
- In-kind, community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter).