April 25, 2022

Via Federal eRulemaking Portal

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security

The Honorable Ur M. Jaddou
Director
U.S. Citizenship and Immigration Services

Attn: USCIS-2021-0013
5900 Capital Gateway Drive
Camp Springs, MD 20746

RE: Notice of Proposed Rulemaking: "Public Charge Ground of Inadmissibility" [RIN: 1615-AC74; CIS No. 2715-22; DHS Docket No. USCIS-2021- 0013]

Dear Secretary Mayorkas and Director Jaddou:

The California Health & Human Services Agency (CalHHS), along with the California Department of Health Care Services (DHCS), the California Department of Public Health (CDPH), the California Department of Social Services (CDSS) and California's Health Insurance Exchange, Covered California, submit the following comments for your consideration on the Notice of Proposed Rulemaking, "Public Charge Ground of Inadmissibility" (hereafter referred to as the proposed rule).[1]

The Department of Homeland Security (DHS) published an Advance Notice of Proposed Rulemaking (ANPRM) on the Public Charge ground of inadmissibility on August 23, 2021. We submitted a comment letter in response to the ANPRM, dated October 22, 2021.[2] This comment explained that it was our position that no past receipt of public benefits should be considered in the public charge determination. Our comment outlined the harms created in the past few years as a result of the previous administration's attempt to include the consideration of receipt of non-cash benefits, such as Medicaid and the Supplemental Nutrition Assistance Program (SNAP), in public charge inadmissibility determinations. We also explained the harm created by the continued consideration of receipt of cash assistance for income maintenance.

As set forth below, we support several elements of the proposed rule and appreciate the administration's efforts to minimize the prior rule's burdens on state and local governments, and harm to immigrants and mixed-status families. **However, it is our position that the proposed**

[1] 87 Fed. Reg. 10,570 (Feb. 24, 2022).
[2] California Health and Human Services Agency's Comment Letter on the Advance Notice of Proposed Rulemaking on the Public Charge Ground of Inadmissibility, October 22, 2021, Advance Notice of Proposed Rulemaking: Public Charge Ground of Inadmissibility (ca.gov).

rule must be amended to exclude any consideration of past receipt of public benefits in the public charge determination.

The proposed rule effectively addresses some of the confusion, inequities, and harm created under past and current public charge rules and policies – but additional clarity with respect to past benefit use is critical.

Under the prior administration, the process of changing to the public charge ground of inadmissibility, culminating in the 2019 Final Rule on Inadmissibility on Public Charge Grounds (2019 Rule)[3], resulted in confusion among Californians eligible for public benefits, fear amongst immigrants and their families, and heightened administrative burdens and costs for public benefit granting agencies at the state and local level. The proposed rule effectively addresses some of these concerns and we support these elements of the proposed rule.

First, the proposed rule removes from consideration in a public charge determination non-cash benefits other than long-term institutionalization at government expense. We agree with the administration that non-cash benefits, including SNAP, housing supports, and Medicaid, should be excluded from consideration. These non-cash benefits are not evidence of primary dependence on the government for subsistence and their inclusion in the 2019 Final Rule had significant chilling effects on immigrant and mixed-status household participation in federal and state public benefits, with resulting detrimental impacts on community health and wellness. The proposed rule also limits the consideration of receipt of public benefits in a public charge determination to instances in which the noncitizen is listed as a beneficiary. We support this limitation as a means of mitigating chilling effects on public benefit participation, particularly in mixed-status households.

The proposed rule includes a list of categories of noncitizens exempt from the public charge ground of inadmissibility and a list of categories of noncitizens eligible to apply for waivers of the public charge inadmissibility ground. We support the inclusion of these lists in any final rule to reduce confusion among immigrant populations as to the applicability of the public charge rule to groups of various status and related chilling effects on public benefit participation.

Finally, the proposed rule requires favorable consideration of an Affidavit of Support Under Section 213A of the Immigration and Nationality Act (INA) in the totality of the circumstances analysis and requires that written denial decisions based on the public charge ground of inadmissibility include a discussion of each of the statutory minimum factors. We support the codification of these elements to ensure that denial decisions are well-supported and only reflect circumstances in which the individual is in fact likely to become primarily dependent on the government for subsistence.

The final rule should not include consideration of past receipt of public benefits as part of the public charge determination.

We provide California residents public benefits and services, including institutional long-term care and cash assistance, with the goal of helping individuals and families get through hard times

[3] 84 Fed. Reg. 41292 (August 14,2019).

and onto a path of financial stability to achieve independence. The proposed rule's consideration of past receipt of a public benefit belies the intent behind federal and state-funded public benefits. Any person, regardless of their socio-economic background, may at some time in their life need public assistance to ensure they and their families are housed, fed, and have access to employment opportunities. The COVID-19 pandemic has made it clear that Californians of all backgrounds are at risk of temporary economic hardship, and this experience is not predictive of their future income. We are opposed to any consideration of past public benefit receipt in a public charge determination because it would undermine our mission to serve, aid, and protect needy and vulnerable children and adults.

California is home to a large immigrant population. As of 2018, twenty-seven percent of California's population, approximately 10.6 million people, are foreign born.[4] One in two children has at least one immigrant parent. In California, 74 percent of non-citizens live in households that also have citizens.[5] Nearly 12 percent of the state's total population – about 4.7 million people – live with an undocumented family member, including about two million children younger than 18 years old.[6] This proposed rule will lead immigrant individuals and households to forego public benefits that they are eligible to receive and that would enable them to weather a time of crisis because they are fearful of future immigration consequences.

By considering past receipt of public benefits, DHS is undermining key state, Tribal, territorial, and local programs; creating unnecessary burdens for benefit granting agencies; instilling fear in immigrant and mixed-status households; and establishing standards that cannot be enforced equitably. The probative value of such consideration is far outweighed by the harm created. As such, the proposed rule should not consider any past receipt of public benefits or services.

The proposed rule must be amended to remove consideration of past receipt of State, Tribal, territorial, and local cash assistance for income maintenance.

The proposed rule fails to clearly articulate which non-federal cash benefits would be considered; a clear standard cannot be established, and the rule should not cover non-federal cash benefits.

The proposed rule defines "Public cash assistance for income maintenance" as including "State, Tribal, territorial, or local cash benefit programs for income maintenance (often called 'General Assistance' in the State context, but which also exist under other names)." The proposed rule does not expressly define "income maintenance," nor does it expressly exclude any special purpose or targeted assistance programs. The reference to general assistance is also not helpful as the proposed regulation clearly states that it is not meant to solely consider general assistance. Therefore, the plain language of the regulation is vague and creates a difficult standard for benefit-granting agencies and individuals to interpret.

The analysis accompanying the proposed regulations provides insufficient explanations and has limited legal effect. The analysis explains that it is DHS' intent to exclude a variety of cash

[4] FACT SHEET Immigrants in California, American Immigration Council, August 2020, immigrants_in_california.pdf (americanimmigrationcouncil.org).
[5] *Id*.
[6] *Id*.

assistance payments, including those designed for a specific purpose (e.g., payments meant to cover childcare expenses), emergency or disaster benefits, and benefits to a target population (e.g., Cash assistance specifically for human trafficking survivors). Unfortunately, even this explanation does not include an express list of excluded benefit types or guidelines for determining whether a benefit should be excluded. The analysis also provides only a minimal description of what DHS means by cash and income maintenance. Again, this analysis is insufficient to allow states and local entities to determine which benefits will or will not be considered. Additionally, future administrations may still seek to interpret the proposed regulation in a more expansive manner. If this were to occur, court intervention would be necessary to protect immigrants who accepted benefits in reliance on the analysis.

Guaranteed income pilot projects provide an excellent example of how the proposed rule fails to clearly articulate a standard for determining which benefits will be included for consideration. In California, guaranteed income programs and universal basic income programs are being piloted throughout the state. These pilot programs provide cash payments to households for a limited number of months. Many, if not most, of the programs are being administered by or in conjunction with counties or city governments. For now, much, if not most, of the funding for these pilots is from private donors and non-profit organizations. In 2021, the State of California allocated $35 million over five years to provide grants to guaranteed income pilots operating in the state. The state funding is limited to those pilots which have additional funding sources. This means that many pilots will be using a mix of private and public funds. Some pilots use a traditional means-test to determine eligibility, while others have means-tests that allow for higher levels of income, and still others rely on the average income for a region, rather than a test for each household. Additionally, some pilots focus on communities or households who have experienced specific harms, including harms created by emergencies or disasters. Neither the proposed regulation, nor the accompanying analysis, create a clear standard for whether such pilots or ongoing programs would be considered for a public charge determination. It is unclear if a pilot benefit would count as a state or local benefit given the mix of public and private funds. It is unclear if a pilot benefit would be considered as “for income maintenance” given the variations in means-testing, the limited period of eligibility, and the program goals, which are typically not focused on the impact to an individual household. It is also unclear if a pilot benefit would be considered if that particular pilot is designed to address the long-term harm of an emergency or disaster.

Guaranteed income programs are typically not designed to be public benefit safety-net programs. The very nature of a guaranteed income project is to raise the income of the community across the board and not to address individual needs or personal circumstances. To exclude immigrants from these projects or to deter them from participating due to public charge concerns would undermine the goals of the pilots and be discriminatory. This harm would occur even though participation is not an accurate indicator of future dependence on the government for subsistence.

Not only does the proposed rule’s vagueness create confusion for entities administering these benefits and the potential recipients of the benefits, but it fails to provide a clear standard for immigration officers to apply. In order for an immigration officer to determine whether they should consider receipt of a given benefit in a public charge determination, they would need a detailed

understanding of each program, including information that may not be available to pilot participants (e.g., Sources of funding). This is an unreasonable amount of information to expect immigrants to provide or for immigration officers to consider.

It is our belief that it is not possible for DHS to establish a clear standard for non-federal cash assistance programs within regulation given the complexity and variety of programs being administered nationwide. Even if the proposed rule were amended to further define income maintenance or provide exclusions in regulation, there will always be too much variety to clearly include or exclude all programs. As such, the consideration of non-federal cash assistance programs must be removed from the proposed rule.

The proposed rule fails to ensure an equitable standard for determination.

Equitable application of the public charge ground of inadmissibility is not possible under the proposed rule, in large part due to the consideration of past receipt of "State, Tribal, territorial, or local cash benefit programs for income maintenance." Since 1999, USCIS has considered benefits received in public charge determinations without consideration of the varying eligibility requirements for state or local benefits. Past polices also failed to consider the variation in benefit availability between the states and localities nationwide. The proposed rule would continue this inequitable and inaccurate application of the public charge ground of inadmissibility. Without a detailed understanding of each specific benefit's eligibility standards and program goals, it is impossible for an immigration officer to accurately analyze the implications of prior receipt of any given type of benefit in the public charge totality of the circumstances test.

Continuing with the example of the guaranteed income pilot projects: the pilots do not all use the same means-test or other eligibility standards. While some guaranteed income pilots rely on a means-test using the federal poverty level, others use the average median income for a county, which in California is typically multiple times higher than the federal poverty level. Therefore, by considering only receipt of a benefit and not the eligibility standards, program goals, and overall design of each benefit, the proposed rule penalizes individuals who have access to pilots and programs with broader eligibility standards.

Without making a significantly more detailed inquiry into the benefits provided and accounting for differences between benefit availability from state to state, consideration of past receipt of public benefits will create inequitable applications of the public charge ground of inadmissibility. The necessary level of inquiry to establish fair considerations of past receipt of public benefits would create an unmanageable administrative burden for immigrants, benefit-granting agencies, and the immigration officer making the public charge determination. Therefore, consideration of past receipt of non-federal cash assistance will inevitably lead to inequitable application of the public charge ground for inadmissibility.

The proposed rule infringes on the authority of States by penalizing participants in lawfully administered public benefit programs.

Under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, states have the authority to issue state and local public benefits to immigrants regardless of their status, so long as the enacted state law affirmatively allows for provision of benefits to immigrants who are not "qualified."[7] As a result, some states offer many public benefits to immigrants who are not "qualified" immigrants under PRWORA or who are subject to a waiting period. California offers several such benefits, many of which are cash aid and/or designed to provide state-funded aid to individuals who would be qualified for a given federal benefit program if not for their immigration status. For example, California offers certain immigrants, who are not yet eligible for Supplemental Security Income (SSI), cash assistance via the Cash Assistance Program for Immigrants (CAPI). Additionally, California provides comprehensive full-scope state-only Medi-Cal benefits for individuals without satisfactory immigration status who are otherwise eligible for Medi-Cal but for their immigration status. From a federal perspective, these individuals are only eligible for restricted-scope or emergency-only Medi-Cal services.

Promulgating regulations that are designed to achieve the same effects as changing eligibility requirements for state and local benefits—decreased and foregone enrollment in public benefit programs by certain populations—usurps the authority of state legislatures and of Congress. The proposed rule will undermine the authority provided to the states by the United States Congress (via PRWORA) by penalizing participants in our lawfully established and administered programs. By creating obstacles to an individual's ability to adjust status or their ability to temporarily leave and re-enter the United States should they receive non-federal cash benefits, DHS is directly hindering a state's ability to administer programs authorized by Congress and established by the state legislature. We believe that the proposed rule must be amended to remove consideration of non-federal cash assistance for income maintenance.

The proposed rule must be amended to remove the consideration of past receipt of federal cash assistance.

By requiring consideration of the receipt of federal cash assistance, the proposed rule perpetuates confusing conflicts between public benefit eligibility and application of the public charge ground of inadmissibility. The proposed rule disregards the federal public benefit eligibility standards created under PRWORA. As DHS is aware, PRWORA significantly restricted immigrants' eligibility for federal, state, and local public benefits.[8] For example, an individual cannot receive Temporary Assistance for Needy Families (TANF) benefits, CalWORKs in California, if they are currently undocumented, a recipient of Temporary Protected Status (TPS), or a holder of certain non-immigrant visas (e.g., student visa). Individuals who are eligible to receive TANF benefits include lawful permanent residents with five years of residence, asylees, refugees, and certain trafficking survivors. Confusingly, the group of individuals who do not qualify for TANF listed above could potentially be subject to a future public charge determination, while the group of qualified immigrants would rarely, if ever, be subject to a future public charge determination.

[7] See 8 U.S.C. section 1621(d).

[8] See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104- 193, section 401, 110 Stat. 2105 (stating that a "qualified alien," as defined by statute, "is not eligible for any public benefit" except as set forth in the statute's exceptions).

Simply put, it is rare that an individual subject to a public charge determination would have previously been eligible to receive the benefits that are considered under both the current and past public charge policies. Therefore, continued inclusion of such consideration in the proposed rule will continue to deter otherwise eligible individuals from participating in public benefit programs and is not a useful indicator in the overall public charge determination.

The incongruity between public benefit eligibility and the proposed rule will perpetuate confusion amongst recipients, applicants, and the public benefit granting agencies. County eligibility workers, who are not immigration law specialists, cannot advise individuals on their likelihood of being subject to a future public charge determination. As a result, public benefit granting agencies are limited to providing feedback on which benefits may be considered under current public charge policy and advising individuals to seek counsel from an immigration legal services expert to see whether they may be subject to a public charge test in the future. This messaging is confusing, does not effectively address applicant and recipient concerns, and leads qualifying individuals to forego needed public benefits for which they are eligible.

It is important to note that it is the province of Congress, not DHS, to change the statutory eligibility requirements for TANF and SSI. As previously explained above, promulgating regulations that are designed to achieve the same effects as changing eligibility requirements for federal benefits—decreased and foregone enrollment in public benefit programs by certain populations—usurps the authority of Congress. If Congress wanted to achieve additional self-sufficiency or cost-savings goals, it could alter the eligibility rules for the enumerated programs. Congress has declined to do so, and in fact expanded eligibility for some federal benefit programs following the enactment of PRWORA in 1996. As such, we believe that the proposed rule must be amended to remove consideration of federal cash assistance for income maintenance from the public charge determinations.

The proposed rule fails to accurately consider administrative burdens for public benefit granting agencies.

As state government public benefit granting agencies, we provide state administration and oversight of both federal and state public benefits. We work in conjunction with county welfare departments, county health officers, non-profit organizations, contractors, and school districts to administer those federal and state public benefits to individuals and communities. As part of the state-level administration, we provide policy guidance and public-facing materials addressing issues such as public charge to ensure that messaging is consistent across the state and local-level administering organizations. Additionally, the state-level public benefit granting agencies are responsible for designing and implementing new public benefit and services programs. The proposed rule will continue to require significant administrative workload, state costs, and county costs while also continuing an insurmountable public messaging issue.

It is in part the responsibility of the state agency overseeing the federal and state public benefit programs to ensure that accurate and consistent public outreach and messaging materials are provided to county and non-profit partners as well as the public at large. The development of

clear and simple messaging on the topic of public charge has been difficult given the complex nature of immigration law and the repeated changes to the public charge policy and rule.

Unfortunately, it is not possible to create an outreach document that serves to inform each immigrant as to whether or not they will be subject to a future public charge determination and, if so, which benefits may be considered in that determination. To address this issue, the public messaging created by California's public benefit granting agencies instructs recipients to seek legal counsel and provide a link to state funded legal services non-profits. In 2018, CDSS awarded a state-funded grant of $1,212,000 entitled Public Benefits for Immigrants Outreach (PBIO) to a non-profit partner to provide technical assistance and training materials for legal service providers and community advocates on public charge. An additional $1,000,000 was issued under this grant program in 2019. Under the PBIO grant program, 40,912 individuals received training on the public charge ground for inadmissibility and related immigration and public benefit eligibility issues. CDSS also awarded $228,000 in funding to a nonprofit partner to train county staff and eligibility workers on public charge.

In California, county welfare departments (CWDs) are responsible for the administration of many of our public benefit programs including Medi-Cal, California Work Opportunity and Responsibility to Kids (CalWORKs), Refugee Cash Assistance (RCA), the Trafficking and Crime Victims Assistance Program (TCVAP), CAPI, and certain guaranteed income projects. While CWD eligibility workers are not permitted to provide legal counsel on an individual's immigration case, it is necessary that they have a working knowledge of what the public charge policy is and how to answer questions regarding public charge from applicants or recipients of public benefits. To address this need, we awarded a state-funded grant of $228,400 in 2019 to a non-profit partner to conduct trainings and develop reference materials for CWD eligibility workers on the topic of public charge. Under this grant, 1,830 county workers received trainings and materials.

As these examples show, it is clear that the 2019 Rule cost California millions of dollars in staff time and grant funding. However, the continued consideration of past receipt of public benefits under the proposed rule would require the State to fund analysis of new programs, creation of public outreach materials, and training for staff and partner organizations. The removal of consideration of past receipt of public benefits from the proposed rule would save federal, state, and local benefit granting agencies significant funding each year and allow for simpler and more effective administration of public benefit programs.

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Congress has authorized states to exclude certain immigrant groups from PRWORA's restrictions on immigrant eligibility for public benefit programs. Under this authority, California uses cash assistance programs to address a wide range of emergent and continuing economic concerns including response to the harms caused by the COVID-19 pandemic. California has spent millions of dollars attempting to educate and inform individuals on their eligibility for necessary public benefits and the potential public charge implications. The confusion and fear caused by the public charge rule has been a significant barrier for effective administration of

necessary public benefit programs in California. **We strongly urge DHS to amend the proposed rule, including by eliminating the consideration of past receipt of public benefits.**

Sincerely,

/s/

Mark Ghaly, MD, MPH

Secretary, Health and Human Services

/s/

Tomas Aragon, MD, DrPH

Director, Public Health

/s/

Jessica Altman

Executive Director, Covered California

/s/

Michelle Baass

Director, Health Care Services

/s/

Kim Johnson

Director, Social Services