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October 3, 2019

The Honorable Kevin McAleenan
Acting Secretary, Department of Homeland Security
3801 Nebraska Ave. NW
Washington D.C. 20016

Kenneth Cuccinelli
Acting Director, U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, D.C. 20529

The Honorable Mick Mulvaney
Director, Office of Management and Budget
Executive Office of the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, D.C. 20503

RE: Absence of Revised Forms and Public Engagement Relating to DHS Final Rule on Public Charge Ground of Inadmissibility

Dear Acting Secretary McAleenan, Acting Director Cuccinelli, and Director Mulvaney:

The undersigned organizations respectfully request that DHS delay the October 15, 2019 effective date of its rule regarding the public charge ground of inadmissibility and take other essential actions described below. Though October 15 is less than two weeks away, USCIS has yet to publish the revised and new forms that affected applicants and petitioners must submit under the rule, or perform any public engagement or issue guidance on implementation of the rule that would

help the immigrant community understand and prepare for the far-reaching changes associated with this regulation. The absence of an adequate form transition period and of outreach to the public not only runs contrary to longstanding agency practice, it will undermine the fair and efficient adjudication of critical immigration benefits, causing adverse consequences to individuals, families, and American businesses throughout the nation.

On August 14, 2019, DHS published in the Federal Register a final rule on the public charge ground of inadmissibility¹—a rule compelling some of the most consequential changes in USCIS policy since the agency’s creation. The regulation substantially heightens the standard by which USCIS determines whether a non-exempt applicant for adjustment of status is likely to become a “public charge” and thus inadmissible to the United States under INA § 212(a)(4). In making this determination, USCIS officers will apply a complex and intricately weighted “totality of circumstances” test assessing a vast array of factors. Those applicants must file in conjunction with a revised Form I-485 a new form—Form I-944—requiring extensive documentation. As these changes make clear, the rule will fundamentally reshape the filing and adjudication of adjustment of status cases. The rule also imposes a novel “public charge condition” on non-exempt requests for change or extension of nonimmigrant status under which adjudicators will examine nonimmigrants’ use of designated public benefits while in the status they wish to change or extend.

By DHS’s own estimate, the rule will impact more than 1.2 million applicants and petitioners annually, including over 382,000 adjustment of status applicants and over 855,000 applicants and petitioners for change or extension of status.² These estimates do not include the many millions of family members, community members, employers, and other individuals and entities affected by the rule.

Despite the gravity of these policy changes, the scale of the impacted populations, and the imminence of the rule’s implementation, USCIS has not published final versions of the revised and new forms associated with the regulation. DHS published *draft* versions of those forms in conjunction with the rule,³ but it remains unknown to what extent the *final* versions will resemble the drafts. Notwithstanding the unavailability of the updated forms, USCIS maintains that it will not accept the current editions of Forms I-485, I-129, I-539, I-864, and I-864EZ, if postmarked on or after October 15, 2019.

This failure to furnish a meaningful transition period between the current and the yet to be published revised forms—and to publish the new forms, such as Form I-944, associated with the rule—needlessly imposes hardship on individuals, families, and American businesses deserving of timely and fair adjudications. Historically, when introducing revised and new forms, USCIS has established reasonable transition periods. Such periods ensure that the regulated public is given adequate notice of any form changes, and allow for an orderly, fair, and efficient progression to the updated forms. These periods have been particularly beneficial for individuals who are not

¹ 84 Fed. Reg. 41292.

² See 84 Fed. Reg. 41292, 41463, 41499-50.

³ See supporting materials at: <https://www.regulations.gov/docketBrowser?rpp=50&po=0&dt=SR&D=USCIS-2010-0012>.

represented by an attorney, as pro se applicants typically have less access to information regarding form revisions and procedural updates.

As you are aware, an individual seeking adjustment of status or change or extension of nonimmigrant status who is rejected by USCIS runs the risk of falling out of status, accruing unlawful presence towards the 3-year and 10-year bars, and being subject to removal proceedings. As USCIS often takes several months to return a rejected application, the absence of a reasonable transition period for forms impacted by the public charge rule could result in irreparable harm to noncitizens' future eligibility for immigration benefits in the United States, as well as to their families and to the American businesses that employ them.

For unrepresented and represented applicants and petitioners who are aware of the form changes and who need to file I-485s, I-129s, or I-539s on or after October 15, USCIS's failure to timely publish updated forms has the effect of slowing, if not temporarily halting, many of those filings. Needless to say, individuals and their attorneys cannot properly prepare for the submission of forms unavailable to them. Once the agency does publish the revised and new forms, moreover, there will necessarily ensue a lag period—during which applicants and their attorneys transition to the updated forms—before associated filings. Often, for instance, form changes require attorneys to update form preparation software, data management systems, and client questionnaires—changes that can take significant time to implement. Already, attorneys are reporting that the unavailability of the updated forms, coupled with USCIS's refusal to accept current editions of impacted forms postmarked on or after October 15, 2019, is effectively freezing their preparation of certain cases. This is particularly significant for spouses and children of lawful permanent residents who are “current” in the F-2A category or those who are eligible to file using Dates for Filing for the month of October but who must file for adjustment before the visa availability changes. Just as important, a reasonable transition period is essential to ensure that USCIS personnel receive proper training on the use and data entry of the yet to be published forms. The lack of such training will further exacerbate crisis-level case processing delays, burdening the government itself as well as individuals, families, and U.S. businesses facing time-sensitive circumstances.

USCIS has in the past published updated forms marred by bugs or other deficiencies that impede timely filing and adjudication. By failing to provide a reasonable form transition period, the agency leaves itself and the public without a meaningful window in which to remedy these potential problems.

The delay in finalization of the I-944 will also impact state benefit agencies and adult education programs that have not had adequate time to prepare for the requests they will receive related to the Form I-944. The draft form I-944 suggests that benefit agencies would be asked to provide individuals with information on the total amount of benefits received, the exact dates and household composition, as well as information regarding whether any of the benefits count as Medicaid for emergency medical conditions or otherwise fall into one of the exceptions to the overall rule.⁴ Adult education programs will be asked to provide evidence of any degrees or certifications, such as transcripts, diplomas, degrees, and trade profession certificates. This will be

⁴ See supporting materials at: <https://www.regulations.gov/docketBrowser?rpp=50&po=0&dct=SR&D=USCIS-2010-0012>.

extremely burdensome for benefit agencies and educational institutions, increase administrative costs, and delay fulfillment of their responsibilities. USCIS's failure to timely publish updated forms has given these agencies and institutions insufficient time to prepare for far-reaching evidentiary requests which may be required under the final Form I-944.

Alarming, this week DHS published a 25-page correction that modifies significant portions of the rule.⁵ Although DHS argues that the changes are merely technical in nature and therefore do not necessitate a change in the effective date, the revisions to 8 C.F.R. 212.21(b)(7) relating to the spouse and children of servicemembers are substantive in nature. The need to publish this laundry list of corrections makes evident that USCIS has rushed the rule's issuance and implementation. Regulations and associated forms not carefully and precisely drafted, and that do not fully conform to each other, can unnecessarily confuse the public, hindering fair and efficient adjudications.

In addition to these last-minute modifications to the regulation and the absence of updated forms, USCIS has failed to hold any public engagements on the rule. The regulation's complexity—including its elaborate "totality of circumstances" test—has prompted significant confusion among the public regarding how USCIS plans to implement the rule in practice. And as widely reported, the rule has sparked fear and panic over the potential immigration consequences of the use of public benefits—even public benefits not covered under the rule. Yet USCIS has elected not to stage any stakeholder events that would aid the public's comprehension of the regulation and resolve misconceptions. Likewise, the agency has not made publicly available any official guidance on implementation of the rule. The "Questions and Answers" that USCIS posted on its website are insufficient in this regard—they fail to address many of the public's most urgent questions. It bears emphasis, moreover, that forms and accompanying instructions often represent a chief source of guidance to the public on the information needed to demonstrate qualification for immigration benefits. Thus, less than two weeks before implementation of profound changes in USCIS adjudications, in critical respects the public remains in the dark as to the nature of those changes.

For these reasons, we urge you to take the following actions:

(1) Delay the effective date of the rule until at least 60 days after publication of all revised and new forms associated with the rule. This measure represents the only option for ensuring a fair, orderly, and responsible transition to the updated forms.

(2) During that 60-day period, hold a series of public engagements, while issuing official guidance and other materials, aimed at enhancing stakeholder understanding of the rule. Such engagements and materials are paramount to allaying widespread confusion over this complex regulation.

(3) In the event that you do not delay implementation of the rule: (A) immediately publish all revised forms associated with the rule; and (B) for at least 60 days following that publication, continue to accept the prior editions of those forms and issue RFEs in response to such submissions, thereby requesting any revised forms and/or other information needed

⁵ 84 Fed. Reg. 52357.

under the rule. In the absence of delayed implementation, a failure to take these alternative measures will cause a broad range of harmful consequences, not least the loss of status of many applicants and petitioners.

We thank you for your consideration of these requests and look forward to hearing from you soon. Should you have any questions, please do not hesitate to contact Sharvari Dalal-Dheini, Director of Government Relations at (202) 507-7621 or SDalal-Dheini@aila.org.

Sincerely,

American Immigration Lawyers Association
Catholic Legal Immigration Network, Inc.
Immigrant Legal Resource Center
National Immigration Law Center
The Center for Law and Social Policy
Boundless Immigration Inc.

cc: Mr. Mark Koumans, Deputy Director, USCIS
Ms. Lora Ries, Chief of Staff, USCIS
Ms. Kathy Nuebel Kovarik, Chief, Office of Policy and Strategy, USCIS
Ms. Julie Kirchner, CIS Ombudsman, DHS
Ms. Stacy Shore, Deputy CIS Ombudsman, DHS
Ms. Elissa McGovern, Chief of Policy, Office of the CIS Ombudsman, DHS
Mr. Paul Ray, Acting Administrator, OIRA, OMB