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

Submitted via www.regulations.gov

Re: DHS Docket No. USCIS-2021-0013; Comments on Public Charge Ground of Inadmissibility

The Catholic Legal Immigration Network, Inc. (CLINIC) submits these comments regarding the Advance Notice of Proposed Rulemaking (ANPRM) that requests stakeholder feedback regarding the upcoming issuance of a regulatory proposal regarding the Public Charge Ground of Inadmissibility. As further described below, CLINIC recommends that the administration define the public charge ground of inadmissibility based on the analysis and interpretation the Immigration and Naturalization (INS) used in its Field Guidance on Deportability and Inadmissibility on Public Charge Grounds.[1] That analysis accurately reflects Congressional intent, administrative and judicial decisions, and the historical application of this ground. CLINIC also recommends that the administration not separately define the five statutory factors set forth in section 212(a)(4)(B)(i) of the Immigration and Nationality Act (INA).

Embracing the Gospel value of welcoming the stranger, CLINIC has promoted the dignity and protected the rights of immigrants in partnership with a dedicated network of Catholic and community legal immigration programs since its founding in 1988. CLINIC's network, originally comprised of 17 programs, has now increased to more than 400 diocesan and community-based programs in 49 states and the District of Columbia. CLINIC is the largest nationwide network of nonprofit immigration programs. Through its affiliates, CLINIC advocates for the just and humane treatment of noncitizens through family-based immigration services, including assistance with applications for adjustment of status to lawful permanent residency.

Our values are best expressed by Pope John XXIII who wrote in Pacem in Terris, "Now among the rights of a human person there must be included that by which a man may enter a political community where he hopes he can more fittingly provide a future for himself and his dependents. Wherefore, as far as the common good rightly understood permits, it is the duty of that state to

[1] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (May 26, 1999).

accept such immigrants and to help to integrate them into itself as new members."[2] Our recommendations regarding the future use of the public charge ground of inadmissibility are based on our convictions that family unity must be the highest priority and not hampered by this policy, and that the American Dream must be equally accessible regardless of wealth.

A. Legal, Regulatory, and Sub-Regulatory Background of the Public Charge Ground of Inadmissibility

The most significant change to the public charge ground of inadmissibility after it was added to the federal statute in 1882[3] occurred in 1996 with passage of both the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[4] and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Act).[5] The latter imposed a new enforceable affidavit of support[6] while the former set forth five factors, plus the affidavit of support, that adjudicators shall consider when making public charge inadmissibility determinations.[7] As the INS concluded at the time: "The most significant change to section 212(a)(4) under IIRIRA is the creation of a new affidavit of support (AOS), which coupled with the new section 213A, imposes on the sponsor a legally enforceable support obligation."[8]

Why was the new affidavit of support considered more important than the designation of the public charge factors? Why have the five statutory factors—age; health; family status; assets, resources, and financial status; and education and skills—never been defined (except briefly during the Trump Administration before those attempts were enjoined)? Why have dozens of agency memoranda and multiple regulations been written interpreting and implementing the affidavit of support over the last 25 years, while only one failed attempt was made to define the five statutory factors? To answer these questions, it is necessary to understand the background and recent history of family-based immigration.

In 1997, after IIRIRA had been implemented, approximately 67 percent of lawful permanent residents (LPRs) obtained their status based on their relationship to a U.S. citizen or LPR family member.[9] Of those, 59 percent gained it through application for an immigrant visa (consular processing), while 41 percent obtained it through adjustment of status.[10] These percentage differences have only widened during the last 24 years after adjustment under INA § 245(i) has

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[2] Pope John XXIII. Encyclical Letter "Pacem in Terris: Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, and Liberty" at para. 106, (April 11, 1963). Available at: http://w2.vatican.va/content/johnxxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html

[3] Immigration Act of August 3, 1882, 22 Stat. 214.

[4] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. 104–208, 110 Stat. 3009-546, enacted September 30, 1996.

[5] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, title IV, §§ 401-435, 110 Stat. 2261-2276 (Aug. 22, 1996) (generally codified, as amended, in 8 USC §§ 1601-1646).

[6] INA § 213A.

[7] Sec. 551 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, codified in INA §§ 212(a)(4), 213A.

[8] Field Guidance, *supra* note 1.

[9] 1997 Statistical Yearbook of the Immigration and Naturalization Service, U.S. Department of Justice, Immigration and Naturalization Service, pp. 12-16.

[10] *Id*. at Table 5, pp. 33-35.

decreased. The public charge ground of inadmissibility has been enforced principally by the Department of State, given that those who were applying to the INS or U.S. Citizenship and Immigration Services (USCIS) to adjust status typically had entered lawfully and were already gainfully employed by the time of adjudication. That explains why the Department of State—rather than the USCIS—issued almost all of the clarifying memos interpreting and implementing the 1996 affidavit of support requirements before they took effect on Dec. 19, 1997.

Historically, the Department of State was always more concerned with possible public charge than the INS. As a result, consular officers were used to screening immigrant visa applicants carefully to ensure that they would be able to support themselves after admission; consular officers often required the submission of an offer of employment from a U.S. employer, as well as an affidavit of support, Form I-134, from the applicant. But by 1996 three courts had held that these affidavits were legally unenforceable. This, coupled with political pressure at the time to restrict LPRs from accessing federal means-tested public benefits, resulted in Congress's passage of section 213A and other provisions of the Welfare Act.

The five factors that were added to the statute in 1996 were not new at that time and did not need to be explained or defined. They were lifted almost verbatim from prior INS instructions and the State Department Foreign Affairs Manual (FAM). For example, the FAM in 1991 enumerated the "Factors in Reviewing Public Charge Requirements." They were listed as the applicant's: "age; health; education; family status; financial resources; and personal income."[11] In other words, when Congress in 1996 enacted INA § 212(a)(4)(B), Factors to be Taken into Account, it was simply incorporating in statutory format what was already current practice. When it enumerated the five statutory factors, it kept the words "age," "health," and "education" from the FAM; it added the words "and skills" to "education"; and it combined "financial resources" and "personal income" into "assets, resources, and financial status."

On December 6, 1997, days before the new Form I-864 was to be used by all immigrant visa applicants, the State Department issued a memo titled "I-864 Affidavit of Support Update No. One – Public Charge Issues."[12] In it the agency discussed the relationship of the new Form I-864 to the INA § 212(a)(4) public charge standard:

> 17. In most cases, the public charge requirements will be satisfied by the submission of a verifiable Affidavit of Support that meets the 125 percent minimum income requirement. However, the fact that the minimum income level has been met does not preclude the Consular Officer from examining other public charge considerations. A finding of ineligibility in cases where the 125 percent minimum has been met must be well-documented and demonstrate a clear basis for the determination that the applicant is likely to become a public charge.

[11] 9 FAM 40.41 Notes N2.1 - 3.4 (8/26/91).
[12] Department of State, "I-864 Affidavit of Support Update No. One – Public Charge Issues," UNCLAS STATE 228862 (Dec. 1997).

> 18. If the applicant and his/her spouse or dependents are in good health and appear to be employable, an Affidavit of Support that meets the minimum income level should generally be considered adequate.
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> 19. If the applicant(s) suffer from poor health or serious physical impairment, are likely to need medical treatment, or are otherwise not likely to be able to support themselves, closer scrutiny of the sponsor's ability to provide the requisite level of support may be necessary. For example, a sponsor who is able to demonstrate an income that barely meets the minimum requirement, should have to demonstrate clearly that he/she has the resources to cover an applicant requiring extensive or long-term medical expenses. In such cases, a joint sponsor with substantial resources would have to provide an Affidavit of Support. (Note. Medical considerations should only be for conditions that exist at the time of the interview. A healthy elderly applicant, for example should not be denied a visa simply because s/he might require medical care at some point in the future).
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> …
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> 24. … If there is a sufficient Affidavit of Support and the applicant appears to be able to support him/herself and dependents, a public charge finding may not be appropriate notwithstanding the petitioner's reliance on public assistance.
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> 25. If, on the other hand, the applicant is unlikely to be able to support him/herself, there will be greater burden on the sponsor(s) to overcome public charge considerations.

In April 1998, the State Department clarified its public charge interpretation with a follow-up cable:

> Subject: I-864 Affidavit of Support—Update No. 12:
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> …
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> 5. As noted in Reftel D (paragraphs 17-20). An I-864 demonstrating financial resources at or above the 125 percent benchmark will generally be adequate for visa issuance. Consular officers must still take into consideration, however, an applicant's ability to provide for him/herself and any special circumstances, such as the need for medical treatment or other financial obligations, which would be a factor in a § 212(a)(4) determination. Thus, an applicant who presents an I-864 which just meets the 125 percent minimum income requirement may easily convince the consular officer that s/he will not become a public charge based on the applicant's ability to support her/himself. Conversely, an applicant who presents an I-864 which fulfills the 125 percent requirement may still be refused under section 212(a)(4) if there are anticipated medical or other costs on behalf of the applicant which the sponsor does not appear capable of meeting.[13]

[13] "I-864 Affidavit of Support: Update No. 12: § 212(a)(4) v. § 221(g)" (98-State-064917) (April 1998).

In June 1998, the State Department issued a further clarification with a cable:

> Subject: I-864 Affidavit of Support: Update No. 14 – Commitment to Provide Assistance
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> …
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> 4. In going beyond the 213A requirements to consideration of eligibility under INA 212(a)(4), Department notes that for several reasons a properly filed, non-fraudulent I-864 shall normally be considered sufficient to overcome the 212(a)(4) requirements. The I-864 is legally enforceable contract, and therefore shall be granted significantly more evidentiary weight than the previous affidavit of support. Moreover, the new AOS [affidavit of support] requirements have not changed the long-standing legal presumption that an able-bodied, employable individual will be able to work upon arrival in the U.S. The presumption that the applicant will find work coupled with the fact that the I-864 is a legally enforceable contract will provide in most cases a sufficient basis to accept a sponsor's or joint sponsor's technically sufficient AOS as overcoming the public charge ground.
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> 5. This should not be misconstrued to mean that posts should accept a fraudulent AOS or one from a non-existent joint sponsor. Absent fraud, however, Department believes that the enforcement measures provided for by the Act should be considered sufficient safeguard in all cases in which there are no significant public charge concerns.
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> 6. …

- Significant public charge concerns are specific, identifiable personal characteristics of the applicant that would lead the consular officer to believe that the applicant would require considerable resources from either the sponsor or the public once the applicant is in the U.S. Such identifiable characteristics might be chronic illness, physical or mental handicaps, extreme age or other serious condition that in the absence available personal resources or insurance would normally result in the expenditure of public funds on an individual's behalf;
- If there are no significant public charge concerns the consular officer should continue with processing;
- If there are significant public charge concerns and petitioner has adequate funds to maintain the applicant, proceed with processing unless evidence comes to light that the petitioner has failed to provide to an alien for whom the petitioner has previously filed an I-864. In the latter case a consular officer could reasonably question the credibility of the petitioner; …[14]

[14] "I-864 Affidavit of Support: Update No. 14 – Commitment to Provide Assistance," UNCLAS STATE 102426 (June 1998).

B. Analysis and Conclusions Drawn from the Legal, Regulatory, and Sub-Regulatory Background

The following conclusions can be drawn from this series of cables. According to the State Department:

1. The submission of a legally sufficient affidavit of support that meets the minimum 125 percent of poverty requirement will usually satisfy the public charge ground of inadmissibility and will not require a separate examination of the five factors.

2. Applicants who are in good health, "employable," and submit an acceptable affidavit of support should not be found inadmissible for public charge.

3. If "significant public charge factors" exist, however, the consular officer may require further assurances and more documentation that the sponsor, or perhaps a joint sponsor, has the necessary financial resources to support the applicant. The existence of these factors requires further scrutiny of the sponsor—not the applicant. It does not require the officer to examine, for example, the applicant's income, job skills, education, employment history, assets, resources, health insurance, or any other related factors.

4. These "significant public charge factors" include advanced age, poor health, or a serious physical impairment that is likely to require costly medical treatment "which the sponsor does not appear capable of meeting."

5. These health-related factors—if they exist—will appear from the results of the medical examination, which is required from every applicant. They do not require any further inquiry from the applicant during the interview.

6. Any finding of public charge after a legally sufficient affidavit of support has been submitted "must be well-documented and demonstrate a clear basis for the determination."

7. The Form I-864 is a legally enforceable contract that provides far more safeguards than the previous Form I-134, and thus should be "granted significantly more evidentiary weight."

Sponsor-to-alien deeming of income, legally enforceable obligations on the sponsor to support the applicant, contractual requirements to reimburse any benefits the sponsored immigrant managed to receive, coupled with the Welfare Act's restricting LPRs' access to federal means-tested programs meant that it was nigh impossible for the immigrant visa applicant to become a public charge, at least for the first five years after immigrating. So while consular officers had been used to examining the applicant's age, health, education, family status, financial resources, and personal income, after the I-864 was implemented, the focus shifted sharply away from the applicant. To a large extent the new focus on the sponsor simplified the public charge determination and reduced it from a subjective balancing test into more of a mathematical computation and binary question: has the applicant submitted an affidavit of support that satisfies the minimum income requirements?

The INS/USCIS and the State Department have endeavored since 1996 to apply the same interpretation of the public charge ground of inadmissibility, even though the State Department

has been far more detailed and prolific. For example, on May 25, 1999, one day before the INS published its Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, the Department of State issued the following unclassified cable:

> Subject: INA 212(A)(4) Public Charge: Policy Guidance
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> Ref: 9 FAM 40.41
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> 1. Summary:
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> This is an action Cable. It clarifies the definition of "public charge" as a person "likely to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense." The cable also provides guidance on the use of this definition. The guidance is based upon the content of a new regulation that INS will publish in the Federal Register. Amendments to the Notes in 9 FAM 41.40 are also provided. End Summary.[15]

Over the next 20 years, the interpretation of public charge in the INS's Adjudicator's Field Manual, which migrated to the USCIS Policy Manual, and the Department of State's FAM reflected the two agencies' lockstep movement on this issue. As recently as January 2018, for example, the FAM stated: "A properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the totality of the circumstances analysis."[16] It went on to inform consular officers to accept the Form I-864 as satisfying the public charge analysis and not question the credibility of the sponsor "unless there are significant public charge concerns relating to the specific case, such as if the applicant is of advanced age or has a serious medical condition."[17]

C. Background of Attempted Changes to Public Charge under the Previous Administration

In summary, before the previous administration proposed its radical interpretation of public charge in an attempt to reduce family-based immigration and frighten family members from accessing benefit programs, the five statutory factors were rarely examined and only when "significant public charge" factors were present. As of 2015, this ground of inadmissibility had been used sparingly by consular officials as a basis for refusing immigrant visa applicants.[18] While it was still a common basis for initial refusal, it was usually overcome through submission of additional documentation or a joint sponsor's affidavit of support. But by the end of fiscal year 2019—as a result of State Department changes to the FAM the year before—refusals based on public charge had soared. For the fiscal year that ended on September 30, 2017, the agency refused 3,237 immigrant visa applicants based on public charge. By the end of fiscal year 2018, that number had

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[15] INS Cable, "INA 212(A)(4) Public Charge: Policy Guidance," (May 25, 1999)
[16] 9 FAM 302.8-2(B).
[17] Id.
[18] Department of State, "Report of the Visa Office 2015," Table XX, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableXX.pdf.

quadrupled to 13,450 applicants; one year later it had risen again to 20,941.[19] But not reported was another figure: those family members who had held off even applying for permanent resident status for fear of being denied and refused re-admission.

The Department of State amended the FAM in January 2018 to increase the burden of satisfying the public charge ground of inadmissibility for both immigrant and nonimmigrant visa applicants. The amended FAM 302.8-2(B) required consular officers "**in every case**" (emphasis in original) to examine the visa applicant's "age, health, family status, assets, resources, financial status, education, and skills." While prior to the change, the Form I-864 affidavit of support had been sufficient proof of satisfying the public charge test in most cases, in 2018 it was relegated to being merely "a positive factor." The amended FAM language even stated: "a properly filed and sufficient, non-fraudulent Form I-864, may not necessarily satisfy the INA 212(a)(4) requirements, but may provide additional evidence in the review of public charge determination." Another 2018 change in the FAM was the addition of language encouraging the consular officer to consider the likelihood that the sponsor would support the visa applicant.

The FAM changes came in the context of the previous administration's public statements disparaging immigrants from Mexico and Central America, decisions reducing the number of refugee admissions, executive orders precluding the immigration of persons from predominantly Muslim countries, another executive order encouraging "extreme vetting" of immigrants and refugee applicants. and failed congressional efforts to replace existing family-based immigration laws with a "merit-based" system. This all climaxed with the Trump Administration's 2019 proposed, final, and interim final regulations published by the Department of Homeland Security and the Department of State that expanded the number of public benefit programs that could be considered in the public charge totality of the circumstances analysis. But even more significant was its attempt through these regulations to define the five statutory factors.

Both agencies defined the five statutory factors in specific ways and assigned various weight to them, ranging from positive and negative to heavily weighted positive and heavily weighted negative. The USCIS required adjustment applicants to complete a new 18-page Form I-944, Declaration of Self-Sufficiency, which captured information necessary to address all of these factors. The Department of State adopted its own shorter form, the DS-5540, Public Charge Questionnaire. Among the factors to be taken into account and that required supporting documentation included the applicant's: age (under 16 or over 63 would be a negative factor), current and estimated income, job history, job skills, liabilities and debts, health status, health insurance, assets, credit reports, prior income tax filings, educational level (lack of high school degree was a negative factor), foreign education degree equivalency reports, proficiency in English, and current or past history of public benefits receipt.

The USCIS admitted at the time that the new standard for determination of public charge inadmissibility would necessarily now be "subjective and discretionary in nature," and "to the extent that each applicant's facts and circumstances are unique, officers' public charge

[19] Department of State, Immigrant and Nonimmigrant Visa ineligibilities (by Grounds for Refusal under the Immigration and Nationality Act), Fiscal Years 2017, 2018, 2019.

inadmissibility determinations will vary." USCIS Policy Manual, Vol. 8, Part G, ch. 4(A). It also acknowledged that there is no longer any "'bright-line' test in making a public charge inadmissibility determination." USCIS Policy Manual, Vol. 8, Part G, ch. 4(C).

The Biden Administration quickly moved to dismiss the pending court challenges to the enjoined public charge regulations and vacated them from the Code of Federal Regulations. It then amended the USCIS Policy Manual to direct officers to the 1999 Interim Field Guidance. It also moved to restore the prior language in the FAM defining public charge. The FAM now includes the key instruction on determining public charge when a legally sufficient affidavit of support has been submitted:

> **Effect of Form I-864 on Public Charge Determinations:** A properly filed, non-fraudulent Form I-864, should normally be considered sufficient to satisfy the INA 212(a)(4) requirements. In determining whether the INA 213A requirements creating a legally binding affidavit have been met, the intent of a qualified sponsor to actually provide support is not a factor, if the person meets the definition of a sponsor and has verifiable resources, because the affidavit is enforceable regardless of the sponsor's actual intent. Consequently, you should not consider sponsor intent, unless there are significant public charge concerns relating to the specific case, such as if the applicant appears likely to have significant health-related costs and likely is unable to work, for example, because the person is of advanced age or has a serious medical condition. If you have concerns about whether a particular Form I-864 may be "fraudulent", you should contact CA/FPP for guidance.[20]

Regarding what weight the five statutory factors should be given, the FAM now reads:

> These factors, and any other factors you believe are relevant in a specific case, will make up the "totality of the circumstances" that you must consider when making a public charge determination. As noted in 9 FAM 302.8-2(B)(2), a properly filed, non-fraudulent Form I-864 in those cases where it is required, should normally be considered sufficient to meet the INA 212(a)(4) requirements and satisfy the "totality of the circumstances" analysis. Nevertheless, the factors cited above could be given consideration in an unusual case in which a Form I-864 has been submitted and should be considered in cases where a Form I-864 is not required.[21]

This means that absent "significant public charge concerns" or "an unusual case," the consular officer should rely on any legally sufficient affidavit of support that has been submitted and: (1) not question the sponsor's intent nor his or her ability to provide the necessary financial support in the future; or (2) put much if any weight on the other five factors as they apply to the applicant. Significant public charge concerns could include the sponsor's advanced age, serious medical condition, or inability to work due to health-related reasons.

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[20] 9 FAM 302.8-2(B)(2)(b).
[21] 9 FAM 302.8-2(B)(3)(a)(2).

D. Analysis and Suggestions for this ANPRM in the Context of the Previous Administration's Attempted Changes to Public Charge

CLINIC is very concerned that any effort to define the five statutory public charge factors will result in a far more complicated and discretionary determination and one that is both unnecessary and potentially harmful. Rather than applying a discrete analysis based on the sponsor's financial status and current income, it would redirect the focus onto the applicant. Consular and USCIS officials would be required to juggle a variety of factors that have little relationship to the applicant's qualifying for certain cash assistance programs at a time well into the future when they might theoretically become eligible to receive them. Applicants and the practitioners who represent them—as well as those who are adjudicating these applications—need to maintain the current bright-line test that is being applied. CLINIC urges this administration not to dismantle it.

E. Conclusion

Based on the above analysis of the legal, regulatory, and sub-regulatory background of the public charge ground of inadmissibility, as well as the context of the previous administration's attempts to reduce immigration by distorting the historic use of this policy, we strongly recommend that the agency maintain the interpretations of public charge and the five factors as they were under the 1999 guidance.

Thank you for the opportunity to submit these comments. We appreciate your consideration. Please do not hesitate to contact Lisa Parisio, CLINIC's Advocacy Director, at lparisio@cliniclegal.org should you have any questions about our comments or require further information.

Sincerely,

Anna Gallagher
Executive Director