



## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 103, 212, 213, and 245

[CIS No. 2715-22; DHS Docket No. USCIS-2021-0013]

RIN 1615-AC74

Public Charge Ground of Inadmissibility

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Final Rule.

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**SUMMARY:** The U.S. Department of Homeland Security (DHS) is amending its regulations to prescribe how it determines whether noncitizens are inadmissible to the United States because they are likely at any time to become a public charge. Noncitizens who are applicants for visas, admission, and adjustment of status must establish that they are not likely at any time to become a public charge unless Congress has expressly exempted them from this ground of inadmissibility or has otherwise permitted them to seek a waiver of inadmissibility. Under this rule, DHS would determine that a noncitizen is likely at any time to become a public charge if the noncitizen is likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. On August 14, 2019, DHS issued a different rule on this topic, Inadmissibility on Public Charge Grounds Final Rule (2019 Final Rule), which is no longer in effect. This rule implements a different policy than the 2019 Final Rule.

**DATES:** This final rule is effective [INSERT DATE 105 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This final rule will apply to applications postmarked on or after the effective date.

**FOR FURTHER INFORMATION CONTACT:** Andrew Parker, Branch Chief, Residence and Admissibility Branch, Residence and Naturalization Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, DHS, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone (240) 721-3000 (this is not a toll-free number).

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## **V. List of Subjects and Regulatory Amendments**

### **Table of Abbreviations**

AAO – Administrative Appeals Office

ADA – Americans with Disabilities Act

ANPRM – Advance Notice of Proposed Rulemaking

ASC – Application Support Center

BIA – Board of Immigration Appeals

BLS – Bureau of Labor Statistics

CBP – Customs and Border Protection

CDC – Centers for Disease Control and Prevention

CFR – Code of Federal Regulations

CHIP – Children’s Health Insurance Program

COS – Change of Status

COVID-19 – Coronavirus Disease 2019

DACA – Deferred Action for Childhood Arrivals

DHS – U.S. Department of Homeland Security

DOD – Department of Defense

DOS – U.S. Department of State

DOJ – Department of Justice

E.O. – Executive Order

EOS – Extension of Stay

FAM – Department of State Foreign Affairs Manual

FBR – Federal Benefit Rate

FDA – Food and Drug Administration

FPG – Federal Poverty Guidelines

FOIA – Freedom of Information Act

HCBS – Home and Community-Based Services

HCV – Housing Choice Voucher

HHS – U.S. Department of Health and Human Services

HSA – Homeland Security Act

HUD – U.S. Department of Housing and Urban Development

IIRIRA – Illegal Immigration Reform and Immigrant Responsibility Act of 1996

INA – Immigration and Nationality Act

INS – Immigration and Naturalization Service

IRCA – Immigration Reform and Control Act

LPR – Lawful Permanent Resident

LRIF – Liberian Refugee Immigration Fairness Act

NACARA – Nicaraguan Adjustment and Central American Relief Act

NATO – North Atlantic Treaty Organization

NEPA – National Environmental Policy Act

NOID – Notice of Intent to Deny

NPRM – Notice of Proposed Rulemaking

OAW – Operation Allies Welcome

OMB – Office of Management and Budget

PHA – Public Housing Agency

PHE – Public Health Emergency

PRA – Paperwork Reduction Act

PRWORA – Personal Responsibility and Work Opportunity Reconciliation Act of 1996

RFA – Regulatory Flexibility Act of 1980

RFE – Request for Additional Evidence

RIA – Regulatory Impact Analysis

SIPP – Survey of Income and Program Participation

SNAP – Supplemental Nutrition Assistance Program

SSA – Social Security Administration

SSI – Supplemental Security Income

TANF – Temporary Assistance for Needy Families

TPS – Temporary Protected Status

TVPA - Trafficking Victims Protection Act

UMRA – Unfunded Mandates Reform Act of 1995

USCIS – U.S. Citizenship and Immigration Services

USDA – U.S. Department of Agriculture

VAWA – Violence Against Women Act

WIC – Special Supplemental Nutrition Program for Women, Infants, and Children

## **I. Executive Summary**

### **A. Purpose of the Regulatory Action**

This rule implements the public charge ground of inadmissibility, found in section 212(a)(4) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(a)(4), in a manner that will be consistent with congressional direction; that will be clear and comprehensible for officers as well as for noncitizens<sup>1</sup> and their families; and that will lead to fair and consistent adjudications, thereby mitigating the risk of unequal treatment of similarly situated individuals.

Under the INA, noncitizens are inadmissible and therefore (1) ineligible for a visa, (2) ineligible for admission, and (3) ineligible for adjustment of status, if, in the opinion of DHS (or the Department of Justice (DOJ)) or consular officers of the Departments of State (DOS), as

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<sup>1</sup> For purposes of this discussion, DHS uses the term “noncitizen” to be synonymous with the term “alien” as it is used in the INA.

applicable),<sup>2</sup> they are likely at any time to become a public charge.<sup>3</sup> While the statute does not define the term “public charge,” it does provide that in making an inadmissibility determination, administering agencies must “at a minimum consider the alien’s age; health; family status; assets, resources, and financial status; and education and skills.”<sup>4</sup> The agencies may also consider an Affidavit of Support Under Section 213A of the INA submitted on the noncitizen’s behalf when such is required.<sup>5</sup>

Beginning in 1999, public charge inadmissibility determinations were made in accordance with the May 26, 1999, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* (1999 Interim Field Guidance), issued by the former Immigration and Naturalization Service (INS).<sup>6</sup> Under that approach, “public charge” was defined as a noncitizen who is “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.”<sup>7</sup> Under the 1999 Interim Field Guidance, a noncitizen’s reliance on or receipt of non-cash benefits such as the Supplemental Nutrition Assistance Program (SNAP), also known as food stamps; Medicaid (except for support for long-term

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<sup>2</sup> Three different agencies are responsible for applying the public charge ground of inadmissibility, each in a different context or contexts. DHS primarily applies the public charge ground of inadmissibility to applicants for admission at or between ports of entry and when adjudicating certain applications for adjustment of status. DOS consular officers are responsible for applying the public charge ground of inadmissibility as part of the visa application process and for determining whether a visa applicant is ineligible for a visa on public charge grounds at the time of application for a visa. This rule does not revise DOS standards or processes. DOJ is responsible for applying the public charge ground of inadmissibility with respect to noncitizens in immigration court. Immigration judges adjudicate matters in removal proceedings, and the Board of Immigration Appeals and in some cases the Attorney General adjudicate appeals arising from such proceedings. This rule does not revise DOJ standards or processes. DOS consular officers are responsible for applying the public charge ground of inadmissibility as part of the visa application process and for determining whether a visa applicant is ineligible for a visa on public charge grounds at the time of application for a visa. This rule does not revise DOS standards or processes.

<sup>3</sup> See INA sec. 212(a)(4)(A), 8 U.S.C. 1182(a)(4)(A). Congress has by statute exempted certain categories of noncitizens, such as asylees and refugees, from the public charge ground of inadmissibility. See, e.g., INA secs. 207(c)(3) and 209(c), 8 U.S.C. 1157(c)(3) and 1159(c). A full list of exemptions is included in this rule.

<sup>4</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>5</sup> See INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

<sup>6</sup> See “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999). Due to a printing error, the *Federal Register* version of the field guidance appears to be dated “March 26, 1999” even though the guidance was actually signed May 20, 1999, became effective May 21, 1999, and was published in the *Federal Register* on May 26, 1999.

<sup>7</sup> See “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689, 28692 (May 26, 1999).

institutionalization); and housing vouchers and other housing subsidies were not considered by DHS in determining whether a noncitizen was deemed likely at any time to become a public charge.

On August 14, 2019, DHS issued a rule on the public charge ground of inadmissibility, which is no longer in effect.<sup>8</sup> The 2019 Final Rule expanded DHS’s definition of “public charge” and imposed a heavy direct paperwork burden on applicants and DHS officers. The 2019 Final Rule was associated with widespread collateral effects as discussed in section III.E below, primarily with respect to those who were not even subject to the public charge ground of inadmissibility, such as U.S. citizen children in mixed-status households. Notwithstanding these widespread collateral effects, during the time that the 2019 Final Rule was in effect, of the 47,555 applications for adjustment of status to which the rule was applied, DHS issued only three denials (which were subsequently reopened and approved) and two Notices of Intent to Deny (which were ultimately rescinded, after which the applications were approved) based on the totality of the circumstances of a public charge inadmissibility determination under section 212(a)(4)(A) and (B) of the INA, 8 U.S.C. 1182(a)(4)(A) and (B).

This final rule would implement a different policy than the 2019 Final Rule. As stated above, in this new rule, DHS will implement section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), in a manner that will be clear and comprehensible for officers as well as for noncitizens and their families and will lead to fair and consistent adjudications, thereby mitigating the risk of unequal treatment of similarly situated individuals. In this rule, DHS has declined to include certain aspects of the 2019 Final Rule that in DHS’s view caused undue fear and confusion, such as (1) a complicated and unnecessarily broad definition of “public charge”; (2) mandatory consideration of past, current, and future receipt of certain supplemental public benefits, notwithstanding that most noncitizens subject to the public charge ground of inadmissibility would not have been

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<sup>8</sup> See “Inadmissibility on Public Charge Grounds,” 84 FR 41292 (Aug. 14, 2019), as amended by “Inadmissibility on Public Charge Grounds; Correction,” 84 FR 52357 (Oct. 2, 2019).



eligible for such benefits at the time of application (and notwithstanding the potential collateral effects of this policy on U.S. citizen children in mixed-status households and noncitizens who are not subject to the public charge ground of inadmissibility); (3) burdensome and in some instances duplicative information collection requirements; (4) designation of certain factors or sets of factual circumstances as “heavily weighted”; and (5) imposition of a “public benefit condition” for extension of stay and change of status, notwithstanding that the nonimmigrant population to whom this condition applied is largely ineligible for such benefits.

As discussed at greater length below, DHS believes that, in contrast to the 2019 Final Rule, this rule would effectuate a more faithful interpretation of the statutory phrase “likely at any time to become a public charge”; avoid unnecessary burdens on applicants, officers, and benefits-granting agencies; and mitigate the possibility of widespread “chilling effects”<sup>9</sup> with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible, especially with respect to individuals who are not subject to the public charge ground of inadmissibility. Under this rule, similar to the 1999 Interim Field Guidance that was in place for two decades prior to the 2019 Final Rule, noncitizens would be considered likely at any time to become a public charge if they are likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

This final rule also makes important clarifications and changes as compared to the 1999 Interim Field Guidance. For instance, this rule clarifies DHS’s approach to consideration of disability and long-term institutionalization at government expense; states a bright-line rule against considering the receipt of public benefits by an applicant’s dependents (such as a U.S.

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<sup>9</sup> The term “chilling effects” used throughout this rule is meant to convey the indirect effect of chilling an individual’s participation in public benefit programs, regardless of whether they are subject to the public charge ground of inadmissibility, based on fear of negative immigration consequences.

citizen child in a mixed-status household); and changes the Form I-485 to collect additional information relevant to the public charge inadmissibility determination. DHS also added streamlined provisions to clarify acceptance, form, and amount of USCIS public charge bonds, as well as cancellation of public charge bonds. Finally, later in this preamble, in response to public comments, DHS further clarifies that primary dependence connotes significant reliance on the government for support, and means something more than dependence that is merely transient or supplementary.

The rule also contains multiple additional provisions and definitions, some of which are consistent with aspects of the 1999 Interim Field Guidance (and the 2019 Final Rule), and some of which differ in material respects.

#### **B. Summary of Legal Authority**

The authority of the Secretary of Homeland Security (Secretary) for the regulatory amendments is found in section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), which governs public charge inadmissibility determinations; section 235 of the INA, 8 U.S.C. 1225, which addresses applicants for admission; and section 245 of the INA, 8 U.S.C. 1255, which addresses eligibility criteria for applications for adjustment of status. In addition, section 103(a)(3) of the INA, 8 U.S.C. 1103(a)(3), authorizes the Secretary to establish such regulations as the Secretary deems necessary for carrying out the Secretary's authority under the INA.

#### **C. Summary of the Proposed Rule**

On February 24, 2022, DHS published a notice of proposed rulemaking, *Public Charge Ground of Inadmissibility* (NPRM).<sup>10</sup> The NPRM proposed to prescribe how DHS would determine whether a noncitizen is inadmissible to the United States under section 212(a)(4) of the INA). Under the NPRM, a noncitizen would be considered likely at any time to become a public charge if they are likely at any time to become primarily dependent on the government for

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<sup>10</sup> 87 FR 10570 (Feb. 24, 2022).

subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. In the NPRM, DHS proposed definitions for the terms “likely at any time to become a public charge,” “public cash assistance for income maintenance,” “long-term institutionalization at government expense,” “receipt (of public benefits),” and “government.”

In the NPRM, DHS proposed to adopt a standard similar to the one used in the 1999 Interim Field Guidance and related 1999 NPRM, which tied public charge inadmissibility to primary dependence on the government for subsistence, as demonstrated by the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. The NPRM also identified the groups of individuals generally subject to or exempt from the public charge inadmissibility ground and provided a list of statutory and regulatory exemptions from and waivers of the public charge ground of inadmissibility.

DHS continues to believe that the “primarily dependent” standard properly balances the competing policy objectives established by Congress.<sup>11</sup> Although the term “public charge” does not have a single clear meaning, its basic thrust is clear: significant reliance on the government for support. This has been the longstanding purpose of the public charge ground of inadmissibility; individuals who are unable or unwilling to work to support themselves, and who

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<sup>11</sup> In the 2019 Final Rule, DHS canvassed a range of sources to support the proposition that the statute was ambiguous and that the new definition represented a reasonable interpretation of such ambiguity in light of the policy goals articulated in PRWORA. For example, DHS wrote that the rule “is not inconsistent with Congress’ intent in enacting the public charge ground of inadmissibility in [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)], or in enacting PRWORA.” See “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41317 (Aug. 14, 2019). DHS noted that Congress enacted those two laws in the same year, that IIRIRA amended the public charge inadmissibility statute, and that PRWORA contained the statements of national policy. DHS continued by stating that the rule, “in accordance with PRWORA, disincentivizes immigrants from coming to the United States in reliance on public benefits.” *Ibid.* Similarly, in support of a similar definition of “public charge” in the 2018 NPRM, DHS wrote that “the term public charge is ambiguous as to how much government assistance an individual must receive or the type of assistance an individual must receive to be considered a public charge. The statute and case law do not prescribe the degree to which an alien must be receiving public benefits to be considered a public charge. Given that neither the statute nor the case law prescribes the degree to which an alien must be dependent on public benefits to be considered a public charge, DHS has determined that it is permissible and reasonable to propose a different approach.” See “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51164 (Oct. 10, 2018). DHS continues to believe that the statute is ambiguous, but for reasons discussed throughout this preamble, DHS now believes the interpretation contained in this rule reflects a reasonable and indeed the most appropriate interpretation of the statute.

do not have other nongovernmental means of support such as family members, assets, or sponsors, are at the core of the term “public charge.” Individuals who are likely to primarily rely on their own resources, while secondarily relying on some government support, are less readily characterized as public charges. DHS does not believe that the term is best understood to include a person who receives benefits from the government to help to meet some needs but is not primarily dependent on the government and instead has one or more sources of independent income or resources upon which the individual primarily relies.

To evaluate a person’s likelihood to become primarily dependent on the government for subsistence, DHS proposed to designate a list of public benefits that would be considered for purposes of a public charge inadmissibility determination. DHS recognized that the universe of public benefits is quite large. In seeking to provide clear notice of the effects of the rule and to limit certain undesired collateral effects that may be associated with the rule (such as indirect effects on social service providers and chilling effects), DHS proposed to designate public cash assistance for income maintenance (i.e., Supplemental Security Income (SSI), cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF), and State, Tribal, territorial, or local cash benefit programs for income maintenance) and long-term institutionalization at government expense as the benefits that DHS would consider as part of the public charge inadmissibility determination.

DHS believes that this approach—the “primarily dependent” standard and the focus on the specific benefits contained in the proposed rule—is consistent with a more faithful interpretation of the term “public charge” and has the additional benefit of being more administrable and consistent with longstanding practice than the 2019 Final Rule.<sup>12</sup> DHS has also

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<sup>12</sup> The 2019 Final Rule also designated a specific list of public benefits as relevant to the public charge determination, which included benefits other than cash assistance for income maintenance and long-term institutionalization at government expense such as SNAP, most non-emergency forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and public housing under the Housing Act of 1937.

determined that this approach is less likely to result in the significant chilling effects among both noncitizens who are not subject to the public charge ground of inadmissibility and U.S. citizens, along with certain effects on State and local governments and social service providers (such as increases in inquiries regarding the public charge implications of receiving certain benefits and increases in uncompensated care), that were observed following promulgation of the 2019 Final Rule.

DHS sought comment on the proposal to consider cash assistance for income maintenance, but not non-cash benefits (apart from long-term institutionalization at government expense), in determining whether a noncitizen is likely at any time to become primarily dependent on the government for subsistence. As explained below, following receipt of a range of public comments on this topic (including proposals to narrow, expand, or maintain the proposed list of public benefits), DHS has decided to finalize this aspect of the proposed rule without change other than the inclusion of an additional provision in the final rule clarifying the continuation of this policy, which was articulated in the 1999 Interim Field Guidance and reiterated in the recent NPRM.

In addition to proposing new definitions, DHS proposed the factors that DHS would consider in prospectively determining whether an applicant for admission or adjustment of status before DHS is inadmissible on the public charge ground in the totality of the circumstances. Those factors include the statutory minimum factors of age; health; family status; assets, resources, and financial status; and education and skills; as well as past receipt of designated public benefits. DHS specifically stated that the fact that an applicant has a disability, as defined by section 504 of the Rehabilitation Act (Section 504), would not alone be a sufficient basis to determine whether the noncitizen is likely at any time to become a public charge.

In addition, DHS proposed to revise the existing information collection, Form I-485, Application to Register Permanent Residence or Adjust Status, to include additional questions regarding several of the statutory minimum factors: family status; assets, resources, and financial

status; education and skills; as well as past receipt of the designated public benefits. As proposed, the additional questions would apply to only those applicants who are subject to the public charge ground of inadmissibility.

DHS also proposed to require that all written denial decisions issued by USCIS to applicants reflect consideration of each of the statutory minimum factors, the Affidavit of Support Under Section 213A of the INA, where required, and the noncitizen's current and/or past receipt of public benefits, consistent with the standards set forth in the proposed rule, and to specifically articulate the reasons for the officer's determination.

DHS also proposed to tailor its rule to limit the effects of certain regulatory provisions on discrete populations. DHS proposed not to consider public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, or for which the noncitizen received a waiver of public charge inadmissibility, as well as not to consider any public benefits received by a noncitizen who was made eligible by Congress for resettlement assistance, entitlement programs, and other benefits available to refugees, even if the noncitizen was not admitted as a refugee under section 207 of the INA, 8 U.S.C. 1157.

Finally, DHS proposed amending regulations related to T nonimmigrant status holders, clarifying that these T nonimmigrants seeking adjustment of status are not subject to the public charge ground of inadmissibility.

DHS received 223 comments on the proposed rule, the majority of which expressed support or qualified support for the policy approach articulated in the proposed rule. A few of the public comments supported a return to the framework contained in the 2019 Final Rule. The preamble to this final rule includes summaries of the significant issues raised in the comments, and includes responses to those comments and explanations for policy changes.

#### **D. Summary of Changes from the NPRM to the Final Rule**

Following careful consideration of public comments received, DHS has made several changes to the regulatory text proposed in the NPRM.<sup>13</sup> As discussed in detail in the comment responses, the changes in this final rule are as follows:

## **1. Definitions**

### **a. Definition of *Household***

In response to public comments, DHS added a definition of “household” to be used in connection with the family status and assets, resources, and financial status factors. The noncitizen’s household will include:

- The noncitizen;
- If physically residing with the noncitizen, the noncitizen’s spouse, parents, unmarried siblings under 21 years of age, and children;
- Any other individuals who are listed as dependents on the noncitizen’s federal income tax return; and
- Any other individuals who list the noncitizen as a dependent on their federal income tax return.

DHS notes that a noncitizen’s household’s income includes income provided to the household from sources who are not members of the household, including but not limited to alimony or child support.

### **b. Definition of Long-term institutionalization at government expense**

DHS replaced the term “alien” with the term “beneficiary” to clarify that the forward-looking nature of the public charge inquiry includes long-term institutionalization that occurs after the applicant for admission or adjustment of status is no longer an “alien,” as that term is defined in the INA.

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<sup>13</sup> 87 FR at 10668–10671 (Feb. 24, 2022).

### **c. Definition of Receipt (of public benefits)**

DHS replaced the term “alien” with the term “individual” to clarify that the forward-looking nature of the public charge determination includes public cash assistance for income maintenance that is received after the applicant for admission or adjustment of status is no longer an “alien,” as that term is defined in the INA.

## **2. Statutory Minimum Factors**

DHS modified 8 CFR 212.22(a)(1) from the proposed version in the following ways:

### **d. General**

DHS eliminated the duplicative text “at a minimum” from paragraph (a)(1).

### **e. Health**

DHS added text stating that DHS will consider the noncitizen’s health as evidenced by a report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required in making public charge inadmissibility determinations. DHS will generally defer to the report of the examination unless there is evidence that the report is incomplete.

### **f. Family Status**

DHS added text stating that DHS will consider the noncitizen’s family status as evidenced by the noncitizen’s household size. “Household” is defined in 8 CFR 212.21(f).

### **g. Assets, Resources, and Financial Status**

DHS added text stating that DHS will consider the noncitizen’s assets, resources, and financial status as evidenced by the noncitizen’s household’s income, assets, and liabilities (excluding any income from public benefits listed in 8 CFR 212.21(b) and income or assets from illegal activities or sources such as proceeds from illegal gambling or drug sales).



## **h. Education and Skills**

DHS added text stating that DHS will consider the noncitizen's education and skills as evidenced by the noncitizen's degrees, certifications, licenses, skills obtained through work experience or educational programs, and educational certificates.

### **3. Consideration of Current and/or Past Receipt of Public Benefits**

DHS clarified the regulatory text by stating that DHS will not consider the receipt of, or certification or approval for future receipt of, public benefits not referenced in 8 CFR 212.21(b) or (c), such as Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs, Children's Health Insurance Program (CHIP), Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits. This policy was discussed at length in the proposed rule's preamble, but DHS has included a more direct statement to that effect in the final regulatory text. As further explained in the proposed rule's preamble and in response to comments below, DHS has opted for an approach in which it considers past or current receipt of the benefits most indicative of whether a person is likely to become primarily dependent on the government for subsistence while excluding from consideration a range of benefits that are less probative of primary dependence—and for which applicants for admission and adjustment of status are most often ineligible in any event. This choice, informed by on-the-record input from benefits-granting agencies, allows DHS to faithfully administer the statute without deterring eligible noncitizens and their families, including U.S. citizen children, from seeking important benefits for which they are eligible and which it is in the public interest for them to receive.

### **4. Public Charge Bonds**

#### **a. Cancellation and breach of public charge bonds**

DHS is amending 8 CFR 103.6(c)(1), relating to the cancellation and breach of public charge bonds. With these amendments, DHS is:

- Clarifying that a public charge bond will be cancelled upon death, permanent departure, or naturalization of the immigrant, provided that the immigrant did not breach such bond by receiving public cash assistance for income maintenance or long-term institutionalization at government expense;
- Stating that a public charge bond may be cancelled by USCIS after the fifth anniversary of the immigrant's admission or adjustment of status, provided the immigrant files a Form I-356, Request for Cancellation of Public Charge Bond, requesting the cancellation, and USCIS finds that the immigrant did not receive public cash assistance for income maintenance or long-term institutionalization at government expense prior to that fifth anniversary; and
- Making technical updates to clarify that bond cancellation authority lies with USCIS rather than district directors.

**b. Public charge bond acceptance, form, and amount**

DHS is amending 8 CFR 213.1, relating to the acceptance of public charge bonds. With these amendments, DHS is:

- Adding a new paragraph specifying that USCIS may invite adjustment of status applicants who are inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and whose applications are otherwise approvable, to submit a public charge bond in USCIS' discretion and clarifying that USCIS will set the bond amount and provide instructions for submission of the bond;
- Modifying the existing regulatory language relating to acceptance of bonds from noncitizens seeking immigrant visas from DOS, clarifying that USCIS will provide instructions for the submission of the bond, USCIS is the agency that accepts the bond, and that the consular officer will set the amount of the bond; and
- Revising the existing regulatory language about form and bond amount of public charge bonds by eliminating reference to a specific form number, stating that USCIS or the

consular officer will set the amount of the bond of an amount no less than \$1,000, and requiring USCIS to provide a receipt to the noncitizen or an interested party on a form designated by USCIS for such purpose.

#### **E. Implementation**

DHS will begin implementing this final rule on its effective date (i.e., on [INSERT DATE 105 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]). This final rule will apply to applications for adjustment of status that are postmarked on or after the effective date. During the period between publication and the effective date, DHS will also conduct necessary public outreach to minimize the risk of confusion or chilling effects among both noncitizens and U.S. citizens. On or before this date, consistent with 8 CFR 212.22(b) DHS will issue subregulatory guidance to inform, but not dictate the outcome of, officers' totality of the circumstances determinations.

#### **F. Summary of Costs and Benefits**

The rule will result in new costs, benefits, and transfers. To provide a full understanding of the impacts of the rule, DHS considers the potential impacts of this final rule relative to two baselines. The No Action Baseline represents a state of the world under the 1999 Interim Field Guidance, which is the policy currently in effect. The second baseline is the Pre-Guidance Baseline, which represents a state of the world before the issuance of the 1999 Interim Field Guidance (i.e., a state of the world in which the 1999 Interim Field Guidance did not exist). DHS also considers the potential effects of a regulatory alternative that is a rulemaking similar to the 2018 NPRM and the 2019 Final Rule. As DHS suggested in the 2019 Final Rule, those effects would primarily be experienced by persons who are not subject to the public charge ground of inadmissibility and who might disenroll from public benefits or forgo enrollment in public

benefits due to fear and confusion regarding the scope of the regulatory alternative.<sup>14</sup> Further discussion of the regulatory alternative can be found in the “Regulatory Alternative” section.

Relative to the No Action Baseline, the primary source of quantified new direct costs for the final rule is the increase in the time required to complete Form I-485. DHS estimates that the rule would impose additional new direct costs of approximately \$6,435,755 annually to applicants filing Form I-485. In addition, the rule will result in an annual savings for a subpopulation of affected individuals: T nonimmigrants applying for adjustment of status would no longer need to submit Form I-601 to seek a waiver of the public charge ground of inadmissibility. DHS estimates the total annual savings for this population will be approximately \$15,359. DHS estimates that the total annual net costs will be approximately \$6,420,396.<sup>15</sup>

Over the first 10 years of implementation, DHS estimates the total net costs of the rule will be approximately \$64,203,960 (undiscounted). In addition, DHS estimates that the 10-year discounted total net costs of this rule will be approximately \$54,767,280 at a 3-percent discount rate and approximately \$45,094,175 at a 7-percent discount rate.

DHS expects the primary benefit of this final rule to be the non-quantified benefit of increased clarity in the rules governing public charge inadmissibility determinations. By codifying into regulations the current practice under the No Action Baseline (the 1999 Interim Field Guidance) with some changes, the final rule reduces uncertainty and confusion.

The following two tables provide a more detailed summary of the provisions and their impacts relative to the No Action Baseline and Pre-Guidance Baseline, respectively.

<b>Table 1. Summary of Major Provisions and Economic Impacts of the Rule, FY 2022 – FY 2032 (Relative to the No Action Baseline)</b>		
<b>Provision</b>	<b>Purpose</b>	<b>Expected Impact of Rule</b>

<sup>14</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41313 (Aug. 14, 2019).

<sup>15</sup> Calculations: Total annual net costs (\$6,420,396) = Total annual costs (\$6,435,755) – Total annual savings (\$15,359).

<p>Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders.</p> <p>Revising 8 CFR 245.23. Adjustment of noncitizens in T nonimmigrant classification.</p>	<p>To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.</p>	<p><b>Quantitative:</b> <u>Cost Savings:</u></p> <ul style="list-style-type: none"> <li>• Total savings of approximately \$15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul>
<p>Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.</p>	<p>To define the categories of noncitizens that are subject to the public charge inadmissibility determination.</p>	<p><b>Qualitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• The rule will reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul>
<p>Adding 8 CFR 212.21. Definitions.</p>	<p>To establish key definitions, including “likely at any time to become a public charge,” “receipt (of public benefits),” “public cash assistance for income maintenance,” “long-term institutionalization at government expense,” and “government,” and “household.”</p>	<p><b>Quantitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Qualitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The final rule could lead to an increase in transfer payments, primarily due to increased public benefit participation by individuals who are not subject to the public charge ground of inadmissibility, but for whom the final rule offers some additional measure of clarity or certainty regarding the immigration-related effects of public benefits enrollment. This could include, for instance, U.S. citizen children</li> </ul>

		<p>in mixed status families, who would receive greater assurance that their receipt of public benefits may not be considered in their relatives' public charge inadmissibility determinations.</p>
<p>Adding 8 CFR 212.22. Public charge inadmissibility determination.</p>	<p>To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.</p>	<p><b>Quantitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Total annual direct costs of the rule will be approximately \$6,435,755 to applicants applying to adjust status using Form I-485 with an increased time burden.</li> </ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• By clarifying rules governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the rule may reduce time spent by the affected population in deciding whether to apply for adjustment of status or enroll in or disenroll from public benefit programs.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Costs to various entities and individuals associated with regulatory familiarization with the rule. Costs will include the opportunity cost of time to read the rule and subsequently determine applicability of the rule's provisions. DHS estimates that the time to read this rule in its entirety will be 8 to 9 hours per individual.</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The rule could lead to an increase in transfer payments associated with public benefit participation, predominantly by individuals who are not subject to the public charge ground of inadmissibility in any event. This increase would be the result of better clarity around which noncitizens are exempt from the public charge ground of</li> </ul>

		<p>inadmissibility, and which benefits are considered under this rule.</p>
<p>Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.</p>	<p>Outlines exemptions and waivers for inadmissibility based on the public charge ground.</p>	<p><b>Qualitative:</b>  <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• The rule will reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens who are in a status that is exempt from the public charge ground of inadmissibility or who are made eligible by Congress for certain benefits made available to refugees, may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.</li> </ul>
<p>Amending 8 CFR 103.6. Immigration bonds.  Amending 8 CFR 213.1. Admission under bond or cash deposit.</p>	<p>To clarify cancellation and breach of public charge bonds.  To add specifics to the public charge bond provision for noncitizens who are seeking adjustment of status for a public charge bond.</p>	<p><b>Qualitative:</b>  <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Potentially enable a noncitizen who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• DHS expects that there will be a cost to bond applicants</li> </ul>

		associated with completing the forms. However, DHS expects the population using the public charge bond form and bond cancellation form to be de minimis.
Source: USCIS analysis.		

<b>Table 2. Summary of Major Provisions and Economic Impacts of the Rule, FY 2022 – FY 2032 (Relative to the Pre-Guidance Baseline)</b>		
<b>Provision</b>	<b>Purpose</b>	<b>Expected Impact of Rule</b>
Revising 8 CFR 212.18. Application for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	<b>Quantitative:</b> <u>Cost Savings:</u> <ul style="list-style-type: none"> <li>Total savings of approximately \$15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility.</li> </ul> <u>Costs</u> <ul style="list-style-type: none"> <li>None</li> </ul>
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge inadmissibility determination.	<b>Qualitative:</b> <u>Benefits</u> <ul style="list-style-type: none"> <li>The rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.</li> </ul> <u>Costs</u> <ul style="list-style-type: none"> <li>None</li> </ul>
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including “likely at any time to become a public charge,” “receipt (of public benefits),” “public cash assistance for income maintenance,” “long-term institutionalization at government expense,” and “government,” and “household.”	<b>Quantitative:</b> <u>Benefits</u> <ul style="list-style-type: none"> <li>None</li> </ul> <u>Costs</u> <ul style="list-style-type: none"> <li>None</li> </ul> <b>Qualitative:</b> <u>Benefits</u> <ul style="list-style-type: none"> <li>None</li> </ul> <u>Costs</u>



		<ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The final rule could lead to an increase in transfer payments, primarily due to increased public benefit participation by individuals who are not subject to the public charge ground of inadmissibility, but for whom the final rule offers some additional measure of clarity or certainty regarding the immigration-related effects of public benefits enrollment. This could include, for instance, U.S. citizen children in mixed status families, who would receive greater assurance that their receipt of public benefits may not be considered in their relatives' public charge inadmissibility determinations.</li> </ul>
<p>Adding 8 CFR 212.22. Public charge inadmissibility determination.</p>	<p>To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.</p>	<p><b>Quantitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Total annual direct costs of the rule will be approximately \$6,435,755 to applicants applying to adjust status using Form I-485 with an increased time burden.</li> </ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the rule may reduce time spent by the affected population in deciding whether to apply for adjustment of status or enroll in or disenroll from public benefit programs.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Costs to various entities and individuals associated with regulatory familiarization with the rule. Costs will include the opportunity cost of time to read the rule and subsequently determine applicability of the rule's</li> </ul>

		<p>provisions. DHS estimates that the time to read this rule in its entirety will be 8 to 9 hours per individual.</p> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The rule could lead to an increase in transfer payments associated with public benefit participation, predominantly by individuals who are not subject to the public charge ground of inadmissibility in any event. This increase would be the result of better clarity around which noncitizens are exempt from the public charge ground of inadmissibility and which benefits are considered under the rule.</li> </ul>
<p>Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.</p>	<p>Outlines exemptions and waivers for inadmissibility based on the public charge ground.</p>	<p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• The rule will reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The primary impact of the rule relative to the Pre-Guidance Baseline will be an increase in transfer payments from the Federal and State governments to individuals. However, DHS is unable to quantify these effects given how much time has passed between the issuance of the 1999 Interim Field Guidance and this rulemaking.</li> <li>• The rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens who are in a status that is exempt from the public charge ground of inadmissibility or who are made eligible by Congress for certain benefits made available to refugees, may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.</li> </ul>

<p>Amending 8 CFR 103.6. Immigration bonds. Amending 8 CFR 213.1. Admission under bond or cash deposit.</p>	<p>To clarify cancellation and breach of public charge bonds. To add specifics to the public charge bond provision for noncitizens who are seeking adjustment of status, including the minimum amount required for a public charge bond.</p>	<p><b>Qualitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Potentially enable a noncitizen who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• DHS expects that there will be a cost to bond applicants associated with completing the forms. However, DHS expects the population using the public charge bond form and bond cancellation form to be de minimis.</li> </ul>
<p>Source: USCIS analysis.</p>		

## II. Background

### A. Legal Authority

The Secretary’s authority for issuing this rule is found in various sections of the INA (8 U.S.C. 1101 et seq.) and the Homeland Security Act of 2002 (HSA).<sup>16</sup>

Section 102 of the HSA, 6 U.S.C. 112, and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration laws of the United States. Section 101 of the HSA, 6 U.S.C. 111, establishes that part of DHS’s primary mission is to ensure that efforts, activities, and programs aimed at securing the homeland do not diminish either the overall economic security of the United States or the civil rights and civil liberties of persons.

In addition to establishing the Secretary’s general authority for the administration and enforcement of immigration laws, section 103 of the INA, 8 U.S.C. 1103, enumerates various related authorities, including the Secretary’s authority to establish such regulations, prescribe such forms of bond, issue such instructions, and perform such other acts as the Secretary deems

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<sup>16</sup> See Pub. L. 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq. (2002).

necessary for carrying out such authority.

Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), provides that an applicant for a visa, admission, or adjustment of status is inadmissible if they are likely at any time to become a public charge.

In general, under section 213 of the INA, 8 U.S.C. 1183, the Secretary has the discretion to admit into the United States a noncitizen who is determined to be inadmissible based only on the public charge ground upon the giving of a suitable and proper bond or undertaking approved by the Secretary.

Section 235 of the INA, 8 U.S.C. 1225, addresses the inspection of applicants for admission, including inadmissibility determinations of such applicants.

Section 245 of the INA, 8 U.S.C. 1255, generally establishes eligibility criteria for adjustment of status to that of a lawful permanent resident.

## **B. The Public Charge Ground of Inadmissibility**

Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), provides that an applicant for a visa, admission, or adjustment of status is inadmissible if they are likely at any time to become a public charge. The public charge ground of inadmissibility, therefore, applies to individuals applying for a visa to come to the United States temporarily or permanently (typically adjudicated by DOS consular officers), for admission (typically adjudicated by U.S. Customs and Border Protection officers and U.S. Border Patrol Agents, and governed by this rule), or for adjustment of status to that of a lawful permanent resident (governed by this rule when adjudicated by U.S. Citizenship and Immigration Services officers).<sup>17</sup> By statute, some categories of noncitizens are exempt from the public charge ground of inadmissibility, while others may apply for a waiver of the public charge inadmissibility ground.<sup>18</sup>

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<sup>17</sup> See INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>18</sup> See INA sec. 245(j), 8 U.S.C. 1255(j). See 8 CFR 245.11. See INA sec. 245(h)(2)(A), 8 U.S.C. 1255(h)(2)(A). See INA sec. 245(l)(2)(A), 8 U.S.C. 1255(l)(2)(A). See INA sec. 212(d)(3)(A), 8 U.S.C. 1182(d)(3)(A).

The INA does not define the term “public charge.” It does, however, specify that when determining whether a noncitizen is likely at any time to become a public charge, consular officers and immigration officers must, at a minimum, consider the noncitizen’s age; health; family status; assets, resources, and financial status; and education and skills.<sup>19</sup> Additionally, section 212(a)(4)(B)(ii) of the INA, 8 U.S.C. 1182(a)(4)(B)(ii), permits the consular officer or the immigration officer to consider any Affidavit of Support Under Section 213A of the INA submitted on the applicant’s behalf, when determining whether the applicant is likely at any time to become a public charge.<sup>20</sup>

Additionally, in general, under section 213 of the INA, 8 U.S.C. 1183, the Secretary has the discretion to admit into the United States a noncitizen who is determined to be inadmissible based only on the public charge ground upon the giving of a suitable and proper bond or undertaking approved by the Secretary.<sup>21</sup>

### **C. 2019 DHS Inadmissibility on Public Charge Ground Final Rule, Vacatur, and Litigation History**

In August 2019, DHS issued a final rule, *Inadmissibility on Public Charge Grounds* (2019 Final Rule).<sup>22</sup> As explained in more detail in the NPRM,<sup>23</sup> the 2019 Final Rule provided key definitions, including “public charge” and “public benefits,” and provided a multi-factor framework along with associated evidentiary requirements through which USCIS would determine inadmissibility on the public charge ground. The 2019 Final Rule added provisions that rendered certain nonimmigrants ineligible for extension of stay or change of status if they

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<sup>19</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>20</sup> See INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii). When required, the applicant must submit an Affidavit of Support Under Section 213A of the INA (Form I-864 or Form I-864EZ). With very limited exceptions, most noncitizens seeking family-based immigrant visas and adjustment of status, and some noncitizens seeking employment-based immigrant visas or adjustment of status, must submit a sufficient Affidavit of Support Under Section 213A of the INA in order to avoid being found inadmissible as likely at any time to become a public charge. See INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

<sup>21</sup> See INA sec. 213, 8 U.S.C. 1183.

<sup>22</sup> See “Inadmissibility on Public Charge Grounds,” 84 FR 41292 (Aug. 14, 2019), as amended by “Inadmissibility on Public Charge Grounds; Correction,” 84 FR 52357 (Oct. 2, 2019).

<sup>23</sup> See 87 FR at 10606 (Feb. 24, 2022).

received public benefits for a certain period, and also revised DHS regulations governing the Secretary’s discretion to accept a public charge bond under section 213 of the INA, 8 U.S.C. 1183, for those seeking adjustment of status. The 2019 Final Rule did not interpret or change DHS’s implementation of the public charge ground of deportability.<sup>24</sup>

Also as discussed in the NPRM,<sup>25</sup> the 2019 Final Rule was set to take effect on October 15, 2019. Before it did, numerous Plaintiffs filed suits challenging the 2019 Final Rule in five district courts, across four circuits.<sup>26</sup> Following a series of preliminary injunctions and stays or reversals of those injunctions, the 2019 Final Rule was ultimately vacated nationwide by a partial final judgment entered by the U.S. District Court for the Northern District of Illinois.<sup>27</sup> DHS subsequently formally removed the 2019 Final Rule from the *Code of Federal Regulations*.<sup>28</sup>

The litigation concerning the 2019 Final Rule continued, with attempts by certain States to intervene in the various cases. On May 12, 2021, a collection of States filed motions to intervene in the U.S. District Court for the Northern District of Illinois for reconsideration of the grant of partial summary judgment and for other relief.<sup>29</sup> The motions were denied, and prospective intervenors noted their appeal to the U.S. Court of Appeals for the Seventh Circuit.

Separately, on March 10, 2021, a collection of prospective intervenors, led by the State of Arizona, filed an unsuccessful motion to intervene before the U.S. Court of Appeals for the Ninth Circuit.<sup>30</sup> The prospective intervenors then filed a motion before the Supreme Court seeking leave to intervene, which the Court ordered to be held in abeyance while the prospective

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<sup>24</sup> See INA sec. 237(a)(5), 8 U.S.C. 1227(a)(5). See “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41295 (Aug. 14, 2019).

<sup>25</sup> See 87 FR at 10586 (Feb. 24, 2022).

<sup>26</sup> *CASA de Maryland, Inc., et al. v. Trump*, 19-cv-2715 (D. Md.); *City and County of San Francisco, et al. v. DHS, et al.*, 19-cv-04717 (N.D.Ca.); *City of Gaithersburg, et al. v. Trump, et al.*, 19-cv-02851 (D. Md.); *Cook County et al. v. McAleenan et al.*, 19-cv-06334 (N.D. Ill.); *La Clinica De La Raza, et al. v. Trump, et al.*, 19-cv-4980 (N.D. Ca.); *Make the Road New York, et al. v. Cuccinelli, et al.*, 19-cv-07993 (S.D.N.Y.); *New York, et al. v. DHS, et al.*, 19-cv-07777 (S.D.N.Y.); *State of California, et al. v. DHS, et al.*, 19-cv-04975 (N.D. Cal.); *State of Washington, et al. v. DHS, et al.*, 19-cv-05210 (E.D. Wa.).

<sup>27</sup> See *Cook County v. Wolf*, 498 F. Supp. 3d 999 (N.D. Ill. Nov. 2, 2020).

<sup>28</sup> See “Inadmissibility on Public Charge Grounds; Implementation of Vacatur,” 86 FR 14221 (Mar. 15, 2021).

<sup>29</sup> See *Texas, et al. v. Cook County, Illinois, et al.*, 1:19-cv-0633419 (N.D. Ill. May 12, 2021).

<sup>30</sup> *City and County of San Francisco, et al. v. USCIS et al.*, 19-17213 (9th Cir.).

intervenors filed a petition for certiorari from the Ninth Circuit intervention denial, which was filed on June 23, 2021.<sup>31</sup> On October 29, 2021, the Supreme Court granted certiorari on a single issue of the three presented in the petition: “Whether States with interests should be permitted to defend a rule when the United States ceases to defend.” On June 15, 2022, the Supreme Court dismissed the writ of certiorari as improvidently granted.<sup>32</sup>

On June 27, 2022, the U.S. Court of Appeals for the Seventh Circuit ruled that the U.S. District Court for the Northern District of Illinois did not abuse its discretion in denying the States’ motions to intervene in the proceedings concerning the 2019 Final Rule and request for relief from judgment under Rule 60(b).<sup>33</sup> Other aspects of the litigation concerning the 2019 Final Rule have been stayed, with varying reporting requirements, pending the outcome of the intervention litigation.

#### **D. Current Public Charge Inadmissibility Guidance**

As discussed in the NPRM, DHS currently makes public charge inadmissibility determinations in accordance with the statute and the 1999 Interim Field Guidance.<sup>34</sup> The guidance explains how the agency determines if a noncitizen is likely at any time to become a public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Under the guidance, officers can offer public charge bonds, but the guidance does not provide procedures for public charge bonds.

#### **E. Current Rulemaking**

On August 23, 2021, DHS published an Advance Notice of Proposed Rulemaking (ANPRM) to seek broad public feedback on the public charge ground of inadmissibility to inform its development of a future regulatory proposal.<sup>35</sup> USCIS sought input from individuals,

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<sup>31</sup> *Arizona, et al., v. City and County of San Francisco, et al.*, 20-1775 (U.S. Oct. 29, 2021).

<sup>32</sup> *Arizona, et al., v. City and County of San Francisco, et al.*, 20-1775 (U.S. June 15, 2022).

<sup>33</sup> *Cook County, Illinois, et al. v. State of Texas, et al.*, 37 F. 4th 1335 (7th Cir. 2022).

<sup>34</sup> See 87 FR at 10585 (Feb. 24, 2022).

<sup>35</sup> See “Public Charge Ground of Inadmissibility,” 86 FR 47025 (Aug. 23, 2021).

organizations, government entities and agencies, and all other interested members of the public. USCIS held two public listening sessions and accepted written comments and related material through October 22, 2021. DHS reviewed all of the comments and considered them in developing the NPRM.<sup>36</sup>

On February 24, 2022, DHS published a proposed rule, *Public Charge Ground of Inadmissibility*.<sup>37</sup> The public comment period closed on April 25, 2022. Following careful consideration of public comments received in response to the NPRM, DHS has made modifications to the regulatory text proposed in the NPRM, as described above and throughout this preamble.

The following section of this preamble includes a detailed summary and analysis of the public comments received on the NPRM. Comments made in response to the ANPRM and the NPRM may be reviewed at the Federal Docket Management System (FDMS) at <https://www.regulations.gov>, docket number USCIS-2021-0013.

### **III. Response to Public Comments on the Proposed Rule**

#### **A. Summary of Public Comments**

DHS received a total of 223 public comment submissions in Docket USCIS-2021-0013 in response to the proposed rule. The majority of comment submissions were from advocacy groups or individual commenters. Other commenters included anonymous commenters; healthcare providers; research institutes, universities, and academic researchers; law firms, individual attorneys, and other legal services providers; Federal, State, and local elected officials; State and local government agencies; religious and community organizations; unions; Federal Government officials; professional associations; and trade and business organizations. While some commenters opposed the rule and some commenters supported the rule in its entirety, the majority of commenters expressed support for the rule with suggestions for improvement, or

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<sup>36</sup> See 87 FR at 10597 (Feb. 24, 2022).

<sup>37</sup> “Public Charge Ground of Inadmissibility,” 87 FR 10570 (Feb. 24, 2022).



indicated that they believed the proposed rule was flawed in some way, but a significant improvement over the 2019 Final Rule. A few of the public comments supported a return to the framework contained in the 2019 Final Rule.

### **B. Comments Expressing General Support for the Proposed Rule**

*Comment:* Many commenters were generally in favor of the proposed rule and expressed support for clarifying the public charge ground of inadmissibility. Some of those commenters stated that the rule ensures that the public charge ground of inadmissibility will be implemented in a clear, consistent, and fair manner. Several commenters praised the rule on the grounds that it requires less paperwork for applicants as compared to the 2019 Final Rule, and allows for administration of the public charge ground of inadmissibility without generating undue fear and confusion. Another commenter similarly stated that the rule is the best option because it respects the rights of the greatest number of stakeholders and produces the best outcome with the least harm. This commenter remarked that this rule would allow more people “who are fit to immigrate a chance to” do so, while keeping more families together. One commenter expressed support for the proposed rule, stating it is critical that DHS move quickly to finalize a more fair and equitable public charge rule that minimizes the harm to children and families, while recognizing the need to create an inclusive and anti-racist system. One commenter stated that they support the development of a rule that avoids the unequal treatment of similarly situated persons, and that a rule that is straightforward and administrable can be applied fairly and consistently.

*Response:* DHS agrees that this rule will help ensure that public charge inadmissibility determinations are fair, consistent with law, and informed by relevant data and evidence. Additionally, DHS agrees that this rule reduces unnecessary burdens on applicants as compared to the 2019 Final Rule. Notwithstanding that the 2019 Final Rule resulted in very few adverse determinations, that rule introduced a new form and form instructions spanning over 45 pages, which was in addition to the more than 60 pages of form and form instructions associated with

the Form I-485, Application to Register Permanent Residence or Adjust Status. This rule introduces a more targeted information collection that collects the necessary information under the statute and this rule without imposing an unnecessary paperwork burden on the public.

*Comment:* Several commenters stated that immigrants fill valuable jobs that U.S. citizens may not generally favor, such as direct care work, which can be very challenging and important but poorly compensated. A commenter remarked that immigrants contribute to the United States through paying their taxes, and others stated that increased immigration would have a positive effect on the current pandemic economy. Two other commenters stated that the rule will allow more noncitizens to immigrate and access public education, which will allow them to obtain better jobs and support themselves and their families.

*Response:* DHS appreciates commenters' support for this rule and notes that any impacts on the U.S. economy, job creation, or better access to education would be indirect effects of the rule, and the rule, designed to implement congressional directions, would be justified even in the absence of such benefits. The fundamental intent of this rule is to help ensure that public charge inadmissibility determinations will be consistent with law, fair, and informed by relevant data and evidence. DHS also expects that this rule will help alleviate the chilling effects caused by previous public charge policies. Historical evidence, both prior to the 2019 Final Rule and from the period of time during which that rule was in effect, does not suggest that this final rule is likely to meaningfully change the overall volume of immigration to the United States.

*Comment:* One commenter commended USCIS on the overall direction of the NPRM and said that the proposed rule is a reasonable interpretation of the statutory public charge ground of inadmissibility that is generally consistent with long-time agency policy and an improvement on the 1999 Interim Field Guidance. Another commenter stated that the rule clearly seeks to avoid the barriers to immigration imposed by the 2019 Final Rule while preserving the integrity of the enforcement of the public charge ground of inadmissibility.

*Response:* DHS agrees that this rule is generally consistent with longstanding agency policy and is a reasonable interpretation of the statutory language in section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). DHS believes this rule codifies a policy that is fully consistent with law, that reflects empirical evidence to the extent relevant and available, and that allows flexibility for officers to benefit from the emergence of new evidence as time passes. DHS believes that this rule will create clear and comprehensible adjudicative standards that will lead to fair and consistent adjudications and ensure equitable treatment of similarly situated individuals. DHS also believes that this rule will not unduly impose barriers for noncitizens or unduly interfere with the receipt of supplemental public benefits, especially by those who are not subject to the public charge ground of inadmissibility.

*Comment:* One commenter indicated agreement with the rule and stated that a person who wants permission to enter the United States should only be allowed to do so if they demonstrate that they would not become a public charge now or sometime in the future. Further, the commenter stated that anyone entering the country illegally should be sent back to their country if they cannot show that they will not become a public charge.

*Response:* Consistent with section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), any noncitizen who is an applicant for a visa, admission, or adjustment of status must demonstrate that they are not likely at any time to become a public charge, unless Congress has expressly exempted them from this ground. If DHS determines an applicant for admission or adjustment of status who is subject to this inadmissibility ground is likely at any time to become a public charge, the applicant is inadmissible and will not be admitted to the United States or granted adjustment of status unless they are eligible for and receive a waiver or are offered and post a public charge bond.

In regard to noncitizens who are entering the United States without authorization, to the extent that such noncitizens are applicants for admission, and subject to the public charge ground of inadmissibility, if they are unable to demonstrate that they are not likely at any time to become

a public charge, they would not be admitted unless they are eligible for and receive a waiver or are offered and post a public charge bond. Such individuals may also be removable on other grounds.

### **C. Comments Expressing General Opposition to the Proposed Rule**

*Comment:* Many commenters stated that they opposed the rule because, in their opinion, the statutory public charge ground of inadmissibility and as a consequence the corresponding proposed rule are racist, xenophobic, based on white nationalism, or otherwise discriminatory. Several commenters stated that the United States should be doing more to help immigrants, and offering them aid and assistance. One commenter said that this rule is intended to prevent immigration, while another commenter stated that the proposed rule seeks to punish potential immigrants for the simple act of being born outside of the United States, and enforces a wealth test that counteracts the reason for the founding of this nation and the legacy of the American dream. A different commenter similarly said that the proposed rule went against the values of the United States. Some commenters stated that it is unfair to reject immigrants based on the public charge ground of inadmissibility because it would take away opportunities for them to have a better life.

*Response:* DHS seeks to be faithful to the relevant statute and hence to congressional directions. For that reason, DHS disagrees with the suggestion that the rule is contrary to the laws and values of the United States, or that the rule implies that immigrants are inherently less worthy than U.S. citizens. DHS does not intend or expect that this rule will have a discriminatory effect based on race, nationality, gender, disability, or any other protected ground. Importantly, the statute does not direct DHS to consider a noncitizen's race, nationality, or gender.<sup>38</sup> Under this rule, DHS will not consider such characteristics when making a public charge inadmissibility determination. DHS cannot rule out the possibility of disproportionate impacts on certain groups

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<sup>38</sup> INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

(whether as a consequence of the policy contained in this rule, the 1999 Interim Field Guidance, or any other policy), but this rule is neutral on its face and DHS in no way intends that it will have such impacts on any protected group. DHS is committed to applying this rule neutrally and fairly to all noncitizens who are subject to it and has included a provision requiring that USCIS denials on public charge grounds be accompanied by a written explanation that specifically articulates the reasons for the officer's determination.<sup>39</sup>

Additionally, this rule does not apply a "wealth test." Consistent with the governing statute, it looks only at whether an applicant for admission or adjustment of status is likely at any time in the future to become primarily dependent on the government for subsistence after consideration of several factors, none of which alone determine the final outcome. In that analysis, the consideration of assets, resources, and financial status is one factor to be considered in the totality of the noncitizen's circumstances.

In addition, as discussed in the NPRM, DHS has taken care to address the potential collateral effects of this rule on the public, including potential chilling effects, by including a range of important provisions. For instance, this rule includes a clear list of statutory exemptions from the public charge ground of inadmissibility; excludes consideration of a noncitizen's past receipt of public benefits while in a status exempt from the public charge ground of inadmissibility; makes clear that a noncitizen's receipt of public benefits solely on behalf of another person (such as a U.S. citizen child) will not work to the noncitizen's disadvantage; and excludes consideration of most non-cash benefits (for which most noncitizens subject to the public charge ground of inadmissibility are ineligible), except in the limited circumstance of long-term institutionalization at government expense.

DHS has concluded that this rule is generally consistent with longstanding agency policy and is a reasonable interpretation of the statutory language. DHS further intends that this rule

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<sup>39</sup> See 8 CFR 212.22(c).

will lead to fair and consistent adjudications, will avoid unequal treatment of similarly situated individuals, and will not otherwise unduly impose barriers for noncitizens seeking admission to or adjustment of status in the United States.<sup>40</sup> Congress requires DHS to consider an applicant’s age; health; family status; assets, resources, and financial status; and education and skills as part of the public charge inadmissibility determination. In the NPRM, DHS proposed to include an objective, data-informed consideration in the totality of the circumstances analysis and is retaining this consideration in this final rule. Namely, when DHS issues guidance to officers that informs the totality of the circumstances assessment, such guidance will consider how these factors affect the likelihood that a noncitizen will become a public charge at any time, and will be based on an empirical analysis of the best-available data as appropriate. The nature of the public charge inadmissibility determination under this rule – a prospective determination made in the totality of the circumstances “in the opinion” of the immigration officer – renders it amenable to sub-regulatory guidance that identifies a range of nonbinding considerations and can be updated to account for advancements in the best-available data. DHS acknowledges that it cannot eliminate the possibility of officer bias, but USCIS adjudicators are trained professionals and as with other immigration determinations, adjudicators will specifically articulate the reasons for a proposed adverse determination and will provide an opportunity to respond.<sup>41</sup>

*Comment:* Several commenters stated that it is immoral for immigration policy to impoverish vulnerable individuals and their family members who are otherwise eligible for cash assistance, physical and mental health care, nutrition, or housing benefits. One commenter remarked that targeting social programs intended to help the general public is a waste of resources, and appears to suggest that the government should instead focus on people who are violating other laws.

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<sup>40</sup> See Executive Order (E.O.) 14012, “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans,” 86 FR 8277 (Feb. 5, 2021).

<sup>41</sup> See 8 CFR 212.22(c).

*Response:* This rule is designed to adhere to, and to implement, congressional instructions. It is not designed to impoverish individuals or require individuals to prove their particular utility to the U.S. economy. Consistent with the statutory directive to determine whether a noncitizen is likely at any time to become a public charge, this rule directs DHS to consider the past or current receipt of public cash assistance for income maintenance and long-term institutionalization at government expense. DHS will be doing so in the totality of the noncitizen's circumstances, and will also take into account the amount, duration, and recency of such receipt. Nothing in this rule directs noncitizens to stop receiving any public benefit considered in this rule, and past or current receipt of public benefits is not alone dispositive of whether or not a noncitizen will be determined to be inadmissible on the public charge ground. While the commenter did not explain why they thought this rule targets social programs or in which way, DHS disagrees with the statement that the NPRM or this final rule "targets" social programs. Nothing in this rule affects eligibility for any one or more public benefits. Instead, DHS is simply establishing which public benefits it will consider in public charge inadmissibility determinations. The benefits that DHS is considering in this rule are the benefits it believes are more indicative of whether a noncitizen is likely to become primarily dependent on the government for subsistence.

DHS is also seeking to ensure that to the extent consistent with law, the rule will not unduly interfere with the receipt of public benefits, especially by those who are not subject to the public charge ground of inadmissibility. DHS has given consideration to the potential chilling effects of promulgating regulations governing the public charge inadmissibility determination. In considering such effects, DHS has taken into account the former INS's approach to chilling effects in the 1999 Interim Field Guidance and 1999 NPRM, the 2019 Final Rule's discussion of chilling effects, judicial opinions on the role of chilling effects, evidence of chilling effects following the 2019 Final Rule (as well as the minimal number of denials of applications for

adjustment of status based on the public charge ground of inadmissibility<sup>42</sup>), and public comments on chilling effects received in response to the August 2021 ANPRM and the NPRM. To this end, DHS has determined that public charge inadmissibility determinations will be limited to the specified statutory factors; the Affidavit of Support Under Section 213A of the INA where required; and current and/or past receipt of TANF; SSI; State, Tribal, territorial, or local cash benefit programs for income maintenance and long-term institutionalization at government expense.

*Comment:* A commenter stated that noncitizens who enter the United States on nonimmigrant visas for certain periods of time have already shown that they can provide for themselves and these noncitizens also do not usually have the right to obtain public benefits. That commenter stated that the likelihood those individuals would become a public charge is extremely low because they have no choice but to support themselves or rely on their families. The commenter also stated that immigrants contribute to our society economically and to limit immigration is to limit economic growth, citing a 2019 report by the Center on Budget and Policy Priorities.<sup>43</sup> Another commenter stated that DHS should do more to reduce barriers to obtaining lawful immigration status because doing so also creates positive externalities, including improved efficiency in the labor market, the creation of new business by immigrants, the filling of less desirable labor positions and economic gains from growth, earnings, tax revenues and jobs.

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<sup>42</sup> In the NPRM, DHS acknowledged that notwithstanding “widespread indirect effects [of the 2019 Final Rule], during the time that the 2019 Final Rule was in place, of the 47,555 applications for adjustment of status to which the rule was applied, DHS issued only 3 denials (which were subsequently reopened and approved) and 2 Notices of Intent to Deny (which were ultimately rescinded, and the applications were approved) based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A)–(B) of the INA, 8 U.S.C. 1182(a)(4)(A)–(B).” 87 FR at 10571 (Feb. 24, 2022).

<sup>43</sup> See Arloc Sherman et al., “Immigrants Contribute Greatly to U.S. Economy, Despite Administration’s ‘Public Charge’ Rule Rationale,” Center on Budget and Policy Priorities (Aug. 15, 2019), <https://www.cbpp.org/research/poverty-and-inequality/immigrants-contribute-greatly-to-us-economy-despite-administrations> (last visited July 7, 2022).



*Response:* DHS agrees with the commenter who pointed out that many noncitizens, including those present in the United States in nonimmigrant status, are not eligible for certain public benefits. PRWORA, which was passed in 1996, significantly restricted noncitizens' eligibility for many Federal, State, and local public benefits.<sup>44</sup> In the NPRM, DHS included a table listing the major categories of noncitizens eligible for SSI, TANF, or Medicaid who would be subject to a public charge inadmissibility determination were they later to apply for adjustment of status or admission to the United States, unless another statutory exemption applies that is particular to their individual circumstances.<sup>45</sup> DHS presents the table again here, for background purposes only. The table should not be used to determine benefits eligibility.<sup>46</sup>

<b>Table 3. Categories of noncitizens eligible for SSI, TANF, or Medicaid for long-term institutionalization whose past or current benefit use may be considered in a public charge inadmissibility determination</b>		
<b>Population</b>	<b>Eligible for which benefits?</b>	<b>Notes</b>
Noncitizens who were paroled into the United States for more than one year	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances. <sup>1</sup>  Medicaid and TANF eligibility subject to 5-year waiting period in most cases.
Noncitizens granted withholding of removal who are allowed to remain in the United States	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances. <sup>1</sup>
Certain citizens of Micronesia, the Marshall Islands, or Palau, who can lawfully reside and work in the United States under the Compacts of Free Association	Medicaid for long-term institutionalization	
Cuban and Haitian Entrants under section 501(e) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note)	SSI, TANF, Medicaid for long-term	SSI eligibility only in limited circumstances. <sup>1</sup>

<sup>44</sup> Pub. L. 104-193, tit. IV, 8 U.S.C. 1601 through 1646.

<sup>45</sup> 87 FR 10570, 10583 (Feb. 24, 2022).

<sup>46</sup> DHS included this table in the NPRM and welcomed proposed clarifications or corrections, but received no substantive comments.

	institutionalization	Not subject to the public charge inadmissibility ground if also in an exempt immigration status. <sup>2</sup>
Lawfully present children and pregnant individuals, including those individuals in the required 60-day postpartum period or a 12-month postpartum period (depending on the State's election), in States that have elected to cover this population in Medicaid	Medicaid for long-term institutionalization	Not subject to the public charge inadmissibility ground if also in an exempt immigration status. <sup>2</sup>
Noncitizen members of federally recognized Indian tribes	SSI, Medicaid for long-term institutionalization	Not subject to the public charge inadmissibility ground if also in an exempt immigration status. <sup>2</sup>
Conditional entrants under section 203(a)(7) of the INA as in effect before April 1, 1980	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances. <sup>1</sup>
Returning lawful permanent residents (LPRs) who are seeking admission to the United States as described in section 101(a)(13)(C) of the INA (8 U.S.C. 1101(a)(13)(C)), including those absent from the United States for more than 180 days	SSI, TANF, Medicaid for long-term institutionalization	LPR eligibility for SSI, TANF, and Medicaid varies depending on factors such as whether the State requires LPRs to have 40 qualified work quarters and whether subject to the 5-year waiting period.
Notes		
<sup>1</sup> See Social Security Administration (SSA), Supplemental Security Income for Non-Citizens, Publication No. 05-11051, available at: <a href="https://www.ssa.gov/pubs/EN-05-11051.pdf">https://www.ssa.gov/pubs/EN-05-11051.pdf</a> (last visited Jul. 27, 2022). <sup>2</sup> See 8 CFR 212.23.		

DHS notes that while the commenter focused on nonimmigrants, this rule will apply only to noncitizens applying for admission or adjustment of status. As discussed elsewhere in this preamble, including sections III.D.3.b. and III.F., unlike the 2019 Final Rule, this rule does not apply to nonimmigrants seeking extension of stay or change of status in the United States.

DHS has concluded that this rule will faithfully administer the public charge ground of inadmissibility. As compared to the 1999 Interim Field Guidance, the rule does not necessarily reduce burdens for applicants, but will provide important clarity and predictability as part of

DHS's overall efforts to reduce barriers for applicants for admission and adjustment of status. As compared to the 2019 Final Rule, this rule does reduce burdens, including the direct paperwork burden imposed on applicants. Under this rule, DHS will not require a separate information collection form regarding the public charge ground of inadmissibility but will instead incorporate a more manageable set of questions in Form I-485, Application to Register Permanent Residence or Adjust Status, that will collect public charge-related information from applicants who are subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

DHS also notes that while the public charge ground of inadmissibility and this final rule include the consideration of an applicant's education and skills when assessing the likelihood at any time of becoming a public charge, DHS is not engaging in an analysis of the utility of a noncitizen to the U.S. labor market nor assessing the impact of an applicant for admission or adjustment of status on the broader U.S. economy. DHS addresses the economic impacts of this rule later in this preamble.

*Comment:* One commenter stated that the rule places a disproportionate burden on noncitizens to avoid assistance, where U.S. citizens can use cash assistance and long-term institutionalization, such as a nursing home, without penalty, and also stated that using cash assistance and institutionalization does not automatically disqualify a person from being a productive member of society. Another commenter stated that the rule imposes undue immigration restrictions.

*Response:* As a matter of law, the public charge ground of inadmissibility applies to noncitizens and not to citizens. It is therefore not inconsistent with law that a rule implementing the public charge ground of inadmissibility would affect noncitizens most directly. In developing this rule, DHS has taken into account the chilling effects historically associated with the public charge ground of inadmissibility<sup>47</sup> and has created a rule that remains faithful to the statutory text

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<sup>47</sup> See, e.g., 87 FR at 10587-10592 (Feb. 24, 2022).

and the underlying Congressional purpose, while remaining cognizant of the provisions of PRWORA restricting the use of certain public benefits by certain groups of noncitizens. In this final rule, DHS specifically indicates that public charge inadmissibility determinations must be based on the totality of the individual's circumstances and no one factor, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, should be the sole criterion for determining an applicant is likely at any time to become a public charge.<sup>48</sup>

*Comment:* One commenter stated that this rule will effectively criminalize poverty and correspond to an increased number of noncitizens who reside in the United States without lawful status because those more likely to become public charges in the future are not likely to be able to afford the cost of departing the United States.

*Response:* DHS disagrees that this rule will effectively criminalize poverty. The public charge ground of inadmissibility is not a criminal statute, and only applies to individuals when they apply for visas, admission, or adjustment of status. DHS is under an obligation to faithfully administer section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), regardless of whether DHS issues implementing regulations.<sup>49</sup> This rule is intended to apply the public charge ground of inadmissibility in a manner that is consistent with the law, is clear, fair, and comprehensible, and takes into account the chilling effects resulting from previous policies on both noncitizens and U.S. citizens. DHS notes that this rule does not create a new ground of inadmissibility to which noncitizens are subject.

It is unclear why the above commenter believes that a rule implementing the public charge ground of inadmissibility would increase the number of noncitizens who reside in the United States unlawfully. The comment implies a connection between the rule discouraging public benefit use by noncitizens and those noncitizens being unable to afford the travel costs to

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<sup>48</sup> See 8 CFR 212.22(b).

<sup>49</sup> In fact, the vast majority of the grounds of inadmissibility at section 212 of the INA, 8 U.S.C. 1182, have not been implemented by regulation at all, but are administered and enforced by DHS based on the statute.

depart the United States. DHS notes that the great majority of noncitizens are either ineligible for the public benefits covered by this rule prior to admission or adjustment of status or are eligible for those benefits but are exempt from a public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Given this, DHS believes it is unlikely that noncitizens would remain in the United States unlawfully as a result of the rule rendering them unable to afford travel costs as the commenter suggests.

*Comment:* Some commenters stated that the rule is “ineffective” and will encourage the use of public benefits by noncitizens while rendering the public charge ground of inadmissibility “useless.” Commenters wrote that, if finalized, the rule will be an incentive for more immigration to the United States by noncitizens who will rely on public benefits without fear of repercussions as they build their lives in the United States and eventually seek to obtain lawful status. They further stated that any changes to the proposed rule that create the appearance of facilitating access to public benefits will only attract more immigration during a time when many noncitizens are entering unlawfully at the southern border.

Another commenter stated that immigrant families may include many family members, which can lead to higher taxes at the State and local level to support education if the children are non-English speaking. Commenters stated that the rule is more concerned with chilling effects but should be concerned with the national value of self-sufficiency established by Congress in more than a century of statutes, a concern also addressed elsewhere in this preamble.

*Response:* DHS disagrees that the rule is ineffective or will encourage the use of public benefits by noncitizens who are subject to the public charge ground of inadmissibility.

The rule establishes appropriate definitions and regulatory standards, and is accompanied by form changes that will allow DHS to collect information from applicants to make determinations under the public charge ground of inadmissibility. Under this rule, DHS will determine whether any noncitizen who Congress has decided is subject to the public charge ground of inadmissibility is likely at any time to become primarily dependent on the government

for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. In making this determination, DHS considers the statutory factors, an Affidavit of Support Under Section 213A of the INA if required, and the applicant’s current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense, in the totality of the circumstances.<sup>50</sup> It is apparent from DHS’s approach in this rule, which considers public benefits receipt both as part of the definition for likely at any time to become a public charge as well as when making the public charge inadmissibility determination in the totality of the circumstances, that commenters’ concern that this rule will render the public charge ground of inadmissibility “ineffective” or “useless” is unfounded.

DHS notes that the commenters’ preferred approach – the 2019 Final Rule or something similar – ultimately did not result in a single denial of adjustment of status on public charge grounds, although that rule apparently resulted in widespread disenrollment effects among those who were not covered by that rule to begin with.<sup>51</sup> To the extent that commenters suggest that the effectiveness of this rule should be measured by disenrollment effects among those who are not subject to the public charge ground of inadmissibility, or that DHS must pursue public charge rulemaking for the sake of, or without regard to, disenrollment effects among that population, DHS respectfully disagrees. Reducing costs by causing confusion among those who are not covered by the rule, leading them to forgo benefits for which they are eligible, would not be a desirable effect even if the rule were found to have that effect.

As discussed in the NPRM,<sup>52</sup> noncitizens who are subject to the public charge ground of inadmissibility are generally not eligible for public benefits. PRWORA significantly restricted

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<sup>50</sup> See 8 CFR 212.22(a).

<sup>51</sup> See, e.g., 87 FR at 10589 (Feb. 24, 2022).

<sup>52</sup> See 87 FR at 10580 (Feb. 24, 2022).

noncitizens' eligibility for many Federal, State, and local public benefits.<sup>53</sup> PRWORA defines the term "Federal public benefit"<sup>54</sup> and provides that an "alien" who is not a "qualified alien" is ineligible for such benefits,<sup>55</sup> subject to certain exceptions.<sup>56</sup> Among the exceptions established by Congress are eligibility among all noncitizens for medical assistance for the treatment of an emergency medical condition; short-term, in-kind, non-cash emergency disaster relief; and public health assistance related to immunizations and treatment of the symptoms of a communicable disease.<sup>57</sup> The exceptions were further clarified by the Department of Justice (DOJ) and some of the agencies that administer these public benefits. On January 16, 2001, DOJ published a notice of final order, "Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation,"<sup>58</sup> which indicated that PRWORA does not preclude noncitizens from receiving certain other widely available programs, services, or assistance as well as certain benefits and services for the protection of life and safety.

Under this rule, DHS will determine if a noncitizen is likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. This rule does not change eligibility for public benefits. Rather, officers will consider a noncitizen's past or current receipt of public cash assistance for income maintenance or long-term institutionalization at government expense when making public charge inadmissibility determinations.

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<sup>53</sup> Pub. L. 104-193, tit. IV, 8 U.S.C. 1601 through 1646.

<sup>54</sup> Pub. L. 104-193, sec. 401(c), 8 U.S.C. 1611(c).

<sup>55</sup> Pub. L. 104-193, sec. 401(a), 8 U.S.C. 1611(a).

<sup>56</sup> Pub. L. 104-193, sec. 401(b), 8 U.S.C. 1611(b).

<sup>57</sup> See Pub. L. 104-193, sec. 401(b)(1), 8 U.S.C. 1611(b)(1). See "Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation," 66 FR 3613 (Jan. 16, 2001); see also "Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996," 62 FR 61344 (Nov. 17, 1997).

<sup>58</sup> See "Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation," 66 FR 3613 (Jan. 16, 2001); see also "Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation," 61 FR 45985 (Aug. 30, 1996).

DHS also disagrees that the rule is likely to meaningfully change the overall volume of immigration, including unlawful migration. This rule certainly does not create any greater incentive for unlawful migration than PRWORA (which noted congressional concern with such incentives, and also created benefits eligibility rules for noncitizens to address them, at least in part) or the various subsequent statutory exceptions to PRWORA's general framework. The commenters provided no objective evidence that any of the above policies resulted in a significant increase in immigration, let alone objective evidence that this rule will have that effect. Even if this rule had a minor effect on immigration, due to the misperception that it alters the impact of the receipt of benefits by noncitizens residing in the United States unlawfully, DHS would still issue it because the rule is generally consistent with longstanding agency policy and is a faithful interpretation of the statutory phrase "likely at any time to become a public charge"; avoids unnecessary burdens on applicants, officers, and benefits-granting agencies; and mitigates the possibility of widespread "chilling effects" with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible, especially with respect to individuals who are not subject to the public charge ground of inadmissibility. As previously noted, this rule has no effect on the limited eligibility of noncitizens for public benefits under PRWORA or any other statute, and for this reason does not have an impact on the availability of public benefits to noncitizens in the United States. Nor should it create an incentive for immigration to the United States.

DHS acknowledges that some non-cash benefits programs involve significant expenditures of government funds, but has concluded that the term "public charge" is best interpreted by reference to the degree of an individual's dependence on the government for support, rather than the scale of overall government expenditures for particular programs. DHS further discusses the impact of this rule on States' social welfare budgets later in this preamble.

Finally, DHS notes that the commenter provided no data or sources for their statement that immigrants have larger families, which can lead to higher State and local taxes based on



education costs. Under this rule, DHS will consider family status and household size as consistent with the standards in the proposed rule to determine whether an individual is likely at any time to become a public charge; it will not rely on generalizations about the relative size of immigrant households when considering family status.

#### **D. Comments Regarding Legal Authority and Statutory Provisions**

##### **1. Statutory Text, Congressional Intent, and the Proposed Rule**

*Comment:* Some commenters said that DHS should be focused on self-sufficiency, with some stating that the rule contradicts Congress' intent, as set forth in 8 U.S.C. 1601,<sup>59</sup> that noncitizens be self-sufficient, and not rely on public resources to meet their needs, but instead rely on their own skills and the resources of their families, their sponsors, and private organizations. These commenters further stated that the rule is inconsistent with 8 U.S.C. 1601 because it incentivizes immigration through the availability of public benefits rather than addressing "the government's interest in ensuring noncitizens are self-reliant in accordance with national immigration policy." Another commenter stated that current eligibility rules for public assistance and unenforceable financial support agreements have not lived up to the intent of the laws to prevent individual noncitizens burdening the public benefits system. A commenter also stated that the role of the Executive Branch is to enforce the laws written by Congress, and suggested that this rule is not enforcing section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and is suspending and dispensing with the ground. A commenter stated that the rule's interpretation of public charge violates the statute's text, intent, and legislative history. A commenter stated that the proposed rule "fails to address the compelling government interest to enact new rules for eligibility and sponsorship agreements in order to assure that noncitizens be self-reliant in accordance with national immigration policy." The commenter also requested DHS remove the

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<sup>59</sup> Pub. L. 104-193, sec. 400, 8 U.S.C. 1601.

“incentives” of the proposed rule and instead provide enforceable consequences to prevent further abuse of already strained public resources.

*Response:* USCIS agrees that self-sufficiency is a principle discussed in 8 U.S.C. 1601,<sup>60</sup> and that subsection (2) of this provision states that “it continues to be the immigration policy of the United States that aliens within the Nation’s borders not depend on public resources to meet their needs.”<sup>61</sup> DHS disagrees that this rule contradicts Congress’ intent with respect to those principles. The principles of self-sufficiency articulated in 8 U.S.C. 1601(2) are reflected in a range of statutory measures including, most directly, those measures specifically referenced in 8 U.S.C. 1601 itself. In that section, immediately after articulating the above policy, Congress—

- expressed concern that “[d]espite the principle of self-sufficiency, aliens have been *applying for and receiving* public benefits from Federal, State, and local governments at increasing rates”;<sup>62</sup>
- concluded that “[c]urrent *eligibility rules for public assistance and unenforceable financial support agreements* have proved wholly incapable of assuring that individual aliens not burden the public benefits system”;<sup>63</sup>
- identified “a compelling government interest *to enact new rules for eligibility and sponsorship agreements* in order to assure that aliens be self-reliant in accordance with national immigration policy,” and “to remove the incentive for illegal immigration *provided by the availability of public benefits*”;<sup>64</sup> and
- stated that “[w]ith respect to the State authority to make determinations concerning *the eligibility of qualified aliens for public benefits* in this chapter, a State that chooses to follow the Federal classification in determining the eligibility of such aliens for public

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<sup>60</sup> 8 U.S.C. 1601(1).

<sup>61</sup> 8 U.S.C. 1601(2)(A).

<sup>62</sup> 8 U.S.C. 1601(3) (emphasis added).

<sup>63</sup> 8 U.S.C. 1601(4) (emphasis added).

<sup>64</sup> 8 U.S.C. 1601(5)-(6) (emphases added).

assistance shall be considered to have chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.”<sup>65</sup>

In short, Congress tied the statement of national policy most closely to two types of actions that have already been taken by Congress itself: further restrictions on noncitizen eligibility for public benefits and enhanced enforceability of the Affidavit of Support Under Section 213A of the INA. Neither of those actions is changed at all by this rule, nor does this rule interfere in any respect with a State’s ability to follow the Federal classification in determining the eligibility of noncitizens for public assistance.

DHS acknowledges a relationship between the statement of national policy and the public charge ground of inadmissibility. The two statutes relate to a similar subject matter; Congress has tied the Affidavit of Support Under Section 213A of the INA to the public charge ground of inadmissibility; and Congress enacted the statement of national policy close in time with revisions to the public charge ground of inadmissibility. But Congress left it to DHS (and other agencies administering the public charge ground of inadmissibility) to specify how best to account for this statement of national policy in the context of a public charge inadmissibility determination generally. DHS notes that while the policy goals articulated in 8 U.S.C. 1601(2) with respect to self-sufficiency and the receipt of public benefits inform DHS’s administrative implementation of the public charge ground of inadmissibility, DHS believes it is permitted to consider other important goals in implementing this ground of inadmissibility, such as clarity, fairness, national resilience, and administrability. Moreover, DHS believes that this rule is consistent with the goals set forth in 8 U.S.C. 1601.<sup>66</sup> Indeed, the rule’s consideration of receipt of public cash assistance for income maintenance or long-term institutionalization at government expense helps ensure that DHS focuses its public charge inadmissibility determinations on

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<sup>65</sup> 8 U.S.C. 1601(7) (emphasis added).

<sup>66</sup> 87 FR at 10611 (Feb. 24, 2022).

applicants who are likely to become primarily dependent on the government for subsistence. As with all grounds of inadmissibility, DHS is bound to administer and enforce the public charge ground of inadmissibility, but DHS is not bound to issue regulations with respect to each and every ground. In fact, such regulations are exceedingly rare. To whatever extent 8 U.S.C. 1601(2) calls for a more systematic implementation of the public charge ground of inadmissibility, DHS has accomplished that goal through this rulemaking.

DHS also disagrees that, in publishing this rule, it is declining to enforce section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and is suspending and dispensing with the ground of inadmissibility. Contrary to this commenter's assertion, and as noted in the NPRM,<sup>67</sup> this rule reflects DHS's faithful administration of the public charge ground of inadmissibility without making it needlessly difficult for individuals to apply for adjustment of status or obtain supplemental services for which they are eligible. This rule is wholly consistent with section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and 8 U.S.C. 1601, as well as longstanding case law (as discussed at length below), mirrors the approach the Executive Branch used in enforcing the provision for two decades, and provides a rule that is clear and fair to administer.

In addition, while commenters state that DHS has failed to adequately account for government interests and the costs of noncitizens receiving public benefits, commenters critical of the proposed policy have not provided data that illustrate how and to what extent noncitizens subject to the public charge ground of inadmissibility are drawing on limited government resources that fund the public benefit programs DHS is excluding from consideration in public charge inadmissibility determinations. Furthermore, as DHS explained in the NPRM, even during the period when the 2019 Final Rule was in effect, when DHS took into consideration a broader list of public benefits, that approach ultimately did not result in any denials of applications for adjustment of status based on the public charge ground of inadmissibility.

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<sup>67</sup> 87 FR at 10611 (Feb. 24, 2022).

With respect to public comments that stated that current sponsorship agreements are “unenforceable” and that DHS has failed to propose or enact new rules for eligibility and sponsorship agreements to assure that noncitizens be self-reliant in accordance with national immigration policy, such comments are largely outside the scope of the proposed rule, which (like the 2019 Final Rule) did not include any changes on those topics. In addition, DHS notes that an Affidavit of Support Under Section 213A of the INA is enforceable by statute.<sup>68</sup> Although DHS may issue regulations governing the Affidavit of Support process, Congress has not tasked DHS with the enforcement of the Affidavit of Support Under Section 213A of the INA; such enforcement may be sought by the sponsored immigrant or by “the appropriate nongovernmental entity which provided such benefit or the appropriate entity of the Federal Government, a State, or any political subdivision of a State.”<sup>69</sup>

The commenters who opposed the proposed rule on this basis also did not provide data showing how many sponsored immigrants<sup>70</sup> actually receive public benefits, and how often benefits-granting agencies have enforced sponsorship obligations.<sup>71</sup>

While DHS agrees that it did not propose in the NPRM to enact new rules related to the Affidavit of Support Under Section 213A of the INA, and notwithstanding that, changes to the Affidavit of Support regulations at 8 CFR part 213a would be outside the scope of this rulemaking, DHS observes that such changes would not be necessary to ensure that applicants for admission or adjustment of status will not become primarily dependent on the government for

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<sup>68</sup> INA sec. 213A, 8 U.S.C. 1183a.

<sup>69</sup> INA sec. 213A(a)(1)(B), (b)(1)(A); 8 U.S.C. 1183a(a)(1)(B), (b)(1)(A).

<sup>70</sup> See 8 CFR 213a.1 (“Sponsored immigrant means any alien who was an intending immigrant, once that person has been lawfully admitted for permanent residence, so that the affidavit of support filed for that person under this part has entered into force.”).

<sup>71</sup> DHS notes that in a proposed rule, “Affidavit of Support on Behalf of Immigrants,” 85 FR 62432 (Oct. 2, 2020), which was withdrawn on March 22, 2021, see “Affidavit of Support on Behalf of Immigrants,” 86 FR 15140 (Mar. 22, 2021), DHS acknowledged that it did “not have data on reimbursement efforts or successful recoveries by benefits granting agencies. USCIS receives limited information from benefit granting agencies or other parties enforcing the Affidavit [Of Support Under Section 213A of the INA or Contract [Between Sponsor and Household Member], despite the information sharing provisions in the statute and regulations and thus is unable to determine whether the proposed rule’s benefits are likely to exceed its costs.” See “85 FR at 62453 (Oct. 2, 2020).

subsistence. This is because determining whether an applicant is likely at any time to become a public charge based on a review of the statutory minimum factors is separate and distinct from both determining the sufficiency of an Affidavit of Support Under section 213A of the INA and enforcing the sponsorship obligation and related reimbursement requirements that attach once the intending immigrant is admitted as a lawful permanent resident (although, as noted throughout this rule, there is a relationship between the two statutes, and the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, renders a noncitizen inadmissible under the public charge ground of inadmissibility).

Furthermore, the obligations and requirements related to the affidavit do not go into effect until after the public charge inadmissibility determination has already been made and the intending immigrant has been admitted as an immigrant or granted adjustment of status. Even if changes to such regulations had been contemplated in the proposed rule, DHS would decline to include any provisions regarding enforcement of the support obligation as part of the public charge inadmissibility determination, in part because they would be unduly cumbersome to incorporate into the predictive public charge inadmissibility determination.

*Comment:* One commenter expressed support for the rule, noting that diminishing chilling effects among groups of immigrants who are eligible for public benefits and not subject to the public charge ground of inadmissibility serves both the public welfare and Congressional intent, as stated in 7 U.S.C. 2011 and the United States Housing Act of 1937. The commenter cited 7 U.S.C. 2011, quoting the statute stating that “[i]t is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households.” The commenter also cited and quoted the United States Housing Act of 1937 stating that assistance under the Housing Act advances “the national policy of the United States to promote the general welfare” to help States and localities “remedy the unsafe and insanitary housing conditions and the acute shortage

of decent, safe, and sanitary dwellings for families of low income, in rural or urban communities, that are injurious to the health, safety, and morals of the citizens of the Nation.”<sup>72</sup>

*Response:* In promulgating this final rule, DHS is implementing the public charge ground of inadmissibility in a way that is consistent with the statutory text of and Congressional intent underlying section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), while also ensuring that the implementing regulations are clear, fair, and understandable for the public and officers. As discussed in the NPRM, when deciding which public benefits to consider when looking at past or current receipt of public benefits for the purpose of making public charge inadmissibility determinations, DHS determined that it should not consider special purpose and supplemental programs such as SNAP and affordable housing programs. DHS agrees with the commenter that programs such as SNAP and housing assistance contribute to the well-being of both low-income individuals and communities at large and assist individuals in ultimately depending on themselves and their families and sponsors rather than the government for subsistence. While DHS notes that very few categories of noncitizens who are subject to the public charge ground of inadmissibility are eligible for SNAP and housing benefits, DHS notes that the exclusion of SNAP and housing benefits from public charge inadmissibility determinations may also reduce the chilling effects among individuals who are not subject to the public charge ground of inadmissibility but who were deterred from enrolling or continuing to receive those benefits due to confusion about the 2019 Final Rule.

*Comment:* Several commenters stated that the rule ignores Congressional intent dating back to the late nineteenth century, relies on interim guidance that was never meant to be the equivalent of a final rule, and seeks to narrowly define critical concepts including “public charge” and the types of public benefits used in a public charge inadmissibility determination.

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<sup>72</sup> Pub. L. 75-412, sec. 1, 50 Stat. 888, 888 (Sept. 1, 1937).

*Response:* First, DHS disagrees with the commenters who argued that the NPRM’s definition of “public charge” conflicts with longstanding Congressional intent. Further discussion of how the NPRM’s and this rule’s standard aligns with long-standing congressional intent is discussed below in this same section in response to other comments.

In addition, DHS disagrees with how these commenters characterized the government’s longstanding policy with respect to the public charge ground of inadmissibility. While DHS acknowledges that the 1999 Interim Field Guidance was interim guidance and not a final rule, the Government has interpreted the public charge ground of inadmissibility consistent with that guidance for over 20 years, with the exception of the short period of time during which the 2019 Final Rule was in effect. Accordingly, it is reasonable that DHS reviewed and considered the guidance’s provisions when developing the NPRM and this rule. At the same time, DHS disagrees with any insinuation by commenters that DHS did not independently consider the merits of the guidance when developing this rule. Although this rule ultimately adopts portions of the guidance as regulations, DHS did not simply adopt the guidance wholesale without further analysis, and, in fact, there are a number of differences between the guidance and this rule.<sup>73</sup> Ultimately, as explained in the NPRM, DHS believes that the approach taken by the 1999 Interim Field Guidance, as further refined in the NPRM and this final rule, reflects a reasonable interpretation of the public charge ground of inadmissibility and is consistent with the statutory text and with Congressional intent, and longstanding caselaw.

DHS has determined that not all public benefits should be considered in public charge inadmissibility determinations because, among other things, not all benefits are equally indicative of primary dependence on the government for subsistence. For one thing, as discussed in more detail later in the preamble, many modern public benefit programs take the form of

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<sup>73</sup> See, e.g., 8 CFR 212.22(a)(4) (providing specific guidance that was not in the 1999 guidance regarding the treatment of disabilities in the context of public charge adjudications); 8 CFR 212.21 (providing definitions for key terms, including “receipt (of public benefits)” and “household.”).



payments or in-kind benefits to help individuals meet particular needs and are not limited to individuals without a separate primary means of support. For another, as both the 1999 Interim Field Guidance and the NPRM explained, under PRWORA, most noncitizens are not eligible for most types of public benefits. Moreover, most categories of noncitizens eligible for public benefits under PRWORA are also statutorily exempt from the public charge ground of inadmissibility.<sup>74</sup> In addition, and as discussed in more detail elsewhere in this rule, some public benefits like public housing and SNAP assist individuals and families to remain employed and support themselves and their families but are on their own insufficient to meet all or even a substantial portion of their needs. This point is illustrated in the case of SNAP; as USDA informed DHS in its on-the-record letter, SNAP is supplemental in nature; SNAP benefits are relatively modest; and most SNAP supports work.<sup>75</sup> In short, the benefits excluded from consideration under this rule are less probative of primary dependence than the benefits that are considered; their consideration would add scant value for officers while—as detailed elsewhere—detering noncitizens and their families (including U.S. citizens and those not subject to the public charge ground of inadmissibility) from seeking benefits for which they are eligible. Nothing in the statute dictates that receipt of such supplemental or special-purpose benefits must be considered for public charge inadmissibility determinations.

*Comment:* One commenter stated concern that the proposed rule mentioned that “Congress has sought to exclude noncitizens who pose a threat to the safety or general welfare of the country,” and expressed concern that such exclusion may be based on a range of acts,

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<sup>74</sup> See, e.g., *Cook County v. Wolf*, 962 F.3d 208, 236-37 (7th Cir. 2020) (Barrett, J., dissenting) (“The upshot is that the [2019 Final Rule] will rarely apply to a noncitizen who has received benefits in the past. . . . Notwithstanding all of this, many lawful permanent residents, refugees, asylees, and even naturalized citizens have disenrolled from government-benefit programs since the public charge rule was announced. Given the complexity of immigration law, it is unsurprising that many are fearful about how the rule might apply to them. Still, the pattern of disenrollment does not reflect the rule’s actual scope.”).

<sup>75</sup> See Letter from USDA Deputy Under Secretary on Public Charge (Feb. 15, 2022), <https://www.regulations.gov/document/USCIS-2021-0013-0199> (last visited July 12, 2022).

conditions, or conduct that would cause a noncitizen to be excluded during a public charge inadmissibility determination.

*Response:* This comment quotes the NPRM, which in turn quotes *Fiallo v. Bell*,<sup>76</sup> for the encapsulation of the government’s general authority over inadmissibility and exclusion of noncitizens from the United States. While this statement is contained in the NPRM, it was not intended to suggest that public charge inadmissibility determinations would be based on an unspecified range of acts, conditions, and conduct. Rather the NPRM, and the regulatory text in particular, included relevant definitions and factors that would be considered were the proposal contained therein to be finalized in a final rule. Such definitions and factors are also in this final rule. USCIS intends to issue additional guidance for officers and the public to further clarify how these definitions and factors should be applied in individual public charge inadmissibility determinations.

*Comment:* One commenter stated that the rule’s definition of “likely at any time to become a public charge” is in line with Congressional intent and that the public charge test was never designed to prevent immigration of low- and moderate-income families who may at some point need access to public programs to overcome temporary setbacks. In addition, twenty-six members of Congress submitted a joint comment from the House Judiciary Committee indicating that the rule is consistent with the intent of Congress to apply the public charge ground of inadmissibility to those who are primarily dependent on the government for subsistence, and urged DHS to finalize the rule as it will provide certainty to applicants and petitioners navigating our immigration system. Another commenter stated that DHS should reject any assertion that the definitions of “public charge” in the 1933 and 1951 editions of Black’s Law Dictionary, and a 1929 immigration treatise, Arthur Cook et al., *Immigration Laws of the United States* § 285

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<sup>76</sup> 430 U.S. 787, 787 (1977) (“The Supreme Court has ‘long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”).

(1929)), show that receipt of “any” amount of public benefits historically rendered the recipient a public charge. The commenter stated that all three of these sources mistakenly rely on a single case, *Ex Parte Kichmiriantz* (involving a noncitizen who had been institutionalized and was “unable to care for himself in any way.”).<sup>77</sup> The commenter stated that contrary to what the three sources indicate, *Kichmiriantz* reflects the consistent historical focus of the term on those unable to care for themselves and without other support.

*Response:* DHS generally agrees with these commenters. As an initial matter, DHS acknowledges that Congress has never, in enacting or reenacting the public charge ground of inadmissibility, defined “public charge,” “likely to become a public charge,” or “likely at any time to become a public charge.” In the 1996 amendments, Congress specified which factors, at a minimum, the relevant government agencies must consider when making public charge inadmissibility determinations; Congress did not provide a specific definition of the term “public charge” or the phrase “likely at any time to become a public charge.” In addition, Congress has long made clear that DHS has broad discretion to administer and interpret the statute. The statute itself uses the words “in the opinion of,” which emphasizes the discretionary nature of the determination.<sup>78</sup> The INA also authorizes the Secretary of Homeland Security to promulgate rules to guide public charge inadmissibility determinations.<sup>79</sup>

In the 2018 proposed rule, DHS indicated that its understanding of the term “public charge” is consistent with various dictionary definitions of that term.<sup>80</sup> DHS stated that the [then] current edition of the Merriam-Webster Dictionary defines public charge simply as “one that is supported at public expense.”<sup>81</sup> DHS further relied on Black’s Law Dictionary (6th ed.) that

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<sup>77</sup> 283 F. 697 (N.D. Cal. 1922).

<sup>78</sup> INA sec. 212(a)(4)(A), 8 U.S.C. 1182(a)(4)(A).

<sup>79</sup> INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3).

<sup>80</sup> “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51158 (Oct. 10, 2018) (“DHS believes that a person should be considered a public charge based on the receipt of financial support from the general public through government funding (i.e., public benefits). This is consistent with various dictionary definitions of public charge and ‘charge’ also support a definition that involves the receipt of public benefits.”).

<sup>81</sup> “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51158 (Oct. 10, 2018) (citing Merriam-Webster Online Dictionary, Definition of Public Charge, <https://www.merriamwebster.com/dictionary/public%20charge>).

further defines public charge as “an indigent; a person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty.”<sup>82</sup> In addition, DHS indicated that the term “charge” is defined in Merriam-Webster Dictionary as “a person or thing committed into the care of another”<sup>83</sup> and Black’s Law Dictionary defines charge as “a person or thing entrusted to another’s care,” e.g., “a charge of the estate.”<sup>84</sup> DHS concluded that the definitions generally suggest that an impoverished or ill individual who receives public benefits for a substantial component of their support and care can be reasonably viewed as being a public charge. DHS also concluded that the then-proposed definition of public charge was also consistent with the concept of an indigent, which is defined as “one who is needy and poor . . . and ordinarily indicates one who is destitute of means of comfortable subsistence so as to be in want.”<sup>85</sup> In the 2019 Final Rule, DHS rejected commenters’ assertions that its reliance on dictionary definitions referenced in the proposed rule was flawed because DHS failed to consider the definition of the term “support,” which Merriam-Webster defined as “pay[ing] the cost of” or “provid[ing] a basis for the existence or subsistence of.”<sup>86</sup> DHS indicated that the dictionary definitions did not specify the degree of assistance, noting that the Merriam-Webster’s dictionary also defines “support” as “assist, help.”<sup>87</sup>

DHS continues to conclude that dictionary definitions of the relevant terms do not dictate a specific meaning of the term “public charge” nor clearly prescribe the level of dependence on the government necessary to render a person a public charge. Although many dictionary

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<sup>82</sup> “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51158 (Oct. 10, 2018) (citing Black’s Law Dictionary 233 (6th ed. 1990), [http://www.republicsg.info/dictionaries/1990\\_black's-law-dictionary-edition6.pdf](http://www.republicsg.info/dictionaries/1990_black's-law-dictionary-edition6.pdf)).

<sup>83</sup> “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51158 (Oct. 10, 2018) (citing Merriam-Webster Online Dictionary, Definition of Charge, <https://www.merriamwebster.com/dictionary/charge>).

<sup>84</sup> “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51158 (Oct. 10, 2018) (citing Black’s Law Dictionary, Charge (10th ed. 2014)).

<sup>85</sup> “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51158 (Oct. 10, 2018) (citing Black’s Law Dictionary 773 (6th ed. 1990), [http://www.republicsg.info/dictionaries/1990\\_black's-law-dictionary-edition6.pdf](http://www.republicsg.info/dictionaries/1990_black's-law-dictionary-edition6.pdf)).

<sup>86</sup> “Inadmissibility and Deportability on Public Charge Grounds,” 84 FR 41292, 41354 (Aug. 14, 2019) (citing Webster’s Dictionary 1828 Online Edition, definition of “charge,” <http://webstersdictionary1828.com/Dictionary/charge> ).

<sup>87</sup> “Inadmissibility and Deportability on Public Charge Grounds,” 84 FR 41292, 41354 (Aug. 14, 2019) (citing Merriam-Webster Online Dictionary, Definition of Support, <https://www.merriamwebster.com/dictionary/support>).

definitions suggest primary or total dependence on the government for subsistence, others may be read to suggest a lesser level of dependence.<sup>88</sup>

The legislative history at the time of the first introduction of a public charge ground of inadmissibility also does not establish a specific definition of the term “public charge.” Congress first included a public charge ground of inadmissibility in the Immigration Act of 1882, which prohibited the entry, inter alia, of “any person unable to take care of himself or herself without becoming a public charge.”<sup>89</sup> Debate in the House of Representatives at the time of enactment indicates that Congress was concerned about preventing the future immigration to the United States of people who would depend on or would be “committed to” the country’s “poor-houses and alms-houses.”<sup>90</sup> The record – which relates to a broader list of grounds of inadmissibility, of which public charge was only one – contains references to people committed to poor-houses and almshouses, paupers, and people who had no earnings in recent years and were wholly destitute, all of whom would likely be covered by the definition adopted in this final rule.

Over the years, judicial decisions interpreting the public charge ground generally did not focus exclusively on whether noncitizens seeking admission or adjustment of status had low earnings or were impoverished at the time of the inadmissibility determination. Rather, officers focused on whether, notwithstanding the current condition of poverty, noncitizens could prospectively support themselves. For example, in *In re Feinknopf*, a federal district court suggested that evidence regarding an individual’s age, profession, presence of family members,

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<sup>88</sup> See also, e.g., *Cook County v. Wolf*, 962 F.3d 208, 223 (7th Cir. 2020) (“Enter the dueling dictionaries. In Cook County’s corner, we have the Century Dictionary, defining a ‘charge’ as a person who is ‘committed to another’s custody, care, concern or management,’ Century Dictionary 929 (William Dwight Whitney, ed., 1889) (emphasis added); and Webster’s Dictionary, likewise defining a ‘charge’ as a ‘person or thing committed to the care or management of another,’ Webster’s Condensed Dictionary of the English Language 84 (Dorsey Gardner, ed., 1884). These suggest primary, long-term dependence. In DHS’s corner, we have dictionaries defining a ‘charge’ as ‘an obligation or liability,’ as in a ‘pauper being chargeable to the parish or town,’ Dictionary of Am. and English Law 196 (Stewart Rapalje & Robert Lawrence, eds., 1888); and as a ‘burden, incumbrance, or lien,’ Glossary of the Common Law 56 (Frederic Jesup Stimson, ed., 1881). These definitions can be read to indicate that a lesser reliance on public benefits is enough. Finding no clarity here, we move on.”).

<sup>89</sup> 22 Stat. 214.

<sup>90</sup> 13 Cong. Rec. 5109 (1882).

assets, and future employability are relevant to determining whether an immigrant is likely to become a public charge.<sup>91</sup>

In *Gegiow v. Uhl*, the Supreme Court concluded that a noncitizen could not “be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked.”<sup>92</sup> The court found that “[t]he persons enumerated, in short, are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions.”<sup>93</sup> In the 2019 Final Rule, DHS concluded that *Gegiow* did not conclusively establish the contours of the public charge ground of inadmissibility.<sup>94</sup> DHS continues to hold that view, but believes that the Supreme Court’s statements there about the public charge ground are nevertheless supportive of the interpretation adopted in this final rule.

In 1917, Congress amended the public charge provision by moving it to the end of a list of factors rendering an “alien” inadmissible.<sup>95</sup> The revised statute rendered inadmissible, among others, “persons . . . who are . . . mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or . . . persons likely to become a public charge.”<sup>96</sup> Legislative history suggests that Congress may have done so “in order to indicate the intention . . . that aliens shall be excluded upon [the public charge] ground for economic as well as other reasons” and did so, specifically, “to overcom[e] the decision of the Supreme Court in [*Gegiow*].”<sup>97</sup> Even assuming

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<sup>91</sup> 47 F. 447, 447, 451 (E.D.N.Y. 1891). The court held that “there must be a determination by the inspection officer of the fact that the immigrant is likely to become a public charge, made upon competent evidence tending to show such to be the fact . . . .”

<sup>92</sup> 239 U.S. 3, 9-10 (1915).

<sup>93</sup> 239 U.S. at 10 (1915).

<sup>94</sup> 84 FR 41292, 41350 n.317 (Aug. 14, 2019).

<sup>95</sup> In addition, Congress amended the immigration laws three other times between the introduction of the public charge ground in 1882 and 1917, but none of the amendments provided a definition of “public charge.” See Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213; Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898; Act of Mar. 26, 1910, ch. 128, 36 Stat. 263.

<sup>96</sup> Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 875–76.

<sup>97</sup> See 70 Cong. Rec. 3620 (1929).

that Congress moved the placement of the public charge provision to respond to *Gegiow*, it still did not define “public charge” or “likely to become a public charge,” leaving the application of the provision in the hands of immigration officials and the executive branch.

DHS continues to believe that the 1917 amendments clarified that Congress intended the Executive Branch to consider something more than “permanent personal objections,” and in particular to consider certain economic factors, when making public charge inadmissibility determinations, and does not consider this decision as limiting its discretion to find individuals inadmissible even if there is evidence that dependence on the government is not complete or permanent. DHS has not designated local labor market conditions as a regulatory factor to determine whether a noncitizen is likely at any time to become a public charge. DHS is considering a noncitizen’s education and skills, as evidenced by their degrees, certifications, licenses, skills obtained through work experience or educational programs, and educational certificates. DHS may also consider other information in the record in the totality of the circumstances, such as a noncitizen’s work history, if applicable. While there may be evidence that factors into a factual conclusion that a particular noncitizen is likely to be wholly and/or permanently dependent on the government for subsistence (whether based on “immutable” characteristics or not), DHS’s inquiry under this rule is broader; under the rule, DHS may determine that a person is inadmissible on public charge grounds even when the record suggests a level of dependence that is less than complete or permanent.

In *Wallis v. United States ex rel. Mannara*, the Second Circuit defined a person likely to become a public charge as “one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty.”<sup>98</sup> In that case, the immigrant family’s primary income earner was “certified for senility” and thus would not be “capable of continued self-support.”<sup>99</sup> The court noted that the family had “insufficient [means]

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<sup>98</sup> 273 F. 509, 510-11 (2d Cir. 1921).

<sup>99</sup> 273 F. at 510 (2d Cir. 1921).

to provide for their necessary wants [for] any reasonable length of time” and no private sources of support.<sup>100</sup> Similarly, in *Howe v. United States ex rel. Savitsky*, immigration officers sought to exclude a noncitizen under the public charge ground because the noncitizen engaged in a dishonest practice (writing a bad check, and being accused of selling another person’s equipment and keeping the proceeds). The Ninth Circuit indicated that it was “convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future. If the words covered jails, hospitals, and insane asylums, several of the other categories of exclusion would seem to be unnecessary.”<sup>101</sup> And in *Ex parte Hosaye Sakaguchi*, the Ninth Circuit held that an immigrant woman with the skills to support herself was not likely to become a public charge.<sup>102</sup> It ruled that the government had to present evidence of “mental or physical disability or any fact tending to show that the burden of supporting the [immigrant] is likely to be cast upon the public.”<sup>103</sup> The court in that case did not explain how much of a burden on the government would make a person a public charge. In the 2019 Final Rule, DHS indicated that it was aware of the *Howe* and *Sakaguchi* decisions but that it did not believe that these cases are inconsistent with the public charge definition set forth in the 2019 Final Rule or with the suggested link between public charge and the receipt of public benefits.<sup>104</sup> DHS expressed a belief that courts generally have quantified neither the level of public support nor the type of public support required for purposes of a public charge inadmissibility finding.<sup>105</sup> DHS continues to agree with that broad statement; DHS further believes that judicial and administrative decisions since the enactment of the public charge provision are clearly consistent with a primary dependence standard in that they focus on a noncitizen’s ability to support themselves, without treating the possibility that the noncitizen

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<sup>100</sup> 273 F. at 510 (2d Cir. 1921).

<sup>101</sup> 247 F. 292, 294 (9th Cir. 1917).

<sup>102</sup> 277 F. 913, 916 (9th Cir. 1922).

<sup>103</sup> 277 F. at 916 (9th Cir. 1922).

<sup>104</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41350 (Aug. 14, 2019).

<sup>105</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41350 (Aug. 14, 2019).



might need publicly subsidized medical care at a hospital, for example, as sufficient to demonstrate that the immigrant is likely to become a public charge.

In *United States ex rel. De Sousa v. Day*, the Second Circuit stated that “[i]n the face of [*Gegiow*] it is hard to say that a healthy adult immigrant, with no previous history of pauperism, and nothing to interfere with his chances in life but lack of savings, is likely to become a public charge within the meaning of the statute.”<sup>106</sup> This rule is consistent with that decision as well.

In 1952, Congress amended the INA in a way that uses the language of discretion: it deemed inadmissible immigrants “who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges.”<sup>107</sup> This language clarifies the temporal dimension of the public-charge determination, but it says nothing about the degree of assistance required. In the special legalization provision under the Immigration Reform and Control Act (IRCA),<sup>108</sup> Congress did not define the term “public charge,” but provided that “[a]n alien is not ineligible for adjustment of status under [that provision] due to being [a public charge] if the alien demonstrates a history of employment in the United States evidencing self-support *without receipt of public cash assistance*.”<sup>109</sup> The Immigration Act of 1990 also lacked a definition of “public charge.”<sup>110</sup>

As noted above, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress for the first time provided guidance on what factors the government agencies tasked with administering the public charge ground of inadmissibility must consider when determining whether a noncitizen is likely to become a public charge.<sup>111</sup> The amended

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<sup>106</sup> 22 F.2d 472, 473-74 (2d Cir. 1927).

<sup>107</sup> An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes, Pub. L. 82-414, sec. 212(a)(15), 66 Stat. 163, 183 (1952).

<sup>108</sup> Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359.

<sup>109</sup> Pub. L. No. 99-603, tit. II, sec. 201 (Nov. 6, 1986) (codified at section 245A(d)(2)(B)(ii)(IV) of the INA, 8 U.S.C. 1255a(d)(2)(B)(ii)(IV)) (emphasis added); *see also id.* at secs. 302, 303 (similar provision for Special Agricultural Workers).

<sup>110</sup> Pub. L. 101-649, sec. 601, 104 Stat. 4978, 5067.

<sup>111</sup> Pub. L. 104-208, div. C, sec. 531, 110 Stat. 3009-546, 3009-674 (1996).

provision instructs government officials “at a minimum” to look at age; health; family status; assets, resources, and financial status; and education and skills.<sup>112</sup> They also could consider whether an immigrant had an Affidavit of Support Under Section 213A of the INA from a third party.<sup>113</sup> Furthermore, Congress rejected a proposal to define “public charge” to cover “any alien who receives [means-tested public benefits] for an aggregate of at least 12 months.”<sup>114</sup>

During the same period that Congress amended the public charge ground of inadmissibility through IIRIRA to add the consideration of certain factors and enforceable affidavit of support requirements, it also enacted PRWORA.<sup>115</sup> As DHS noted in the 2019 Final Rule, language in that statute expresses Congress’s desire that immigrants be self-sufficient and not come to the United States with the purpose of benefitting from public welfare programs.<sup>116</sup> To that end, Chapter 14 of Title 8 of the U.S. Code restricts most noncitizens from eligibility for many federal and State public benefits. It grants most lawful permanent residents access to means-tested public benefits only after they have spent five years as a lawful permanent resident.<sup>117</sup> But the exclusions are not absolute. Congress specified instead that immigrants may at any time receive emergency medical assistance; immunizations and testing for communicable diseases; short-term, in-kind emergency disaster relief; various in-kind services such as short-term shelter and crisis counseling; and certain housing and community development assistance.<sup>118</sup>

In addition, a series of administrative decisions after the passage of the INA of 1952 clarified that more than a possibility of receipt of public benefits is needed to lead to a finding of likelihood of becoming a public charge. The cases focused on the presence of more “permanent”

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<sup>112</sup> Pub. L. 104-208, div. C, sec. 531, 110 Stat. 3009-546, 3009-674 (1996).

<sup>113</sup> Pub. L. No. 104-208, Div. C, sec. 531, 110 Stat. 3009-546, 3009-674 (1996).

<sup>114</sup> 142 Cong. Rec. 24313, 24425 (1996).

<sup>115</sup> Pub. L. 104-193 (1996), 110 Stat. 2105.

<sup>116</sup> 8 U.S.C. 1601.

<sup>117</sup> Pub. L. 104-193 (1996), secs. 401, 403, 411, 8 U.S.C. 1611, 1613, 1621, 110 Stat. 2105.

<sup>118</sup> 8 U.S.C. 1611, 1613, 1621.

characteristics along with a relative lack of non-governmental sources of support. In *Matter of Martinez-Lopez*, the Attorney General opined that the statute

require[d] *more than a showing of a possibility that the alien will require public support*. . . . A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency.<sup>119</sup>

Furthermore, in *Matter of Perez*, the Board of Immigration Appeals (BIA) held that “[t]he determination of whether an alien is likely to become a public charge . . . is a prediction based upon the totality of the alien’s circumstances at the time he or she applies for an immigrant visa or admission to the United States. The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge.”<sup>120</sup> This decision supports DHS’s position that evidence of past or current receipt of public benefits, alone, is not outcome determinative. In *Matter of Harutunian*, the INS Regional Commissioner determined that public charge inadmissibility determinations should take into consideration factors such as a noncitizen’s age, incapability of earning a livelihood, a lack of sufficient funds for self-support, lack of persons in this country willing and able to assure that the noncitizen will not need public support, and the expectation that the noncitizen will depend on old age assistance, a form of financial assistance for low income older adults.<sup>121</sup> In the 2019 Final Rule, DHS cited *Harutunian* and *Matter of Vindman*<sup>122</sup> for the general proposition that “[a]bsent a clear statutory or regulatory definition, some courts and administrative authorities have tied the public charge ground of inadmissibility to the receipt of public benefits.”<sup>123</sup> This remains DHS’s view of those

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<sup>119</sup> 10 I&N Dec. 409, 421–23 (BIA 1962; Att’y Gen. 1964) (emphasis added).

<sup>120</sup> 15 I&N Dec. 136, 137 (BIA 1974).

<sup>121</sup> 14 I&N Dec. 583, 583–89 (Reg’l Comm’r 1974) (finding that the applicant who was 70 years old, lacked means of supporting herself, had no one responsible for her support, and who expected to be dependent for support on old-age assistance was ineligible for a visa, as likely to become a public charge).

<sup>122</sup> *Matter of Vindman*, 16 I&N Dec. 131, 132 (Reg’l Comm’r 1977) 132 (“Congress intends that an applicant be excluded who is without sufficient funds to support himself, who has no one under any obligation to support him, and whose chances of becoming self-supporting decrease as time passes”).

<sup>123</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41349 (Aug. 14, 2019).

cases – i.e., that they are indicative of the relatively wide ambit of DHS’s interpretive authority – although DHS also notes that both cases involved receipt of cash assistance.

In the 1999 Interim Field Guidance, the INS interpreted the 1996 statutory scheme by defining “public charge” as someone who is “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”<sup>124</sup> Consistent with an earlier 1987 rule addressing the IRCA<sup>125</sup> legalization program,<sup>126</sup> and based on input from benefits-granting agencies, the 1999 Interim Field Guidance stated that “officers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds.”<sup>127</sup>

Following PRWORA, later statutory enactments lightened some of the statutory restrictions on noncitizens receiving benefits, in order to allow additional categories of these individuals to qualify for certain benefits without a five-year waiting period.<sup>128</sup>

Some of the courts in recent litigation against the 2019 Final Rule generally agreed that the meaning of the term “public charge” is ambiguous, that it has evolved over time, and that Congress granted wide discretion to the Executive Branch to interpret that term.<sup>129</sup> DHS agrees

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<sup>124</sup> “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999).

<sup>125</sup> Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359.

<sup>126</sup> “Adjustment of Status for Certain Aliens,” 52 FR 16205, 16211–16212, 16216 (May 1, 1987).

<sup>127</sup> “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999).

<sup>128</sup> See Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, sec. 4401, 116 Stat. 34, 333 (2002); Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, sec. 214, 123 Stat. 8, 56 (2009).

<sup>129</sup> See *Cook County v. Wolf*, 962 F.3d 208, 226 (7th Cir. 2020) (“[T]he question before us is not whether Cook County has offered a reasonable interpretation of the law. It is whether the statutory language unambiguously leads us to that interpretation. We cannot say that it does. As our quick and admittedly incomplete overview of this byzantine law has shown, the meaning of ‘public charge’ has evolved over time as immigration priorities have changed and as the nature of public assistance has shifted from institutionalization of the destitute and sick, to a wide variety of cash and in-kind welfare programs. What has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations.”); *id.* at 248, 253 (Barrett, J., dissenting) (noting that “DHS could have exercised its discretion differently” than it chose to do in the 2019 Final Rule and that “the term ‘public charge’ is indeterminate enough to leave room for interpretation.”); *Casa de*

with those principles. Other courts found that the term “public charge” has an unambiguous meaning and/or that the 2019 Final Rule definition was contrary to the historical understanding of that term.<sup>130</sup> This conclusion likewise does not preclude the rule at issue here.

With respect to commenters who indicated that *Ex parte Kichmiriantz*<sup>131</sup> reflects the historical understanding of the term public charge, and does not contemplate a standard under which a person is a public charge if they impose any level of burden upon the public, DHS agrees, although of course that individual case is not dispositive. In that case, the court concluded that a noncitizen who was institutionalized in a mental hospital was not a public charge because his family was paying for the institutionalization. The court opined that “the words ‘public charge,’ as used in the Immigration Act, mean . . . a money charge upon, or an expense to, the public for support and care.” The court indicated that when “a state receives from the relatives what it has fixed as an adequate compensation for such support,” the noncitizen so cared for is not a public charge, “within the meaning of the act,”<sup>132</sup> even if the physical condition of the person suggest a significant level of dependence on others for their basic care. Given that the

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*Maryland v. Trump*, 971 F.3d 220, 229 (4th Cir. 2020) (“[T]he public charge provision has led for almost a century and a half a long and varied life, with different administrations advancing varied interpretations of the provision, depending on the needs and wishes of the nation at a particular point in time. To be sure, the public charge provision ties alien admissibility to prospective alien self-sufficiency. But within that broad framework, Congress has charged the executive with defining and implementing what can best be described as a purposefully elusive and ambiguous term.”), *rehearing en banc granted*, 981 F.3d 311 (4th Cir. 2020).

<sup>130</sup> See *New York v. DHS*, 969 F.3d 42, 74-75 (2d Cir. 2020) (“The prevailing administrative and judicial interpretation of ‘public charge’ ratified by Congress understood the term to mean a non-citizen who cannot support himself, in the sense that he ‘is incapable of earning a livelihood, . . . does not have sufficient funds in the United States for his support, and has no person in the United States willing and able to assure that he will not need public support[.]’ . . . We think it plain on the face of these different interpretations that the Rule falls outside the statutory bounds marked out by Congress. . . . Whatever gray area may exist at the margins, we need only decide today whether Congress ‘has unambiguously foreclosed the [specific] statutory interpretation’ at issue. . . . And we conclude that Congress’s intended meaning of ‘public charge’ unambiguously forecloses the Rule’s expansive interpretation. We are not persuaded by DHS’s efforts to argue otherwise.” (internal citations omitted)); *City and County of San Francisco v. United States Citizenship and Immigration Services*, 981 F.3d 742, 756-58 (9th Cir. 2020) (“From the Victorian Workhouse through the 1999 Guidance, the concept of becoming a ‘public charge’ has meant dependence on public assistance for survival. Up until the promulgation of this Rule, the concept has never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance. . . . For these reasons we conclude the plaintiffs have demonstrated a high likelihood of success in showing that the Rule is inconsistent with any reasonable interpretation of the statutory public charge bar and therefore is contrary to law.”).

<sup>131</sup> 283 F. 697, 698 (N.D. Cal. 1922).

<sup>132</sup> 283 F. 697, 698 (N.D. Cal. 1922).

court was opining about the meaning of the term “public charge” in the context of long-term institutionalization, DHS agrees that this case does not stand for the proposition that “any” reliance on the government for subsistence would render a noncitizen likely at any time to become a public charge, and thus inadmissible.

In short, DHS has determined that it is appropriate in light of the statute’s text and purpose, as well as longstanding judicial and administrative precedent to focus on primary dependence on the government for subsistence, and to do so by reference to public cash assistance for income maintenance and long-term institutionalization at government expense in particular. In addition, when considering past, current, and future receipt of such public benefits, DHS believes it is appropriate to take into consideration the amount, duration, and recency of receipt along with other factors.

*Comment:* One commenter stated that facilitating the use of public benefits generally by immigrants, even those who may be eligible by the benefits’ authorizing statutes, directly conflicts with Congressional intent in enacting the public charge ground of inadmissibility, and that the rule, which “significantly” raises the threshold of permissible means-tested benefits usage for purposes of public charge inadmissibility determinations, should be withdrawn. The commenter also stated that Congress, in enacting PRWORA and IIRIRA very close in time, must have recognized that it made certain public benefits available to some noncitizens who are also subject to the public charge ground of inadmissibility, even though receipt of such benefits could render the noncitizen inadmissible as likely to become a public charge. The commenter cited data and studies, including those conducted by the Center for Immigration Studies,<sup>133</sup> for the proposition that a high percentage of “immigrant-led” households depended on safety-net public

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<sup>133</sup> See Steven Camarota and Karen Ziegler, “63% of Non-Citizen Households Access Welfare Programs,” Center for Immigration Studies (Nov. 2018), <https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs> (last visited Aug. 16, 2022).

benefit programs, and that a change in policy by DHS could result in significant cost savings in the context of Medicaid as well as other public benefit programs.

*Response:* While DHS agrees with commenters that Congress was aware that some noncitizens who are eligible for public benefits under PRWORA are also subject to the public charge ground of inadmissibility and may have their past or current receipt of some benefits considered in the context of public charge inadmissibility determinations, DHS disagrees with the suggestion that it should withdraw the proposed rule. As noted above, the congressional statement of policy at 8 U.S.C. 1601(2) relates most directly to other policy measures enacted (and in fact later relaxed) by Congress, and does not mandate a specific result in this rulemaking.

DHS believes that the rule draws reasonable distinctions consistent with Congressional intent between cash benefits intended for income maintenance and special-purpose and supplemental benefits intended to help recipients remain self-sufficient. Furthermore, DHS has determined that very few noncitizens are both eligible for public benefits and subject to the public charge ground of inadmissibility. DHS has also determined that a great number of households not subject to the public charge ground of inadmissibility could be deterred from receiving important supports (such as medical care or preventive services needed to combat or prevent the spread of communicable disease, or supplemental nutrition assistance for children) because of the chilling effects that would be associated with expanding the list of public benefits considered in making public charge inadmissibility determinations, as this commenter suggested. DHS is uncertain how the commenter arrived at the estimated \$4.9 billion in savings in Medicaid by the year 2030 but disagrees that any direct impacts of the rule on the population regulated thereby would result in significant cost savings in the context of Medicaid; rather DHS believes that the commenter is suggesting that chilling effects that could be caused by the rule, influencing primarily those individuals not subject to the rule, would result in what they view as a desirable outcome and cost savings. DHS disagrees that such a policy objective – which

depends on confusion about the scope and effect of the rule – is consistent with Congressional intent or that it is desirable.

DHS also notes that the analysis by the Center for Immigration Studies cited by the commenter is methodologically flawed, which results in inflated and inaccurate estimates of benefit use. The analysis examined benefit use by “non-citizen-headed households” rather than by noncitizens themselves.<sup>134</sup> While that analysis showed generally low use of SSI and TANF by such households, even those low rates of use are misleading in the context of a public charge inadmissibility determination. Under both the 2019 Final Rule, favored by the commenter, and this rule, only public benefits received by the noncitizen, where the noncitizen is listed as a beneficiary, are considered in a public charge inadmissibility determination. Given that this analysis cited by the commenter attributes to the noncitizen “head of household” any use of benefits by any member of the household, including U.S. citizens, the rates of SSI and TANF use by such households is unrelated to public charge inadmissibility determinations under both the 2019 Final Rule and this rule.

Since Congress sharply limited the eligibility for public benefits for noncitizens in PRWORA (and, as noted, provided exceptions to the public charge ground of inadmissibility for most categories of noncitizens eligible for benefits), the members of the “non-citizen-headed households” actually receiving the SSI and TANF in this analysis are most likely not the noncitizen heading the household but rather other members of the family.

The SIPP data used by the analysts at the Center for Immigration Studies does allow for a more accurate assessment of public benefit use by noncitizens themselves, using individuals as the basis for analysis, which was the approach taken by DHS in the 2019 Final Rule and in this

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<sup>134</sup> See Steven Camarota and Karen Ziegler, “63% of Non-Citizen Households Access Welfare Programs,” Center for Immigration Studies (Nov. 20, 2018), <https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs> (last visited Aug. 16, 2022).



rule. However, the Center for Immigration Studies used household as the basis for analysis which resulted in inflated and inaccurate estimates of benefit use.

## **2. Support for Changes to the Public Charge Ground of Inadmissibility**

*Comment:* One commenter stated that immigrants deserve a right to benefits when they migrate because they may come to the United States with nothing and may be migrating out of a need for survival rather than because they feel they are entitled to benefits. This commenter said that it is unjust to assume immigrants will be able to support themselves shortly after leaving dangerous situations and short-term government assistance should be an option for those experiencing traumatic situations in their home countries. Another commenter stated that all noncitizens should have access to public benefits, including housing, Medicaid, food stamps, and other benefits Congress intended. Another commenter stated that many U.S.-born citizens have needed government assistance, so it is reasonable that immigrants starting over in the United States would also need support from the government and should receive that support. Another commenter stated that for whatever reason people become public charges, they are often grateful for the help and do the best they can to contribute back to our society.

*Response:* To the extent that these commenters suggest that DHS should, through this rulemaking, expand the public benefits available to noncitizens, DHS disagrees. As explained in more detail above, Congress has the authority to legislate which noncitizens are eligible to apply for and receive Federal public benefits and did so when it enacted PRWORA. Neither the statutory public charge ground of inadmissibility nor this final rule govern eligibility for public benefits. This final rule does not intend to decide or impact which categories of noncitizens are, or should be, eligible to receive public benefits, but rather to indicate when a noncitizen is inadmissible under the public charge ground of inadmissibility. DHS therefore declines to make any changes in response to these commenters.

*Comment:* Many commenters suggested that the public charge inadmissibility determination should be eliminated entirely. Others suggest that while DHS waits for Congress

to eliminate the public charge ground of inadmissibility, it should not apply it. One commenter suggested DHS inform Congress of the “many issues of the Public Charge rules and regulations.” One commenter stated that the public charge ground of inadmissibility is dehumanizing to immigrants because it punishes them for accessing support for basic human needs in the adjudication of immigration benefit applications. One commenter opposed the public charge ground of inadmissibility because it is dehumanizing to force individuals to prove their utility to the U.S. economy before permitting them to stay in the country and implies that noncitizens are inherently worth less than U.S. citizens. Another commenter stated that the statute has historically been used to erect barriers to immigrants of color.

*Response:* To the extent that these commenters suggest that DHS has the authority to eliminate or ignore the public charge ground of inadmissibility, DHS disagrees. DHS recognizes that the public charge ground of inadmissibility could result in the denial of admission or adjustment of status for certain applicants, but DHS notes that the commenters’ concerns with respect to the existence and structure of this ground of inadmissibility should be directed to Congress, not to DHS. The public charge ground of inadmissibility was established by Congress in some of the earliest immigration laws<sup>135</sup> and, as discussed in the NPRM,<sup>136</sup> has existed in its current form since 1996.<sup>137</sup> As Congress has determined that all applicants for visas, admission, and adjustment of status are inadmissible if they are determined to be likely at any time to become a public charge, DHS is required to apply the public charge ground of inadmissibility to all noncitizens seeking admission or adjustment of status unless otherwise expressly exempted by Congress.

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<sup>135</sup> Immigration Act of 1882, Pub. L. 47-376, 22 Stat. 214 (1882).

<sup>136</sup> 87 FR at 10579 (Feb. 24, 2022).

<sup>137</sup> Pub. L. 104–208, div. C, 110 Stat 3009–546, 3009–674.

However, DHS does have the authority to define “likely at any time to become a public charge,”<sup>138</sup> as it has in this rule, and in doing so, decide which public benefits are considered for the purposes of this rule.

DHS notes that it did not codify this final rule to discriminate against noncitizens based on their race or color. Rather, as noted in the NPRM,<sup>139</sup> this rule is intended to be a faithful execution of the public charge ground of inadmissibility that is clear and comprehensible, and that would lead to fair and consistent adjudication. DHS believes that this rule accomplishes that goal, avoids unequal treatment, and avoids imposing undue barriers for noncitizens applying for admission or adjustment of status. Indeed, through this rulemaking, DHS is promulgating a clear and concise regulation that implements the public charge ground of inadmissibility by evaluating each noncitizen applying for adjustment of status or admission for public charge inadmissibility in the totality of the circumstances, absent statutory exemptions.

*Comment:* Another commenter stated that the statute is in conflict with E.O. 14012, “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans,” as neither efficient nor a removal of barriers. While several commenters acknowledged that amending or repealing the statute is not within DHS’s authority, one commenter stated that the statute compromises the overall goal of DHS to prioritize and incorporate equity into the rule.

*Response:* As noted above, DHS lacks the authority to make any changes to the statute underlying the public charge ground of inadmissibility; only Congress can do so. To the extent that these commenters are suggesting that this rule conflicts with the Administration’s goals to achieve equality and inclusion, as set forth in E.O. 14012,<sup>140</sup> DHS disagrees. As explained

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<sup>138</sup> See Homeland Security Act of 2002, Pub. L. 107–296, sec. 102, 116 Stat. 2135, 2142 (2002) (codified at 6 U.S.C. 112); INA sec. 103, 8 U.S.C. 1103.

<sup>139</sup> 87 FR at 10599 (Feb. 24, 2022).

<sup>140</sup> See “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans,” 86 FR 8277 (Feb. 5, 2021).

above, this rule is intended to be a faithful execution of the public charge ground of inadmissibility that is clear and comprehensible, and that would lead to fair and consistent adjudication for similarly situated applications. DHS believes that this rule avoids unequal treatment and avoids imposing undue barriers for noncitizens applying for admission or adjustment of status.

### **3. Other Legal Arguments**

#### **a. Comments on Litigation Relating to the 2019 Final Rule**

*Comment:* A commenter representing a State remarked that the changes in this rule are being proposed even though the 2019 Final Rule was still being litigated, and DHS removed the 2019 Final Rule from the *Federal Register* without notice and comment based entirely on the “unreviewed, nationwide vacatur” issued by the District Court for the Northern District of Illinois, despite multiple States seeking to intervene. The commenter wrote that “multiple states (including the undersigned) have sought to intervene in the Northern District of Illinois for the purpose of challenging that vacatur, and that matter is currently pending before the Seventh Circuit. Multiple states (including the undersigned) have also sought to intervene in a similar case in the Ninth Circuit, and that matter is currently pending before the United States Supreme Court. These cases are ongoing and could easily result in a reversal of the Northern District of Illinois’s vacatur of the 2019 Rule, which was the sole justification for the immediate removal of the 2019 Rule from the Federal Register without notice and comment.”<sup>141</sup> Another commenter stated that if DHS were to finalize the proposed rule, the commenter would pursue litigation against the rule.

*Response:* Comments regarding the basis for the vacatur implementation rule are outside the scope of this rulemaking. To the extent that the commenter suggests that DHS should delay issuance of this final rule pending resolution of all litigation regarding the 2019 Final Rule, the

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<sup>141</sup> Internal footnotes omitted.

vacatur of the 2019 Final Rule, and the implementation of that vacatur, the comment is arguably within the scope of the rulemaking, but DHS respectfully disagrees with the commenter's suggestion. First, as a factual matter, in the time since the commenter submitted the above comments, the Supreme Court dismissed the writ of certiorari in one case as improvidently granted, and the Seventh Circuit upheld the U.S. District Court for the Northern District of Illinois' denial of intervention. Although it is conceivable that these issues will continue to be litigated, DHS sees no reason to delay issuance of this rule pending resolution of all possible litigation.

Second, DHS does not see how delaying issuance of this notice-and-comment rulemaking would meaningfully address concerns about the adequacy of the rulemaking process for the vacatur implementation rule. The expressed concern regarding that rule was the absence of notice and comment, but in this rulemaking, DHS has completed multiple rounds of notice and comment, including an ANPRM and virtual public listening sessions, as well as the notice-and-comment process in which this commenter took advantage of the opportunity to participate. This rulemaking process has provided ample opportunity for public participation. The commenter's suggestion that DHS should delay issuing this rule pending further litigation is therefore unwarranted.

Third, DHS notes that although this rule does not replace the 2019 Final Rule, throughout the rulemaking process, DHS has considered and welcomed comment related to various aspects of the content and effects of that rule. DHS has analyzed the effects of this rule against the 1999 Interim Field Guidance, a Pre-Guidance Baseline, and an alternative similar to the 2019 Final Rule. To whatever extent the commenter expresses concern regarding the availability of notice and comment regarding whether to issue a rule similar to the 2019 Final Rule, this rulemaking process has addressed the matter squarely.

Finally, DHS acknowledges the significant public interest in public charge issues. The 2018 NPRM resulted in over 266,000 comments, vastly more than any other rulemaking in the

history of the Department. This rulemaking resulted in a much smaller number of public comments. Although in both rulemaking proceedings the vast majority of comments expressed opposition to the 2019 Final Rule or a return to a similar framework, in this rulemaking proceeding, DHS has carefully considered comments from all quarters and representing all perspectives. Ultimately, following careful consideration of the public comments received in response to the 2021 ANPRM and the 2022 NPRM, and for the reasons expressed throughout this preamble, DHS determined that this rule represented the most appropriate path forward.

DHS understands that some commenters intend to pursue litigation against this rule. Although DHS is confident that this rule is fully consistent with law, DHS notes its intention that the provisions of the rule be treated as severable to the maximum extent possible, such that if any court of competent jurisdiction were to deem any provision of the rule to be invalid or unenforceable in any respect, all other parts of the rule will remain in effect to the maximum extent permitted by law.

**b. Allegations That the Proposed Rule Is Arbitrary and Capricious**

*Comment:* Several commenters stated that DHS failed to adequately explain its decision to take a different approach from the previous Administration's rule and appears to simply express its disagreement with the 2019 Final Rule. Commenters stated that, although DHS is within its discretion to take a different approach than DHS did in 2019 as long as that approach is consistent with the law, proposed rules must include justification and reasoning for the approaches taken. Commenters stated that DHS appears to be motivated simply by issuing a rule that is different from the 2019 Final Rule.

*Response:* DHS disagrees that it failed to adequately explain that it was considering adopting an approach different than the approach set forth in the 2019 Final Rule. In fact, DHS explained at the outset of the NPRM that, rather than simply disagreeing with the approach taken in the 2019 Final Rule, DHS was aiming to implement a rule that provided a more faithful interpretation of the public charge ground of inadmissibility that would also, to the extent

possible, minimize the unnecessary paperwork burdens, confusion, and chilling effects associated with the 2019 Final Rule.<sup>142</sup>

Moreover, throughout the NPRM, DHS noted where this rule substantively differed from the 2019 Final Rule and explained why DHS had opted to take a different approach. For example, in the NPRM, in explaining the definition for “likely at any time to become a public charge,” DHS explained in detail why the degree of dependence on the government that would give rise to inadmissibility under this rule – primary dependence on the government for subsistence – as compared to the degree of dependence in the 2019 Final Rule – reliance over a specific threshold for duration of receipt – was a more sound interpretation of the public charge ground of inadmissibility and appropriately balanced the policy objectives set forth in PRWORA and section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).<sup>143</sup>

Additionally, DHS explained in detail in the NPRM why, after consulting with Federal benefits-granting agencies like HHS and USDA, it was proposing to consider a narrower list of public benefits than the more extensive list of public benefits that were considered under the 2019 Final Rule.<sup>144</sup> For instance, DHS explained that it proposed not to include SNAP benefits and most Medicaid benefits, as receipt of such was described by the relevant benefits-granting agencies as not being indicative of an individual being or likely to become primarily dependent on the government for subsistence.<sup>145</sup> DHS further explained in the NPRM that its approach to this rule was based on the objective to faithfully execute the public charge ground of inadmissibility while avoiding policies that unduly discourage individuals from availing themselves to the public benefits for which they are eligible.<sup>146</sup> Following consideration of public comments received on the NPRM, DHS continues to believe this to be the case.

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<sup>142</sup> 87 FR at 10571 (Feb. 24, 2022).

<sup>143</sup> 87 FR at 10606 (Feb. 24, 2022).

<sup>144</sup> 87 FR at 10609-10610 (Feb. 24, 2022).

<sup>145</sup> 87 FR at 10610 (Feb. 24, 2022).

<sup>146</sup> 87 FR at 10610 (Feb. 24, 2022).

*Comment:* Several commenters stated that DHS fails to provide any reasoned analysis concerning why noncitizens changing or extending their nonimmigrant status in the United States should not be subject to the proposed rule. The commenters reasoned that if these classes of noncitizens may ultimately be able to utilize certain public benefit programs, States have a right to understand why DHS intends to exercise its discretion this way, and saying that certain noncitizens may not presently be eligible for benefits is insufficient and does not provide a meaningful opportunity to comment on the proposed rule. Another commenter acknowledged that DHS has the discretion to decide whether to set conditions on extension of stay and change of status applications, but said DHS is arbitrarily declining to include a public benefits condition in this rule.

*Response:* DHS disagrees that it failed to explain why this rule does not impose conditions on extension of stay and change of status applications and petitions based on the receipt of public benefits. Although DHS has the authority to set conditions on requests for extension of stay and change of status,<sup>147</sup> as explained in the NPRM,<sup>148</sup> DHS cannot apply the public charge ground of inadmissibility to such requests because the plain language of the statute provides that the ground only applies to applications for a visa, admission, and adjustment of status under the INA.<sup>149</sup> Requests for extension of stay and change of status are not applications for visa, admission, or adjustment of status, and therefore are not subject to the public charge ground of inadmissibility.

Furthermore, as explained in the NPRM,<sup>150</sup> DHS does not believe that it needs to require, as a condition of an application or petition for extension of stay or change of status, that the nonimmigrant not become a public charge or not receive public benefits, because such a condition would be applicable to very few nonimmigrants, if any. This is because nonimmigrants

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<sup>147</sup> INA secs. 214 and 248, 8 U.S.C. 1184 and 1258.

<sup>148</sup> 87 FR at 10600-10601 (Feb. 24, 2022).

<sup>149</sup> INA sec. 212(a)(4)(A), 8 U.S.C. 1182(a)(4)(A).

<sup>150</sup> 87 FR at 10600-10601 (Feb. 24, 2022).



are generally barred from receiving the public benefits considered in this proposed rule, such as SSI, TANF, and Medicaid for long-term institutionalization.<sup>151</sup> Additionally, to the extent that commenters are concerned that a nonimmigrant seeking an extension of stay or change of status may not be self-reliant, these concerns are, for many nonimmigrant categories, addressed by both the requirements for obtaining such status in the first instance as well as the requirements applicable to their applications and petitions for extension of stay and change of status.

For example, in some of the employment-based nonimmigrant cases, the petitioning employer is required to comply with certain wage requirements applicable to such classifications. In the temporary agricultural worker (H–2A nonimmigrant) context,<sup>152</sup> the employer must offer the appropriate wage rate<sup>153</sup> and comply with other requirements as set by law and regulations.<sup>154</sup> Other nonimmigrants, such as F and M nonimmigrant students, need to demonstrate that they have sufficient funds to pay tuition and related costs as part of the application for extension of stay or change of status to such nonimmigrant categories.<sup>155</sup> Therefore, DHS believes that it has adequately explained its reasons for not imposing conditions related to the receipt of public benefits on nonimmigrants seeking an extension of stay or change of status and as a result declines to add provisions in this regard to the final rule.

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<sup>151</sup> Pub. L. 104-193, sec. 431(b), Pub. L. 104-208, div. C, sec. 501 (amending Pub. L. 104-193 by adding sec. 431(c)), 8 U.S.C. 1641(b) and (c) (defining “qualified aliens” for Federal public benefits purposes); Pub. L. 104-193, sec. 411, 8 U.S.C. 1621 (describing eligibility for State and local public benefits purposes).

<sup>152</sup> See INA secs. 101(a)(15)(H)(ii)(a), 218, 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1188.

<sup>153</sup> See 20 CFR 655.120(l). Employers must pay H–2A workers and workers in corresponding employment, unless otherwise excepted by the regulations, at least the highest of the Adverse Effect Wage Rate (AEWR), the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining wage (if applicable), or the Federal or State minimum wage in effect at the time the work is performed.

<sup>154</sup> See 20 CFR 655.100 through 655.185.

<sup>155</sup> See 8 CFR 214.1(f)(1)(i)(B) (requiring that the student presents documentary evidence of financial support in the amount indicated on the SEVIS Form I–20 (or the Form I–20A–B/I–20ID)); 8 CFR 214.2(m)(1)(i)(B) (requiring that student documents financial support in the amount indicated on the SEVIS Form I–20 (or the Form I–20M–N/I–20ID)); USCIS, “Adjudicator’s Field Manual (AFM),” Chapter 30.3(c)(2)(C) (applicants to change status to a nonimmigrant student must demonstrate that they have the financial resources to pay for coursework and living expenses in the United States), <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm30-external.pdf> (last visited Aug. 16, 2022); see also 22 CFR 41.61(b)(1)(ii) (requiring that F and M nonimmigrants possess sufficient funds to cover expenses while in the United States or can satisfy the consular officer that other arrangements have been made to meet those expenses); 22 CFR 41.62(a)(2) (requiring that J-1 visa applicants possess sufficient funds to cover expenses or have made other arrangements to provide for expenses before a DOS consular officer can approve the visa).

*Comment:* Several commenters suggested that the proposed rule reflects DHS's intention to ignore its authority with respect to public charge bonds without adequate justification.

*Response:* DHS disagrees with commenters' assertion that it is ignoring its bond authority without justification. On the contrary, DHS acknowledged its discretionary bond authority in the NPRM,<sup>156</sup> and DHS reiterates, in this rule, that it has authority under section 213 of the INA, 8 U.S.C. 1183, to consider whether to exercise its discretion on a case-by-case basis to admit noncitizens who are inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), upon the submission of a suitable and proper public charge bond.

However, as explained more fully in the bond section below, after careful consideration of public comments and feedback, DHS has revised the bond provisions to reflect DHS's statutory authority to consider offering public charge bonds, in its discretion, to adjustment of status applicants inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1183.<sup>157</sup> These additional provisions will help ensure that DHS adequately addresses how DHS will exercise its discretion to offer public charge bonds in the context of adjustment of status applications and will help ensure that public charge bonds remain operationally feasible in such cases. Under this rule, DHS will consider offering adjustment of status applicants who are inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the opportunity to submit a bond as a condition of adjustment of status.<sup>158</sup> When USCIS determines, in its discretion, to offer an adjustment of status applicant the opportunity to submit a public charge bond, USCIS will set the bond amount at an amount of no less than \$1,000 and provide instructions for the submission of a public charge bond.<sup>159</sup> USCIS will also amend the other regulations pertaining to public charge bonds. USCIS will provide officers with guidance and training to ensure that this discretionary authority is exercised in a fair, efficient, and consistent manner.

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<sup>156</sup> 87 FR at 10597 (Feb. 24, 2022).

<sup>157</sup> 8 CFR 213.1.

<sup>158</sup> See 8 CFR 213.1(a) and (c).

<sup>159</sup> See 8 CFR 213.1(a) and (c).

**c. Allegations That the Proposed Rule Is Inconsistent with the Statute**

*Comment:* Commenters opposed to the rule generally stated that the rule markedly departs from the standards in the 2019 Final Rule and is contrary to law.

*Response:* Although DHS agrees that this rule is different than the standards set forth in the 2019 Final Rule, DHS disagrees that this rule is contrary to law. DHS noted that neither the statute nor case law require DHS to interpret the statute as was done in the 2019 Final Rule. On the contrary, when Congress enacted the public charge ground of inadmissibility without defining what it meant to be a “public charge” or “likely at any time to become a public charge,” Congress authorized the agencies administering this ground of inadmissibility to determine and specify what those terms meant and how such inadmissibility determinations would be made.<sup>160</sup> DHS has concluded, consistent with the NPRM,<sup>161</sup> that this rule is a permissible and faithful implementation of the public charge ground of inadmissibility. With this rule, DHS is providing important definitions and guidance to implement the public charge ground of inadmissibility, such as defining “likely at any time to become a public charge,” that Congress left for DHS to implement. Also as noted in the NPRM,<sup>162</sup> this rule provides a close connection to the language used in the statute and reflects the forward-looking subjective aspect of the statutory standard. DHS has further determined, consistent with the NPRM,<sup>163</sup> that this rule better balances the overlapping policy objectives established by Congress when it enacted PRWORA<sup>164</sup> in close proximity to enacting the current public charge ground of inadmissibility, without unnecessarily harming separate efforts related to the health and well-being of people whom Congress made eligible for supplemental supports, let alone those eligible for benefits and not subject to the public charge ground of inadmissibility.

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<sup>160</sup> See Pub. L. 104–208, div. C, sec. 531, 110 Stat. 3009–546, 3009–674 (1996) (amending INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4)).

<sup>161</sup> 87 FR at 10571, 10606-10610 (Feb. 24, 2022).

<sup>162</sup> 87 FR at 10606 (Feb. 24, 2022).

<sup>163</sup> 87 FR at 10610 (Feb. 24, 2022).

<sup>164</sup> See Pub. L. 104–193, sec. 400, 110 Stat. 2105, 2260 (1996) (codified at 8 U.S.C. 1601).

*Comment:* One commenter stated that the rule conflicts with section 101 of the HSA, 6 U.S.C. 111, which requires DHS to protect the economic security of the United States. The commenter said that providing public benefits, even with an approved sponsor, bond or undertaking approved by the Secretary, has the potential to impede the economic security of the United States and its citizens.

*Response:* DHS disagrees with this commenter's characterization of 6 U.S.C. 111(b)(1)(F), and further disagrees that this rule conflicts with that provision. 6 U.S.C. 111(b)(1)(F) provides that among other primary missions, DHS should "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland . . . ." <sup>165</sup> Consistent with this mission set forth in the statute, DHS has determined that this rule properly achieves the policy objective set by Congress in ensuring that those who are likely at any time to become a public charge are not admitted into the United States or permitted to adjust status, without diminishing the overall economic security of the United States.

Moreover, to the extent that this commenter suggests that this rule provides public benefits to noncitizens that will diminish the economic security of the United States, DHS strongly disagrees.

Neither the public charge ground of inadmissibility nor this final rule govern eligibility for public benefits. Rather, the public charge ground of inadmissibility and this final rule pertain to whether an applicant for admission or adjustment of status is likely at any time to become a public charge. This final rule thus does not determine which noncitizens are, or should be, eligible to apply for and receive public benefits. And in any event, DHS disagrees that a contraction of eligibility for public benefits (or a change in incentives for or fear and confusion about their use) would have a positive effect on the economic security of the United States. DHS

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<sup>165</sup> Pub. L. 107-296, sec. 101(b)(1)(F), 6 U.S.C. 111(b)(1)(F).

has determined that using the public charge ground of inadmissibility to deter the use of health and nutrition benefits primarily among people who are not subject to the public charge ground of inadmissibility (such as U.S. citizen children in mixed-status households) would not further the nation's economic security. Accordingly, DHS declines to make any changes in response to the comment.

*Comment:* One commenter stated an opposition to PRWORA and the restriction for eligibility for federal means-tested benefits within PRWORA.

*Response:* The comment is outside the scope of the rulemaking. As explained more fully above, this rule does not govern eligibility for public benefits. Rather, this final rule governs the determination of whether an applicant for admission or adjustment of status is likely at any time to become a public charge.

## **E. Chilling Effects**

### **1. Impacts of Previous Public Charge Policies**

*Comment:* Many commenters opposed the previous public charge policy enacted by the 2019 Final Rule due to the confusion and fear it caused with respect to the immigration consequences of utilizing public benefits, with some remarking that the 2019 Final Rule had a profound chilling effect. One commenter noted that a court decision concerning the 2019 Final Rule, *Cook County v. Wolf*,<sup>166</sup> observed that much of the chilling effect was a result of the 2019 Final Rule's complexity.

Several commenters stated generally that the chilling effects caused older adults and their families to forgo benefits, including Medicaid and SNAP, due to the feared immigration consequences, with a disproportionate impact on older adults and people with disabilities. Commenters cited published research and studies that found that the mere announcement of a public charge rule in 2018 led to declines in safety-net participation, with an analysis of State-

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<sup>166</sup> 962 F.3d 208 (7th Cir. 2020).

reported data showing that the announcement of public charge regulations was associated with a decrease in child enrollment in Medicaid of approximately 260,000 from 2017 levels.<sup>167</sup> Commenters submitted studies that found evidence that enrollment by all individuals in Medicaid, SNAP, and CHIP, as well as enrollment in WIC, even though CHIP and WIC were not included in the 2019 Final Rule, declined.<sup>168</sup> A different commenter noted a study that found that 30 percent of adults in low-income immigrant families with children reported that they or a family member had avoided non-cash government programs or other assistance with their basic needs because of concerns about the impact on their immigration status. Another commenter cited research on the impact of the 2019 Final Rule on immigrant families, which they described as showing that 48 percent of immigrant families avoided the SNAP program, 45 percent avoided Medicaid and CHIP, and 35 percent avoided housing subsidies because of the fear of risking their ability to obtain a green card.<sup>169</sup> The commenter also cited a 2020 report by the Center for Law and Social Policy stating that some parents were also reluctant to send their children to school or childcare, although the report did not attribute that claim to a specific study.<sup>170</sup> Another commenter stated that the Asian American, Native Hawaiian, and Pacific Islander population was especially affected by the chilling effects of the 2019 Final Rule, and

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<sup>167</sup> Jeremy Barofsky et al., “Spreading Fear: The Announcement of the Public Charge Rule Reduced Enrollment in Child Safety-Net Programs,” *Health Affairs* (Oct. 2020), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763> (last visited Aug. 16, 2022).

<sup>168</sup> Jeremy Barofsky et al., “Spreading Fear: The Announcement of the Public Charge Rule Reduced Enrollment in Child Safety-Net Programs,” *Health Affairs* (Oct. 2020), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763> (last visited Aug. 16, 2022); Jeremy Barofsky et al., “Putting Out the ‘Unwelcome Mat:’ The Announced Public Charge Rule Reduced Safety Net Enrollment among Exempt Noncitizens,” *J. of Behav. Pub. Admin.* (Oct. 2021), <https://doi.org/10.30636/jbpa.42.200> (last visited Aug. 16, 2022); Hamutal Bernstein et al., “Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019,” *Urban Institute* (May 2020), <https://www.urban.org/research/publication/amid-confusion-over-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-2019> (last visited Aug. 16, 2022).

<sup>169</sup> Hamutal Bernstein et al., “Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019,” *Urban Institute* (May 2020), <https://www.urban.org/research/publication/amid-confusion-over-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-2019> (last visited Aug. 16, 2022).

<sup>170</sup> Rebecca Ullrich, “The Public Charge Rule & Young Children: Q&A on the New Regulation,” *Center for Law and Social Policy* (Feb. 2020), [https://www.clasp.org/sites/default/files/publications/2020/02/2020.02.24%20Public%20Charge%20Young%20Children%20Final%20Rule%20QA\\_update.pdf](https://www.clasp.org/sites/default/files/publications/2020/02/2020.02.24%20Public%20Charge%20Young%20Children%20Final%20Rule%20QA_update.pdf) (last visited Aug. 16, 2022).

continues to be affected in Medicaid and CHIP enrollment and renewals. Some commenters said that the 2019 Final Rule also affected U.S. citizen children, whose parents elected to disenroll or not enroll them in CHIP due to fear of immigration consequences.

One commenter cited a study showing that from 2016 to 2019, U.S. citizen children living in low-income households with at least one noncitizen saw:

- An 18 percent drop in Medicaid participation compared to an 8 percent drop in participation for U.S. citizen children living in households with only U.S. citizens;
- a 36 percent drop in SNAP participation compared to a 17 percent drop in participation for U.S. citizen children living in households with only U.S. citizens; and
- A 36 percent drop in TANF, General Assistance, and similar cash assistance programs compared to a 20 percent drop in participation for U.S. citizen children living in households with only U.S. citizens.<sup>171</sup>

A commenter cited data suggesting that the local SNAP program in the City and County of San Francisco (known as CalFresh) experienced a 15 percent decline in the caseload associated with households containing at least one noncitizen, and a much smaller decline associated with citizen-only households.

One commenter cited stories from survivors of domestic violence and sexual assault who stated they did not enroll in programs specifically designed for them, including domestic violence transitional housing, food pantry assistance, and sexual assault nurse examination and associated counseling services due to fear of the impact of the public charge ground of inadmissibility, and that they also withdrew from assistance programs that supported their basic needs. The commenter urged DHS to promptly publish a rule that advances victim and public safety and health; encourages victims to seek or utilize safety net benefits that are crucial to their

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<sup>171</sup> Randy Capps et al., “Anticipated ‘Chilling Effects’ of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families,” Migration Policy Institute (Dec. 2020), <https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real> (last visited Aug. 16, 2022).

ability to escape or recover from abuse and trauma; does not serve to punish victims for the violence they have experienced; and strengthens their ties to their families, who are essential sources of support in escaping and recovering from abuse.

Commenters wrote about the particularly harmful effects on a number of States, including California, New York, Maryland, and Illinois, stating that a rule similar to the 2019 Final Rule would result in coverage losses, decreased access to care, and worsened health outcomes for entire families, including children, many of whom are U.S. citizens. They also wrote about jeopardized access to health services for legal immigrants across individual States, affecting children, seniors, people with disabilities, and those with chronic conditions, which could exacerbate medical conditions and lead to sicker patients and greater reliance on hospital emergency departments, which would subsequently raise costs for all residents. Several commenters stated that the 2019 Final Rule deterred eligible individuals from accessing health care, particularly preventive care, which harmed the community and forced their county to shoulder the costs of expensive, last-minute emergency-department interventions. This is in agreement with another comment that predicted that failing to guarantee access to health care services for all people, including immigrants, will cause an increased use of emergency rooms and emergency care as a method of primary health care due to delayed treatment.

Several commenters indicated that the 2019 Final Rule had chilling effects on students from households with mixed immigration and citizenship status, with one commenter – a coalition of the nation’s largest central city school districts – stating that frequent “fluctuations in federal immigration policy have resulted in significant upheaval in the lives of many school children and their families, and have manifested in school absenteeism, behavior incidents, mental health issues, and declining academic performance for many affected students.” The commenter stated that the 2019 Final Rule “exacerbated disruptions for the families of tens of thousands of school children with such mixed immigration and citizenship status affecting their financial, emotional, and physical well-being.”



Another commenter stated that a rule similar to the 2019 Final Rule could lead to emotional trauma resulting from family separations due to denials of admission or adjustment of status based on public charge inadmissibility.

One commenter indicated that the chilling effects of the 2019 Final Rule will continue despite the publication of a new rule due to fears of reinstatement of the 2019 Final Rule as the result of future election outcomes, with another similarly stating that one aspect contributing to the chilling effect is a concern that a future administration will adopt a new public charge policy that penalizes people for using public benefits that are not included in the current public charge rule.

*Response:* DHS acknowledges that the 2019 Final Rule caused fear and confusion among U.S. citizens and noncitizens and had a significant chilling effect on the use of public benefits by noncitizens, even among those who were not subject to the rule and with respect to public benefits that were not covered by the rule. DHS is aware of evidence that the 2019 Final Rule, and the rulemaking process that preceded it, resulted in significant disenrollment effects among noncitizens and U.S. citizens in immigrant families. DHS also acknowledges the challenges associated with measuring chilling effects with precision, and notes that different studies use different data, methodologies, and periods and populations of analysis and therefore reach different estimates of chilling effects.<sup>172</sup>

DHS appreciates the commenter's concerns regarding family unity, but notes that the potential for a portion of a family to be deemed inadmissible is inherent in the concept of an individual inadmissibility determination. As compared to the 2019 Final Rule, however, this rule likely strengthens immigrant and mixed-citizenship families by virtue of avoiding certain chilling effects.

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<sup>172</sup> At the same time, no commenters submitted studies suggesting that there was no chilling effect.

In this rule, given the significant evidence of the deleterious collateral effects of the 2019 Final Rule, DHS gives more thorough consideration to the potential chilling effects of promulgating regulations governing the public charge inadmissibility determination. DHS believes that in fashioning this rule, it is appropriate to consider the widespread collateral effects of the 2019 Final Rule, including loss of nutrition and medical assistance by, for instance, U.S. citizen children in mixed-status households. Such effects are not solely the consequence of the policy contained in the 2019 Final Rule, but they are attributable to the 2019 Final Rule at least in part and are potentially very harmful for some people, including U.S. citizen children, and are not an inevitable consequence of public charge policy. In fact, as DHS has noted elsewhere, the public charge ground of inadmissibility identifies a range of relevant considerations, but does not require DHS to consider past or current receipt of any specific public benefits; most noncitizens who are subject to the public charge ground of inadmissibility are not eligible for the public benefits covered by either the 2019 Final Rule or this rule; and the 2019 Final Rule, notwithstanding its broader construction of the term “public charge” (which resulted in such chilling effects) and various other policy features (including a heavy paperwork burden), ultimately did not result in any final denials of adjustment of status based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A) and (B) of the INA, 8 U.S.C. 1182(a)(4)(A) and (B).<sup>173</sup> The 2019 Final Rule thus produced significant adverse collateral effects with no corresponding increase in the number of noncitizens found to be inadmissible on the public charge ground.

In considering chilling effects, DHS took into account the former INS’s approach to chilling effects in the 1999 Interim Field Guidance and 1999 NPRM, the 2019 Final Rule’s discussion of chilling effects, judicial opinions on the role of chilling effects, evidence of chilling effects following the 2019 Final Rule, and public comments on chilling effects following the

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<sup>173</sup> As noted above, while the 2019 Final Rule was in effect, DHS issued only three denials, which were subsequently reopened and approved.

August 2021 ANPRM and the 2022 NPRM. While DHS cannot predict how future administrations will act and what policies will be put into place, with this rule DHS commits itself to issuing guidance in a manner that will be clear and comprehensible for officers as well as for noncitizens and their families and that will lead to fair and consistent adjudications, thereby mitigating the risk of unequal treatment of similarly situated individuals.

*Comment:* Commenters said that older adults and people with disabilities, particularly in low-income communities and communities of color, have been disproportionately impacted by the COVID-19 pandemic. A national association of children’s hospitals stated that the COVID-19 pandemic created significant pressures on health care providers, which are only made worse by policies that deter eligible individuals from enrolling in coverage, and said that any increase in uncompensated care as a result of increased uninsured rates exacerbates the unprecedented strains faced by children’s hospitals nationwide due to the pandemic, the continuing mental health crisis amongst our children and youth, and an ongoing and worsening workforce shortage. This commenter stated that those strains threaten to undermine our pediatric health care system and the health of our children. Two commenters particularly emphasized the adverse health effects that resulted from the 2019 Final Rule during the pandemic when eligible individuals did not access Medicaid due to the chilling effects of the 2019 Final Rule, noting a 2021 Kaiser Family Foundation study that found that 35 percent of immigrants expressed concern that getting the COVID-19 vaccine would negatively impact their immigration status, and that the chilling effects continued even after and despite the fact that DHS issued guidance excluding Medicaid coverage of COVID-19 testing and treatment from the public charge inadmissibility determination.<sup>174</sup> Commenters also cited a 2021 report by Protecting Immigrant Families stating that even after the beginning of the COVID-19 pandemic, research shows that immigrant

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<sup>174</sup> Liz Hamel et al., “KFF COVID-19 Vaccine Monitor: COVID-19 Vaccine Access, Information, and Experiences Among Hispanic Adults in the U.S.,” Kaiser Fam. Found. (May 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-access-information-experiences-hispanic-adults/> (last visited Aug. 16, 2022).

families avoided non-cash benefits or other assistance because of public charge or other immigration concerns.<sup>175</sup> These commenters stated that these alarming trends have significant implications for the long-term health and well-being of children in immigrant families and threaten our nation’s future prosperity and ability to recover from the pandemic. One commenter similarly stated that COVID-19 will be harder to control and eradicate if people are afraid of seeking medical benefits. Commenters said that the impacts of the 2019 Final Rule severely impair their city’s overall ability to recover from the COVID-19 pandemic, particularly affecting older adults and people with disabilities, that the chilling effects have put public health at risk during the pandemic, and that the 2019 Final Rule undermined some of the States’ most effective tools for protecting the public’s health and well-being during a crisis and promoting our nation’s recovery. One commenter cited a national survey of adults primarily in families with mixed immigration or citizenship status that found that 46 percent of surveyed families that needed assistance during the COVID-19 pandemic did not apply for it due to concerns over immigration status.<sup>176</sup>

*Response:* DHS acknowledges that the COVID-19 pandemic began to affect the United States at the same time as DHS began implementing the 2019 Final Rule. As discussed in the NPRM, the pandemic had widespread effects, including on the population that changed its behavior in response to the 2019 Final Rule – and this population was largely not even subject to the 2019 Final Rule. DHS also fully understands that although the COVID-19 pandemic has evolved, the pandemic’s effects continue, in a variety of ways, to this day. DHS notes that some noncitizens in the United States may be especially vulnerable to the direct and indirect effects of the pandemic due to higher employment in high-risk occupations, greater fear of seeking care

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<sup>175</sup> Protecting Immigrant Families, “Research Documents Harm of Public Charge Policy During the COVID-19 Pandemic,” (Jan. 2022), [https://protectingimmigrantfamilies.org/wp-content/uploads/2022/01/PIF-Research-Document\\_Public-Charge\\_COVID-19\\_Jan2022.pdf](https://protectingimmigrantfamilies.org/wp-content/uploads/2022/01/PIF-Research-Document_Public-Charge_COVID-19_Jan2022.pdf) (last visited Aug. 16, 2022).

<sup>176</sup> No Kid Hungry, “Public Charge was Reversed—But Not Enough Immigrant Families Know” (Dec. 2021), [https://www.nokidhungry.org/sites/default/files/2021-12/NKH\\_Public%20Charge\\_Micro-Report\\_English\\_0.pdf](https://www.nokidhungry.org/sites/default/files/2021-12/NKH_Public%20Charge_Micro-Report_English_0.pdf) (last visited Aug. 15, 2022).

and enrolling in public benefit programs, comparatively limited healthcare and financial assistance options, limited English proficiency, and higher levels of poverty than U.S. citizens.<sup>177</sup>

Although DHS believes that the approach contained in this rule would be warranted, on both legal and policy grounds, regardless of the effects of the COVID-19 pandemic, this current pandemic has shown that pandemics are not a hypothetical concern and illustrates the importance of policy accounting for the possibility of similar occurrences in the future.

*Comment:* Two commenters pointed out that the 2019 Final Rule resulted in few adverse actions, which suggests that any public charge rule would only very narrowly protect the country's economic security, but a rule like the 2019 Final Rule would create widespread chilling effects extending to individuals not even subject to the public charge ground of inadmissibility.

*Response:* DHS agrees with these commenters that the 2019 Final Rule was not very consequential, during its period of implementation, in terms of the number of denials of adjustment of status applications. DHS acknowledges that the 2019 Final Rule resulted in widespread fear and confusion of being denied admission or adjustment of status, when in reality, as stated above, during the time that the 2019 Final Rule was in effect, of the 47,555 applications for adjustment of status to which the rule was applied, DHS issued only 3 denials (which were subsequently reopened and approved) and 2 Notices of Intent to Deny (which were ultimately rescinded, and the applications were approved). In promulgating this rule, DHS has given more thorough consideration to the potential chilling effects of promulgating regulations governing the public charge inadmissibility determination. DHS has concluded that this rule is consistent with the nation's economic security and will help ensure that public charge

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<sup>177</sup> DHS Office of Immigration Statistics and DHS Countering Weapons of Mass Destruction Office, "COVID-19 Vulnerability by Immigration Status" (May 2021), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/research\\_reports/research\\_paper\\_covid-19\\_vulnerability\\_by\\_immigration\\_status\\_may\\_2021.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/research_reports/research_paper_covid-19_vulnerability_by_immigration_status_may_2021.pdf) (last visited Aug. 15, 2022).

inadmissibility determinations will be fair, consistent with law, and informed by relevant data and evidence.

*Comment:* One commenter remarked that the 2019 Final Rule dramatically increased the burden placed on adjustment of status or admission applicants. Other commenters, including a trade association of home builders and a nonprofit organization serving farmworkers, similarly opposed the 2019 Final Rule as significantly discouraging lawful immigration by requiring Form I-944, Declaration of Self-Sufficiency, which created an impediment for employers, particularly small businesses, and negatively affected industries that required immigrant workers. Another commenter remarked that the public charge formula in the 2019 Final Rule was so complex and layered that it was extraordinarily difficult even for service providers to understand whether and how it applied.

*Response:* The 2019 Final Rule imposed a range of burdens separate and apart from the chilling effects that many commenters expressed their concern about. DHS agrees with the commenters who stated that the 2019 Final Rule was too burdensome on applicants by requiring additional information collection and evidence and its complex requirements. For example, Form I-944, together with its instructions, spanned 30 pages and requested a wide range of information on the statutory minimum factors, some of which was duplicative of other filings.

DHS believes that, in contrast to the 2019 Final Rule, this rule will avoid unnecessary burdens on applicants, officers, and benefits-granting agencies. In the 2019 Final Rule, DHS responded to multiple comments on the then-proposed Form I-944. In response to those comments, DHS revised certain fields to eliminate some redundancies or provide greater flexibility or clarity, and acknowledged that the time necessary to complete Form I-944 would vary by applicant (such that, for instance, a child without assets would not pose the same paperwork burden as an adult with assets).<sup>178</sup> DHS also emphasized that it was required to collect

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<sup>178</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41483-41484 (Aug. 14, 2019).

much of the information on the form in order to consider the statutory minimum factors. In the end, DHS finalized a lengthy and complex form that, according to the vast majority of comments that addressed the issue in that rulemaking and in this rulemaking, took many hours to complete.

This rule also ensures that DHS collects information regarding each of the statutory minimum factors, but does not require any additional forms and imposes a comparatively smaller paperwork burden. DHS has determined that the Form I-485, with some amendments, will sufficiently collect information regarding the factors that will be considered in a public charge inadmissibility determination. DHS reviewed the current form and proposed several additional questions regarding the factors used to make a public charge inadmissibility determination that were not already included in the form's information collection, including information about an applicant's household size, income, assets, liabilities, an applicant's education or skills, an applicant's use of public cash assistance for income maintenance, and any long-term institutionalization of the applicant at government expense. The form also informs applicants that additional space is available if applicants need to provide more information. DHS did not include additional questions or request additional evidence from applicants that is not related to a public charge inadmissibility determination. In order to reduce the burden on applicants not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), DHS also included a question asking applicants if they are subject to the public charge ground of inadmissibility and, if not, instructing that they may skip the subsequent related questions. DHS believes that these updated questions to the Form I-485 are necessary for DHS to make an accurate inadmissibility determination under the statutory public charge ground and will not impose undue burdens on applicants.

*Comment:* Consistent with many comments stating the 2019 Final Rule was discriminatory, one commenter remarked that the 2019 Final Rule contained no clear justifications beyond discriminating against immigrants and satisfying voters who expressed anti-immigrant sentiments, with other commenters calling it a direct assault on the health and

well-being of low-income immigrant households. One commenter stated that the 2019 Final Rule stood as a direct refutation of generations of immigrants who built this nation by dramatically broadening the classes of public benefits that could trigger a finding of public charge inadmissibility; instituting a durational test for measuring dependence on the unprecedented, expanded set of benefits; penalizing the mere application for benefits, even for those not subject to the public charge ground of inadmissibility; and replacing the totality of circumstances test with a rigid formula. One commenter stated that the 2019 Final Rule precluded immigrants with disabilities from applying for adjustment of status; put immigrant children with disabilities, such as those with diagnoses of autism spectrum disorder or failure to thrive, substantially at risk of worse outcomes due to limits in access to care; and contributed to creating and exacerbating life barriers, including timely medical attention. One commenter stated that the definition of “public charge” in the 2019 Final Rule resulted in almost all immigrants becoming ineligible for U.S. citizenship, and that people in America should not be deterred from help due to fear of deportation.

*Response:* DHS appreciates the commenters’ concerns about the 2019 Final Rule and notes that comments about the intention of the 2019 Final Rule fall outside the scope of this rulemaking. However, to the extent these commenters intended to express concern about this final rule discriminating against low-income immigrants, DHS notes that section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), requires DHS to consider how a noncitizen’s age; health; family status; assets, resources, and financial status; and education and skills impact whether the noncitizen is likely at any time to become a public charge. Under the statute, DHS may also consider an applicant’s Affidavit of Support Under Section 213A of the INA, if applicable.

Furthermore, to the extent that commenters are suggesting that this rule will make most noncitizens ineligible for naturalization, DHS disagrees. This rule addresses how DHS



determines inadmissibility based on the public charge ground and does not apply to individuals applying for naturalization.<sup>179</sup>

*Comment:* Commenters stated that the 2019 Final Rule did not take into account the contributions of immigrants to the economy and that the cost of issuing a rule similar to the 2019 Final Rule would outweigh the potential benefit to taxpayers because immigrants are less likely to use government benefits compared to people born in the United States. The commenters stated that the argument that taxpayers will be supporting immigrants is unfair, as millions of citizens born in the United States access public benefits and the effect on individual taxpayers is minimal. One commenter also stated that portraying any group of people solely as assets to the U.S. economy is dehumanizing and that it is important to consider human lives and basic human needs.

One commenter quoted a report from the National Immigration Law Center stating that the 2019 Final Rule made it harder for service providers to do their jobs due to the need for service providers and outreach workers to research the rule, understand its implications, and explain it to the clients as well as overcome misinformation from the media, social networks, and immigration attorneys.<sup>180</sup>

Another commenter stated that the 2019 Final Rule was an unreasonable and arbitrary interpretation of section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and has burdened the States with additional healthcare costs and harmed the public health and economic well-being of

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<sup>179</sup> See INA sec. 318, 8 U.S.C. 1429. DHS notes, however, that USCIS assesses as part of the naturalization whether the applicant was properly admitted as a lawful permanent resident and therefore was eligible for adjustment based upon the public charge ground of inadmissibility at the time of the adjustment of status. Additionally, an individual may become removable on account of public charge while in lawful permanent resident status, which is a consideration which may be assessed at the time of naturalization. See INA sec. 237(a)(5), 8 U.S.C. 1227(a)(5). However, the assessment of removability for public charge is different from the assessment of public charge inadmissibility and is not a part of this rule.

<sup>180</sup> See Holly Straut-Eppsteiner, “Documenting Harm through Service Provider Accounts Harm Caused by the Department of Homeland Security’s Public Charge Rule” (Feb. 2020), <https://www.nilc.org/wp-content/uploads/2020/02/dhs-public-charge-rule-harm-documented-2020-02.pdf> (last visited Aug. 16, 2022).

residents, disproportionately impacting communities of color and people with disabilities, which only intensified during the COVID-19 pandemic.

*Response:* Many commenters opposed the 2019 Final Rule for economic reasons. While the stated intent of the 2019 Final Rule was to ensure that noncitizens subject to the public charge inadmissibility ground are self-sufficient, the 2019 Final Rule had many additional consequences that DHS acknowledges in promulgating this rule. DHS recognizes the burden on applicants and the time spent by service providers helping the public understand the nuances of the 2019 Final Rule. Furthermore, the burden on States and the harm to public health and the well-being of residents has been well-documented.<sup>181</sup> In drafting this rule, DHS has determined that it is issuing a policy that is fully consistent with the law; that reflects empirical evidence to the extent relevant and available; that is clear and comprehensible for officers as well as for noncitizens and their families; that will lead to fair and consistent adjudications and, thus, avoid unequal treatment of similarly situated individuals; and that will not otherwise impose undue barriers for noncitizens seeking admission or adjustment of status in the United States.

*Comment:* A commenter stated that noncitizens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates, and in many cases more often than U.S. citizens, since the 1960s. The commenter stated that current eligibility rules for public assistance and unenforceable financial support agreements have not lived up to the intent of the laws to prevent individual noncitizens burdening the public benefits system. The commenter – a nationwide network of attorneys, law students, and paralegals who “support strong enforcement of federal immigration law and protecting the United States’ sovereignty” – stated that several of its members were themselves immigrants, and that at the time of their arrival, “it was both written and understood that ‘self-reliance’ was required with the promise of expulsion should an immigrant apply and/or receive public benefits.” The commenter supported

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<sup>181</sup> See 87 FR at 10589-10593 (Feb. 24, 2022).

the approach taken in the 2019 Final Rule, which allowed immigration officials to consider noncash benefits such as housing vouchers in a public charge inadmissibility determination, stating that previous guidelines only resulted in a few hundred applicants being found inadmissible and increased financial burdens upon States and their residents. This commenter went on to express its support for the 2019 Final Rule as aligning more closely with the intent of Congress and policies of self-sufficiency.

*Response:* DHS respectfully disagrees with the commenter's assertions. The commenter did not cite any sources to support its claims regarding the insufficiency of eligibility restrictions, the insufficiency of the affidavit of support, past increases in public benefits use by noncitizens, or written policies regarding the use of different types of public benefits by noncitizens. DHS notes that most noncitizens who are eligible for public benefits are not subject to the public charge ground of inadmissibility.

## **2. Impacts of the 2022 Proposed Rule**

*Comment:* Many commenters supported the proposed rule as a means to mitigate the chilling effects of prior public charge policies. Commenters stated that the rule will avoid unnecessary burdens on applicants, officers, and benefits-granting agencies while mitigating the possibility of widespread chilling effects with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible. Commenters also stated that the rule will allow immigrants better access to nutritional services and healthcare and in turn lower mortality rates among immigrant communities and improve the overall U.S. economy. One commenter also remarked that the rule would limit negative impacts by reducing the number of individuals who disenroll or elect to not enroll in healthcare programs and, due to the reduction of disenrollment from these programs, no longer shift the cost of care from less costly preventive care to the more costly emergency care.

*Response:* DHS agrees that this rule will avoid some of the chilling effects of prior public charge policies by ensuring that the rules governing the application of the public charge ground

of inadmissibility are clear and that public charge inadmissibility determinations will be fair, consistent with law, and informed by relevant data and evidence. DHS also agrees that the rule will avoid unnecessary burdens on applicants, officers, and benefits-granting agencies while mitigating the possibility of widespread chilling effects with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible. In this rulemaking effort, DHS considered the former INS's approach to chilling effects in the 1999 Interim Field Guidance and 1999 NPRM, the 2019 Final Rule's discussion of chilling effects, judicial opinions on the role of chilling effects, evidence of chilling effects following the 2019 Final Rule, and public comments on chilling effects received in response to the ANPRM and the NPRM.

*Comment:* Many commenters stated that this rule will discourage noncitizens from seeking needed public assistance, with one commenter stating that non-enrollment persists despite those noncitizens helping to fund those programs through income taxes. Commenters who opposed the proposed rule stated that regardless of the actual definitions and text, it will only exacerbate mass homelessness, poverty, unemployment, hunger, and deteriorating mental and economic health, and lead to more of the chilling effects that resulted from the 2019 Final Rule, negatively impacting the health, safety, and well-being of immigrants. Another commenter stated that to enforce a rule that prevents those in need from obtaining necessary medical and nutritional assistance is immoral, particularly while in the midst of a pandemic. One commenter feared that this rule will disproportionately cause chilling effects among noncitizens with disabilities, because people may not apply for the services they need and to which they are legally entitled because they are afraid of the immigration consequences. Another commenter also said the chilling effect makes it more difficult for community-based providers to reach older adults and people with disabilities most in need of support.

Some commenters generally supported the approach taken in the proposed rule as compared to the 2019 Final Rule, but expressed concern that adding clarity to the public charge

definition will do little to eliminate chilling effects and that the chilling effects not only have an impact on immigrants, but on communities as a whole. They wrote that including State and local benefits, current and past use of public benefits, as well as Medicaid for long-term institutionalization, still increases fear and confusion, and the chilling effects caused by the 2019 Final Rule will not be alleviated and mixed-status families will suffer.

Several commenters stated that the best way to reduce the chilling effect is to remove any consideration of public benefits from the public charge inadmissibility determination and to conduct robust outreach and education to explain the elimination of the 2019 Final Rule. One of those commenters stated that the consideration of public benefits creates an administrative burden to local government to keep immigrants informed and contributes to the harmful misperception that immigrants are present in the United States only to take and receive, which results in immigrants experiencing mistreatment and even violence, and harms overall public health and the economy.

*Response:* DHS disagrees that this rule will perpetuate the chilling effects of prior rulemaking efforts. While DHS acknowledges that that 2019 Final Rule caused fear and confusion among U.S. citizens and noncitizens, even among those who were not subject to the rule and with respect to public benefits that were not covered by the rule, with this rule DHS is working to mitigate the effects of that prior rulemaking. In drafting this rule, DHS endeavored to give more thorough consideration to the potential chilling effects of promulgating regulations governing the public charge ground of inadmissibility. In considering such effects, DHS took into account the former INS's approach to chilling effects in the 1999 Interim Field Guidance and 1999 NPRM, the 2019 Final Rule's discussion of chilling effects, judicial opinions on the role of chilling effects, evidence of chilling effects following the 2019 Final Rule, and public comments on chilling effects submitted in response to the ANPRM and NPRM.

DHS appreciates that the consideration of the past and current receipt of certain benefits in public charge inadmissibility determinations has resulted and may continue to result in

chilling effects, notwithstanding that few categories of noncitizens are subject to the public charge ground of inadmissibility and eligible for such public benefits. However, DHS nonetheless believes that it is important to consider a noncitizen's past or current receipt of certain benefits, to the extent that such receipt occurs, as part of the public charge inadmissibility determination, as such receipt can be indicative of future primary dependence on the government for subsistence. DHS notes that Congress appears to have recognized that past receipt of at least some public benefits may be properly considered in determining the likelihood of someone becoming a public charge, as evidenced by its prohibition against considering the receipt of public benefits that were authorized under 8 U.S.C. 1641(c) for certain battered noncitizens.<sup>182</sup> As DHS wrote in the 2019 Final Rule, DHS believes that Congress' prohibition of consideration of prior receipt of public benefits by a specific class of noncitizens indicates that Congress understood and accepted consideration of past receipt of public benefits in other circumstances. However, DHS has never believed that this requires DHS to consider receipt of all such benefits.

*Comment:* One commenter stated that the proposed rule should be revoked, as it is very similar to the 2019 Final Rule, which was deemed unlawful and is dangerous for the public at large, and had harmful consequences for the U.S. economy in the midst of a pandemic.

*Response:* DHS disagrees that this rule is unlawful, dangerous to the public, or harmful to the U.S. economy. DHS has determined that, in contrast to the 2019 Final Rule, this rule would effectuate a more faithful interpretation of the statutory phrase "likely at any time to become a public charge"; avoid unnecessary burdens on applicants, officers, and benefits-granting agencies; and mitigate the possibility of widespread "chilling effects" with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible, especially with respect to individuals who are not subject to the public charge ground of inadmissibility.

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<sup>182</sup> See INA sec. 212(s), 8 U.S.C. 1182(s).

*Comment:* One commenter stated that the proposed rule has a chilling effect on parents with children in U.S. schools, and that school districts should not forward household income information used to determine eligibility for critical school services that can be later used to deport a parent or caregiver based on current or past financial status.

*Response:* As indicated elsewhere in this rule, in making public charge inadmissibility determinations, DHS would consider the statutory minimum factors, the affidavit of support (if required), and receipt of cash assistance for income maintenance and long-term institutionalization at government expense. DHS did not propose to collect any information from schools and has not imposed such a requirement here. The specific suggestion, as it relates to the actions of school districts, is outside the scope of the rulemaking, particularly because this rule does not apply to any determinations regarding deportability.

### **3. General Suggestions for Addressing or Limiting Chilling Effects**

*Comment:* Commenters stated that DHS should be aware that clear and simple rules are the least likely to have chilling effects and will benefit officers and organizations. One commenter wrote that while the 1999 Interim Field Guidance was “indisputably superior” to the 2019 Final Rule, even the 1999 Interim Field Guidance “created confusion and an unnecessary chilling effect.”<sup>183</sup> They suggested DHS begin the final rule with a simply worded executive summary or prominently displayed simple and clear description of the limited circumstances in which noncitizens already in the United States are and are not subject to a public charge inadmissibility assessment, and the effective date of the new regulations and proposed public charge inadmissibility determination process. Two commenters also recommended that multiple government agencies that administer public benefits issue public letters annually clarifying which programs that they administer are considered in public charge inadmissibility determinations and which are not. Commenters stated that the incorporation of clear language

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will help service providers respond to immigrant families' concerns that they will be penalized under some future rule for receiving benefits that the proposed rule does not take into consideration because immigrants and their families receive critical support from a variety of programs funded by various entities. One commenter emphasized the importance of clear guidance for how to apply the rule and prioritizing communication given that any changes to public charge policy will lead to misinformation about which benefits will impact a noncitizen's ability to enter the United States or adjust their immigration status. One commenter stated that any lack of clarity regarding the implementation of the various elements of the rule permits reviewing officers to exercise discretion in a way that invites personal bias against applicants.

Another commenter similarly suggested that to mitigate the chilling effects of the 2019 Final Rule and this rule, DHS should expressly clarify in this final rule that utilization of Medicaid for healthcare, SNAP, and public housing, whether past or current, should never be considered in a public charge inadmissibility determination.

*Response:* DHS appreciates and understands commenters' concerns about using clear and clarifying language in this rule. In drafting this rule, DHS believes it provided clarification in its definitions as well as to which public benefits will be considered in a public charge inadmissibility determination. For example, as noted in the NPRM, defining "likely at any time to become a public charge" as likely at any time to become primarily dependent on the government for subsistence provides a clear connection between the exact language used in section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and the regulatory definition.<sup>184</sup> Additionally, this rule establishes key regulatory definitions for "public cash assistance for income maintenance," "long-term institutionalization at government expense," "receipt (of public benefits)," "government," and "household."

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<sup>184</sup> 87 FR at 10607 (Feb. 24, 2022).



DHS appreciates the suggestion that chilling effects could be ameliorated by public communications efforts, including annual letters, by benefits-granting agencies which clarify how the programs that they administer interact with this rule, if at all. Although such communications materials are not part of the rulemaking, DHS is planning a robust communication effort in conjunction with and immediately following the publication of this rule and notes the helpful suggestions of commenters that such efforts involve collaboration with agencies that administer public benefits.

Some commenters suggested DHS begin this rule with a simply worded executive summary and DHS has obliged (see above Executive Summary section). As for the comment suggesting that DHS expressly clarify in the rule that DHS will not consider the receipt of SNAP, public housing, or Medicaid for anything other than long-term institutionalization in a public charge inadmissibility determination, DHS has added language to 8 CFR 212.22(a)(3) stating that DHS will not consider receipt of, or certification or approval for future receipt of, public benefits not referenced in 8 CFR 212.21(b) or (c), such as Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs, Children's Health Insurance Program (CHIP), Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits. As for the suggestion that using clear language about which benefits are, and are not, considered under this rule may help service providers respond to immigrant families' concerns that they will be penalized under some future rule for receiving such benefits, DHS notes that it cannot affect the policy decisions in future rules by the use of such language but changes to the clarifying regulatory text discussed above would require an amendment to the regulations.

As with any new regulation, the regulated public may need to read and become familiar with the regulation to understand how it applies. DHS will also issue guidance and may further revise such guidance as necessary after it has gained experience with the new regulatory regime.

*Comment:* Commenters expressed appreciation for DHS’s acknowledgment of chilling effects and the attempts to lessen their harm through this rulemaking but expressed fear that the chilling effects would continue unless DHS engaged in a comprehensive information campaign. Many commenters suggested that DHS clearly communicate to the public that the 2019 Final Rule is no longer in effect so that the health and care of people in need will be better sustained.

Commenters stated that DHS should clearly and prominently list in all communications about the final rule and in the executive summary of the final rule all the benefits that will be considered as part of the public charge inadmissibility determination and emphasize that no other benefits will be taken into account. One commenter pointed out that a list, rather than a technical definition, is more useful and comprehensible for those seeking to understand the scope of the public charge assessment. The commenter cited a 2021 study by No Kid Hungry that found that in a survey of adults with family or friends who are noncitizens, 50 percent of respondents said that knowledge about changes to public charge regulations would make them more likely to use safety net programs when necessary.<sup>185</sup> One commenter suggested DHS maintain a streamlined mechanism for submitting questions about benefits that may be considered in a public charge inadmissibility determination, which will allow noncitizens to be more confident and certain they can access listed programs without endangering their immigration status, result in fewer calls to a State program, and make it easier for the State to serve the community by allowing them to streamline training and communications.

Several commenters recommended that multiple government agencies draft letters that distinguish SSI and TANF from other “cash-related” programs that their agencies oversee, to be posted on DHS’s public charge resource page and updated annually to include new programs in order to reduce the chilling effect of this rule and the previous 2019 Final Rule. Many

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<sup>185</sup> No Kid Hungry, “Public Charge was Reversed—But Not Enough Immigrant Families Know” (Dec. 2021). [https://www.nokidhungry.org/sites/default/files/2021-12/NKH\\_Public%20Charge\\_Micro-Report\\_English\\_0.pdf](https://www.nokidhungry.org/sites/default/files/2021-12/NKH_Public%20Charge_Micro-Report_English_0.pdf) (last visited Aug 15, 2022).

commenters stated that communication and outreach efforts must be available in multiple languages and have clear links to translated versions on the webpage. Commenters suggested a variety of communication strategies and materials, emphasizing the importance of multilingual outreach and diverse methods of performing this outreach. Commenters stated that immigration policies should not discourage immigrants and their family members from seeking physical or mental health care, nutrition, or housing benefits for which they are eligible, and recommended DHS make a concerted effort to educate and affirm that an individual's temporary use of assistance will not negatively impact their immigration status.

Some commenters recommended that in furtherance of the Biden administration's commitment to promote equity and restore faith in our immigration systems, DHS partner with Federal and State agencies that operate public health programs to implement a nationwide outreach and education effort to combat fear of utilization of public assistance programs and restore trust among immigrant families. Commenters said that DHS should also clearly communicate to parents of all children, both noncitizen children and U.S. citizen children, to reinforce that benefits received by children are not considered as part of any public charge inadmissibility determination, because both U.S. citizen children and noncitizen children have been detrimentally impacted by the false belief that a child's use of benefits would have immigration consequences for their parents or family members and it is important that families understand a child's use of benefits will not have immigration consequences. One commenter recommended that DHS clearly communicate to parents and caregivers that their own use of benefits, other than TANF and SSI, will not be considered in a public charge inadmissibility determination. For example, they recommended that DHS clarify that SNAP benefits and housing benefits supporting the whole family will not be taken into account so that parents and caregivers can access these programs without fear of immigration consequences and children's access to critical benefits will not be impacted. Commenters suggested DHS provide sample

language to or coordinate with States and benefit granting agencies to create easy-to-understand materials with government agency logos to include on forms and public-facing websites.

*Response:* DHS remains interested in public input regarding ways to shape public communications around the final rule to mitigate chilling effects among U.S. citizens and noncitizens, including the great majority of noncitizens who are either ineligible for the public benefits covered by this rule prior to admission or adjustment of status or are exempt from the public charge ground of inadmissibility. Although such communications materials are not part of the rulemaking, DHS is keenly aware of the established effects of its actions in this policy area and wishes to ensure that the final rule faithfully applies the public charge ground of inadmissibility without causing undue confusion among the public. To further this, DHS is planning a robust communication effort in conjunction with and immediately following the publication of this rule.

*Comment:* Many commenters recommended that DHS provide funding to trusted community organizations, including health and social services organizations, that will provide outreach and education to noncitizens and their families related to this rule such as “know your rights” presentations, hotline services, phone banks, social media engagement, and train the trainer presentations to community leaders, because community organizations are trusted by noncitizens.

*Response:* DHS appreciates the recommendations made by commenters to provide funding to community organizations that provide outreach and education related to this rule. As discussed elsewhere in this preamble, USCIS intends to conduct its own robust outreach in advance of implementing this final rule. Although recommendations for new grant programs are outside the scope of the rulemaking, DHS will take them under advisement as it implements and monitors the effects of this rule.

*Comment:* Commenters indicated that DHS should invest significantly in training and retraining immigration officers and case workers.

*Response:* USCIS plans to provide its officers with a solid foundation on and knowledge of public charge inadmissibility determinations by conducting training for officers to ensure consistency in adjudications. Additionally, USCIS plans to issue policy guidance in its USCIS Policy Manual (<https://www.uscis.gov/policy-manual>), which will include information from the NPRM, and this final rule and can be accessed by potential applicants, officers, and the public.

*Comment:* Commenters stated that despite previous alert boxes and updates on the USCIS webpage seeking to clarify that testing, treatment, and vaccination related to COVID-19 would not be considered as part of a public charge inadmissibility determination, there remained widespread fear that prevented many immigrants and their family members from seeking medical care, and the best way to ensure that people are not afraid to access health care is to provide a clear, concise statement that receiving government-funded health care or insurance will never have negative immigration consequences for immigrants or their family members. Another commenter similarly stated that the rule and outreach materials should also state that public health assistance for immunizations for any vaccine-preventable diseases and testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease are not included in a public charge inadmissibility determination.

*Response:* With respect to the comment that the rule should state that public health assistance for immunizations for any vaccine-preventable diseases and testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease are not considered in a public charge inadmissibility determination, DHS notes that it has made clear in the regulatory text that DHS will not consider the receipt of, or certification or approval for future receipt of, public benefits not referenced in 8 CFR 212.21(b) or (c), such as SNAP, CHIP, Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act), housing benefits, benefits related to

immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits.<sup>186</sup>

Regarding providing information about immunizations for any vaccine-preventable diseases and testing and treatment of symptoms of communicable diseases that are not considered under this rule in outreach materials, DHS notes that although such communications materials are not part of the rulemaking, DHS is keenly aware of the established effects of its actions in this policy area and wishes to ensure that the final rule faithfully applies the public charge ground of inadmissibility without causing undue confusion among the public. DHS previously indicated in the NPRM, is reiterating here, and will reiterate again in follow-on guidance, that it will not consider receipt of treatments or preventative services related to COVID-19, including vaccinations, in a public charge inadmissibility determination.

#### **F. Applicability of the Public Charge Ground of Inadmissibility**

*Comment:* Some commenters agreed that DHS should not consider the receipt of public benefits when adjudicating extension of stay and change of status requests. However, some commenters requested that DHS amend the rule to include a requirement that noncitizens seeking an extension of stay or change of status demonstrate that they have not, since obtaining their existing status, become a public charge or received public benefits sufficient to be determined to be a public charge. A commenter remarked that DHS has the authority to impose conditions on extension of stay and change of status and that doing so ensures noncitizens present in the United States are self-sufficient. The commenter suggested that DHS should require disclosure of any public benefit on extension of stay and change of status applications as well as the submission of a Declaration of Self Sufficiency by any noncitizen who discloses the use of a public benefit.

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<sup>186</sup> 8 CFR 212.22(a)(1)(3).

*Response:* Although DHS agrees that it has the authority to set conditions on requests for extension of stay and change of status,<sup>187</sup> as explained in more detail in the Other Legal Arguments section of this rule, consistent with the NPRM,<sup>188</sup> DHS has concluded that it will not require, as a condition of an application or petition for extension of stay or change of status, that a nonimmigrant disclose the use, if any, of public benefits since obtaining the nonimmigrant status that they wish to extend or change. Because such conditions would apply to very few, if any nonimmigrants, DHS finds that the burden of this inquiry outweighs any possible benefit that could result. This is, in part, because nonimmigrants are generally barred from receiving many of the public benefits considered in this rule, such as SSI, TANF, and Medicaid for long-term institutionalization.<sup>189</sup>

Additionally, to the extent that commenters are concerned that a nonimmigrant seeking an extension of stay or change of status may not be self-reliant, these concerns are, for many nonimmigrant categories, addressed both by the requirements for obtaining such status in the first instance<sup>190</sup> as well as the requirements applicable to their applications and petitions for extension of stay and change of status.<sup>191</sup> In sum, DHS believes that it has adequately explained its reasons for not imposing conditions related to the receipt of public benefits on nonimmigrants seeking an extension of stay or change of status and, as a result, declines to add provisions in this regard to the rule.

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<sup>187</sup> INA secs. 214 and 248, 8 U.S.C. 1184 and 1258.

<sup>188</sup> 87 FR at 10600-10601 (Feb. 24, 2022).

<sup>189</sup> 8 U.S.C. 1641(b) and (c) (defining “qualified aliens” for Federal public benefits purposes); 8 U.S.C. 1621 (describing eligibility for State and local public benefits purposes).

<sup>190</sup> *See, e.g.*, 8 CFR 214.1(f)(1)(B) (requiring that the student presents documentary evidence of financial support in the amount indicated on the SEVIS Form I-20 (or the Form I-20A-B/I-20ID)); 8 CFR 214.1(m)(1)(B) (requiring that student documents financial support in the amount indicated on the SEVIS Form I-20 (or the Form I-20M-N/I-20ID)).

<sup>191</sup> *See* USCIS, “Adjudicator’s Field Manual,” Chapter 30.3(c)(2)(C) (applicants to change status to a nonimmigrant student must demonstrate that they have the financial resources to pay for coursework and living expenses in the United States) <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm30-external.pdf> (last visited Aug. 16, 2022); USCIS, “Adjudicator’s Field Manual,” Chapter 30.2(c)(3)(D) (DHS will consider an applicant’s “financial ability to maintain the status sought” when determining whether to grant change of status in the exercise of discretion) <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm30-external.pdf> (last visited Aug. 16, 2022).

## **G. Exemptions, Limited Exemption, and Waivers**

*Comment:* Some commenters recommended excluding children and teenagers from the public charge ground of inadmissibility because of the difficulty in accurately predicting a child or teenager's future likelihood of becoming primarily dependent on the government for subsistence.

*Response:* DHS disagrees that it should not apply the public charge ground of inadmissibility to children because it is difficult to predict a child's likelihood of becoming primarily dependent on the government for subsistence. While DHS acknowledges that the public charge inadmissibility determination is a complex assessment, the language of section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), requires that this be a predictive assessment. This is evidenced by Congress' use of the terms "likely at any time" and "become," which clearly indicate that the assessment should be a prediction based on the factors that Congress said must be considered when determining the likelihood of becoming a public charge. These statutory mandatory factors include considering an applicant's age when determining whether a noncitizen is likely to become a public charge at any time in the future.

While DHS understands that there are many circumstances that may affect whether a child ultimately is likely to become primarily dependent on the government for subsistence, DHS is required to make this predictive assessment when a child is applying for admission or adjustment of status unless the child is within one of the categories expressly exempted by Congress. DHS notes that Congress did not exclude children from the public charge ground of inadmissibility, and, therefore, DHS must apply the ground to applications for admission or adjustment of status by a child unless the child is seeking admission or adjustment of status in a classification exempted from the public charge ground of inadmissibility, for example adjustment of status as a special immigrant juvenile.<sup>192</sup>

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<sup>192</sup> INA sec. 245(h)(2)(A), 8 U.S.C. 1255(h)(2)(A).



*Comment:* Some commenters recommended that DHS include in the rule a presumption that children cannot be a public charge, barring compelling evidence to the contrary. One commenter wrote that children are far more likely than adults to be enrolled in TANF (77 percent of total TANF enrollees were children in FY 2021<sup>193</sup>), that use of benefits by a child does not indicate their likelihood to be a public charge as an adult, and that children are not accountable for their presence in the United States nor any application for public benefits on their behalf.

*Response:* DHS disagrees with the suggestion that there should be a presumption that children are not likely at any time to become public charges absent compelling evidence to the contrary. Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), neither permits DHS to focus the public charge inadmissibility determination solely on the applicant's age (specifically, the fact that the applicant is a child), nor supports a presumption that an applicant who is a child is not likely at any time to become a public charge. On the contrary, an applicant's age is but one of the statutory minimum factors that DHS must consider as part of a public charge inadmissibility determination.<sup>194</sup> Regardless of an applicant's age, Congress mandated that DHS, in every case except where there is an insufficient Affidavit of Support Under Section 213A of the INA when required, consider all of the statutory minimum factors in assessing whether an applicant is likely at any time to become a public charge.<sup>195</sup>

While DHS acknowledges that children are far more likely than adults to be enrolled in TANF, the HHS data provided by the commenter does not distinguish between TANF recipients based on immigration or citizenship status.<sup>196</sup> DHS notes that the great majority of noncitizens (including children) are either ineligible for TANF prior to admission or adjustment of status or

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<sup>193</sup> Administration for Children and Families, "Temporary Assistance for Needy Families (TANF) Caseload Data – Fiscal Year (FY) 2021" (Dec. 20, 2021), [https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021\\_tanf\\_caseload.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021_tanf_caseload.pdf).

<sup>194</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>195</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>196</sup> Administration for Children and Families, "Temporary Assistance for Needy Families (TANF) Caseload Data – Fiscal Year (FY 2021)" (Dec. 20, 2021), [https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021\\_tanf\\_caseload.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ofa/fy2021_tanf_caseload.pdf).

are exempt from the public charge ground of inadmissibility. It is unlikely that the children receiving TANF are both noncitizens who are not yet lawful permanent residents and subject to the public charge ground of inadmissibility. DHS understands that according to the commenter, the study and book cited by the commenter state that public benefit use by children may lead to increased income throughout their lifetimes.<sup>197</sup> However, under section 212(a)(4)(A) of the INA, 8 U.S.C. 1182(a)(4)(A), DHS must determine if a noncitizen “is likely *at any time* to become a public charge” (emphasis added). “At any time,” certainly includes the period soon after a noncitizen’s potential admission or adjustment of status. The questions that DHS must consider, therefore, are not only whether a child applicant is likely to become a public charge at some point during adulthood but, whether the child applicant is likely to become a public charge immediately after admission or adjustment of status, while still a child. Finally, Congress has provided exemptions from the public charge ground of inadmissibility for certain groups, including groups to which children belong, for example applicants for adjustment of status based on special immigrant juvenile classification.<sup>198</sup> However, Congress has not created a general exemption for children from the public charge ground of inadmissibility, nor has Congress indicated that this ground of inadmissibility only applies to noncitizens who are “accountable” for being in the United States or who intended to immigrate. Similarly, the statute does not suggest that Congress intended DHS to consider whether an applicant received public benefits because someone applied for such benefits on their behalf or whether the applicant had any choice in someone applying for a benefit on their behalf as part of a public charge inadmissibility determination.

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<sup>197</sup> The commenter cites to Edwin Park, et al., “Jeopardizing a Sound Investment: Why Short-Term Cuts to Medicaid Coverage During Pregnancy and Childhood Could Result in Long-Term Harm” (Dec. 2020), [https://www.commonwealthfund.org/sites/default/files/2020-12/Park\\_Medicaid\\_short\\_term\\_cuts\\_long-term-effects\\_ib\\_v2.pdf](https://www.commonwealthfund.org/sites/default/files/2020-12/Park_Medicaid_short_term_cuts_long-term-effects_ib_v2.pdf) and National Academies of Sciences, Engineering, and Medicine, “A Roadmap to Reducing Child Poverty” (2019), <https://nap.nationalacademies.org/download/25246> (last visited Aug. 16, 2022).

<sup>198</sup> INA sec. 245(h)(2)(A), 8 U.S.C. 1255(h)(2)(A).

Therefore, DHS declines to add a provision to this rule that would direct officers to treat an applicant's age, specifically the fact that an applicant is a child, as either outcome-determinative or as creating a presumption that the applicant is not inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Instead, under this rule and as noted in the NPRM, in making public charge inadmissibility determinations, DHS will consider the statutory minimum factors as set forth in the rule and the applicant's current and past receipt of public benefits in the totality of the circumstances<sup>199</sup> as well as favorably consider a sufficient Affidavit of Support Under Section 213A of the INA (i.e., a positive factor that makes an applicant less likely at any time to become a public charge in the totality of the circumstances). Finally, DHS acknowledges the unique position of children and will provide guidance to officers on how to faithfully apply the statute and this final rule given the circumstances particular to children.

*Comment:* Many commenters expressed support for the proposed rule's listing of exemptions, limited exemptions, and waivers, with some requesting that DHS update public-facing guidance quickly and regularly to reflect this list and reduce the chilling effect on the legitimate use of benefits for those individuals who are exempt from the public charge ground of inadmissibility.

*Response:* In addition to including a comprehensive list of exemptions from the public charge ground of inadmissibility, which includes a "catch-all" exemption in the event that Congress adds other exemptions by legislation,<sup>200</sup> USCIS plans to issue policy guidance in its Policy Manual (<https://www.uscis.gov/policy-manual>), which will include information from the NPRM and this final rule regarding the exemptions from the public charge ground of inadmissibility and can be accessed by potential applicants. USCIS will update its Policy Manual as appropriate to reflect any changes made by Congress, if any, to the exemptions from the public charge ground of inadmissibility.

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<sup>199</sup> 8 CFR 212.22(a)(2), (b).

<sup>200</sup> 8 CFR 212.23.

*Comment:* Several commenters also recommended DHS add certain categories to the list of exempt categories, including withholding of removal, parole, suspension of deportation, Deferred Enforced Departure, Deferred Action for Childhood Arrivals, and deferred action. These commenters recommended that DHS clarify that the “catch all” exemption in proposed 8 CFR 212.23(a)(29) includes these categories as well as all “categories of lawfully present immigrants,” which are not subject to the public charge ground of inadmissibility but may qualify for certain cash assistance programs. One commenter noted that this recommendation is aimed at helping to prevent chilling effects and provide “protection against adverse consideration of such benefits for as many applicable categories of immigrants as possible.” In the alternative to adding these categories of noncitizens to the exempt categories listed in 8 CFR 212.23(a), some commenters recommended that DHS add provisions to 8 CFR 212.22 stating that even though such noncitizens are not exempt from the public charge ground of inadmissibility, DHS would not consider public benefits received by such noncitizens while they were present in the United States in such immigration categories.

*Response:* The public charge ground of inadmissibility applies to all applicants for visas, admission, and adjustment of status unless exempted from the ground by Congress.<sup>201</sup> The exemptions that are listed in 8 CFR 212.23 reflect the classes of noncitizens who are applicants for admission or adjustment of status but who, as the commenters acknowledged, Congress has designated are exempt from the public charge ground of inadmissibility. DHS notes, however, that requests for withholding of removal, parole, Deferred Enforced Departure, Deferred Action for Childhood Arrivals, and deferred action are not applications for visas, admission, or adjustment of status, and, therefore, are not subject to the public charge ground of inadmissibility. Additionally, DHS notes that it does not need to include suspension of deportation under sections 202(a) and 203 of the Nicaraguan Adjustment and Central American

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<sup>201</sup> See INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).

Relief Act (NACARA)<sup>202</sup> in the list of exemptions in 8 CFR 212.23(a) because they are already included in this rule, in 8 CFR 212.23(a)(7).

Furthermore, to the extent that these commenters believe that DHS should not consider in a public charge inadmissibility determination any benefits received during a period in which the noncitizen was present in the United States while benefiting from withholding of removal, parole, Deferred Enforced Departure, Deferred Action for Childhood Arrivals, deferred action generally, or in any of the “categories of lawfully present immigrants to whom public charge inadmissibility grounds are inapplicable,” DHS notes that Congress has not prohibited DHS from considering any public benefits received by such noncitizens. In the absence of such instruction, DHS believes that to not consider all benefit use by noncitizens in such categories, which would encompass all the categories of noncitizens eligible for SSI, TANF, or Medicaid for long-term institutionalization whose past or current benefit use may be considered in a public charge inadmissibility determination, would be inconsistent with Congressional intent.

Congress, in enacting PRWORA and IIRIRA very close in time, made certain public benefits available to a small number of noncitizens who are also subject to the public charge ground of inadmissibility, even though receipt of some such benefits could influence a determination of whether the noncitizen is inadmissible as likely at any time to become a public charge.

Under the statute crafted by Congress, noncitizens generally will not be issued visas, admitted to the United States, or permitted to adjust status if they are likely at any time to become a public charge. Congress nonetheless recognized that certain noncitizens present in the United States who are subject to the public charge ground of inadmissibility might reasonably find themselves in need of public benefits that, if obtained, could influence a determination of whether they are inadmissible as likely at any time to become a public charge. Consequently, in

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<sup>202</sup> See Pub. L. 105–100, 111 Stat. 2193 (1997), as amended, 8 U.S.C. 1255 note.

PRWORA, Congress allowed certain noncitizens to be eligible for some public benefits even though they may later seek a visa, admission, or adjustment of status and thereby be subject to the public charge ground of inadmissibility. However, Congress, except in very limited circumstances,<sup>203</sup> did not prohibit DHS from considering the receipt of such benefits in a public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). In other words, although a noncitizen may obtain public benefits for which they are eligible, DHS may consider the receipt of those benefits for the purposes of a public charge inadmissibility determination.

It is consistent with Congressional intent for DHS to not consider public benefits received by noncitizens during periods in which they were (1) present in an immigration category that is exempt from the public charge ground of inadmissibility or (2) eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157 as described in this rule. The categories comprise a long list of vulnerable populations or groups of noncitizens of particular policy significance for the United States. Congress expressed a policy preference that individuals in these categories should be able to receive public benefits without risking adverse immigration consequences. DHS believes that Congress did not intend to later penalize such noncitizens for using benefits while in these categories because such consideration would undermine the intent of their exemption. Given the nature of these populations and the fact that, consistent with specific statutory authority, they would be exempt from the public charge ground of inadmissibility if applying for admission or, as permitted, adjustment of status under those categories, it is reasonable for DHS to exclude from consideration those benefits that an applicant received while in a status that is exempt from the public charge ground of inadmissibility. However, the same Congressional intention has not been expressed for other categories of noncitizens. DHS therefore will consider current and/or

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<sup>203</sup> See INA sec. 212(s), 8 U.S.C. 1182(s).

past benefit receipt by these other categories of noncitizens (i.e., parolees, granted withholding of removal, or any other categories of lawfully present immigrants) who received those benefits when they apply for admission or adjustment in a category that is subject to a public charge inadmissibility determination. We note, however, that many of those categories of noncitizens would not be eligible for most public benefits to begin with. For these reasons, DHS declines to add the suggested changes to 8 CFR 212.23.

*Comment:* Many commenters recommended DHS strengthen the scope of protection provisions for vulnerable immigrants in certain categories by adding clauses recognizing that the exemption from the public charge ground of inadmissibility attaches regardless of their pathway to adjustment of status. Specifically, they recommended that DHS add such provisions for Violence Against Women Act (VAWA) self-petitioners and “qualified aliens” under 8 U.S.C. 1641(c), similar to provisions in the NPRM for T-nonimmigrant and U-nonimmigrant exemptions. The commenters suggested that such additions would remove unnecessary barriers for adjustment of status of noncitizens in these categories.

*Response:* Under section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E), certain “qualified alien” victims are exempt from the public charge ground of inadmissibility. This includes, as the commenters note, a noncitizen who “is a qualified alien described in” 8 U.S.C. 1641(c) and who is “a VAWA self-petitioner,” or an applicant for or recipient of U nonimmigrant status under section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U).

The commenters were under the impression that because proposed 8 CFR 212.23(a)(18) and (19) specifically mention “seeking an immigration benefit for which admissibility is required, including, but not limited to, adjustment of status under section 245(a) of the Act,” that the absence of such language in proposed 8 CFR 212.23(a)(20) and (21) suggested that the statutory exemptions from the public charge ground of inadmissibility for VAWA self-petitioners and “qualified aliens” described in 8 U.S.C. 1641(c) were dependent upon the particular pathway to LPR status being sought by the noncitizen. However, DHS notes that these

commenters are mistaken in their interpretation of the proposed regulatory text. As they correctly stated, a noncitizen who “is a VAWA self-petitioner” or who “is a qualified alien described in” 8 U.S.C. 1641(c) is exempt from INA sec. 212(a)(4)(A)-(C), 8 U.S.C. 1182(a)(4)(A)-(C), and this exemption does not depend on the particular pathway to LPR status being sought by the noncitizen.

The language that the commenters praised in proposed 8 CFR 212.23(a)(18) and (19) and recommended including in 8 CFR 212.23(a)(20) and (21) is present due to statutory ambiguities unique to the adjustment of status of T and U nonimmigrants. Specifically, there is an inconsistency between INA sec. 212(a)(4)(E)(iii), 8 U.S.C. 212(a)(4)(E)(iii), and INA sec. 245(l)(2), 8 U.S.C. 1255(l)(2), as the former provides an exemption from INA sec. 212(a)(4)(A)-(C), 8 U.S.C. 1182(a)(4)(A)-(C), while the latter states that the public charge inadmissibility ground applies to T nonimmigrants but a waiver is available. This inconsistency is due to Congress’ failure to amend INA sec. 245(l)(2), 8 U.S.C. 1255(l)(2), when it created INA sec. 212(a)(4)(E), 8 U.S.C. 1182(a)(4)(E), in its current form. Because the amendments to INA sec. 212(a)(4)(E), 8 U.S.C. 1182(a)(4)(E),<sup>204</sup> occurred later in time than the creation of INA sec. 245(l), 8 U.S.C. 1255(l),<sup>205</sup> DHS considers the text and exemption in INA sec. 212(a)(4)(E)(iii), 8 U.S.C. 1182(a)(4)(E)(iii), controlling. Given the conflicting statutory provisions, it is important for DHS to clarify in the regulatory text of 8 CFR 212.23(a)(18) that despite INA sec. 245(l), 8 U.S.C. 1255(l), the exemption applies in the adjustment of status context.

While U nonimmigrants do not have conflicting statutory provisions as just described for T nonimmigrants, one could read the exemption language in INA sec. 212(a)(4)(E)(ii), 8 U.S.C. 1182(a)(4)(E)(ii), as limited to applying for and being granted U nonimmigrant status rather than being inclusive of adjustment of status and any other immigration benefit for which admissibility

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<sup>204</sup> See, Sec. 803, Violence Against Women Reauthorization Act of 2013, Public Law 113-4, 127 Stat. 54 (Mar. 7, 2013).

<sup>205</sup> See, Sec. 107(f) of the Victims of Trafficking and Violence Protection Act of 2000, Public Law 106- 386, 114 Stat. 1464 (Oct. 8, 2000).



is required. Due to this potential ambiguity, DHS in this rule (and in the 2019 Final Rule) clarified in 8 CFR 212.23(a)(19) that the exemption applies to all immigration benefits for which admissibility is required, including, but not limited to, adjustment of status.

Unlike the T and U nonimmigrants, the statutory language relating to the exemptions from INA sec. 212(a)(4)(A)-(C), 8 U.S.C. 1182(a)(4)(A)-(C), for VAWA self-petitioners and “qualified aliens” described in 8 U.S.C. 1641(c) (apart from the T nonimmigrants) is straightforward and clear. If the noncitizen “is” in one of those two categories, INA sec. 212(a)(4)(A)-(C), 8 U.S.C. 1182(a)(4)(A)-(C), shall not apply to them. There is no ambiguity in the statutory language or a conflicting statutory provision that requires DHS to clarify the issue within the regulatory text. For this reason, DHS declines to make the proposed changes to the rule.

While not raised by the commenters, DHS points out that the exemptions found in INA sec. 212(a)(4)(E), 8 U.S.C. 1182(a)(4)(E), do not apply to INA sec. 212(a)(4)(D), 8 U.S.C. 1182(a)(4)(D). Congress did not include paragraph (D) among the exemptions in section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E). DHS must presume that Congress acted intentionally in requiring all noncitizens described in paragraph (D) to file the requisite Affidavit of Support Under Section 213A of the INA, even if they are described in paragraph (E).<sup>206</sup> Accordingly, in the unlikely event that a noncitizen described in paragraph (E) seeks admission or adjustment of status based on an immigrant visa issued under section 203(b) of the INA, 8 U.S.C. 1153(b), that individual must comply with the affidavit of support requirement in section 213A of the INA, 8 U.S.C. 1183a. Such individuals, however, would not need to demonstrate, as

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<sup>206</sup> See, e.g., *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) (counseling against interpretative methodologies that yield “not . . . a construction of [a] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope”); *Yith v. Nielsen*, 881 F.3d 1155, 1164 (9th Cir. 2018) (“It is never our job to rewrite a constitutionally valid statutory text. Indeed, it is quite mistaken to assume that whatever might appear to further the statute’s primary objective must be the law.” (citations, quotation marks, and alterations omitted)).

set forth in paragraphs 212(a)(4)(A) and (B), 8 U.S.C. 1182(A) and (B), that they are not likely at any time to become a public charge.

*Comment:* One commenter suggested that DHS clearly provide waivers for individuals who would otherwise qualify for protections provided for victims of domestic violence, sexual assault, and human trafficking afforded under VAWA, the Trafficking Victims Protection Act (TVPA), and other humanitarian immigration provisions, but who have not sought such protections or benefits and are seeking admission or adjustment of status under another provision in the INA, such as through family or employment sponsorship, the diversity visa program, or other programs. The commenter explained that this waiver would provide increased protection for survivors and reduce burden on the immigration system by decreasing additional processing of immigration applications and reducing pressure on immigration court dockets.

*Response:* The waivers that are listed in 8 CFR 212.23(c) reflect the classes of noncitizens who are applicants for admission or adjustment of status, and therefore subject to the public charge ground of inadmissibility, but who Congress has designated as eligible to seek a waiver of inadmissibility. DHS notes that only Congress can establish a waiver for this ground of inadmissibility. Accordingly, to the extent that this commenter believes that DHS should expand the waivers of the public charge ground of inadmissibility to include victims of domestic violence, sexual assault, and human trafficking who might be eligible for certain benefits under VAWA, the TVPA, and other humanitarian immigration provisions, but who have not sought such benefits and who are seeking admission or adjustment of status under a category to which the public charge ground of inadmissibility applies, DHS disagrees.

Congress, through legislation, decides to whom the public charge ground of inadmissibility applies, which classes of noncitizens are exempt from the ground, and which can obtain a waiver of the ground. Although DHS understands the desire to expand waivers to be available to victims of domestic violence, sexual assault, and human trafficking, the only waivers presently available are for applicants for admission as nonimmigrants under section

101(a)(15)(S) of the INA, 8 U.S.C. 1101(a)(15)(S), nonimmigrants admitted under that provision who are applying for adjustment of status under section 245(j) of the INA, 8 U.S.C. 1255(j), and the waiver under INA sec. 212(d)(3), 8 U.S.C. 1182(d)(3), for noncitizens applying for a nonimmigrant visa or admission as a nonimmigrant. DHS is not authorized to expand the waivers beyond those decided by Congress and as a result, DHS declines to adopt this commenter's recommendation.

*Comment:* Several commenters recommended removing the requirement that T and U nonimmigrants must be in valid T or U visa status at the time of filing the application for adjustment of status as well as at the time of adjudication of the adjustment of status application in order to adjust under section 245(a) of the INA, 8 U.S.C. 1255(a), or to seek another immigration benefit for which admissibility is required, as this limitation is unnecessary and could undermine the effectiveness of the exemptions at protecting these immigrants.

*Response:* As noted above, section 804 of VAWA 2013, which added section 212(a)(4)(E)(iii) of the INA, 8 U.S.C. 1182(a)(4)(E)(iii), specifically excludes noncitizens, such as “qualified aliens” described in 8 U.S.C. 1641(c) (including those granted T nonimmigrant status and those with a pending prima facie application for T nonimmigrant status) and noncitizens who are applicants for or have been granted U nonimmigrant status, from section 212(a)(4)(A), (B), and (C) of the INA, 8 U.S.C. 1182(a)(4)(A), (B), and (C). Additionally, T nonimmigrants seeking to adjust status under section 245(a) of the INA, 8 U.S.C. 1255(a) (with a limited exception), and section 245(l) of the INA, 8 U.S.C. 1255(l), are not subject to the public charge ground of inadmissibility for purposes of establishing eligibility for adjustment of status provided that the T nonimmigrants are in valid T nonimmigrant status at the time the Form I-485 is properly filed in compliance with 8 CFR 103.2(a)(7) and throughout the pendency of an

application.<sup>207</sup> As with the U nonimmigrants discussed below, DHS points out that Congress used present tense language “is a qualified alien described in” 8 U.S.C. 1641(c) in describing the exemption for T nonimmigrants. If a noncitizen was in the past “a qualified alien described in” 8 U.S.C. 1641(c) but no longer is such a “qualified alien” at the time that their benefit request is filed with USCIS or at the time that the benefit request is adjudicated, the noncitizen no longer meets the requirements of INA sec. 212(a)(4)(E)(iii), 8 U.S.C. 1182(a)(4)(E)(iii), and INA sec. 212(a)(4)(A)-(C), 8 U.S.C. 1182(a)(4)(A)-(C), would apply to the noncitizen.

Furthermore, consistent with section 804 of VAWA 2013,<sup>208</sup> which, as noted above, added new section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E), an individual who is an applicant for, or is granted, U nonimmigrant status is exempt from the public charge ground of inadmissibility. However, DHS believes that for this exemption from the public charge ground of inadmissibility to apply, the U nonimmigrant must hold and be in valid U nonimmigrant status at the time the Form I-485 is properly filed in compliance with 8 CFR 103.2(a)(7) and throughout the pendency of an application.<sup>209</sup> U nonimmigrant status is not indefinite but rather is granted for a finite period of time, generally not to exceed 4 years in the aggregate.<sup>210</sup> In addition, U nonimmigrant status can be revoked.<sup>211</sup> DHS believes that the most reasonable interpretation of “or is granted, nonimmigrant status under” INA sec. 101(a)(15)(U), 8 U.S.C. 1101(a)(15)(U), is that the exemption only applies while the noncitizen has an active grant of U nonimmigrant status given the present tense of “is granted.” If Congress had intended for the exemption to

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<sup>207</sup> See 8 CFR 103.2(b)(1) (an applicant or petitioner must establish that they are eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication); see also *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (“an application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered”). DHS notes that although VAWA 2013 did not amend section 245(l)(2) of the INA, 8 U.S.C. 1255(l)(2), which provides that DHS may waive the application of the public charge ground of inadmissibility if it is in the national interest to do so for a T nonimmigrant seeking to adjust status to lawful permanent residence under section 245(l) of the INA, 8 U.S.C. 1255(l), DHS concludes, however, that the VAWA 2013 amendments, which postdated the enactment of section 245(l)(2) of the Act, 8 U.S.C. 1255(l)(2), are controlling.

<sup>208</sup> See Pub. L. 113-4, 127 Stat. 54 (2013).

<sup>209</sup> See 8 CFR 212.23(a)(19)(ii).

<sup>210</sup> See 8 CFR 214.14(g)(1).

<sup>211</sup> See 8 CFR 214.14(h).

persist even after the noncitizen was no longer in U nonimmigrant status, they could have indicated this in the statutory text by choosing a different verb tense. The law does not permit DHS to add language to the statute.

## **H. Definitions**

*Comment:* One commenter stated that the lack of enrollment in public benefits due to ongoing fear and confusion in the immigrant community will not improve without clear definitions of “public charge,” “primarily,” “public cash assistance,” and “long-term institutionalization.”

*Response:* Rather than defining the term “public charge” separately, DHS believes that defining “likely at any time to become a public charge” to mean “likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense,”<sup>212</sup> as well as defining the phrases “public cash assistance for income maintenance”<sup>213</sup> and “long-term institutionalization at government expense,”<sup>214</sup> achieves the necessary clarity. Officers have been applying a similar standard for over 20 years before and after the 2019 Final Rule was in effect, and DHS does not believe that further clarification is necessary.

DHS again emphasizes that the intent of this rule is to ensure fair public charge inadmissibility determinations consistent with section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). DHS also anticipates that this rule will help alleviate the chilling effects caused by the 2019 Final Rule.

### **1. Likely at Any Time to Become a Public Charge**

*Comment:* Several commenters supported the definition of “likely at any time to become a public charge” proposed by DHS in its entirety. One of those commenters noted that case law

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<sup>212</sup> See 8 CFR 212.21(a).

<sup>213</sup> See 8 CFR 212.21(b).

<sup>214</sup> See 8 CFR 212.21(c).

reflects that from the time the term “public charge” was first used by Congress in 1882 until the 2019 Final Rule, “public charge” was broadly understood to mean a person primarily or entirely dependent on the government for subsistence.<sup>215</sup>

*Response:* DHS agrees that the definition for “likely at any time to become a public charge” in this rule is consistent with the historical understanding of the public charge inadmissibility ground. This position is reinforced by the cases cited by the commenter, which highlight that the historical understanding of “public charge” has been one of “dependence on public assistance for survival”<sup>216</sup> and a reliance “on the government for subsistence.”<sup>217</sup>

*Comment:* One commenter opposed allowing officers to make a prospective assessment in a public charge inadmissibility determination, as it invites officers’ subjective biases into the determination.

*Response:* The public charge inadmissibility determination is necessarily prospective in nature based on the language of the statute. Indeed, through this rulemaking, DHS is implementing the congressional mandate to assess an applicant’s likelihood at any time of becoming a public charge based on, at a minimum, the factors that Congress put into place.<sup>218</sup> As DHS noted in the NPRM,<sup>219</sup> this rule is consistent with the statutory wording, in that the statute uses the phrase “likely at any time,” which suggests that the public charge inadmissibility determination is a forward-looking, prospective determination that is made at the time of the application for a visa, admission, or adjustment of status.

DHS also agrees, as noted in the NPRM,<sup>220</sup> that the public charge inadmissibility determination is inherently subjective in nature given the express wording of section

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<sup>215</sup> The commenter cited to *City and County of San Francisco v. USCIS*, 981 F.3d 756 (9th Cir. 2020) and *New York v. DHS*, 969 F.3d 42, 74 (2d Cir. 2020).

<sup>216</sup> *City and County of San Francisco v. USCIS*, 981 F.3d 756 (9th Cir. 2020).

<sup>217</sup> *New York v. DHS*, 969 F.3d 42, 74 (2d Cir. 2020).

<sup>218</sup> See INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

<sup>219</sup> 87 FR at 10606-10607 (Feb. 24, 2022).

<sup>220</sup> 87 FR at 10579 (Feb. 24, 2022).

212(a)(4)(A) of the INA, 8 U.S.C. 1182(a)(4)(A), which states that the public charge inadmissibility determination is “in the opinion of” DHS.<sup>221</sup> Insofar as this rule reflects the prospective nature of this ground of inadmissibility and the subjective nature of the determination as set by Congress, DHS declines to eliminate the prospective determination.

*Comment:* One commenter recommended DHS clarify the word “likely,” as the lack of specificity in the definition creates an opportunity for confusion or over-reach.

*Response:* To the extent that this commenter suggests that DHS should define the term “likely” to avoid officers applying the statute inconsistently or abusing their discretion, DHS disagrees that a separate definition is needed. DHS has been applying the “likely to become primarily dependent on the government for subsistence” standard for public charge inadmissibility determinations for over 20 years (with the exception of the period during which the 2019 Final Rule was in effect) and believes that the definitions in the rule sufficiently explain to officers that the focus of the inquiry is on whether an applicant is likely to become primarily dependent on the government for subsistence. As explained in the NPRM, DHS defined the term “likely” as “more likely than not” in the 2019 Final Rule.<sup>222</sup> DHS continues to believe that this interpretation is appropriate. Therefore, DHS does not believe that it needs to further define the term “likely” to ensure that officers properly exercise the fact-specific, discretionary determination required by Congress in the statute,<sup>223</sup> and declines to make changes to the rule in this regard.

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<sup>221</sup> See *Matter of Harutunian*, 14 I&N Dec. 583, 588 (Reg’l Cmm’r 1974) (“[T]he determination of whether an alien falls into that category [as likely to become a public charge] rests within the discretion of the consular officers or the Commissioner . . . Congress inserted the words ‘in the opinion of’ (the consul or the Attorney General) with the manifest intention of putting borderline adverse determinations beyond the reach of judicial review.” (citation omitted)); see also *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421 (Att’y Gen. 1962) (“[U]nder the statutory language the question for visa purposes seems to depend entirely on the consular officer’s subjective opinion.”).

<sup>222</sup> 87 FR at 10607-10608 (Feb. 24, 2022).

<sup>223</sup> See INA sec. 212(a)(4)(A), 8 U.S.C. 1182(a)(4)(A) (“Any alien, who in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of the application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”).

*Comment:* One commenter recommended DHS adjust the definition for “likely at any time to become a public charge” to clearly indicate that public charge inadmissibility determinations are prospective, and to include the relevant time for likelihood of becoming a public charge is “at any time *in the future.*” Another commenter recommended that DHS clarify the phrase “at any time” to avoid confusion.

*Response:* As noted above, section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), uses the term “at any time,” which indicates that the public charge inadmissibility determination is a forward-looking, prospective determination that is made at the time of the application for a visa, admission, or adjustment of status. Consistent with the wording Congress used in enacting the public charge ground of inadmissibility, DHS has included a provision in this final rule that makes it clear that the public charge inadmissibility determination is a determination of a noncitizen’s likelihood of becoming a public charge at any time in the future, based on the totality of the circumstances.<sup>224</sup> Insofar as DHS has already clarified that the public charge inadmissibility determination is forward-looking, DHS does not believe it is necessary to add “in the future” to the definition of “likely at any time to become a public charge” and declines this commenter’s suggestion.

*Comment:* One commenter suggested that the final rule could be strengthened by including a time limit for the prospective test to create a clearer standard for officers, which would lead to more consistent adjudication. For instance, DHS could limit the forward-looking part of the test to 5 years, which is the length of time it generally takes for an LPR to be eligible to apply for naturalization. The same commenter suggested 3 years as an alternative, based on the length of time it generally takes for an LPR married to a U.S. citizen to be eligible to apply for naturalization, or to limit the forward-looking period to any time prior to naturalization. The commenter justified the recommendation of a fixed time limit to provide a clearer standard for

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<sup>224</sup> See 8 CFR 212.22(b).



USCIS officers and increase the likelihood that the standard would be implemented consistently. The commenter also noted that given an indefinite window, almost anyone is at risk of experiencing financial distress that could lead to public benefit use.

*Response:* DHS disagrees with limiting the forward-looking aspect of the public charge ground of inadmissibility to any specific period of time, including five years or three years as the commenter suggests. While commenters are correct that lawful permanent residents generally are eligible to naturalize after five years,<sup>225</sup> the public charge ground of inadmissibility does not have such specific temporal limits. Indeed, Congress directed the agencies administering the public charge ground of inadmissibility to determine whether the applicant is likely, *at any time*, to become a public charge, without explicit mention of the fact that the applicant may ultimately naturalize. While DHS appreciates the commenter’s proposal and acknowledges that a fixed time limit for the prospective determination might be easier for DHS to implement, DHS declines to adopt this suggestion because Congress has not authorized DHS to set specific temporal limits on the prospective public charge inadmissibility determination.

**a. Comments on “Primarily Dependent”**

*Comment:* Many commenters supported the standard of primary dependence, with some emphasizing the supplementary nature of some public benefits and stating that the definition allows for the possibility of an applicant having and maintaining their main source of income and being assisted by non-cash benefits if needed, without being primarily dependent on the government. Commenters remarked that the primarily dependent language strikes an appropriate balance between providing a definition in line with the statutory intent without overly confining definitions; and appropriately avoids any numerical analysis or threshold that is likely to be over-inclusive.

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<sup>225</sup> See INA sec. 316(a), 8 U.S.C. 1427(a).

*Response:* As explained in the NPRM and throughout this final rule, DHS believes that this rule’s “primarily dependent on the government for subsistence” standard, which is evidenced by the receipt of public cash assistance for income maintenance or by long-term institutionalization at government expense, is more consistent with Congressional intent, as well as the historical meaning of the term “public charge,” than the definition contained in the 2019 Final Rule.

*Comment:* One commenter recommends that DHS define “likely at any time to become a public charge” as likely to become primarily dependent on the government for subsistence, as demonstrated by the long-term receipt of Federal cash assistance for income maintenance. This commenter indicated that these modifications to the definition would clarify that dependence must be prolonged and would limit the public benefits considered to Federal cash assistance for income maintenance. The commenter stated that federal courts have recognized that these definitions and clarifications align with well-established legal and historical understandings of “public charge.”<sup>226</sup>

*Response:* DHS does not believe that these modifications to the definition are warranted. As explained elsewhere in this preamble, DHS believes that the standard in this rule is clear and familiar to both the public and DHS officers, as it was the standard that DHS used for over 20 years before and after the 2019 Final Rule was in effect. The “primary dependence” standard identifies individuals who are dependent on the government without other sufficient means of support. DHS believes that receipt of public cash assistance for income maintenance, even for a short period of time, may reasonably be considered as part of the totality of the circumstances analysis. As the 1999 Interim Field Guidance stated, the longer ago a noncitizen received such

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<sup>226</sup> Citing *City and County of San Francisco v. USCIS*, 981 F. 3d 742, 756 (9th Cir. 2020). *New York v. DHS*, 969 F.3d 42, 74 (2d Cir. 2020), cert dismissed, 141 S. Ct. 1292 (2021). *Cook County v. Wolf*, 962 F.3d 208, 216 (7th Cir. 2020) (quoting “Inadmissibility and Deportability on Public Charge Grounds,” 64 FR 28676, 28677 (May 26, 1999)). See also *New York*, 969 F.3d at 71 (determining meaning of public charge based on “historical administrative and judicial interpretations”).

cash benefits (or was institutionalized on a long-term basis at government expense), the less weight these factors will have as a predictor of future receipt. In addition, the longer a noncitizen has received cash income-maintenance benefits in the past and the greater the amount of benefits, the stronger the implication that the noncitizen is likely to become a public charge. Positive factors in the noncitizen's case demonstrating an ability to be self-supporting may overcome the negative implication of past receipt of such benefits or past institutionalization.<sup>227</sup>

Ultimately, DHS believes that the "primary dependence" standard identifies individuals who are dependent on the government without other sufficient means of support, as opposed to individuals whose dependence on the government for income or institutionalization is transient or merely supplementary. So, for example, institutionalization for a short period of rehabilitation would not constitute primary dependence. However, dependence on public cash assistance for income maintenance need not be "prolonged" to constitute primary dependence.

As DHS discusses in more detail below, DHS does not believe that it is reasonable to focus exclusively on the receipt of Federal cash assistance for income maintenance given that receipt of State, Tribal, territorial, or local cash assistance generally serves the same purpose and can be similarly indicative of future primary dependence on the government for subsistence, depending on the recency, amount, and duration of receipt.

*Comment:* Commenters suggested that receipt of public benefits to address temporary situations, such as pregnancy, should not be considered primary dependence. The commenters reasoned that accessing safety-net programs when pregnant is important for ensuring prenatal health, which can prevent long-term health needs. Commenters also stated that the receipt of benefits during natural disasters or other extraordinary circumstances, such as the COVID-19 pandemic or in the aftermath of hurricanes and wildfires, is due entirely to external events and

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<sup>227</sup> See "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689, 28690 (May 26, 1999).

does not provide any information on the recipient's likelihood of becoming primarily reliant on government assistance at a future date.

One commenter additionally recommended advertising that participation in basic nutrition programs does not demonstrate primary dependence on the government, because school nutrition professionals serving communities with large immigrant populations have stated that families are increasingly hesitant to apply for critical nutrition benefits due to confusion on the interpretation of public charge.

*Response:* Under this rule, DHS will not consider receipt of non-cash benefits, with the exception of long-term institutionalization at government expense (including Medicaid when used for that purpose).<sup>228</sup> Therefore, DHS will not consider most Medicaid benefits, as well as SNAP, CHIP, WIC, or other non-cash, supplemental, or special-purpose benefit programs. These programs assist many low-income individuals in remaining employed and self-sufficient. As indicated in the NPRM, DHS, and the INS before it, have never considered free or subsidized school lunches, home energy assistance, childcare assistance, or special nutritional benefits for children and pregnant individuals to be the types of public benefits that should be considered in a public charge inadmissibility determination, notwithstanding that each could conceivably have some nexus to future primary dependence on the government (or, in the case of the 2019 Final Rule, some nexus to future receipt of designated benefits above that rule's durational threshold).<sup>229</sup>

As indicated previously, DHS will consider the recency, amount, and duration of receipt of any cash assistance for income maintenance, as well as any long-term institutionalization at government expense, when determining whether a noncitizen is likely to become primarily dependent on the government for subsistence. Given the list of public benefits considered, and

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<sup>228</sup> See 8 CFR 212.22(a)(3).

<sup>229</sup> See "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689, 28692–28693 (May 26, 1999).

that most noncitizens are not eligible for these programs, however, these considerations will not often be present. As a result, DHS does not think that it should exclude from consideration all public benefits received by pregnant persons during pregnancy and after, although if a covered benefit was received during pregnancy, DHS could take the surrounding circumstances into account in the totality of the circumstances.

In addition, DHS will not consider disaster or pandemic assistance as those benefits are for a specific purpose – dealing with the natural disasters (including hurricanes or wildfires) or pandemics and their aftermath.

*Comment:* Several commenters disagreed with the “primarily dependent” definition as the standard of determining whether a noncitizen is likely at any time to become a public charge. One commenter stated that Congressional policy objectives are reflected in more than a century of statutes aimed at ensuring that noncitizens do not rely on public benefits, and the policies behind those statutes are summed up in PRWORA. Several commenters stated that the proposed rule uses the guise of long-standing precedent to narrowly define critical concepts, including public charge and the types of public benefits that could lead to such a determination. Another commenter stated that the narrow definitions distort the actual cost of immigrants’ participation in public assistance programs and ignore the harm that such costs inflict on the States. Several commenters stated that Congress explicitly did not want noncitizens drawn to the United States by the promise of reliance on public benefits at taxpayer expense. These commenters stated that limiting the determination of a public charge to a noncitizen who is primarily dependent on public benefits ignores the fact that the noncitizen may still rely heavily on public benefits, even if they do not rely primarily on a benefit for subsistence, would allow many noncitizens to receive substantial public benefits without being determined to be a public charge. One of these commenters stated that this will encourage the use of public benefits while simultaneously rendering useless the public charge ground of inadmissibility.

Commenters disagreed with DHS's statement that the definition should not include a person who receives benefits from the government to help meet some needs but is not primarily depending on the government because the person also has one or more sources of independent income or resources upon which the individual primarily relies. These commenters stated that Congress' express policy is to avoid reliance on the government for support and contended that it is unclear why a noncitizen who relies on support, regardless of the type or purpose, should not be determined to be a public charge.

*Response:* DHS disagrees with these commenters. As discussed in the section dealing with Congressional intent, DHS believes that the rule's definition of public charge is consistent with Congressional intent. While DHS agrees that Congress has stated that the availability of public benefits should not form an incentive for immigration, DHS does not believe that Congress intended the exclusion of individuals who merely receive special-purpose benefits to supplement existing income or bridge temporary circumstances. In addition, DHS believes that the policy contained in this rule appropriately accounts for other important congressional policy objectives, such as protecting public health, the wellbeing of U.S. citizen children, and the stability of families and communities.

For instance, under the 2019 Final Rule, which the above commenters favored, a noncitizen could be deemed inadmissible if DHS found the noncitizen likely to receive as little as \$20 a month in SNAP benefits for a year. DHS does not believe that the term "public charge" necessarily encompasses such a circumstance. In addition, the past or current existence of such a circumstance is of limited value in determining whether a person is likely at any time to become primarily dependent on the government for subsistence.<sup>230</sup>

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<sup>230</sup> See Memorandum from Sasha Gersten-Paal, Director, Program Development Division, Food and Nutrition Service, U.S. Department of Agriculture, to All State Agencies, "SNAP – Fiscal Year 2022 Cost-of-Living Adjustments" (Aug. 16, 2021), <https://www.fns.usda.gov/snap/fy-2022-cost-living-adjustments> (last visited Aug. 15, 2022) ("The minimum benefit for the 48 states and D.C. will increase to \$20 and will also increase in Alaska, Guam, Hawaii and the U.S. Virgin Islands.").

In the 2019 Final Rule, DHS acknowledged that some people might receive the designated public benefits in small amounts but noted that (at the *household* level) this happened rarely relative to circumstances in which the household received over \$150 a month. DHS reasoned that the 2019 Final Rule’s adverse treatment of low-level benefit receipt was “to some extent a consequence of having a bright-line rule that (1) provides meaningful guidance to aliens and officers, (2) accommodates meaningful short-term and intermittent access to public benefits, and (3) does not excuse continuous or consistent public benefit receipt that denotes a lack of self-sufficiency during a 36-month period.”<sup>231</sup> DHS ultimately concluded that the standard in that rule “appropriately balance[d] the relevant considerations, and that even an alien who receives a small dollar value in benefits over an extended period of time can reasonably be deemed a public charge, because of the nature of the benefits designated by [that] rule.”<sup>232</sup>

DHS has reconsidered its position on this matter and does not believe that the approach taken in the 2019 Final Rule was necessary to achieve an administrable rule or to effectuate a policy consistent with the principle of immigrant self-sufficiency. Moreover, with respect to the specific point made by the commenter, DHS observes that this rule is far more consistent with historical approaches to the public charge ground of inadmissibility than a rule that takes into consideration all or nearly all use of formerly designated public benefits, let alone a rule that would define a person as a public charge for having received benefits of such little monetary value.

DHS also disagrees with the comments stating that the definitions in this rule distort the cost of immigrants’ participation in public benefit programs. While the commenters wrote that the 2019 Final Rule “saved states money,” they did not adequately explain this claim or provide evidence to support it. Instead, they assert generally that the disenrollment effects of the 2019 Final Rule reduced both the costs for States to administer the programs as well as the States’

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<sup>231</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41361 (Aug. 14, 2019).

<sup>232</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41361 (Aug. 14, 2019).

portion of the benefits themselves, and alleged that the proposed rule would increase those costs. DHS notes that most applicants for admission and adjustment of status are not eligible for public benefits, and most categories of noncitizens who are eligible for such benefits are also exempt, by statute, from the public charge ground of inadmissibility.<sup>233</sup> Reducing costs by causing confusion among those who are not covered by the rule, leading them to forgo benefits for which they are eligible, would not be a desirable effect even if the rule were found to have that effect. This comment is addressed in more detail in the Costs and Impacts, Economic Analysis Comments & Responses section.

*Comment:* Some commenters suggested that DHS should modify the “primarily dependent” standard. One commenter suggested an alternative definition of “likely at any time to become a public charge” by replacing the word “primarily” with the words “exclusively and persistently.” This commenter stated that “primarily” is a vague formulation that lacks clear standards to evaluate benefits received and provides no guidance on concrete time periods or objective elements to assess the reasons why a person obtained benefits. The commenter further stated that the “primarily dependent” standard invites arbitrary and inconsistent public charge adjudications. The commenter stated that reliance on government benefits should count negatively only in those narrow situations where there is no probability that the applicant would ever be capable of self-support under any scenario, independent of government benefits, in a totality of circumstances review. The commenter stated that this approach would align with the Second Circuit’s view that the term public charge has a settled meaning reflecting a persistent dependence that goes beyond mere receipt of public benefits.<sup>234</sup> The commenter further stated

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<sup>233</sup> See, e.g., *Cook County v. Wolf*, 962 F.3d 208, 236-37 (7th Cir. 2020) (Barrett, J., dissenting) (“The upshot is that the [2019 Final Rule] will rarely apply to a noncitizen who has received benefits in the past. . . . Notwithstanding all of this, many lawful permanent residents, refugees, asylees, and even naturalized citizens have disenrolled from government-benefit programs since the public charge rule was announced. Given the complexity of immigration law, it is unsurprising that many are fearful about how the rule might apply to them. Still, the pattern of disenrollment does not reflect the rule’s actual scope.”).

<sup>234</sup> *New York v. DHS*, 969 F.3d 42, 74 (2d Cir. 2020).



that DHS should not penalize individuals for obtaining benefits designed to help people make ends meet when wages are insufficient or nonexistent or to secure adequate housing, nutrition, health services, or even training and education and that people should be able to receive benefits for periods of time to cover periods of illness, dislocation, etc. until they are able to provide for themselves.

One commenter said that using “exclusively” would accurately capture DHS’s stated intention that a public charge is a person who relies on government support without other means, while “primarily” is ambiguous, invites discretion, is overly broad, and is inconsistent with the stated intent. Several other commenters recommended the definition require that reliance on the government be necessary to avoid destitution. Another commenter supported the longstanding “primary dependence” standard but recommended that DHS further refine the definition to require that dependence on government support be permanent. This commenter indicated that DHS should not count short-term reliance on public benefits against individuals, particularly when such reliance is due to job loss, illness, or other temporary conditions.

*Response:* DHS disagrees with the commenter’s statements that the “primarily dependent” standard is vague and subject to inconsistent application. DHS has been applying this standard since the 1999 Interim Field Guidance was published (with the exception of the time period during which the 2019 Final Rule was in effect). To the extent that difficulties in applying the standard arise, DHS may issue interpretative guidance informed by the terms of the statute and rule, as well as the relevant data. DHS agrees that evidence of persistent and/or exclusive dependence on the government for subsistence without any countervailing evidence that a noncitizen would be able to support themselves in the future would likely lead to the finding that a noncitizen is likely at any time to be primarily dependent on the government for subsistence. In addition, while DHS agrees that some degree of persistent dependence is reflected in the primary dependence standard (e.g., long-term institutionalization suggests persistent dependence), DHS

does not agree that such dependence must be exclusive (i.e., that there must be evidence that a noncitizen is unable to meet *any* of their needs without government assistance).

Similarly, to the extent that commenters are suggesting that when looking at the likelihood of becoming primarily dependent on the government for subsistence, DHS should be assessing the likelihood of becoming primarily dependent on the government solely on a permanent basis, DHS disagrees. DHS notes, however, that evidence establishing that an applicant is primarily dependent on the government for subsistence on a permanent basis would lead to a finding that an applicant is inadmissible on the public charge ground.

DHS also disagrees that the statute demands such a high standard. While DHS acknowledges that the Second Circuit issued the strongest pronouncement regarding the statutory meaning of the term “public charge,”<sup>235</sup> it was not the only court to consider the meaning of the term. The Ninth Circuit found that the agency departed from the historical interpretation of the term,<sup>236</sup> and the Fourth and Seventh Circuits found the term to be ambiguous and open to reasonable agency interpretation, and the Supreme Court stayed the injunctions that were upheld by the Second (and Seventh) Circuits.<sup>237</sup>

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<sup>235</sup> *New York v. DHS*, 969 F.3d 42, 64, 74 (2d Cir. 2020) (“We start our analysis below by considering whether Congress has spoken to its intended meaning of the statutory term ‘public charge’ and conclude that it has done so. . . . The settled meaning of ‘public charge,’ as the plain meaning of the term already suggests, is dependency: being a persistent ‘charge’ on the public purse. And as we explain further below, the mere receipt of benefits from the government does not constitute such dependency.”).

<sup>236</sup> *City and County of San Francisco v. USCIS*, 981 F.3d 742, 756-58 (“From the Victorian Workhouse through the 1999 Guidance, the concept of becoming a ‘public charge’ has meant dependence on public assistance for survival. Up until the promulgation of this Rule, the concept has never encompassed persons likely to make short-term use of in-kind benefits that are neither intended nor sufficient to provide basic sustenance. . . . For these reasons we conclude the plaintiffs have demonstrated a high likelihood of success in showing that the Rule is inconsistent with any reasonable interpretation of the statutory public charge bar and therefore is contrary to law.”).

<sup>237</sup> *See Cook County v. Wolf*, 962 F.3d 208, 226 (7th Cir. 2020). (“As the district court recognized, there is abundant evidence supporting Cook County’s interpretation of the public-charge provision as being triggered only by long-term, primary dependence. But the question before us is not whether Cook County has offered a reasonable interpretation of the law. It is whether the statutory language unambiguously leads us to that interpretation. We cannot say that it does. As our quick and admittedly incomplete overview of this byzantine law has shown, the meaning of ‘public charge’ has evolved over time as immigration priorities have changed and as the nature of public assistance has shifted from institutionalization of the destitute and sick, to a wide variety of cash and in-kind welfare programs. What has been consistent is the delegation from Congress to the Executive Branch of discretion, within bounds, to make public-charge determinations.”); *Casa de Maryland v. Trump*, 971 F.3d 220, 229 (4th Cir. 2020)

As noted in the NPRM,<sup>238</sup> although the term “public charge” does not have a single clear meaning, its basic thrust is clear: significant reliance on the government for support. This has been the longstanding purpose of the public charge ground of inadmissibility; individuals who are unable or unwilling to work to support themselves, and who do not have other nongovernmental means of support such as family members, assets, or sponsors, are at the core of the term’s meaning. Individuals who are likely to primarily rely on their own resources as well as some government support—even if they could be reliably identified—are less readily characterized as likely to become public charges. DHS does not believe that the term is best understood to include a person who receives benefits from the government to help to meet some needs but is not primarily dependent on the government, and instead has one or more sources of independent income or resources upon which the individual primarily relies.

As indicated in the NPRM, and this final rule, when making public charge inadmissibility determinations, DHS intends to analyze the factors set forth in this rule in the context of each noncitizen’s individual circumstances.<sup>239</sup> When looking at past or current receipt of public benefits as potentially indicative of a likelihood of primary dependence on the government for subsistence, DHS will look at the recency, amount, and duration of such dependence. Finally, DHS plans to issue guidance for officers and the public. While not outcome determinative, this guidance would be intended to better ensure that the regulatory standard is appropriately and consistently applied. In conclusion, DHS is declining to modify the standard in accordance with the above suggestions.

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*(rehearing granted)* (“[T]he public charge provision has led for almost a century and a half a long and varied life, with different administrations advancing varied interpretations of the provision, depending on the needs and wishes of the nation at a particular point in time. To be sure, the public charge provision ties alien admissibility to prospective alien self-sufficiency. But within that broad framework, Congress has charged the executive with defining and implementing what can best be described as a purposefully elusive and ambiguous term.”).

<sup>238</sup> 87 FR at 10606 (Feb. 24, 2022).

<sup>239</sup> See 8 CFR 212.22(b).

**b. General Comments on the Inclusion or Exclusion of Specific Public Benefits**

*Comment:* Several commenters stated that DHS should exclude from consideration all current or past receipt of public benefits. Other commenters focused on exclusion of all temporary current or past receipt of public benefits. Others asked DHS to exclude all non-cash benefits, including long-term institutionalization. One of those commenters stated that they opposed consideration of public benefits because nonimmigrant visa holders and undocumented immigrants are ineligible for Federal means-tested public benefits and there should therefore be no current or past public benefit use for DHS to consider. Other commenters similarly opposed the inclusion of consideration of receipt of any public benefits because of a concern that people will avoid all benefits due to the confusion regarding the scope of the public charge inadmissibility determination. Still other commenters opposed such inclusion because the consideration is not mandated by either PRWORA or IIRIRA.

*Response:* DHS disagrees with commenters that it should eliminate all consideration of current or past receipt of public benefits, or that it should not consider temporary use of such benefits. While DHS acknowledges that relatively few noncitizens subject to the public charge ground of inadmissibility are eligible for the public benefits considered under this rule prior to applying for a visa, admission or adjustment of status, DHS believes that when certain public benefits are received, such receipt can be indicative of future primary dependence on the government for subsistence. Moreover, Congress appears to have recognized that past receipt of public benefits is properly considered in determining likelihood of someone becoming a public charge, as evidenced by its prohibition against considering the receipt of public benefits that were authorized under 8 U.S.C. 1641(c) for certain battered noncitizens.<sup>240</sup> DHS believes that Congress' prohibition of consideration of prior receipt of public benefits by a specific class of

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<sup>240</sup> See INA sec. 212(s), 8 U.S.C. 1182(s).

noncitizens indicates Congress understood and accepted consideration of past receipt of public benefits in other circumstances.

DHS notes that section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), only designates statutory minimum factors and otherwise grants discretion to the Secretary to establish a regulatory framework for making public charge inadmissibility determinations. As part of the exercise of that discretion, DHS has added the consideration of past and current receipt of certain public benefits to the list of factors officers will consider when making public charge inadmissibility determinations. While not required to do so, DHS has determined that past or current receipt of public cash assistance for income maintenance or long-term institutionalization at government expense is probative for determining whether a noncitizen will become primarily dependent on the government for subsistence in the future. As discussed throughout this final rule, DHS will take any such receipt into consideration in the totality of the circumstances including the recency, duration, and amount of receipt.

*Comment:* One commenter recommended that DHS not consider direct cash assistance, SSI, or other public benefits used by individuals with disabilities who are using those benefits specifically because they are individuals with disabilities. The commenter acknowledged that use of public benefits is only one part of the public charge inadmissibility determination, but stated that because officers have high caseloads and make decisions using paper evidence, they may fail to consider the relationship between using one public benefit and another. The commenter stated that eliminating the consideration of public benefits would benefit immigrants with disabilities who rely on these programs. The commenter recommended instead that USCIS “limit the discussion to an immigrant’s financial circumstances sans their receipt of public benefits, as is required by law. In situations where the immigrant’s only income is public benefits, we recommend that this be recorded neutrally without reference to specific benefits (such as by stating that the immigrant does not earn income and having this fact, rather than the individual benefits, be considered relevant to the determination).”

*Response:* As discussed in more detail below, DHS disagrees that it should exclude from consideration all public benefits used by individuals with disabilities. As for other applicants, current or prior use of public cash assistance for income maintenance or long-term institutionalization at government expense could, in conjunction with other factors, be predictive of primary dependence on the government for subsistence. To be clear, this final rule is unequivocal on the point that DHS cannot use the very fact of disability alone to conclude that a noncitizen is likely at any time to become a public charge.

It was not clear from these comments why the commenter believed that officers would have difficulty considering the relationship between different kinds of benefit use for this or any other pool of applicants. However, officers will only consider the receipt of public cash assistance for income maintenance and long-term institutionalization at government expense. As explained in the NPRM, DHS will not consider the use of home and community-based services (HCBS), and will also take into consideration any evidence that a person was long-term institutionalized at government expense in violation of their rights. DHS has clarified in this final rule that the noncitizen's household income does not include income from public benefits listed in 8 CFR 212.21(b).<sup>241</sup> In addition, relevant changes to the Form I-485 collect information regarding the noncitizen's household income, assets, and financial status separately from information about past or current receipt of public benefits.

*Comment:* One commenter stated that healthcare received by asylees, refugees, and noncitizens without lawful status should be considered in a public charge inadmissibility determination until the Biden Administration shifts funding from USAID or the UN to reimburse U.S. taxpayers for funding short- and long-term "charity" hospital care.

*Response:* Refugees and asylees are exempt from the public charge ground of inadmissibility by statute, and those exemptions are reflected in new 8 CFR 212.23(a)(1) and (2).

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<sup>241</sup> 8 CFR 212.22(a)(1)(iv).

DHS will not consider any public benefits received by these populations. Some populations of noncitizens who entered the United States without inspection or are in the United States without a lawful immigration status may be subject to the public charge ground of inadmissibility if they seek to adjust status to that of a lawful permanent resident. In instances where the public charge ground of inadmissibility applies, DHS will consider such noncitizens' past or current receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. In addition, to the extent these individuals are subject to the affidavit of support requirement, benefit-granting agencies can move to enforce such affidavits of support in order to be reimbursed for the cost of benefits provided. However, DHS is not the Federal agency tasked with the enforcement of affidavits of support. Similarly, DHS is not aware of any initiatives whereby USAID or the UN would cover the cost of medical care for certain noncitizens.

*Comment:* One commenter commended DHS for obtaining on-the-record letters from HHS and USDA concerning the public charge ground of inadmissibility and the benefits that those agencies administer. The commenter strongly encouraged DHS to obtain similar letters from six other federal agencies, implying that those letters should similarly discuss the benefits that the agencies administer and the relationship of those benefits to the public charge ground of inadmissibility.

*Response:* DHS will not be including any additional letters with this final rule. In the published NPRM, DHS included letters from both HHS and USDA, and DHS believes those letters continue to support issuance of this final rule.

### **c. Comments on “Subsistence”**

*Comment:* One commenter expressed agreement with DHS's standard of “primarily dependent,” but recommended replacing “for subsistence” with “for a recent and sustained amount of time with little prospect for change.” The commenter stated that the 1999 Interim Field Guidance indicated that recency and length are more predictive, and that DHS should not define subsistence by reference to benefits that families use to support work, such as health care,

nutrition, or housing assistance. The commenter stated that this recommended definition is aligned with the longstanding interpretation of the law.

*Response:* DHS agrees with the commenter that it should consider the recency and duration of public benefit receipt when making a determination regarding whether a noncitizen is likely at any time to become primarily dependent on the government. However, DHS is also limiting the list of public benefits considered as part of a public charge inadmissibility determination to those benefits most indicative of primary dependence on the government, namely public cash assistance for income maintenance and long-term institutionalization at government expense. As explained throughout this final rule, this approach satisfies DHS's objective to faithfully administer this ground of inadmissibility while also being mindful of the potential indirect effects of its actions on a wide range of government programs. DHS is not adopting the suggestion proposed by this commenter, given that the regulatory framework finalized in this rule already takes into account the recency and duration of public benefit receipt.

#### **d. Proposals for Specific Thresholds**

*Comment:* One commenter recommended that DHS further define "primarily dependent" to indicate cash assistance for income maintenance comprising 75 percent to 100 percent of a person's income, so as to clarify the definition and reduce the chilling effect of the use of common cash benefit programs. Another commenter indicated that DHS should avoid any numerical analysis or threshold because an attempt to find a one-size-fits all threshold is likely to be over-inclusive and not sufficiently nimble to account for the myriad of ways in which older adults access government benefits.

*Response:* DHS appreciates these recommendations and has decided not to define "primarily dependent" in terms of a numerical threshold in this final rule. DHS believes that setting a numerical threshold in this context is unnecessary and might in certain respects or circumstances be viewed as arbitrary. In addition, this approach would be unnecessarily inflexible and take away from the individualized determinations that are contemplated by the



statutory language. DHS considers the word “primarily” to have its ordinary meaning – namely main, chief, principal, of first importance, or foremost.<sup>242</sup> The longstanding “primarily dependent” standard has never been accompanied by a numerical threshold, and the commenter did not provide any examples of past standards setting a numerical threshold in this respect.

## **2. Public Cash Assistance for Income Maintenance**

*Comment:* Two commenters supported the rule’s determination that public cash assistance for income maintenance includes SSI, TANF, or State, Tribal, territorial, or local cash benefit programs for income maintenance because they are intended to maintain a person at a minimum level of income. One commenter stated that by modifying the definition to “cash assistance,” the rule mitigates the impact of an applicant’s use of public benefits and is a positive modification to the public charge standard.

Most commenters supported DHS’s proposal to exclude most noncash benefits from consideration. Many commenters agreed that noncash benefits are supplemental benefits and that DHS should exclude programs not intended for income maintenance, such as CHIP, SNAP, or Medicaid, other than Medicaid for long-term institutionalization at government expense, from a public charge inadmissibility determination. Commenters added that numerous public benefit programs and resources are vital to foster healthy individuals and communities, including public assistance programs that provide medical care and health insurance, food and nutrition, and housing assistance. One commenter stated that most immigrants who receive benefits like SNAP or Medicaid are employed or are married to someone who works — a sign that their family is working but workers are in low-paid jobs. The commenter described an analysis of Census data showing that 77 percent of working-age immigrants (18 to 64) who received one or more of six benefits (TANF, SSI, Medicaid, SNAP, housing assistance, or General Assistance) during 2020

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<sup>242</sup> See, e.g., *Board of Governors v. Agnew*, 329 U.S. 441, 446 (1947) (holding that the word “primarily” means “first,” “chief,” or “principal” but can also mean “essentially,” “fundamentally,” or “substantially” (such that more than one activity could be principal)); *Malat v. Riddell*, 383 U.S. 569, 571-72 (1966) (holding that “primarily” means “of first importance” or “principally”).

also worked during the year or were married to a worker. For half of working-age immigrants who received benefits, the work was year-round, that is, 50 weeks of the year or more.<sup>243</sup> The share who are working or married to a worker would be higher if one looks over multiple years. The commenter wrote that because a large majority of people who are immigrants and receive these benefits are in families that include people who work, the commenter agreed that it is consistent with the intent of the law not to include noncash benefits including SNAP, housing assistance, and Medicaid in the definition of public benefits.

These commenters support not including these benefits in the list of public benefits considered in public charge inadmissibility determinations.

*Response:* DHS agrees with these commenters. As discussed in the NPRM, the structure of means-tested benefits programs—many of which were changed significantly in 1996, one month after the last amendment to the public charge ground of inadmissibility—supports the view that predicted participation in non-cash programs is not a good indicator that a noncitizen is likely to become a public charge. Many modern public assistance programs take the form of payments or in-kind benefits to help individuals meet particular needs and are not limited to individuals without a separate primary means of support. The Medicaid program, subsidized housing, and SNAP provide benefits to millions of individuals and families across the nation, many of whom also work.<sup>244</sup> One analysis of the 2019 Final Rule found that “[i]n a single year, 24 percent – nearly 1 in 4 – of U.S.-born citizens receive one of the main benefits in the [rule’s] definition . . . . Looking at benefit receipt at any point over a 20-year period, approximately 41 to 48 percent of U.S.-born citizens received at least one of the main benefits in the public charge

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<sup>243</sup> The commenter reported that it analyzed the March 2021 Current Population Survey and considered participation in six forms of assistance covered by the 2019 Final Rule and available in the annual Census data: the individual’s Medicaid or SSI participation and the family’s SNAP, housing, TANF, or General Assistance participation.

<sup>244</sup> For instance, in July 2021, over 76 million individuals were enrolled in Medicaid, of whom between 42 and 44 million were adults. See Medicaid.gov, “July 2021 Medicaid & CHIP Enrollment Trends Snapshot,” <https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/july-2021-medicaid-chip-enrollment-trend-snapshot.pdf> (last visited Aug. 18, 2022).

definition.”<sup>245</sup> Although the public charge ground of inadmissibility does not apply to most participants in these programs, and notwithstanding that the 2019 Final Rule took a different view as a consequence of a different approach to the concept of “self-sufficiency” and a decision to cover a wider range of public benefits, it would seem not to comport with common usage to describe so many Americans as being public charges.<sup>246</sup> Relatedly, all such non-cash program participants require a separate source of income to meet a number of basic needs. Cash assistance programs, on the other hand, are typically reserved for individuals with few if any other sources of income.<sup>247</sup> In addition, because cash assistance is not restricted to particular uses, receipt of cash assistance—which often coincides with the receipt of other means-tested benefits<sup>248</sup>—allows an individual to become dependent on the government in a way that participation in one or more non-cash benefits programs cannot. For example, an individual who receives only non-

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<sup>245</sup> Danilo Trisi, “Administration’s Public Charge Rules Would Close the Door to U.S. to Immigrants Without Substantial Means,” Center on Budget and Policy Priorities (Nov. 11, 2019), at 4, <https://www.cbpp.org/research/immigration/administrations-public-charge-rules-would-close-the-door-to-us-to-immigrants> (last visited Aug. 15, 2022). The analysis also observed that “[i]n contrast, only about 5 percent of U.S.-born citizens meet the [1999 Interim Field Guidance] benefit-related criteria in the public charge [inadmissibility] determination.” *Ibid.*

<sup>246</sup> In the 2018 NPRM, DHS stated that “[c]ash aid and non-cash benefits directed toward food, housing, and healthcare account for significant federal expenditure on low-income individuals and bear directly on self-sufficiency,” and emphasized the significant impact, in terms of overall expenditures, of non-cash benefit programs such as Medicaid and SNAP. *See* “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51160 (Oct. 10, 2018). At the same time, DHS acknowledged that “receipt of noncash public benefits is more prevalent than receipt of cash benefits” (*ibid.*), and DHS cited data indicating that over 20 percent of the U.S. population receives Medicaid, SNAP, or Federal housing assistance, whereas 3.5 percent of the U.S. population receives cash benefits (*id.* at 51162). DHS acknowledges that non-cash benefits programs involve significant expenditures of government funds, but the Department believes that the term “public charge” is best interpreted by reference to the degree of an individual’s dependence on the government for support, rather than the scale of overall government expenditures for particular programs. And DHS has limited consideration of past receipt of public benefits to the benefits covered by this rule for the reasons stated throughout this preamble.

<sup>247</sup> *See, e.g.*, HHS Office of Family Assistance, “Characteristics and Financial Circumstances of TANF Recipients, FY 2010” (Aug. 8, 2012), <https://www.acf.hhs.gov/ofa/data/characteristics-andfinancial-circumstances-tanf-recipients-fiscal-year2010> (last visited Aug. 15, 2022) (“In FY 2010, about 17 percent of TANF families had non-TANF income.”); SSA, “Fast Facts & Figures About Social Security” (2021), [https://www.ssa.gov/policy/docs/chartbooks/fast\\_facts/2021/fast\\_facts21.pdf](https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2021/fast_facts21.pdf) (among SSI recipients, “[e]arned income was most prevalent (4.1%) among those aged 18–64”); GAO, GAO–17–558, “Federal Low-Income Programs: Eligibility and Benefits Differ for Selected Programs Due to Complex and Varied Rules” (June 2017), at 23–24 (illustrating income eligibility thresholds for a hypothetical family of three, and showing lower income eligibility thresholds for SSI (\$1,551) and TANF (\$0 to \$1,660, depending on the State) as compared to SNAP (\$2,184), Housing Choice Vouchers (\$1,613 to \$4,925, depending on the program and State), and Medicaid (\$218 to \$5,359, depending on the beneficiary’s age and the State)).

<sup>248</sup> *See, e.g.*, Center on Budget and Policy Priorities, “Policy Basics: Supplemental Security Income” (Feb. 8, 2021), <https://www.cbpp.org/research/social-security/supplemental-security-income> (“Over 60 percent of SSI recipients also get SNAP (food stamps) and about one-quarter receive housing assistance.”) (last visited Aug. 18, 2022).

cash assistance would need another source of income to acquire various basic necessities like clothing or household items, while an individual who receives cash assistance could rely on that assistance, potentially combined with non-cash government benefits, to the exclusion of any other independent source of income or support.

When deciding to limit consideration to public cash assistance for income maintenance and “institutionalization for long-term care” at government expense,<sup>249</sup> both the former INS and DHS consulted with benefit-granting agencies. The former INS concluded that cash assistance for income maintenance and long-term institutionalization at government expense constituted the best evidence of whether a noncitizen is primarily dependent on the government for subsistence.<sup>250</sup> DHS’s general approach to public benefits in this rule also better advances the multiple policy objectives established by Congress. This rule is an effort to faithfully implement the public charge ground of inadmissibility without unnecessarily and at this point, predictably, harming separate efforts related to health and well-being of people whom Congress has made eligible for supplemental supports.

*Comment:* Many commenters suggested explicitly including a list in the regulatory text, not just the preamble of the final rule, of public benefits that would not be included in a public charge inadmissibility determination, as well as providing a non-exclusive list of examples of public benefits not included. These commenters explained that this would clearly communicate to entities administering these benefits, recipients of benefits, and officers those benefits which benefits are not covered.

*Response:* DHS has included such a non-exclusive list in the final regulatory text. DHS intends to further address this issue in future guidance.

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<sup>249</sup> As explained more fully below, for the purposes of this rule, DHS is replacing the term “institutionalization for long-term care at government expense” that was used in the 1999 NPRM and 1999 Interim Field Guidance with the term “long-term institutionalization.”

<sup>250</sup> See “Inadmissibility and Deportability on Public Charge Grounds,” 64 FR 28676, 28677 (May 26, 1999). The former INS consulted primarily with HHS, SSA, and USDA in formulating the list of public benefits that it would have considered. *Ibid.*

**a. Comments on Proposed Inclusion of SSI and TANF**

*Comment:* Many commenters recommended limiting public charge consideration to only the two listed Federal cash-assistance programs, TANF and SSI. Commenters stated limiting the definition to include only two Federal benefits is simpler to communicate and understand, less likely to create confusion among immigrants and their families, and less likely to deter participation in public benefit programs that promote healthy communities. One commenter stated that even if the rule were amended to further define income maintenance or provide exclusions in regulation, there will always be too much variety to clearly include and exclude all programs. Thus, the commenter said that DHS should remove non-Federal cash assistance programs from the rule.

*Response:* DHS is declining to exclude the consideration of State, Tribal, territorial, and local cash assistance for income maintenance. DHS believes that such programs serve similar purposes to Federal programs and are generally readily identifiable as general assistance programs. DHS is concerned about distinguishing between benefits that serve the same basic purpose, solely on the basis of funding source or authority. If questions arise about which cash benefits are considered and not considered, DHS may address the matter in interpretative guidance. DHS believes that excluding all such programs from consideration would be inconsistent with Congressional intent, because receipt of cash assistance for income maintenance from such State, Tribal, territorial, or local governments is fairly indicative of primary dependence on the government for subsistence.

*Comment:* Several commenters opposed the inclusion of SSI in a public charge inadmissibility determination, saying this targets people with disabilities and older adults. The commenters recommended DHS revise the language to include only long-term use of SSI. One commenter also mentioned that short-term use of SSI benefits may help individuals to stabilize their living and employment situation and should not prevent them from adjusting status in the United States.

*Response:* DHS thanks commenters for these suggestions. While DHS disagrees that it should exclude SSI from consideration in public charge inadmissibility determinations, DHS notes that current or past receipt of SSI, or any other covered public benefit, is not alone dispositive with respect to whether a noncitizen will be found likely at any time to become a public charge. As proposed in the NPRM, and retained in this final rule, DHS will consider not only the fact of receipt in the totality of the circumstances, but also the recency, duration, and amount of public benefits received when determining whether a noncitizen is likely at any time to become primarily dependent on the government for subsistence, and thus likely to become a public charge. While DHS agrees that SSI, by design, is reserved for specific populations of individuals (namely those who are over the age of 65, are blind, or have disabilities), DHS notes that SSI is included in the list of considered public benefits not because it is received by certain groups of individuals sharing such characteristics, but because of the degree of dependence on the government for subsistence that receipt of SSI may indicate. DHS is separately tasked by section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), to consider whether age and health could make a noncitizen likely to at any time become a public charge.

*Comment:* One commenter stated that by including SSI in the consideration of a public charge inadmissibility determination, DHS is indirectly including the receipt of Medicaid-funded long-term services and supports into a public charge inadmissibility determination, even when they are supports delivered by the community. The commenter stated that most people with disabilities who rely on Medicaid-funded HCBS also rely on SSI and other cash assistance programs, and that including SSI in the public charge inadmissibility consideration would discriminate against people with disabilities who require HCBS. Another commenter stated that SSI and long-term institutionalization are factors that solely apply to people with disabilities.

*Response:* As explained in the NPRM, DHS is excluding the consideration of HCBS in large part because HCBS help older adults and persons with disabilities live, work, and fully participate in their communities, promoting employment and decreasing reliance on costly

government-funded institutional care. As indicated by HHS in its letter to DHS supporting the February 24, 2022 NPRM, HHS distinguished HCBS from long-term institutionalization at government expense by stating that HCBS do not provide “total care for basic needs” because HCBS do not pay for room and board. To the extent HCBS are coupled with receipt of cash assistance for income maintenance, such as SSI, DHS believes that such receipt of SSI could be indicative or predictive of primary dependence on the government for subsistence. Because SSI is similarly situated to other cash assistance for income maintenance programs, DHS does not believe that it would be reasonable to exclude SSI from consideration. DHS disagrees that considering SSI discriminates against older adults or people with disabilities; such consideration treats them on par with other recipients of cash assistance for income maintenance.

*Comment:* Several commenters disagreed that cash-support programs, such as TANF, are indicative of the likelihood of an individual being primarily dependent on the government for subsistence and argued that DHS should accordingly not consider these programs. For example, commenters explained that: TANF has its own built-in protections against abuse and long-term reliance; in at least some jurisdictions TANF recipients receive a low amount of funds compared to the high costs of living; and TANF recipients must comply with work requirements and are limited to 60 months of receipt. One commenter also stated that assessment of public charge inadmissibility based on TANF receipt is weak, given low-income noncitizen immigrants are much less likely to receive TANF benefits than similar U.S.-born adults, their use of benefits declines over time, and people generally cannot receive TANF benefits for more than five years.

*Response:* DHS disagrees that DHS should exclude TANF from consideration in public charge inadmissibility determinations. However, as DHS indicated in the NPRM and in this final rule, the consideration of prior or current receipt of TANF, and other programs providing cash assistance for income maintenance, is not dispositive in a public charge inadmissibility determination. Rather, DHS will consider all the factors in new 8 CFR 212.22, including the noncitizen’s household income and assets, as well as liabilities, exclusive of any income received

from public benefits or illegal activities or sources and an Affidavit of Support Under Section 213A of the INA if required, and will also take into consideration the recency, amount, and duration of receipt of public benefits received, including TANF, in the totality of the circumstances. DHS believes that these considerations are more relevant to assessing the likelihood of becoming primarily dependent on the government for subsistence than overall statistics about costs of living in a particular geographic area.

While DHS appreciates the study analyzing the SIPP data cited by the commenter comparing benefit use among citizens versus noncitizens and how noncitizen benefit use varies over time,<sup>251</sup> DHS does not think that a lower rate of receipt of TANF by noncitizens supports exclusion of TANF from consideration. Although fewer noncitizens than citizens may be receiving TANF, especially prior to applying for a visa, admission, or adjustment of status, DHS finds that, based on information provided by HHS during this rulemaking, cash assistance programs under TANF are much more frequently used as a primary source of subsistence. As a result, such past and current receipt can still be indicative of primary dependence on the government for subsistence. Therefore, TANF is properly considered in the totality of the circumstances.

*Comment:* One commenter specifically indicated agreement with the exclusion of child-only TANF cases from a public charge inadmissibility determination because cash assistance like TANF reduces child poverty and improves children’s long-term health and educational and economic outcomes. The commenter stated that immigration-related concerns should not impede children from receiving these critical benefits.

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<sup>251</sup> Leighton Ku and Erin Brantley, “Immigrants’ Progress: Changes in Public Charge Policies Can Promote The Economic Mobility of Immigrants and Their Contribution to the U.S. Economy,” Social Science Research Network (Apr. 18, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4086782](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4086782) (“Census Bureau data [] demonstrates immigrants are often poor and in need when they first arrive in the US, but rapidly improve their economic status the longer they remain. Longitudinal analysis further shows that low-income non-citizen immigrants are less than half as likely to receive cash assistance thru Temporary Assistance for Needy Families (TANF) and less than one-seventh as likely to receive Supplemental Security Income (SSI) than similar low-income US-born citizens.”) (last visited Aug. 15, 2022).



*Response:* DHS appreciates these comments but is declining to exclude all consideration of TANF received by children from public charge inadmissibility determinations. DHS did propose and is finalizing the proposal in this final rule to not attribute the receipt of cash assistance for income maintenance to a noncitizen if the noncitizen is receiving a public benefit (in this case TANF) solely on behalf of another, such as a child. However, if the applicant is a child and is subject to the public charge ground of inadmissibility, DHS would still consider the receipt by the child of TANF or other covered public benefits under new 8 CFR 212.21(b). Such consideration is not outcome determinative given that it is only one among a number of factors to be considered, and that DHS would still look at the recency, amount, and duration of receipt when determining whether a child noncitizen is likely at any time to become primarily dependent on the government for subsistence. In addition, DHS is not precluded from considering empirical evidence that receiving public benefits as a child could lead to better long-term outcomes, and make a child less likely at any time to become a public charge.

**b. Comments on Proposed Inclusion of Other Cash Benefit Programs for Income Maintenance**

*Comment:* Many commenters, including a group of 13 United States Senators, opposed the inclusion of State, Tribal, territorial, or local benefits, including programs providing cash assistance for income maintenance, as part of the public charge inadmissibility determination and recommended DHS delete this clause from the regulatory text. Commenters explained that programs funded by State and local government are an exercise of the powers reserved to the States themselves and that counting programs provided by Tribal governments is a violation of Tribal sovereignty and self-determination.

Commenters specifically provided examples of State-funded benefits that provide rental assistance, medical insurance, earned income tax credits, nutrition programs, guaranteed income pilots, and cash assistance that are temporary and act as pathways to self-sufficiency and said that DHS should not punish participants in these programs by being subject to the public charge

inadmissibility determination. One of these commenters specifically referenced the New York Safety Net Assistance program (SNA) that is available to individuals not eligible for TANF. The commenter stated that the cash assistance portion of the benefit is mandatory (even if insignificant) and said that the program is aimed at preventing homelessness and primarily comprises rental and medical assistance. The commenter characterized the program as a proven path to self-sufficiency. Some commenters pointed to States that may have elected to provide State-funded coverage to immigrants who are in the United States lawfully but who do not qualify for Federal means-tested public benefits, and said that some States may provide veteran services benefits to dependents who may not be eligible for Federal veterans' benefits. Those commenters also remarked that State and local programs can be dynamic and variable among States in name and form, which makes the rule complicated to explain to impacted individuals, as well as complicated to administer and which will contribute to confusion among the public for public charge inadmissibility determinations. Commenters stated that public charge concerns should not limit the ability of States and localities to create support programs and that the rule should not penalize immigrants in any way for accepting the benefits for which they are eligible at the State and local level.

Some commenters additionally stated that exempting State and local programs would better allow local governments to provide services and increase trust within communities and improve constituents' quality of life, but not exempting these programs would require detailed policy and legal assessments for appropriate messaging and targeted outreach. One commenter also wrote about the difficulties and costs of constantly training staff and community partners on the potential immigration consequences of the receipt of new State and local public benefits.

*Response:* While DHS appreciates these comments, DHS is not excluding State, Tribal, territorial, or local cash assistance for income maintenance from this final rule. As discussed previously, DHS is concerned about distinguishing between benefits that serve the same basic purpose, solely on the basis of funding source or authority. DHS disagrees that considering

benefits interferes with State rights or Tribal sovereignty. This final rule does not regulate which benefits or programs States and other governmental entities may provide. DHS is taking into consideration those programs that are more indicative of primary dependence on the government for subsistence in the totality of the noncitizen's circumstances. As indicated in the NPRM, these considerations exclude any special-purpose or supplemental programs, as well as disaster and similar assistance. With respect to the New York's SNA program, if the program provides a combination of non-cash and cash benefits, DHS would only consider the cash portion of the benefit in the totality of the circumstances, and such receipt would never alone be outcome determinative. If an individual receives a small amount of cash assistance for a limited period of time, such receipt would be unlikely to result in an adverse public charge inadmissibility determination. DHS also notes that applicants who are uncertain whether a benefit they are receiving is cash assistance for income maintenance can include information about the program to assist officers in determining whether the benefit should be considered.

In addition, DHS is only considering State, Tribal, territorial, or local programs providing medical coverage in narrow circumstances of long-term institutionalization at government expense. As with Medicaid, DHS is not considering application for, or approval to receive medical coverage or the fact that the individual is getting medical care or treatments through the State, Tribal, territorial, or local program, unless that care is long-term institutionalization.

*Comment:* One commenter stated that if DHS chooses to retain consideration of State and local benefits, DHS should explicitly distinguish State, local, territorial, or Tribal tax credits and other cash assistance programs from "cash assistance for income maintenance." One commenter indicated that while USCIS has been clear that it will not consider tax credits, including the child tax credit, in public charge inadmissibility determinations, there is a concern that the rule would not explicitly protect a future child allowance that is not delivered through the tax system from consideration in a public charge inadmissibility determination. The commenter also noted that even when a child allowance was delivered through the tax system, focus groups and parents in

mixed status families reported concerns that the CTC would have an impact on their immigration status.

*Response:* DHS is not considering tax credits as cash assistance for income maintenance, whether they are Federal, State, Tribal, territorial, or local, because many people with moderate or higher incomes are eligible for these tax credits, and the tax system is structured in such a way as to encourage taxpayers to claim and maximize all tax credits for which they are eligible. In addition, as the Department of the Treasury has noted, “[i]t can be challenging to distinguish between the portion of a credit that offsets an individual tax liability versus the portion that is refundable. Determining the impact of a refundable tax credit depends on multiple variables, including other return elements and information the taxpayer provides, some of which are unrelated to the refundable tax credit in question.”<sup>252</sup> DHS also has no interest in any action that may cause fear or confusion in relation to the payment of income taxes. Finally, these tax credits may be combined with other tax credits between spouses. One spouse may be a U.S. citizen, and the couple may file the tax return jointly. In such a case, DHS would not be able to determine whether the noncitizen or the U.S. citizen received the tax credit.

In addition, while DHS is clear that it will not consider the Child Tax Credit (CTC), DHS would consider any other general cash assistance that is available to families with children, which is similarly situated to programs like TANF, to be cash assistance for income maintenance, unless it could be classified as a special-purpose program. TANF, for example, is available to pregnant individuals or those responsible for one or more children under the age of 19, but there are no restrictions on the use of TANF cash assistance. Therefore, if similar general assistance is not provided as a tax credit and is not restricted in how it may be used, DHS would consider such assistance cash assistance for income maintenance. If, on the other hand, a future allowance is restricted in how it may be used – for example, cash or cash equivalent that may

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<sup>252</sup> See Dep’t of the Treasury, “Agency Financial Report: Fiscal Year 2021” (2021), at 198, <https://home.treasury.gov/system/files/266/Treasury-FY-2021-AFR.pdf> (last visited Aug. 10, 2022).

only be used to pay for daycare or school, then DHS would consider such assistance special-purpose and would not consider it in public charge inadmissibility determinations.

*Comment:* One commenter stated generally that DHS should not include cash assistance and that DHS should instead treat it on par with general health, nutrition, and housing programs, among others. The commenter stated that including cash assistance will only confuse people who may assume that COVID-19 stimulus checks, tax returns, and credits are included, particularly citing the need to specifically exclude coverage for testing and treatment for COVID-19. Another commenter stated that the use of cash assistance for designated purposes does not accurately predict whether a person is likely to become a public charge because individuals who receive these benefits can also independently earn income or have resources.

*Response:* As discussed previously in this final rule, DHS is not eliminating the consideration of cash assistance for income maintenance. However, such cash assistance does not include special-purpose benefits like disaster assistance. Finally, DHS was very clear in the NPRM, and is reiterating in this final rule, that DHS will not consider receipt of treatments or preventive services related to COVID-19 for purposes of public charge determinations. While COVID-19 vaccines, for example, are free to anyone who desires to get one, DHS is not considering healthcare coverage (except for long-term institutionalization at government expense), so DHS would not consider medications to treat COVID-19 or hospitalization in this context.

*Comment:* Other commenters also requested the explicit exclusion of benefits used by survivors of domestic violence or other serious crimes or benefits used by anyone during natural disasters, such as State-funded emergency relief funds, or other extraordinary circumstances, for example COVID-19-related relief funds that have been made available to everyone, including noncitizens without lawful status in the United States. They stated that use of these benefits is due entirely to external events and does not provide any information on the recipient's likelihood of becoming primarily reliant on government assistance.

*Response:* As indicated throughout this final rule, the only benefits DHS is considering are Federal (SSI and TANF), State, Tribal, territorial, and local cash assistance for income maintenance and any program (including Medicaid) that provides or covers the costs of long-term institutionalization at government expense. DHS is not considering disaster assistance, COVID-19 stimulus payments, or other similarly situated benefits. DHS notes that at least some survivors of domestic violence are exempt from the public charge ground of inadmissibility. Where the ground does not apply, DHS would not consider any public benefits received by those individuals. DHS is not adding a separate exclusion for all victims of crime and/or domestic violence because such an exclusion may overlap with existing exemptions and because an exclusion for all victims of crime would not take into account whether a noncitizen is receiving benefits because they were victimized or whether the benefits had nothing to do with the noncitizen's victim status. An applicant may always supplement their application with an explanation of the temporary circumstances that gave rise to benefits receipt covered by the rule.

*Comment:* A commenter also raised concerns with the consideration of "general assistance" and "guaranteed income" programs in public charge inadmissibility determinations. The commenter stated that "[o]nly half of the states in the nation provide any type of general assistance, and it is only available to very few of those in need," noting that "[s]ome are only available to individuals with a disability, and have maximum grant levels below the federal poverty level in all but two states and below one-quarter of the federal poverty level in half the programs." The commenter said that these State- and locally-funded programs are by definition guided by State and local priorities, and that DHS should not include them in public charge inadmissibility determinations because they do not provide enough income for "income maintenance" that would indicate "primary dependence" on the government, and because they are not funded nor guided by priorities set by the federal government. The commenter also flagged a "growing trend" around the country known as "Guaranteed Income" programs, which range between \$200 and \$1,000 monthly to households with eligibility and prioritization chosen

by the locality or State implementing the program. The commenter stated that “Guaranteed Income” programs are not intended to be the sole source of income for the recipient households, but instead a support to allow the households to meet their other needs without creating dependence on the programs due to their time-limited nature. The commenter also expressed concern that looking at the amount and duration of benefit receipt would create disparate treatment among recipients given that different jurisdictions have differing resources available.

*Response:* As indicated previously, DHS is declining to exclude from consideration State, Tribal, territorial, and local cash assistance for income maintenance because such assistance can be indicative of primary dependence on the government for subsistence. The definition of government is not limited to the Federal government, and, as indicated in other comment responses, DHS has concluded that it would not be reasonable to distinguish between cash assistance recipients solely because of the source of the funds (i.e., solely because the funds came from the Federal government, as opposed to State, Tribal, territorial, or local government). To the extent that “guaranteed income” programs are not the same as cash assistance for income maintenance in that they typically do not provide the primary source of income for recipients, or are made available without income-based eligibility rules, DHS would not consider these programs.

**c. Suggestions that Other Benefit Programs Be Included in Public Cash Assistance for Income Maintenance**

*Comment:* A commenter requested that DHS include the Earned Income Tax Credit (EITC) and Child Tax Credit (CTC) programs in the definition of public cash assistance for income maintenance. The commenter stated that although these payments are employment-based subsidies, they are still means-tested transfer payments for which noncitizens must individually qualify and are evidence that such noncitizens are not self-sufficient without a government subsidy. The commenter stated that at a minimum, DHS should exclude payments under either program from the definition of gross annual household income.

*Response:* DHS appreciates the comments regarding the EITC and CTC but is declining to add these to the definition of public cash assistance for income maintenance in new 8 CFR 212.21(b). Although EITC and the CTC benefits provided could be considered a particular form of cash assistance, DHS is not including the consideration of tax credits in this final rule because many people with moderate or higher incomes are eligible for these tax credits, and the tax system is structured in such a way as to encourage taxpayers to claim and maximize all tax credits for which they are eligible. In addition, as the Department of the Treasury has noted, “[i]t can be challenging to distinguish between the portion of a credit that offsets an individual tax liability versus the portion that is refundable. Determining the impact of a refundable tax credit depends on multiple variables, including other return elements and information the taxpayer provides, some of which are unrelated to the refundable tax credit in question.”<sup>253</sup> DHS also has no interest in any action that may cause fear or confusion in relation to the payment of income taxes. Finally, these tax credits may be combined with other tax credits between spouses. One spouse may be a U.S. citizen, and the couple may file the tax return jointly. Therefore, DHS would not be able to determine whether the noncitizen or the U.S. citizen received the tax credit. DHS is also not including the suggestion to exclude from the household income any amounts attributable to these tax credits, in part because of the same practical limitations.

**d. Requests that Non-Cash Benefits Other Than Long-Term**

**Institutionalization at Government Expense Be Considered**

*Comment:* A commenter recommended that DHS withdraw the definition of public benefit and promulgate a new NPRM that defines public benefit in a manner that the commenter believes would be more commensurate with Congressional intent and with the way States and the Federal government distribute monies for public benefits, as the commenter does not believe it is appropriate to exclude entire programs, like Medicaid, that cost billions of dollars a year.

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<sup>253</sup> See Dep’t of the Treasury, “Agency Financial Report: Fiscal Year 2021” (2021), at 198, <https://home.treasury.gov/system/files/266/Treasury-FY-2021-AFR.pdf> (last visited Aug. 10, 2022).



Another commenter wrote that that PRWORA broadly defined federal public benefits and indicated that the proposed definition of public benefits in the NPRM is too restrictive. Another commenter wrote that in differentiating between types of benefits, DHS ignores Congressional intent in favor of an interim guidance memorandum that was never meant to be the equivalent of a final agency rule. Several commenters stated that by limiting the public charge inadmissibility determination to only cash benefits for income maintenance or long-term institutionalization, the definition improperly restricts the benefits that DHS could consider in the analysis. Several commenters stated that distinguishing between cash and noncash benefits is “contrary to our national principle of self-sufficiency.” One commenter said that the proposed rule’s removal of the consideration of any supplemental or in-kind benefits is not a permissible construction of the statute, a claim they stated is supported by history and Congress’s 1996 statutory amendments and additions. That commenter stated that many recognize that the 1996 affidavit of support provision reflects Congress’s “preference that the Executive consider even supplemental dependence in enforcing the public charge exclusion.”<sup>254</sup> Another commenter similarly recommended the rule require officers to consider all means-tested public benefits, including public benefits provided by State, Tribal, territorial, and local governments to “nonqualified aliens” under PRWORA, consistent with Congress’s scheme in limiting access to public benefits and the provisions of the INA, which according to the commenter state that the law is intended to protect each of these entities and allow them to recover lost benefits they may have provided.

*Response:* Congress itself previously distinguished between cash and non-cash benefits in the same manner as this rule in the IRCA legalization provision, which provided that “[a]n alien is not ineligible for adjustment of status under [that provision] due to being [a public charge] if the alien demonstrates a history of employment in the United States evidencing self-support

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<sup>254</sup> *Cook County v. Wolf*, 962 F.3d 208, 248 (7th Cir. 2020) (Barrett, J., dissenting).

*without receipt of public cash assistance.*”<sup>255</sup> Further, INS made this same distinction in the 1999 Interim Field Guidance, after which Congress amended the applicability of section 212(a)(4) of the INA multiple times, but only to limit the application of the ground of inadmissibility to certain populations or to limit consideration of certain benefits in certain circumstances.<sup>256</sup> As noted previously, Congress has long deferred to the Executive to interpret the meaning of “likely at any time to become a public charge.” DHS is not treading new ground by exercising that discretion in the way presented in this rule. DHS believes Congress’ prohibition of consideration of prior receipt of public benefits by a specific class of noncitizens when making public charge inadmissibility determinations<sup>257</sup> indicates that Congress believed that the consideration of receipt of at least some public benefits was relevant to determining whether an applicant is likely at any time to become a public charge and that DHS should consider the receipt in all other circumstances when making a public charge inadmissibility determination. However, Congress left it to the agencies administering the ground to specify which public benefits should be considered when defining key statutory terms and standards, such as the forward-looking and predictive “likely at any time to become a public charge,” and the “factors to be taken into account,” which entails assessing current and past behavior in order to make the prediction of possible future likelihood of becoming a public charge.

*Comment:* Some commenters stated that the distinction that DHS drew between monetary and non-monetary benefits is artificial. A few commenters also stated that the proposed rule uses semantics rather than facts to argue substantive differences between cash and non-cash benefits. Commenters stated that Congress was concerned about noncitizens relying on all

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<sup>255</sup> Pub. L. No. 99-603, tit. II, sec. 201 (Nov. 6, 1986) (codified at section 245A(d)(2)(B)(ii)(IV) of the INA, 8 U.S.C. 1255a(d)(2)(B)(ii)(IV)) (emphasis added); *see also id.* at secs. 302, 303 (similar provision for Special Agricultural Workers).

<sup>256</sup> *See, e.g.,* Pub. L. No. 113-4, sec. 804 (2013) (codified as amended at section 212(a)(4)(E)(i)-(iii) of the INA, 8 U.S.C. 1182(a)(4)(E)(i)-(iii)); Pub. L. No. 106-386, sec. 1505(f).(2000) (codified as amended at section 212(s) of the INA, 8 U.S.C. 1182(s)).

<sup>257</sup> *See* INA sec. 212(s), 8 U.S.C. 1182(s).

government-funded welfare programs, not only receiving income-deriving benefits, and indicated that there is simply no functional difference between a cash and a non-cash benefit. Both stem from public funds used for public benefits that are equally relied on by those who cannot afford to meet some need. The commenter wrote that a recipient of federal or State housing assistance significantly relies on the government, as do the recipients of Medicaid or other State low or no-cost medical benefits. Another commenter also indicated that there is no difference between being reliant on benefits for a certain need, rather than reliant on benefits for income. One commenter stated that DHS relies on a flawed premise that, for public charge purposes, the analysis should rest on how the benefit is used by the individual, but instead DHS should only look to whether an individual is, in fact, relying on a public benefit. The commenter said that if the goal is to ensure that the noncitizen is not reliant on the government, the focus should be on how much the government spends on the benefit, not whether the benefit is income-deriving. A commenter supporting the exclusion of noncash benefits and advocating for exclusion of cash benefits as well stated that the distinction between cash and noncash benefits is arbitrary and confusing, and indicated that the assertion that cash benefits allow individuals to become dependent on the government in a way that participation in non-cash benefit programs did not was not supported by DHS with statistics. The commenter said that including this distinction would risk perpetuating and exacerbating disparities in access to stability and opportunities.

*Response:* DHS disagrees that it is drawing an artificial or arbitrary distinction between cash and non-cash benefits or that it is contradicting Congress' statements regarding self-sufficiency and dependence on public benefits. In determining to exclude most non-cash benefits as part of the definition of "likely at any time to become a public charge," DHS has concluded, based on feedback from benefits-granting agencies, that non-cash benefits generally are less indicative of primary dependence on the government for subsistence than those benefits included in this rule for consideration. During the development of the NPRM, DHS consulted with

benefits-granting agencies. In its on-the-record letter,<sup>258</sup> USDA advised that participation in nutrition programs, such as SNAP, “is not an appropriate indicator of whether an individual is likely to become primarily dependent on the government for subsistence.” The letter explained that SNAP is supplementary in nature as the benefits are calculated to cover only a portion of a household’s food costs with the expectation that the household will use its own resources to provide the rest. The letter also stated that SNAP benefits are modest and tailored based on the Thrifty Food Plan (TFP), USDA’s lowest cost food plan, and that an individual or family could not subsist on SNAP alone. USDA emphasized that a recipient can only use SNAP benefits for the purchase of food, such as fruits and vegetables, dairy products, breads, and cereals, or seeds and plants that produce food for the household to eat. The recipient may not convert SNAP benefits to cash or use them to purchase hot foods or any nonfood items. Receiving SNAP benefits only pertains to a need for supplemental food assistance and does not address all food needs or other general needs such as cooking equipment, hygiene items, or clothing, for example. USDA also stated that most SNAP recipients work and that there is no research demonstrating that receipt of SNAP benefits is a predictor of future dependency.

Similarly, in its on-the-record consultation letter,<sup>259</sup> HHS evaluated the Medicaid program within the context of a public charge definition based on primary dependence on the government for subsistence. HHS stated that “with the exception of long-term institutionalization at government expense, receipt of Medicaid benefits is . . . not indicative of a person being or likely to become primarily dependent on the government for subsistence.” This conclusion was based on HHS’s assessment that Medicaid, except for long-term institutionalization, does not provide assistance to meet basic subsistence needs. In addition, HHS highlighted developments since 1999 that “reaffirm Medicaid’s status as a supplemental benefit.” These developments include

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<sup>258</sup> See Letter from USDA Deputy Under Secretary on Public Charge (Feb. 15, 2022), <https://www.regulations.gov/document/USCIS-2021-0013-0199> (last visited July 12, 2022).

<sup>259</sup> See Letter from HHS Deputy Secretary on Public Charge (Feb. 16, 2022), <https://www.regulations.gov/document/USCIS-2021-0013-0206> (last visited July 12, 2022).

Congressional action that has expanded Medicaid coverage, such that in many States individuals and families are eligible for Medicaid despite having income substantially above the HHS poverty guidelines. HHS also noted that among working age adults without disabilities who participate in the Medicaid program, most are employed.<sup>260</sup> HHS also agreed with DHS that “receipt of cash assistance for income maintenance, in the totality of the circumstances, is evidence that an individual may be primarily dependent on the government for subsistence.” HHS addressed the TANF program, which it administers, and stated that unlike Medicaid, cash assistance programs under TANF have remained limited to families with few sources of other income and are much more frequently used as a primary source of subsistence. DHS acknowledges the possibility of opposing views,<sup>261</sup> but believes that the information in these letters provides ample support for the distinction that DHS has historically drawn between cash and noncash benefits.

DHS also notes that, based on experience with the 2019 Final Rule, DHS knows that including non-cash benefits as part of a public charge inadmissibility determination, both in the definition and in the factors considered, predictably results in widespread chilling effects based on a misunderstanding of the law, while ultimately not resulting in any denials under that rule. As DHS explained in the NPRM, the inclusion of non-cash benefits in the 2019 Final Rule had a significant chilling effect on enrollment in Federal and State public benefits, including Medicaid, resulting in fear and confusion among both noncitizens and U.S. citizens. Concerns over actual and perceived adverse legal consequences tied to seeking public benefits have affected whether or not immigrants seek to enroll in public benefit programs, including Medicaid and CHIP, and have resulted in a decrease in health insurance rates among eligible immigrants, particularly

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<sup>260</sup> See Rachel Garfield, et al., “Work Among Medicaid Adults: Implications of Economic Downturn and Work Requirements,” Kaiser Family Foundation (Feb. 11, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/work-among-medicaid-adults-implications-of-economic-downturn-and-work-requirements/> (last visited Aug. 15, 2022).

<sup>261</sup> See, e.g., *Cook County*, 962 F.3d 208, 249 (7th Cir. 2020) (Barrett, J., dissenting) (suggesting that DHS might reasonably decline to distinguish between “\$500 for groceries or \$500 worth of food”).

Latinos.<sup>262</sup> Medicaid provides critical health care services including vaccination, testing and treatment for communicable diseases; the importance of these services has been demonstrated during the COVID-19 pandemic.<sup>263</sup>

The final rule is guided by data and input from expert agencies regarding the nature of certain noncash benefits, as well as a recognition of the predicted and documented effects of the 2019 Final Rule’s chilling effects that reduced noncitizens accessing critical benefits, including health benefits.<sup>264</sup> By focusing on those public benefits that are most indicative of primary dependence on the government for subsistence, DHS can faithfully administer the public charge ground of inadmissibility without exacerbating challenges confronting individuals who work, go to school, and contribute meaningfully to our nation’s social, cultural, and economic fabric. This approach is consistent with the INA, PRWORA, and this country’s long history of welcoming immigrants seeking to build a better life. By focusing on cash assistance for income maintenance and long-term institutionalization at government expense, DHS can identify those individuals who are likely at any time to become primarily dependent on the government for subsistence, without interfering with the administrability and effectiveness of other benefit programs that serve important public interests.

Importantly, as noted above receipt of most non-cash public benefits by applicants for visas, admission, and adjustment of status who are subject to the public charge ground of

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<sup>262</sup> HHS, Assistant Secretary for Planning and Evaluation, Office of Health Policy, “Health Insurance Coverage and Access to Care for Immigrants: Key Challenges and Policy Options” (Dec. 17, 2021), <https://aspe.hhs.gov/sites/default/files/documents/96cf770b168dfd45784cdcefd533d53e/immigrant-health-equity-brief.pdf>.

<sup>263</sup> See Centers for Medicare & Medicaid Services (CMS), “Coverage and Reimbursement of COVID-19 Vaccines, Vaccine Administration, and Cost-Sharing under Medicaid, the Children’s Health Insurance Program, and Basic Health Program” (updated May 2021), <https://www.medicare.gov/state-resource-center/downloads/covid-19-vaccine-toolkit.pdf>; CMS State Health Official letter #12–006, “Mandatory Medicaid and CHIP Coverage of COVID–19-Related Treatment under the American Rescue Plan Act of 2021” (issued Oct. 22, 2021), <https://www.medicare.gov/federal-policy-guidance/downloads/sho102221.pdf>; CMS State Health Official letter #21–003, “Medicaid and CHIP Coverage and Reimbursement of COVID–19 Testing under the American Rescue Plan Act of 2021 and Medicaid Coverage of Habilitation Services” (issued Aug. 30, 2021) <https://www.medicare.gov/federal-policy-guidance/downloads/sho-21-003.pdf>.

<sup>264</sup> See Hamutal Bernstein et al., “Immigrant Families Continued Avoiding the Safety Net during the COVID–19 Crisis,” Urban Institute (2021), at 1, <https://www.urban.org/sites/default/files/publication/103565/immigrant-families-continued-avoiding-the-safety-net-during-the-covid-19-crisis.pdf> (last visited Aug. 17, 2022).

inadmissibility is uncommon.<sup>265</sup> It would be exceedingly rare to encounter a non-institutionalized person who is primarily dependent on the government for subsistence, but who does not receive any degree of cash assistance for income maintenance from the government.

*Comment:* Some commenters stated that drawing a distinction between cash and noncash benefits does not make economic sense. One commenter cited estimates in the 2019 Final Rule that the rule would “cumulatively save the States \$1.01 billion annually,” and also stating that the federal government only pays a portion of the costs.<sup>266</sup> The commenter stated that the States need that savings in order to adequately provide for the economically disadvantaged. Another commenter also remarked that the distinction between cash and noncash benefits ignores costs to the States. And another commenter stated that it is not appropriate to exclude whole programs where any State is spending billions of dollars per year, although they supported a *de minimis* exception to certain benefit programs.

*Response:* DHS disagrees that treating non-cash benefits differently than cash benefits is irrational. As discussed in some detail above, DHS is drawing a reasonable line between, on the one hand, cash assistance for income maintenance and long-term institutionalization at government expense (which DHS views as more probative of primary dependence on the government for subsistence) and, on the other hand, supplemental and special-purpose non-cash benefits (which are less probative of such dependence). In addition, DHS is taking into consideration the impacts of the 2019 Final Rule on families, communities, States, and localities that suffered economically due to reduction in food security, adverse impacts on public health, and increase in uncompensated medical care, including during the COVID-19 pandemic, as a result of chilling effects caused by the 2019 Final Rule.<sup>267</sup> DHS recognizes that a regulatory alternative that would consider a wider range of non-cash benefits similar to the 2019 Final Rule

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<sup>265</sup> See, e.g., 8 U.S.C. 1611; 8 U.S.C. 1621.

<sup>266</sup> See “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41301 (Aug. 14, 2019). *City & County of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 981 F.3d 742, 754 (9th Cir. 2020).

<sup>267</sup> See generally, 87 FR at 10587-10597 (Feb. 24, 2022).

would likely result in a reduction of payments by States to beneficiaries as a result of disenrollment/forgone enrollment. However, DHS notes that this particular transfer effect may be attributable to a very significant extent to confusion and uncertainty among populations that are not directly regulated by this rule. In addition, a range of downstream consequences for the general public and for State and local governments may accompany such an effect (such as avoidance of preventative medical care, children's immunizations, and nutrition programs, primarily by persons not even subject to the public charge ground of inadmissibility). DHS therefore disagrees that the line drawn in this rule with regard to which benefits DHS will consider for public charge purposes ignores the economic effects on States; DHS is aware of such effects, but in light of the nature of the public charge inquiry and the applicability of the ground of inadmissibility, DHS has chosen to address the problem differently than some commenters prefer. DHS also does not believe that using this rule to deter those who are not subject to the public charge ground of inadmissibility from accessing benefits for which they are eligible would be an appropriate or valid exercise of authority.

DHS acknowledges that the economic analysis for the 2019 Final Rule accounted for a 2.5 percent rate of disenrollment/forgone enrollment from public benefit programs for "individuals who are members of households with foreign-born non-citizens," resulting in an anticipated reduction in transfer payments from both Federal and State governments to individuals, and that it referenced "the 10-year undiscounted amount of state transfer payments of the provisions of [the 2019] final rule [of] about \$1.01 billion annually." However, as DHS noted in the NPRM and discusses later in this final rule, there are challenges associated with measuring chilling effects with precision. With respect to the chilling effects associated with the 2019 Final Rule, different studies have used different data, methodologies, and periods and populations of analysis, each with their own potential advantages and disadvantages, yet all found some degree of chilling effect.



As DHS noted in the NRPM, the estimated rate of disenrollment/forgone enrollment used in the 2019 Final Rule was based on a potentially overinclusive population sample, at least as it relates to the population that would be directly regulated by the 2019 Final Rule.<sup>268</sup> As discussed at length later in this preamble, DHS has included estimates of a similar disenrollment rate in the economic analysis for this rule. DHS developed the estimates following consideration of a range of studies of the effects of the 2019 Final Rule, and cautions that any quantified estimate is subject to significant uncertainty.

Despite this uncertainty as to its precise magnitude, as DHS explained in the NPRM, a variety of evidence indicates that the inclusion of non-cash benefits in the 2019 Final Rule had significant chilling effect on enrollment in Federal and State public benefits, including Medicaid, resulting in fear and confusion among both noncitizens and U.S. citizens. Concerns over actual and perceived adverse legal consequences tied to seeking public benefits have affected whether or not immigrants seek to enroll in public benefit programs, including Medicaid and CHIP, and have depressed health insurance uptake among eligible immigrants.<sup>269</sup> Medicaid provides critical health care services including vaccination, testing and treatment for communicable diseases.<sup>270</sup> By focusing on those public benefits that are indicative of primary dependence on the

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<sup>268</sup> As discussed in the Regulatory Alternative section, a 2.5 percent rate of disenrollment/forgone enrollment from public benefit programs appears to have resulted in an underestimate due to the documented chilling effects associated with the 2019 Final Rule among other parts of the noncitizen and citizen populations who were not included as adjustment applicants or members of households of adjustment applicants as well as other noncitizens who were not adjustment applicants.

<sup>269</sup> See HHS, Assistant Secretary for Planning and Evaluation, Office of Health Policy, “Health Insurance Coverage and Access to Care for Immigrants: Key Challenges and Policy Options” (Dec. 17, 2021), <https://aspe.hhs.gov/sites/default/files/documents/96cf770b168dfd45784cdcefd533d53e/immigrant-health-equity-brief.pdf> (last visited Aug. 18, 2022); Kaiser Family Foundation, “Health Coverage of Immigrants” (Apr. 6, 2022), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/> (last visited Aug. 18, 2022).

<sup>270</sup> See CMS, “Coverage and Reimbursement of COVID-19 Vaccines, Vaccine Administration, and Cost-Sharing under Medicaid, the Children’s Health Insurance Program, and Basic Health Program” (updated May 2021) <https://www.medicaid.gov/state-resource-center/downloads/covid-19-vaccine-toolkit.pdf>; CMS State Health Official letter #12–006, “Mandatory Medicaid and CHIP Coverage of COVID–19-Related Treatment under the American Rescue Plan Act of 2021” (issued Oct. 22, 2021), <https://www.medicaid.gov/federal-policy-guidance/downloads/sho102221.pdf>; CMS State Health Official letter #21–003, “Medicaid and CHIP Coverage and Reimbursement of COVID–19 Testing under the American Rescue Plan Act of 2021 and Medicaid Coverage of Habilitation Services” (issued Aug. 30, 2021), <https://www.medicaid.gov/federal-policy-guidance/downloads/sho-21-003.pdf>.

government for subsistence, DHS can faithfully administer the public charge ground of inadmissibility without exacerbating challenges confronting individuals who work, go to school, and contribute meaningfully to our nation’s social, cultural, and economic fabric. This approach is consistent with the INA, PRWORA, and this country’s long history of welcoming immigrants seeking to build a better life. By focusing on cash assistance for income maintenance and long-term institutionalization at government expense, DHS can identify those individuals who are likely at any time to become primarily dependent on the government for subsistence, without interfering with the administrability and effectiveness of other benefit programs that serve important public interests.

As discussed in the NPRM, based on the review of sources looking at the impacts of the 2019 Final Rule, DHS concluded that inclusion of non-cash benefits in the definition of “likely at any time to become a public charge” or in the list of “factors to consider” is not only unnecessary to faithfully implement the INA but would lead to predictably harmful chilling effects.<sup>271</sup> DHS believes that this rule is consistent with the goals set forth in 8 U.S.C. 1601.<sup>272</sup> Indeed, the rule’s consideration of receipt of public cash assistance for income maintenance or long-term institutionalization at government expense helps ensure that DHS focuses its public charge inadmissibility determinations on applicants who are likely to become primarily dependent on the government for subsistence and therefore lack self-sufficiency. DHS further notes that its administrative implementation of the public charge ground of inadmissibility is informed not only by the policy goals articulated in 8 U.S.C. 1601(2) with respect to self-sufficiency and the receipt of public benefits but also by other relevant and important policy considerations, such as clarity, fairness, national resilience, and administrability.<sup>273</sup> Therefore, DHS declines to adopt these suggestions.

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<sup>271</sup> 84 FR at 10589-10591 (Feb. 24, 2022).

<sup>272</sup> 87 FR at 10611 (Feb. 24, 2022).

<sup>273</sup> *See, e.g.*, 6 U.S.C. 111(b)(1)(F).

### 3. Long-term Institutionalization at Government Expense

*Comment:* One commenter recommended DHS provide officers appropriate training to ensure public charge inadmissibility determinations support robust compliance with the Americans with Disabilities Act, the Rehabilitation Act, and the Supreme Court’s decision in *Olmstead v. L.C.*, particularly with respect to persons at serious risk of institutionalization or segregation but not limited to individuals currently in institutional or other segregated settings. Other commenters stated that DHS should not subject an individual institutionalized in violation of federal law to a public charge inadmissibility determination. Commenters recommended that DHS should direct officers not to assume the lack of evidence that an applicant’s past or current institutionalization violates federal law means institutionalization was voluntary or lawful. Two commenters similarly stated that if the final rule includes consideration of past or current long-term institutionalization as part of the public charge inadmissibility determination, DHS should include a presumption that the institutionalization was improper because *Olmstead v. L.C.*<sup>274</sup> places the burden on the government rather than the individual to show that community placement is improper and thus the public charge inadmissibility determination should do the same. One commenter also stated that the lack of evidence that past or current institutionalization is in violation of Federal law should never be construed against the applicant, recommending deleting the reference in the regulatory text that evidence be “submitted by the applicant.” Additionally, one commenter added that there is no simple way to establish that a person was institutionalized in violation of federal anti-discrimination laws or because of a lack of access of services. Another commenter said that DHS should examine the impact on children with special health care needs of the inclusion of “long-term institutionalization at government expense” as grounds for inadmissibility in public charge inadmissibility determinations.

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<sup>274</sup> 527 U.S. 581 (1999).

*Response:* DHS agrees that it will need to provide training to officers on all aspects of this final rule and specifically on how it should consider disability in the totality of the circumstances analysis, as well as how it should consider evidence that a noncitizen's rights were violated in instances where the noncitizen was eligible for but unable to obtain HCBS in lieu of long-term institutionalization. As proposed in the NPRM, DHS will not consider disability as sufficient evidence that an applicant for admission or adjustment of status is likely at any time to become a public charge. For example, DHS will not presume that an individual having a disability in and of itself means that the individual is in poor health or is likely to receive cash assistance for income maintenance or require long-term institutionalization at government expense. DHS will also not presume that disability in and of itself negatively impacts the analysis of the other factors in new 8 CFR 212.22.

DHS also recognizes that there are some circumstances where an individual may be institutionalized long-term in violation of Federal antidiscrimination laws, including the Americans with Disabilities Act (ADA) and Section 504. The ADA requires public entities, and Section 504 requires recipients of Federal financial assistance, to provide services to individuals in the most integrated setting appropriate to their needs.<sup>275</sup> As discussed in the NPRM, the Supreme Court in *Olmstead v. L.C.*,<sup>276</sup> held that unjustified institutionalization of individuals with disabilities by a public entity is a form of discrimination under the ADA and Section 504. Given the significant advancements in the availability of Medicaid-funded HCBS since the 1999 Interim Field Guidance was issued,<sup>277</sup> individuals who previously experienced long-term

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<sup>275</sup> See U.S. Department of Justice, Civil Rights Division, Disability Rights Section, "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*," [https://www.ada.gov/olmstead/q&a\\_olmstead.htm](https://www.ada.gov/olmstead/q&a_olmstead.htm) (last updated Feb. 25, 2020) (last visited Aug. 16, 2022).

<sup>276</sup> 527 U.S. 581 (1999).

<sup>277</sup> For example, Congress has expanded access to HCBS as an alternative to long-term institutionalization since 1999 by establishing a number of new programs, including the Money Follows the Person program and the Balancing Incentive Program, and new Medicaid State plan authorities, including Community First Choice (42

institutionalization may not need long-term institutionalization in the future. The public charge ground of inadmissibility is designed to render inadmissible those persons who, based on their own circumstances, would need to rely on the government for subsistence, and not those persons who might be confined in an institution without justification. The possibility that an individual will be confined without justification thus should not contribute to the likelihood that the person will be a public charge. Therefore, while DHS will consider current or past long-term institutionalization as having a bearing on whether a noncitizen is likely at any time to become primarily dependent on the government for subsistence, DHS will also consider evidence that past or current institutionalization is in violation of Federal law, including the Americans with Disabilities Act or the Rehabilitation Act.<sup>278</sup> However, DHS will not implement the commenter's suggestion to strike the reference in the regulatory text that evidence that the past or current institutionalization is in violation of Federal law is to be submitted by the applicant. DHS notes that an applicant for admission or adjustment of status bears the burden of proof to establish eligibility for the immigration benefit sought and DHS declines to shift this burden of proof to itself.

In addition, DHS again confirms in this final rule that HCBS are not considered long-term institutionalization.

*Comment:* Several commenters supported the change in language from the 1999 Interim Field Guidance “institutionalization for long-term care at government expense” to the rule’s “long-term institutionalization at government expense,” because it clarifies that short-term residential care for rehabilitation or mental health treatment is not included, as well as the

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U.S.C. 1396n(k) and the HCBS State plan option (42 U.S.C. 1396n(i)). Most recently, Congress provided increased funding to expand HCBS in the American Rescue Plan. These programs are in addition to the HCBS waiver program (42 U.S.C. 1396n(c)), first authorized in the Social Security Act in the early 1980s. As a result of a combination of these new HCBS programs and authorities and the Supreme Court’s *Olmstead* decision in 1999, States have expanded HCBS. *See, e.g.*, CMS, “Long-Term Services and Supports Rebalancing Toolkit” (Nov. 2020), <https://www.medicaid.gov/medicaid/long-term-services-supports/downloads/lts-rebalancing-toolkit.pdf>.<sup>278</sup> *See* new 8 CFR 212.22(a)(3).

statement that long-term institutionalization is the only category of Medicaid-funded services that DHS would consider in public charge inadmissibility determinations.

One commenter supported adoption of an objective metric for long-term institutionalization, such as a stay of 30 or more days in a nursing facility or other specifically listed type of institutional setting. Another commenter suggested that long-term be defined as five or more years. Another commenter also stated that if DHS does continue to consider long-term institutionalization, it should only consider it if it is current and has lasted for at least five years. A commenter stated that it is important to define long-term in the rule because to one officer it may mean six months and to another six years. A commenter, who received support from other commenters on this point, stated that they did not support a time-based definition of “long-term” because it is likely to be overly inclusive. They stated that DHS should define “long-term institutionalization” to refer to someone who is permanently residing in an institution, an approach that they stated aligns with HHS’s recommendation during the 1999 rulemaking. They stated that HHS defined “long-term institutionalized care” as “the limited case of [a noncitizen] who permanently resides in a long-term care institution (e.g., nursing facilities) and whose subsistence is supported substantially by public funds (e.g., Medicaid).” Another commenter recommended clearly stating that long-term means uninterrupted, extended periods of stay in an institution. One commenter stated that long-term care is hard to define precisely, citing an article on the National Institutes of Health website.<sup>279</sup> Several commenters recommended clarifying that “long-term” means “permanently” to narrow the definition and limit confusion. One commenter thought that a two- or three-tiered medical evaluation is more helpful than setting a time limit of “long-term” to the institutional care.

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<sup>279</sup> Penny Feldman and Robert Kane, “Strengthening Research to Improve the Practice and Management of Long-Term Care,” *The Millbank Quarterly* (June 2003), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690214/> (last visited Aug. 18, 2022).

*Response:* With respect to commenters' suggestions to set a specific threshold for long-term institutionalization, DHS appreciates the comments that it received on this topic. DHS is declining to adopt a specific length of time to define "long-term" and is not aware of a definitional standard in Medicaid or other benefit programs that would support a specific numerical threshold. However, DHS, in collaboration with HHS, will develop sub-regulatory guidance to help assess evidence of institutionalization. Relevant considerations in determining whether a person is institutionalized on a long-term basis may include the duration of institutionalization and (where applicable) whether the person has been assessed and offered, and has declined, comparable services and supports such as HCBS, and availability of such services in the geographic area where the individual resides.

While DHS believes that permanent institutionalization would be the most likely to contribute to an inadmissibility determination as part of the totality of circumstances, DHS believes that institutionalization of indefinite duration, or shorter than indefinite duration, may also qualify. As discussed throughout this final rule, DHS will take into consideration whether the noncitizen's rights were violated because the noncitizen was eligible but was not provided the opportunity to receive care through HCBS rather than long-term institutionalization. Lastly, DHS is uncertain what the commenter meant by a "two- or three-tiered medical evaluation" or how such evaluation would help DHS determine the likelihood that an individual would become long-term institutionalized at government expense. As a result, DHS is not making any changes to the final rule based on that comment.

*Comment:* One commenter stated that allowing USCIS to incorporate into its standard an assessment of whether the institutionalization of any given individual was consistent with the Americans with Disabilities Act, *Olmstead v. L.C.*, and related authorities for the prospect of obtaining immigration relief would create distorted incentives and needlessly complicate both areas of law. The commenter explained that the courts, not USCIS, are best situated to elevate such disputes.

*Response:* DHS concluded that considering evidence that a noncitizen was institutionalized in violation of their rights is an important guardrail in public charge inadmissibility determinations. DHS understands that services available to individuals may not be in full compliance with disability rights laws, depending on their place of residence. For that reason, individuals who might otherwise receive HCBS are institutionalized at government expense instead. Given this, DHS has expressly stated in the regulatory text that DHS will consider evidence submitted by the applicant that their institutionalization violates Federal law, in the totality of the circumstances, and has updated the instructions for Form I-485 to inform applicants that they should submit such evidence.

*Comment:* Several commenters recommended DHS not include “long-term institutionalization” in the definition of “likely at any time to become a public charge.” One commenter stated that long-term institutionalization is a factor that only applies to people with disabilities. The commenter stated that if long-term institutionalization is included, they support the limitations that DHS has proposed and that they urge as narrow of a definition as possible that places minimum weight on past institutionalization. Some commenters further stated that the inclusion of long-term institutionalization discriminates against people with disabilities and older people and disproportionately affects people of color, with one commenter stating that considering long-term institutionalization negatively in a public charge inadmissibility determination is at odds with DHS’s statement that disability will not alone be a sufficient basis to determine whether a noncitizen is likely to become a public charge. One commenter stated that DHS should not consider Medicaid benefits, including the provision of HCBS, and disagreed that long-term institutionalization is a suitable exception in determining whether one is likely to become a public charge. The commenter added that if DHS does continue to consider long-term institutionalization, it should do so only if DHS can demonstrate that the individual had a meaningful, affordable, and available option, known to them, to receive HCBS instead of institutionalization; and that institutionalization is current and has lasted for at least 5 years. One



commenter stated that including long-term institutionalization at government expense would continue to discriminate against people with developmental disabilities by making them more likely to be found to be public charges since only people with disabilities and older adults experience long-term institutionalization. One commenter stated that including long-term institutional care in a public charge inadmissibility determination contributes to substantial opportunity costs that are borne by immigrant families, particularly women, who must then provide the needed care themselves, citing a study that found family caregivers who leave the workforce to care for a family member experience an average of \$303,880 in lost income and benefits over their lifetime. The commenter remarked that including long-term institutional care financed by Medicaid likely would disproportionately and adversely impact women economically and have ripple effects throughout family structures and help perpetuate disparities across American society.<sup>280</sup>

*Response:* DHS appreciates these comments but is declining to omit long-term institutionalization from consideration in this final rule. DHS disagrees that the provision discriminates on the basis of disability, race, or any other protected ground. In a decision affirming a preliminary injunction against the 2019 Final Rule, the Seventh Circuit wrote that the public charge statute’s “health” criterion and the Rehabilitation Act “can live together comfortably, as long as we understand the ‘health’ criterion in the INA as referring to things such as contagious disease and conditions requiring long-term institutionalization, but *not* disability per se.”<sup>281</sup> This rule is not inconsistent with that view.

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<sup>280</sup> See Peter Arno et al., “The MetLife Study of Caregiving Costs to Working Caregivers: Double Jeopardy for Baby Boomers Caring for Their Parents,” MetLife Mature Market Institute (June 2011), <https://www.caregiving.org/wp-content/uploads/2011/06/mmi-caregiving-costs-working-caregivers.pdf>. The study estimated ranges from a total of \$283,716 for men to \$324,044 for women, or \$303,880 on average. The average figure breaks down as follows: \$115,900 in lost wages, \$137,980 in lost Social Security benefits, and conservatively \$50,000 in lost pension benefits.

<sup>281</sup> 962 F.3d 208, 228 (7th Cir. 2020).

As stated previously, considering the past or current receipt of long-term institutionalization at government expense is a longstanding element of the public charge inadmissibility analysis. In DHS's view, this scenario is at the core of the public charge statute. Past or current receipt of long-term institutionalization at government expense can be predictive of future dependence on those same benefits. However, such consideration is not alone dispositive. In addition, as indicated previously, DHS will take into consideration any credible and probative evidence that an individual was institutionalized in violation of disability laws.

*Comment:* Another commenter stated that DHS should not include long-term institutionalization in the public charge assessment. They stated that the preamble to the 1999 proposed regulations lists "the historical context of public dependency when the public charge immigration provisions were first enacted more than a century ago" as support for the agency's proposed definition of public charge. However, they stated that modern long-term institutionalization is unlike the turn of the century almshouses. Specifically, the commenter stated that while only a small portion of the population resided in institutional settings at that time, today long-term institutionalization is more widespread. They also stated their view that the need for long-term care is expected to grow over time as the population ages and medical advances increase the lifespans of people with disabilities or health challenges.<sup>282</sup> Commenters stated that while approximately 60 million Americans receive taxpayer-funded health care through Medicare, the program does not cover the costs of custodial long-term care. As a result, the commenters said, Medicaid is the primary payer for long-term care in the United States, covering over 60 percent of nursing home residents.<sup>283</sup> Given its pervasiveness, the commenters

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<sup>282</sup> See Administration for Community Living, "How Much Care Will You Need?," <https://acl.gov/ltc/basic-needs/how-much-care-will-you-need> (last modified Feb. 18, 2020) (estimating that almost 70 percent of people turning 65 will require long-term services and supports, with 37 percent requiring care outside of their own homes) (last visited Aug. 18, 2022).

<sup>283</sup> Medicaid and CHIP Payment and Access Commission, "Nursing facilities: Long-Term Services and Supports," <https://www.macpac.gov/subtopic/nursing-facilities/> (last visited Aug. 18, 2022).

wrote, Medicaid funding for long-term care is more like a general public health program than evidence of an individual's dependency.

*Response:* While DHS acknowledges that more individuals reside in institutional facilities today than at the turn of the century, the population of the United States is also much larger, and the portion of the overall population residing in such facilities remains very small. The study cited by the commenter found 84,108 “paupers” residing in almshouses in 1910,<sup>284</sup> out of a total population of 92,228,496, or 0.09%.<sup>285</sup> By contrast, the 2020 Census found 1,697,989<sup>286</sup> individuals residing in nursing facilities/skilled-nursing facilities, or other institutional facilities (excluding correction facilities for adults and juvenile facilities) out of a total population of 331,449,281, or 0.5%.<sup>287</sup> While DHS acknowledges that relatively larger percentage of U.S. residents live in nursing facilities or other institutional facilities today than the population residing in almshouses in 1910, that percentage is still very small.

As this commenter and many others have noted, the United States has made significant advances both for older adults and for individuals with disabilities, since the publication of the 1999 Interim Field Guidance. This is reflected in the decreasing population (and percentage of the overall population) residing in such facilities during that time period. If, as the commenter states, the need for certain services is growing over time “as the population ages and medical advances increase the lifespans of people with disabilities or health challenges,” Census data shows that U.S. residents are increasingly receiving such services outside of institutional

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<sup>284</sup> Department of Commerce, Bureau of the Census, Bulletin 120, “Paupers in Almshouses: 1910” (1914), at 46, <https://www2.census.gov/prod2/decennial/documents/03322287no111-121ch7.pdf> (last visited July 21, 2022).

<sup>285</sup> United States Census Bureau, “History Through The Decades: 1910 Fast Facts,” [https://www.census.gov/history/www/through\\_the\\_decades/fast\\_facts/1910\\_fast\\_facts.html](https://www.census.gov/history/www/through_the_decades/fast_facts/1910_fast_facts.html) (last visited July 21, 2022).

<sup>286</sup> United States Census Bureau, “Group Quarters Population by Major Group Quarters Type” (Aug. 2021), <https://data.census.gov/cedsci/table?q=group%20quarter&tid=DECENNIALPL2020.P5> (last visited July 21, 2022).

<sup>287</sup> United States Census Bureau, “Apportionment Population, Resident Population, and Overseas Population: 2020 Census and 2010 Census” (Apr. 26, 2021), <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-tableA.pdf> (last visited July 21, 2022).

settings. In the 2000 Census, 1,954,740<sup>288</sup> individuals resided in nursing homes or other institutional facilities, out of a total population of 281,421,906,<sup>289</sup> or 0.7%. As a comparison to the 2020 figures above shows, even with an increasing population, an aging population, and the medical advances noted by the commenter, both the total number and percentage over the overall population residing in such facilities fell over that two-decade period.

Since the population residing in nursing facilities or other institutional settings (both overall and as a percentage of the total population) remains small and has decreased over the past two decades, even if Medicaid is the primary source of funding for 62 percent of nursing home residents,<sup>290</sup> such a small percentage of the overall population is residing in nursing homes and institutions providing long-term care that Medicaid funding for long-term care cannot be said to be “a general public health program.” Long-term institutionalization at government expense remains rare among the U.S. population as a whole, and given DHS’s conclusion that it is indicative of primary dependence on the government for subsistence, DHS declines to exclude long-term institutionalization at government expense from consideration in public charge inadmissibility determinations.

*Comment:* One commenter stated that there is no bright line between long-term and short-term institutionalization for rehabilitation purposes. The commenter wrote that many people return to their community after being institutionalized for long-term care, but their ability to do so can depend on the availability of HCBS, other resources in their area, their health status, and their access to rehabilitative services while in long-term care. As they and other commenters have noted, the availability of alternatives to institutionalization varies greatly by geography and

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<sup>288</sup> United States Census Bureau, “Population in Group Quarters by Type, Sex and Age, for the United States: 2000” (Nov. 10, 2003), <https://www2.census.gov/programs-surveys/decennial/2000/phc/phc-t-26/tab01.pdf> (last visited July 21, 2022).

<sup>289</sup> United States Census Bureau, “Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000” (Dec. 2000), <https://www2.census.gov/programs-surveys/decennial/2000/phc/phc-t-26/tab01.pdf> (last visited July 21, 2022).

<sup>290</sup> Medicaid and CHIP Payment and Access Commission, “Nursing facilities: Long-Term Services and Supports,” <https://www.macpac.gov/subtopic/nursing-facilities/> (last visited Aug. 18, 2022).

a person's disability, age, and wealth. The commenter stated that these factors also affect the availability of other resources needed to transition from long-term care into the community.<sup>291</sup> A person's likelihood of transitioning from long-term care back to the community can also depend on the characteristics of the long-term care facility.<sup>292</sup> The commenter stated that DHS should not penalize immigrants for the structural deficiencies of the country's healthcare system. Finally, the commenter wrote that inviting officers to forecast whether an individual is likely to use government programs to pay for future long-term institutionalization is particularly speculative given the potential for medical advances and changes in the healthcare delivery system.

*Response:* As discussed in the NPRM, DHS will not consider HCBS in public charge inadmissibility determinations. DHS will, however, consider evidence that individuals were institutionalized in violation of their rights. Where such evidence is credible, it will have the tendency of offsetting evidence of current or past institutionalization. DHS acknowledges that there may be limitations on the resources and services available to individuals, and that many factors could have an impact on whether an individual is institutionalized for long-term care or receives care through HCBS.

With respect to commenter requests to exclude from public charge inadmissibility determinations the consideration of past or current long-term institutionalization, particularly focusing on the prevalence of nursing home care for older adults, and the impacts on adult children who are caregivers, DHS is not adopting this request. As noted above, long-term institutionalization at government expense is at the core of the public charge statute. Although some individuals may ultimately enter institutional care at government expense because of

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<sup>291</sup> The commenter referenced Julie Robinson et al., "Challenges to community transitions through Money Follows the Person," 55 Health Servs. Res. 3 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7240761/> (last visited Aug. 16, 2022).

<sup>292</sup> The commenter cited Amanda Holup et al., "Community Discharge of Nursing Home Residents: The Role of Facility Characteristics," 51 Health Servs. Res. 2 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4799895/> (last visited Aug. 16, 2022).

problems associated with local health care systems, at bottom, this type of benefit tracks most closely to the almshouse concept closely associated with the public charge ground of inadmissibility. DHS acknowledges the difficulties associated with predicting that an individual will be institutionalized in the future, let alone the difficulties associated with predicting the funding source for such institutionalization. DHS will ensure that officers make predictive public charge inadmissibility determinations on the basis of available evidence to the extent appropriate, and without unduly speculating as to an applicant's future circumstances.

*Comment:* Several commenters supported including long-term institutionalization at government expense in the public charge inadmissibility determination, with one commenter reasoning that DHS should account for immigrants who may come to the United States for free medical care. Another commenter similarly emphasized that places like nursing homes may take advantage of the use of Medicaid, and policies should focus on managing that concern.

*Response:* DHS agrees that it should continue to consider long-term institutionalization at government expense. DHS does not agree that it should include other forms of Medicaid or other healthcare coverage at government expense. With respect to comments about Medicaid abuse, DHS notes that it does not have authority to regulate how Medicaid is used in nursing homes. DHS is simply considering in public charge inadmissibility determinations whether or not the noncitizen has been, is currently, or is likely at any time to be institutionalized long-term at government expense. This approach is consistent with long-standing interpretation of section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

*Comment:* Many commenters stated that they supported DHS's decision not to consider use of HCBS by a noncitizen in a public charge inadmissibility determination. One commenter recommended DHS explicitly clarify in the preamble of the final rule and in sub-regulatory guidance that it will not consider HCBS in a public charge inadmissibility determination. One commenter cited the material differences between the use of HCBS and reliance on institutional long-term care, as well as the public health interest of reducing the spread of infection in

congregate settings and the national economic interest of reducing the cost of long-term care and promoting individuals' independence, and recommended DHS include clarification in the preamble of the rule and sub-regulatory guidance and policies for adjudicating officers to ensure that they will not consider Medicaid HCBS in a public charge inadmissibility determination. The commenter also requested clarification in the preamble that HCBS are not included.

*Response:* DHS agrees with commenters that HCBS and Medicaid generally (with the exception of long-term institutionalization at government expense) should not be considered in public charge inadmissibility determinations. DHS is retaining this clarification in this final rule. DHS intends to also retain this clarification in any sub-regulatory guidance issued for officers and the public.

*Comment:* Some commenters stated that there were issues with the inclusion of long-term institutionalization at government expense and the exclusion of HCBS. One commenter stated that due to an Indiana law that requires a person to qualify for SSI in order to remain in HCBS programs, the rule will negatively affect every person receiving HCBS who is 18 years or older in Indiana. Other commenters also pointed out that studies have found there is unequal minority access to HCBS, which adds to another layer of bias to which this community is subject, and stated that DHS should not punish immigrants with disabilities because their State does not offer HCBS. Another commenter stated that, if the rule does not exclude all of Medicaid, older immigrants may be afraid to access any type of HCBS or other health support. One commenter disagreed with the inclusion of long-term institutionalization unless DHS can demonstrate that the individual had a meaningful, affordable, and available option to receive HCBS instead and that the institutionalization was current. Some commenters similarly stated that institutionalization for long-term care at government expense should not be a barrier to immigration unless DHS can demonstrate that the individual had access to HCBS rather than institutionalization. The commenters said that DHS should require officers to assess the availability of alternatives to institutionalization, including waiting lists for HCBS, average time

to be placed into HCBS, and availability of transition services. A commenter appreciated DHS's clarification in the preamble that HCBS are not to be included. The commenter stated that older adults receive HCBS from a variety of programs, including Medicaid, Medicare, and Older Americans Act programs.

*Response:* As noted above, consistent with the NPRM, DHS will consider evidence that long-term institutionalization of an individual was in violation of federal law. This would include circumstances where the individual has experienced long-term institutionalization due to lack of HCBS availability, and may include consideration of evidence regarding HCBS waiting lists, States' compliance with disability rights laws, etc. DHS declines, however, to shift the burden to itself to demonstrate that long-term institutionalization was not in violation of an individual's rights because the applicant for admission or adjustment of status has the burden of proof to establish eligibility for the immigration benefit sought. With respect to the comment regarding eligibility for SSI and HCBS, if a noncitizen is receiving SSI, then they are receiving public cash assistance for income maintenance. While their receipt of HCBS would not be considered in a public charge inadmissibility determination, DHS would consider their receipt of SSI.

*Comment:* A few commenters suggested that DHS include guidance directing the consideration of the role an individual's family would have in overseeing the individual's care, as well as the impact the denial of an individual's application for permanent resident status based on a public charge inadmissibility determination would have on a family.

*Response:* DHS will consider whether the noncitizen is likely at any time to become primarily dependent on the government for subsistence by taking into consideration the totality of the circumstances. Where there is evidence that a noncitizen has a medical condition that impacts their ability to care for themselves, DHS can also take into consideration whether the noncitizen is being cared for and/or supported by their family or sponsor(s). DHS does not believe that it should take into consideration the impact of an inadmissibility determination on a family because the impact on the family may not make a noncitizen more or less likely to



become primarily dependent on the government for subsistence. However, in the context of the assets, resources, and financial status factor, DHS is taking into consideration the household assets and resources, including income, rather than solely one individual's. DHS acknowledges that it would take into consideration insufficient assets and resources that may be a direct result of, for example, a member of a household no longer being able to provide financial support because they must depart the United States due to an inadmissibility finding. In addition, and similar to the approach that DHS took in the 2019 Final Rule, DHS could take into consideration in the totality of the circumstances that a noncitizen in the household subject to the public charge ground of inadmissibility is a primary caregiver to another member of the household and while not contributing income to the household is providing an in-kind contribution to the household. However, "impact on the family" is not a relevant factor in the public charge inadmissibility determination, as the assessment is related to the noncitizen's likelihood at any time to become a public charge.

*Comment:* One commenter supported the rule's provision that use of Medicaid alone does not render an individual inadmissible on the public charge ground, because the Department of Health and Human Services has stated that Medicaid "does not provide assistance to meet basic subsistence needs such as food or housing, with the exception of long-term institutionalization, and as such the receipt of Medicaid is not indicative of a person being or likely to become primarily dependent on the government for subsistence." Another commenter stated that the rule's anticipated positive effect on healthcare enrollment, including in Medicaid and other publicly funded and administered health insurance programs, will leave the States in a better position to assist public health and relief efforts during COVID-19 and future public health crises. This increased access to healthcare, as well as to nutritional services, will reduce disruptions in benefits and result in long-term net benefits for States and their residents, according to the commenter. The commenter also noted the rule will alleviate administrative costs to State benefits-granting agencies, which were forced to devote scarce time and resources

to attempt to counteract the fear and confusion caused by the 2019 Final Rule. Another commenter specifically pointed to the positive effect Medicaid coverage has with regular check-ups and access to prescription medications and ultimately mortality rates. This commenter cited that deferring or delaying care will often result in increased rates of poverty and housing instability and reduced rates of productivity and educational attainment, and that the rule will help alleviate the apprehension of noncitizens from enrolling in Medicaid and help maintain the financial viability of the emergency care safety net.

*Response:* DHS agrees that enrollment in Medicaid, compared with those benefits considered under this rule, is less indicative of primary dependence on the government for subsistence, with the exception of long-term institutionalization at government expense. DHS agrees that Medicaid and other public health services provide many socially beneficial services, and also play an important role in public health, as evidenced by the important role it plays in combatting the spread and effects of COVID-19. Therefore, DHS is not considering the receipt of Medicaid in this final rule, with the exception of Medicaid-funded long-term institutionalization at government expense.

*Comment:* Many commenters, including a group of thirteen United States Senators, stated that DHS should exclude all Medicaid and Medicare coverage, including long-term institutionalization, from consideration. An association wrote that its members were over 300 hospitals that provide a disproportionate share of the nation's uncompensated care -- \$56 million in uncompensated care annually. The commenter wrote that the 2019 Final Rule hampered the public health response to COVID-19 and that patients forgoing public insurance programs and seeking care at hospitals without insurance strained the tight budgets of essential hospitals. The commenter wrote that the Medicaid program is an integral part of the American health care system, providing coverage of primary care, prenatal care, mental health and substance misuse services, specialty care, prescription drug coverage, and a variety of wraparound services. The commenter also stated that Medicaid also is a critical source of coverage for children, paying for

routine check-ups, oral and vision care, and treatment for chronic conditions. Citing studies, the commenter stated that care reimbursed by Medicaid drives improved outcomes; reduces emergency department use and unnecessary hospitalizations; and helps decrease infant and child mortality rates.<sup>293</sup> The commenter also stated that the benefits of Medicaid go beyond health care—individuals who receive Medicaid go on to become productive members of the workforce and realize better employment and educational attainment, thus strengthening the economy.

Several commenters, one citing various studies, wrote about the chilling effect of including any Medicaid, and stated that families may forgo accessing necessary healthcare because of fear of affecting the whole family’s immigration status.<sup>294</sup> A commenter said that insurance coverage helps keep families stable and leads to a vibrant and strong local economy. One commenter wrote about the heavy burden State benefit-granting agencies will be put under to fill gaps in Federal benefits for long-term institutionalization and care. Commenters also stated that many nursing home residents have qualified for Medicaid only after having first exhausted the maximum time covered by Medicare, any private long-term care insurance, and their savings, and that DHS should not penalize older adults who have no alternative to institutionalization for the structural limitations of the U.S. healthcare system. One commenter said there would be increased hospital costs and unsustainable financial burdens on healthcare systems if Medicaid is not extended to all people, not just those eligible under current immigration laws. Some commenters also stated that there is a growing number of older adults with conditions that

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<sup>293</sup> Laura Wherry et al., “Childhood Medicaid Coverage and Later Life Health Care Utilization” (Feb. 2015), <https://www.nber.org/papers/w20929> (last visited July 21, 2022). Andrew Goodman-Bacon, “Public Insurance and Mortality: Evidence from Medicaid Implementation” (Nov. 2015), [http://www-personal.umich.edu/~ajgb/medicaid\\_ajgb.pdf](http://www-personal.umich.edu/~ajgb/medicaid_ajgb.pdf) (last visited July 21, 2022).

<sup>294</sup> Randy Capps et al., “Anticipated ‘Chilling Effects’ of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families,” Migration Policy Institute (Dec. 2020), <https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real> (last visited Aug. 16, 2022). HHS, Assistant Secretary for Planning and Evaluation, “Caring for Immigrants: Health Care Safety Nets in Los Angeles, New York, Miami, and Houston” (Jan. 31, 2001), <https://aspe.hhs.gov/reports/caring-immigrants-health-care-safety-nets-los-angeles-new-york-miami-houston#main-content> (last visited Aug. 18, 2022). Hamutal Bernstein et al., “Immigrant Serving Organizations’ Perspectives on the COVID-19 Crisis,” Urban Institute (Aug. 2020), <https://www.urban.org/research/publication/immigrant-serving-organizations-perspectives-covid-19-crisis> (last visited Aug. 17, 2022).

require some level of care, and that who becomes institutionalized and for how long has changed over the years, with the result that substantial portions of the U.S. population will likely end up in an institution on a long-term basis, such as in a nursing facility, at some point in their lifetime. Commenters also remarked upon the variability of availability of alternatives to institutionalization by geography, disability, age, and wealth.

Commenters also stressed the importance of not including Medicaid in a public charge inadmissibility determination, with one stating that discouraging access to proper mental health care may put a patient at risk to themselves or others and punishes these people for having legitimate illnesses. Another commenter stated that access to Medicaid and other health care programs provide a critical lifeline for survivors of domestic violence, sexual assault, and human trafficking to treat significant health consequences of abuse, as healthcare is a benefit that many survivors cannot afford. Commenters stated that the definition of public charge should explicitly state that any form of Medicaid and other health insurance and health care services will not be considered for public charge inadmissibility determinations, particularly with an extension of Medicaid and CHIP eligibility for pregnant and postpartum noncitizens. One commenter stated that Medicaid covers almost half of childbirths in the United States, and agreed that including Medicaid in the public charge inadmissibility determination would contribute to a chilling effect where immigrants of all statuses are wary of seeking the maternity care they need.

One commenter cited a Kaiser Family Foundation finding that in the United States one in three people turning 65 will require nursing facility care in their lives. One commenter stated that DHS should recognize that including long-term institutionalization is particularly outdated, given the much larger and different role than publicly founded almshouses played in the early days of the public charge doctrine. One commenter also remarked that programs like Medicaid allow intergenerational households the ability to earn income and contribute to their communities without placing their loved ones at risk of going without care for fear of immigration consequences. Commenters added that an inclusion of long-term care creates confusion about the

receipt of Medicaid more broadly and it would be far easier and clearer to exclude all Medicaid coverage completely. One commenter also remarked that reducing access to healthcare for parents will subsequently reduce access to their children, putting families at greater risk of medical debt, unpaid bills, and bankruptcy. Commenters stated that including any form of Medicaid coverage in public charge inadmissibility determinations will introduce confusion for immigrants and have measurable chilling effects, and that immigrant women, who are more likely to live in poverty than immigrant men or U.S. citizens, would be disproportionately harmed by the resulting chilling effects. One commenter stated that DHS should not put access to Medicaid at risk or discourage enrollment in any programs that serve to keep older adults and people with disabilities healthy, together with their families, and integrated in their communities. The commenter stated that Medicaid is particularly critical to helping people with disabilities, including older adults, live in the community because it covers services and supports that private insurance does not, such as personal care, transportation, and home modifications. The commenter stated that they are concerned that if the rule does not exclude all of Medicaid that older immigrants may be nonetheless afraid to access any kind of HCBS or other health support.

*Response:* DHS emphasizes that it will generally not consider non-cash public benefits, including government-funded healthcare coverage such as Medicaid or Medicare. The only healthcare service included in the public charge inadmissibility determination is long-term institutionalization at government expense (including when funded by Medicaid). The regulatory text clearly identifies the only benefits that DHS considers both for the purposes of “defining likely at any time to become a public charge”<sup>295</sup> and for making a public charge determination.<sup>296</sup> Moreover, DHS has provided regulatory text that explains the types of institutionalizations that do not qualify as long-term institutionalization at government expense as defined in 8 CFR 212.21 – such as short-term rehabilitation and imprisonment. DHS is committed to mitigating

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<sup>295</sup> See 8 CFR 212.21(a).

<sup>296</sup> See 8 CFR 212.21(b) and (c).

chilling effects and intends to also make this point clear in guidance and any communication materials stemming from this final rule in order to ensure that the public understands that DHS does not consider other forms of Medicaid in public charge inadmissibility determinations.

With respect to long-term institutionalization in a nursing home for older individuals, DHS is aware of the prevalence of nursing home care for older individuals, both native-born and intending immigrants who reach a certain age. While the public charge inadmissibility determination is based on the statutory language “likely at any time,” DHS acknowledges that the further out in time an event may occur, the more difficult it is for officers to determine whether such an event is likely to occur. For example, where an applicant for admission or adjustment of status is in the prime of their life, healthy, and able to support themselves, DHS is unlikely to determine that the noncitizen is inadmissible because they may need long-term nursing home care at government expense at a later point in their life. However, where a noncitizen is older, has one or more serious health conditions, and limited resources, DHS may conclude that such noncitizen is likely at any time to become primarily dependent on the government for subsistence, based in part on the likelihood that the noncitizen may need nursing home care at government expense.

*Comment:* One commenter suggested that DHS create an internal structure to expedite appeals and allow families an easier way to clarify the status of their loved ones who require long-term services and supports for noncitizens denied based on a public charge inadmissibility determination.

*Response:* DHS is not adopting the proposal to create a special appellate process for public charge inadmissibility determinations. Although not specific to this rule, in cases in which an applicant has not submitted all required initial evidence or the evidence submitted does not demonstrate eligibility, USCIS has the discretion to issue a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) with respect to any basis for ineligibility, including the public

charge ground of inadmissibility, in accordance with 8 CFR 103.2(b)(8) and USCIS policy in regard to RFEs, NOIDs, and denials.

DHS notes that there is no administrative appeal available from a denial of an application for adjustment of status issued by USCIS,<sup>297</sup> but an applicant may file a motion to reopen/reconsider as set forth in 8 CFR 103.5, and USCIS may certify any such case to the Administrative Appeals Office (AAO) if it involves an unusually complex or novel issue of law or factor.<sup>298</sup> If the noncitizen is placed in removal proceedings, they can renew the denied adjustment of status application before an immigration judge.<sup>299</sup> With respect to inadmissibility determinations made by CBP, if found inadmissible, CBP will generally place the individual in removal proceedings in which the individual can seek relief or protection from removal.

*Comment:* One commenter stated that including institutionalization for long-term care financed by Medicaid in a public charge inadmissibility determination likely contributes to uncompensated care costs currently borne by providers relating to medication non-adherence and accidental falls. The commenter reasoned that long-term institutionalization helps patients that are vulnerable to missing their medications and accidental falls by having skilled professionals take care of them and that, if they fear immigration consequences, immigrant families may avoid this professional care.

*Response:* DHS agrees with commenters that long-term institutionalization at government expense provides relevant and important services to individuals who need such care. Nonetheless, DHS is declining to exclude past or current institutionalization from consideration, or from the definition of “likely at any time to become a public charge.” As indicated elsewhere in this final rule, DHS believes that past or current institutionalization at government expense, together with other factors, can be indicative of future primary dependence on the government

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<sup>297</sup> 8 CFR 245.2(a)(5)(ii).

<sup>298</sup> 8 CFR 103.4(a)(1).

<sup>299</sup> 8 CFR 245.2(a)(5)(ii).

for subsistence. DHS recognizes that individuals and families may need to make decisions regarding reliance on public benefits' impact on their immigration status; however, DHS does not consider excluding the fact of such institutionalization to be justified.

*Comment:* Some commenters stated that if DHS decides to continue to consider long-term institutionalization, it should clarify that involuntary civil commitment in criminal proceedings is excluded from its definition. Commenters also suggested to exclude involuntary observation or commitment to a civil psychiatric facility pursuant to a judicial order pending or after a finding of incompetence to stand trial in a criminal proceeding for lack of responsibility for criminal conduct by reason of mental illness. The commenter stressed that the standards and purposes of civil commitment in criminal proceedings differ from those of voluntary admission to a care facility and DHS should make clear to officers that they should not equate the two. Another commenter similarly supported the rule's clarification that imprisonment for conviction of a crime would not be considered in a public charge inadmissibility determination.

*Response:* DHS notes that involuntary observation or commitment to a psychiatric facility pursuant to judicial order pending or after a finding of incompetence to stand trial in a criminal proceeding may be considered in the totality of the circumstances under the health factor if the underlying condition is identified on Form I-693, and DHS is not adding an exception for these circumstances. However, commitment to a facility, rather than prison, resulting from a criminal proceeding would not be considered long-term institutionalization at government expense. Rather, under the health factor, DHS could take into consideration the underlying medical/psychiatric condition in the totality of the circumstances when making a determination regarding whether the noncitizen is likely to be primarily dependent on the government in the future. In addition, DHS notes that criminal activity may separately subject a noncitizen to criminal grounds of inadmissibility, even if the noncitizen is determined not likely to become a public charge at any time in the future.



DHS is not taking into consideration current or past incarceration for a crime in a public charge inadmissibility determination, but notes that the fact of such incarceration may lead the noncitizen to be excluded and/or removed from the United States based on the criminal inadmissibility standards.

*Comment:* One commenter recommended that due to historical and ongoing racism and xenophobia in the United States health care system and health policies resulting in low-income immigrant women facing high rates of maternal morbidity, all receipt of Medicaid, including Medicaid for long-term institutionalization, by pregnant people be excluded from a public charge inadmissibility determination. The commenter stated that pregnant individuals have significantly higher instances of COVID-19 hospitalization and case fatality than similarly aged adults and are at risk of severe or critical disease and preterm birth, complications that are heightened for low-income immigrant women. The commenter also recommended Medicaid use, including Medicaid for long-term institutionalization, for children be excluded from a public charge inadmissibility determination because childhood institutionalization is not an indicator of long-term institutionalization and reliance on the government, and because COVID-19 has also affected children, with hospitalization rates especially high for children under 5 who were not at the time of the comment eligible for vaccinations. Another commenter similarly stated that DHS should exclude Medicaid for institutional long-term care for children because Medicaid supports many children with special health care needs, and Medicaid and CHIP cover almost half of all children in the United States with special health needs, children who are more likely to be low-income, from marginalized communities, and younger than children on private insurance only. The commenter stated that considering children's use of Medicaid for long-term institutionalization is likely to discriminate against children with disabilities and children from marginalized communities. The commenter expressed concern that allowing any type of Medicaid coverage to be included in the rule will cause confusion and perpetuate the chilling effect caused by the 2019 Final Rule. The commenter noted that it is also important to realize

that not all children who receive long-term care may require it into adulthood, and that considering its use would discriminate against children with disabilities. One commenter also stated that many older adults and individuals with disabilities rely on Medicaid for long-term care, and recommended that DHS exclude any type of Medicaid benefit from consideration because it discriminates against this population. The commenter also stated that it is difficult to provide clear messages to people who need Medicaid now that their use of Medicaid for non-institutional purposes will not be used to indicate that they will rely on Medicaid should they need long-term care in the future.

*Response:* DHS is not excluding past or current long-term institutionalization from consideration in this final rule, nor is DHS adding exclusions for pregnant individuals, children, or older adults. DHS has made clear that considering any receipt of public benefits, including long-term institutionalization at government expense, is not alone dispositive in determining whether a noncitizen is likely at any time to become primarily dependent on the government for subsistence. Instead, DHS will perform a totality of the circumstances analysis, and will also look at the recency and duration of such long-term institutionalization. In addition, in the NPRM DHS distinguished long-term institutionalization at government expense from periodic or intermittent stays in an institution. Additionally, receipt of Medicaid for the purpose of obtaining preventive services or treatment for COVID-19 will not be considered under this final rule. Finally, as indicated in the NPRM, the population of individuals who are both subject to the public charge ground of inadmissibility and institutionalized for long-term care at government expense is anticipated to be very small.

With respect to the commenter's assessment that inclusion of long-term institutionalization at government expense will discriminate against children and individuals from low-income, marginalized communities, DHS notes that Medicaid, for example, provides long-term institutionalization even for wealthier individuals if they are determined to be

“medically needy” through spend-down programs.<sup>300</sup> In addition, given the purpose and history of the public charge ground of inadmissibility, DHS is not able to exclude long-term institutionalization at government expense from consideration, given that such institutionalization can provide the most probative evidence of likely future primary dependence on the government for subsistence. That said, and as discussed throughout this final rule, such past or current institutionalization will be taken into account in the totality of the circumstances. With respect to the institutionalization of children, DHS notes that it can and will consider in the totality of the circumstances any evidence supplied by the applicant that the child’s condition is not permanent, or can be managed through HCBS, rather than long-term institutionalization, as well as any evidence that the child was or is institutionalized in violation of their rights.

While DHS is concerned about chilling effects that might have resulted from the 2019 Final Rule and has taken considerable efforts to reduce or reverse such chilling effects, DHS believes that the policy contained in this final rule faithfully administers the public charge ground of inadmissibility while taking care to avoid potential chilling effects that could arise as a result of the policy reflected in this final rule. DHS is again noting that it is not considering non-cash benefits, including healthcare coverage under this final rule, with the narrow exception of long-term institutionalization.

*Comment:* One commenter stated that if DHS considers long-term institutionalization in a public charge inadmissibility determination, DHS should consider only current institutionalization, as the fact that a person was institutionalized in the past does not suggest a likelihood of future institutionalization.

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<sup>300</sup> See Letty Carpenter, “Medicaid eligibility for persons in nursing homes,” 10 Health Care Financing Review 2, 67-77 (Winter 1988), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4192916/pdf/hcfr-10-2-67.pdf> (last visited Aug. 16, 2022) (“Basically, there is no absolute upper limit on the amount of income that a medically needy applicant can start with. Anyone who is otherwise eligible (e.g., who belongs to one of the groups that the State has chosen to cover and whose assets are within allowable ceilings) can potentially qualify, provided their medical expenses are high relative to their income. . . In the process known as spend down, a medically needy person establishes eligibility once income, after deducting expenses the person has incurred for medical or remedial services, has been reduced to welfare-related thresholds. In spending down, the medically needy are assumed to use income in excess of these thresholds to pay their medical bills, including nursing home bills.”).

*Response:* DHS agrees with this commenter in part. As indicated in the NPRM and this final rule, DHS will consider the duration and recency of benefit receipt, which will also apply to long-term institutionalization at government expense. If such institutionalization occurred many years ago it is unlikely to affect the inadmissibility determination in terms of future institutionalization. If, however, it was recent, or there is evidence of repeat long-term institutionalization, then it is more likely to be probative evidence related to future primary dependence at any time.

#### **4. Receipt of Public Benefits**

*Comment:* Many commenters supported the clarification that applying for or receiving benefits on behalf of another will not be considered in the public charge inadmissibility determination. The commenters stated that this clarification is critical to ensuring that children in immigrant families continue to receive benefits for which they are eligible. Some commenters stated that this definition will greatly assist States' public benefits program staff in effectively communicating to families concerning the public charge inadmissibility determination.

*Response:* DHS agrees that the clarification that the receipt of public benefits occurs when a public benefit-granting agency provides public benefits to a noncitizen, but only where the noncitizen is listed as a beneficiary; applying for a public benefit on one's own behalf or on behalf of another, and receiving public benefits on behalf of another, would not constitute receipt of public benefits by the noncitizen applicant. Similarly, approval for future receipt of a public benefit on the noncitizen's own behalf or on behalf of another would not constitute receipt of public benefits by the noncitizen applicant, though if information or evidence of such approval is in the record, DHS will consider it in the totality of the circumstances. Any evidence of approval for future receipt of a public benefit on behalf of an applicant, while not constituting receipt of public benefits, would indicate a probability of future receipt of public benefits and be considered by DHS as probative of being likely of becoming a public charge in the future. Finally, the noncitizen's receipt of public benefits solely on behalf of another, or the receipt of

public benefits by another individual (even if the noncitizen assists in the application process), would also not constitute receipt of public benefits by the noncitizen. DHS believes that this approach, which is similar to the policy approach to “receipt” in the 2019 Final Rule, is appropriate.

*Comment:* Several commenters suggested that DHS should clarify what does not count as receipt of a public benefit; for example, it should state that an intending immigrant who is not eligible for a particular benefit will not be considered to have received that benefit themselves, even if another person in the household receives it or if they are listed as a member of the household by the benefits granting agency to provide greater ease of administration and mitigation of the chilling effect. Commenters said that the rule should also clearly state that children in mixed-status families will not impact a public charge inadmissibility determination for their families by accessing certain benefits to which they are legally entitled because data demonstrates that eligible children miss out on essential benefits because of their parents’ immigration concerns.

Commenters’ suggestions for clarification of the definition included citing the use of language such as “child only” TANF benefits and “serving as the representative payee” for someone under the SSI program, and specifically stating that recipients of a benefit do not include those assisting with an application for the benefit. Commenters further suggested the definition of receipt should include common words that do not necessarily equate to receipt, such as “payee,” “representative payee,” “head of household,” and receipt “on behalf of,” and should also include that approval for long-term institutional care without being the resident of the designated care facility does not count as receipt of public benefits and other guidance on what does not count as “receipt.” Several commenters suggested the definition should specifically state that issuance or provision of service of the actual benefit is essential to the definition of receipt of a public benefit. One commenter further stated that DHS should add additional rules as

to what is not counted as receipt and add a non-exclusive list of examples of what does not count as receipt of benefits by an intending immigrant.

*Response:* DHS appreciates the commenters' thoughtful consideration of the proposed definition of receipt of public benefits and their corresponding suggestions. DHS has determined that receipt of public benefits occurs when a public benefit-granting agency provides public cash assistance for income maintenance or long-term institutionalization at government expense to a noncitizen, where the noncitizen is listed as a beneficiary. DHS included the clarifications that applying for a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits by such noncitizen, and approval for future receipt of a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits (although, as noted, approval for future receipt on one's own behalf can be considered in the totality of the circumstances). DHS also clarified that a noncitizen's receipt of public benefits solely on behalf of another individual does not constitute receipt of public benefits, and if a noncitizen assists another individual with the application process, this assistance does not constitute receipt for such noncitizen.<sup>301</sup> Further, DHS believes that by indicating that "receipt of public benefits occurs when a public benefit-granting agency *provides* public cash assistance for income maintenance or long-term institutionalization at government expense to a noncitizen,"<sup>302</sup> the rule sufficiently indicates that a public benefits granting agency must issue such benefit to the noncitizen beneficiary to meet the definition of receipt.

DHS believes this language clearly indicates that a noncitizen who is not a named beneficiary of a public benefit is not considered to have received that public benefit. Therefore, if a member of the noncitizen's household receives a benefit, the noncitizen will not be considered to have received a public benefit if the noncitizen is not identified as a named beneficiary of such benefit. Due to the wide variety of programs that provide or fund public cash assistance for

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<sup>301</sup> See 8 CFR 212.21(d).

<sup>302</sup> See 8 CFR 212.21(d) (emphasis added).

income maintenance and long-term institutionalization at government expense, and the varying requirements and procedures for such programs, individuals may be confused about whether DHS would consider their or their family members' participation in or contact with such programs in the past, currently, or in the future to be "receipt" of such benefits. DHS believes that this rule's definition will help alleviate such confusion and unintended chilling effects that resulted from the 2019 Final Rule by clarifying that only the receipt of specific benefits covered by the rule, only by the noncitizen applying for the immigration benefit, and only where such noncitizen is a named beneficiary would be taken into consideration. By extension, DHS would not consider public benefits received by the noncitizen's relatives (including U.S. citizen children or relatives).

DHS disagrees that the regulatory language requires additional clarifying language to emphasize that only those benefits<sup>303</sup> for which a noncitizen is the named beneficiary and are actually received by that noncitizen will be considered in a public charge inadmissibility determination. However, DHS will consider providing more extensive examples of what is and is not considered receipt of public benefits when issuing guidance related to this rule.

*Comment:* An advocacy group recommended DHS include a noncitizen's dependent's receipt of public benefits when making a public charge inadmissibility determination, stating that an analysis of a noncitizen's financial status and likelihood of becoming a public charge is incomplete without assessing any public benefits that are used by the noncitizen's dependents because a noncitizen is not self-reliant if required to depend upon public benefits to support children or other dependent family members.

*Response:* DHS disagrees that it should consider a noncitizen's dependent's receipt of public benefits in a public charge inadmissibility determination. DHS recognizes that past policies, such as the 1999 Interim Field Guidance and the rules implementing IRCA legalization,

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<sup>303</sup> As defined in 8 CFR 212.21(b).

allowed for consideration of a dependent's receipt of public benefits. But the statute does not require such a policy, and neither the NPRM, nor the 2019 Final Rule, provided for a scenario in which a noncitizen is incentivized to disenroll a dependent (such as a U.S. citizen child) to avoid an adverse public charge inadmissibility determination. DHS expects that it would be quite rare for a noncitizen to subsist primarily on their dependents' benefits, such that it would be necessary to expand the aperture of DHS's inquiry in the manner proposed by the commenter. DHS also observes that a variety of programs provide or fund public cash assistance for income maintenance and long-term institutionalization at government expense, and that if DHS were to adopt the policy proposed by the commenter, individuals may be confused about whether DHS would consider their or their family members' participation in or contact with such programs in the past, currently, or in the future to be "receipt" of such benefit. DHS believes that this rule's definition of receipt of public benefits will help alleviate such confusion. Accordingly, under this final rule, DHS will only consider the receipt of the benefits listed in 8 CFR 212.21(b) and (c), and only if received by the noncitizen applying for the immigration benefit as a named beneficiary of the public benefit. DHS will not consider public benefits received by the noncitizen's relatives (including U.S. citizen children or relatives).

*Comment:* One commenter suggested that DHS should expressly clarify in this final rule that utilization of Medicaid for healthcare, SNAP, and public housing, whether past or current, should never be considered in a public charge inadmissibility determination.

*Response:* DHS appreciates the commenter's suggestion, and has added language to 8 CFR 212.22(a)(3) stating that DHS will not consider receipt of, or certification or approval for future receipt of, public benefits not referenced in 8 CFR 212.21(b) or (c), such as Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs, Children's Health Insurance Program (CHIP), Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits. While this



was implicit in the regulatory text of the NPRM that identified only the benefits that DHS would consider, and DHS was clear in the NPRM that it would not consider any benefits other than those referenced in 8 CFR 212.22(a)(3) in making a public charge inadmissibility determination, DHS agrees with the commenter that stating this explicitly within the regulatory text will help clarify this important point for the public and potentially reduce uncertainty and disenrollment effects from these programs.

## **5. Government**

*Comment:* Commenters stated that the definition of government should only include the Federal government, eliminating references to State, Tribal, or local cash benefit programs for income maintenance, and clarify that SSI and TANF are the specific programs that may be considered in a public charge inadmissibility determination as this decision to provide this assistance is constitutionally reserved by the States. One of those commenters went further in stating that rather than defining “government,” if DHS would clarify that the only public benefits to be considered in a public charge inadmissibility determination are cash assistance for income maintenance received through SSI and TANF then providing that specificity would obviate any need to define the word government.

A commenter noted that although the 1999 Interim Field Guidance and 1999 NPRM include State and local governments in the definition of government, neither explained the basis for this conclusion. Another commenter stated that the definition of government should only include the Federal government, because immigration is a matter regulated by the Federal government and because one government agency should not penalize anyone for appropriately accessing services promoted and provided by another government agency.

*Response:* DHS disagrees with the commenters who stated that the definition of government should only include the Federal government and not include State, Tribal, territorial, or local government entity or entities of the United States. DHS declines to exclude the consideration of State, Tribal, territorial, and local cash assistance for income maintenance

because excluding those programs would unfairly distinguish recipients of Federal aid from those receiving aid from States, Tribes, territories, and localities. Furthermore, DHS believes that excluding all such programs from consideration would be contrary to Congressional intent to the extent that receipt of non-Federal benefits, such as State, Tribal, territorial, or local benefits, may be no less indicative of primary dependence on the government for subsistence than Federal benefits.

In this rule, DHS has chosen to consider the same list of public benefits that are considered under the 1999 Interim Field Guidance with certain clarifications. These benefits are public cash assistance for income maintenance and long-term institutionalization at government expense (including when funded by Medicaid). DHS believes that this approach is consistent with a more faithful interpretation of the term “public charge” and has the additional benefit of being more administrable and consistent with long-standing practice than the 2019 Final Rule. DHS also believes this approach is less likely to result in the significant chilling effects and effects on State and local governments and social service providers (such as increases in inquiries regarding the public charge implications of receiving certain benefits and increases in uncompensated care) that were observed following promulgation of the 2019 Final Rule.

As noted by one commenter, the 1999 NPRM defined government as any Federal, State, or local government entity or entities of the United States but did not explain the basis for the definition.<sup>304</sup> However, both the 1999 Interim Field Guidance and the 1999 NPRM suggest that the definition for public charge is tied to the fact that the types of benefits that are indicative of primary dependence on the government for subsistence are public cash assistance for income maintenance provided by Federal, State, and local benefits-granting agencies as well as institutionalization at Federal, State, and local entities’ expense.<sup>305</sup> Similarly, DHS currently

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<sup>304</sup> “Inadmissibility and Deportability on Public Charge Grounds,” 64 FR 28676, 28681 (May 26, 1999).

<sup>305</sup> “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689, 28692 (May 26, 1999); “Inadmissibility and Deportability on Public Charge Grounds,” 64 FR 28676, 28677 (May 26, 1999).

believes that it is appropriate to use a definition of government that includes all U.S. government entities. For much of the time that the concept of public charge has been part of our immigration statutes, States, Tribes, territories, and localities provided much of the public support available to noncitizens and although the Federal government has increased its role in providing benefits, the social safety net in the United States continues to consist of a variety of Federal, State, Tribal, territorial, and local programs that operate collaboratively to provide support for individuals. These non-Federal programs play an important role and are interwoven with Federal programs (some programs are funded by the Federal Government as well as States, Tribes, territories, and localities).

Moreover, there are provisions of law that demonstrate Congressional concern not only with noncitizens' receipt of Federal public benefits, but also noncitizens' receipt of State, Tribal, territorial, and local public benefits. For example, in addition to codifying Federal deeming provisions in 8 U.S.C. 1631, Congress included State "deeming" provisions in 8 U.S.C. 1632, which allow States to consider the income and resources of a noncitizen's sponsor and spouse in "determining the eligibility and the amount of benefits" of a noncitizen. Consistent with Congress' focus on benefits provided by Federal, State, Tribal, territorial, and local entities, and its focus on reimbursing and holding harmless those entities, DHS believes that it is appropriate and consistent with Congressional purpose to define government to "mean[] any Federal, State, Tribal, territorial, or local government entity or entities of the United States."<sup>306</sup>

*Comment:* Some commenters supported the definition of government including Federal, State, Tribal, territorial, and local governments for public charge inadmissibility determination purposes. One of the commenters stated further that to so define government would clarify for noncitizens that receipt of cash assistance from private or non-governmental entities will not have any implication on their applications to adjust their status.

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<sup>306</sup> See 8 CFR 212.21(e).

*Response:* DHS agrees with the commenters who stated that the term DHS should define “government” as any Federal, State, Tribal, territorial, or local government entity or entities of the United States, and this rule accordingly retains the same definition proposed in the NPRM. As stated in the NPRM, this definition identifies which public cash assistance and long-term institutionalization programs DHS will consider in a public charge inadmissibility determination.<sup>307</sup>

## **6. Other Definitions**

*Comment:* Two commenters suggested using the definition of household size as defined in connection with the Affidavit of Support Under Section 213A of the INA, with one commenter stating that an additional definition is superfluous and would add confusion and inconsistency.

One commenter stated that DHS should define a noncitizen’s household and should use the definition of household used in the 2019 Final Rule, taking into account the number of household members and the number of individuals for whom a noncitizen or noncitizen’s parent or guardians provide at least 50 percent of financial support. The commenter stated that DHS should consider the noncitizen’s household size as the primary element of the family status factor.

Another commenter recommended that household remain undefined, as it does not appear in the statute or elsewhere in the proposed regulations. Several commenters remarked that when household was given a distinct definition in the 2019 Final Rule it caused harm and confusion.

*Response:* DHS appreciates all of the commenters who responded to DHS’s request in the NPRM to comment on how, if at all, DHS should define “household” for use in applying the statutory minimum factors, as it did in the 2019 Final Rule. Because a definition of household provides important clarity for the public and for officers as to how DHS will be considering both

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<sup>307</sup> See 87 FR at 10615 (Feb. 24, 2022).

the family status and assets, resources, and financial status factors, DHS disagrees with the commenter who suggested the regulations should not define household.

DHS considered the calculation used to determine a sponsor's household size in connection with an Affidavit of Support Under Section 213A of the INA, but notes that the sponsor's household size calculation pertaining to Affidavit of Support Under Section 213A of the INA is designed to demonstrate that a sponsor's income and assets are sufficient to support their household at the corresponding HHS Poverty Guideline. Because the intent for a public charge inadmissibility determination is not a direct comparison of a noncitizen's income with a noncitizen's household size, DHS decided to use a simpler definition of household in the public charge inadmissibility determination that would better reflect whether an individual is likely at any time to become a public charge in a totality of the circumstances assessment. Accordingly, this rule defines a noncitizen's household as "(1) The alien; (2) The alien's spouse, if physically residing with the alien; (3) If physically residing with the alien, the alien's parents, the alien's unmarried siblings under 21 years of age, and the alien's children as defined in section 101(b)(1) of the INA; (4) Any other individuals (including a spouse or child as defined in section 101(b)(1) of the Act not physically residing with the alien) who are listed as dependents on the alien's federal income tax return; and (5) Any other individual(s) who list the alien as a dependent on their federal income tax return."<sup>308</sup>

DHS believes that the definition from the 2019 Final Rule classifying people as household members depending on a threshold of either 50 percent or more financial support from or to the noncitizen places an unnecessary burden of quantification and analysis on applicants. As commenters to the 2019 Final Rule noted, such a definition could also disadvantage larger households who must show larger incomes or resources to support the larger numbers being counted, regardless of the reality of the economic benefits certain family members might provide

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<sup>308</sup> See 8 CFR 212.21(f).

to such households, or such households may be providing to society.<sup>309</sup> This could also disadvantage members of families who provide financial assistance to extended family members in cases of emergencies or for other short-term periods of time without being legally required to do so because counting those individuals as part of a noncitizen’s “household” would increase the household size and decrease the household income even in circumstances that may be temporary. DHS recognizes that it could define “household” in ways that are potentially more expansive (as in the 2019 Final Rule) or less expansive, but DHS believes that this rule’s definition of household provides officers with a sufficiently accurate representation of the assets and resources available to a noncitizen, recognizing that multiple household members may contribute to the overall financial picture of the household as a whole, without at the same time creating a system that is potentially unworkable or overinclusive.

## **I. Factors**

### **1. Statutory Minimum Factors**

*Comment:* A number of commenters stated that they supported the NPRM’s proposed return to the statutory factors and use of the Affidavit of Support Under Section 213A of the INA over the approach taken in the 2019 Final Rule. Several of the commenters further stated support for DHS forgoing defining the statutory factors and merely relying on the statutory language because the 2019 Final Rule created complicated definitions that required USCIS officers to review voluminous amounts of documentation and assign negative or positive weight to evidence and what commenters stated led to inconsistent results. Furthermore, some commenters stated that defining the factors would invite potential abuse by officers and result in a more complicated and discretionary determination that is unnecessary and harmful.

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<sup>309</sup> See 84 FR 41292, 41393-41396 (Aug. 14, 2019).

*Response:* DHS acknowledges the commenters' concerns about complicated and potentially harmful interpretations of the statutory minimum factors. In this rule, DHS is maintaining the longstanding and straightforward framework set forth in the 1999 Interim Field Guidance, in which officers consider the statutory minimum factors, the Affidavit of Support Under Section 213A of the INA, where required, and current and/or past receipt of public benefits, in the totality of the circumstances, without separately codifying evidence required for each factor as was done in the 2019 Final Rule. DHS believes this will reduce burdensome and unnecessary evidentiary and information collection requirements pertaining to the statutory minimum factors, which in turn will decrease the burdens on DHS when reviewing and evaluating information and evidence.

While DHS is neither codifying specific evidentiary requirements for the statutory minimum factors nor creating a separate form to collect information and evidence about those factors, following receipt of public comments, DHS has made changes to the provisions addressing the following statutory minimum factors to identify information relevant to such factors: health, family status; assets, resources, and financial status; and education and skills. In accordance with those changes, DHS has made changes to Form I-485 to effectuate the relevant information collection. The identification and collection of this relevant information will help officers make public charge inadmissibility determinations without being unnecessarily burdensome for the public and for DHS, and will provide clarity to the public regarding what information is relevant and needed to make public charge inadmissibility determinations.

DHS will make a public charge inadmissibility determination based on the totality of a noncitizen's circumstances.<sup>310</sup> The rule explicitly states that none of the statutory minimum factors other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, "should be the sole criterion for determining if an alien is likely to become a public

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<sup>310</sup> See 8 CFR 2 12.22(b).

charge.”<sup>311</sup> As noted in the NPRM,<sup>312</sup> this rule includes elements consistent with the standard previously in place for over 20 years.

In addition, consistent with 8 CFR 212.22(b), DHS plans to issue subregulatory guidance to officers to inform (but not dictate the outcome of) the totality of the circumstances assessment, which will address how the factors identified in the rule may affect the likelihood that a given noncitizen will become primarily dependent on the government for subsistence at any time as informed by an empirical analysis of the best-available data. DHS plans to issue such guidance prior to the implementation date of this rule, and expects that this guidance will promote consistency in adjudication as well as transparency for applicants and other stakeholders. DHS may periodically update this guidance as needed to reflect current data.

To illustrate the approach taken in this rule, consider the following hypothetical examples of noncitizens applying for adjustment of status by submitting to USCIS, for instance, the Form I-485, Application to Register Permanent Residence or Adjust Status; a valid Form I-693, Report of Medical Examination and Vaccination Record; a sufficient Form I-864, Affidavit of Support Under Section 213A of the INA, if required; and all other required supporting evidence. Note that the following examples are meant as illustrations only, and that in any individual case, an officer’s consideration of each factor identified in the rule would entail a detailed review and analysis.

(1) The officer considers the noncitizen’s age; health; family status; assets, resources, and financial status; education and skills; past and current receipt of public cash assistance of income maintenance or long-term institutionalization at government expense; sufficient Affidavit of Support Under Section 213A of the INA; and the guidance. The guidance includes an empirical analysis of how these factors (except for the sufficient Affidavit of Support Under Section 213A of the INA) may affect the likelihood that a noncitizen would at any time of becoming primarily

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<sup>311</sup> See 8 CFR 212.22(b).

<sup>312</sup> See 87 FR at 10621 (Feb. 24, 2022).



dependent on the government for subsistence, based on the best-available data. The officer determines that the noncitizen's combination of factors does not contain any adverse indications (such as past or current receipt of public cash assistance for income maintenance or inadequate assets, resources, or financial status). As a result, the officer finds in the totality of the circumstances that the applicant has met their burden of demonstrating they are not inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

(2) The officer considers the factors and empirical evidence in the guidance in the manner described above except that the evidence reflects that the noncitizen received public cash assistance for income maintenance several years ago, which comprised a small portion of the noncitizen's income and did not last for an extended period of time. The officer's determination therefore entails consideration of the duration and recency of public cash assistance for income maintenance, which in this hypothetical case occurred several years ago, comprised a small portion of the individual's income and did not last for an extended period of time. The officer ultimately determines, following consideration of the guidance and the individual circumstances presented by the applicant (such as the applicant's health, education, and income), that the applicant has met their burden of demonstrating they are not inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

(3) The officer considers the factors and empirical evidence in the manner described above, except that the evidence reflects that the noncitizen's receipt of public cash assistance for income maintenance has occurred over an extended period of time and continues to this day, and the noncitizen has almost no other sources of income. Following consideration of this information, together with the other factors (such as the noncitizen's education and skills), the officer determines in the totality of the circumstances that the applicant is inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

*Comment:* One commenter disagreed with considering statutory minimum factors in a public charge inadmissibility determination, stating that the use of those factors may still be

discriminatory against individuals with disabilities. The commenter stated that having a disability can affect every single aspect of one's life, so the fact that disability alone cannot lead to a finding of inadmissibility does not account for the ways in which the individual's disability may impact the other factors considered. Another commenter stated that many immigrants come to the United States to improve the factors used to make a public charge inadmissibility determination and encouraged DHS to remember the inalienable rights of life, liberty, and the pursuit of happiness.

*Response:* Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific factors, at a minimum, in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors are the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.<sup>313</sup> The statute does not indicate the circumstances under which any of these factors are to be treated positively or negatively, how much weight the factors should be given, or what evidence or information is relevant to the each of the statutory minimum factors. DHS may not alter or dismiss the factors as set forth by Congress in the statute. DHS is maintaining the longstanding and straightforward framework set forth in the 1999 Interim Field Guidance, in which officers consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, where required, in the totality of the circumstances, without separately codifying initial supporting evidence that must be submitted for each factor as was done in the 2019 Final Rule. DHS believes that this will reduce burdensome and unnecessary evidentiary and information collection requirements pertaining to the statutory minimum factors, which in turn will decrease the burdens on DHS when reviewing and evaluating information and evidence. DHS also believes that this focus on a

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<sup>313</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i). The statute also permits, but does not require, the consideration of a sufficient Affidavit of Support Under Section 213A of the INA, if required. See INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

totality of the circumstances framework is the fairest and most equitable way to apply the public charge ground of inadmissibility.

**a. Age**

*Comment:* A number of commenters disagreed that a person's age may impact their ability to work or is relevant to the likelihood of becoming a public charge. One commenter stated that employers are prohibited from discriminating against people who are 40 and over based on the Age Discrimination in Employment Act of 1967<sup>314</sup> and, thus, DHS should caution its officers to the potential for abuse of this specific criterion. One commenter noted that many older immigrants make important contributions to their households, including providing income, caregiving, and other support that enables other household members to work outside the home. The commenter further stated that these contributions in turn benefit our communities and our economy.

*Response:* Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors include the noncitizen's age.<sup>315</sup> However, DHS appreciates commenters' concerns that a person's age may not determine their likelihood of becoming a public charge. For this reason, DHS notes that in this rule DHS specifically indicates that the determination of an individual's likelihood of becoming a public charge must be based on the totality of the individual's circumstances and no one factor, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, should be the sole criterion for determining if an individual is likely to become a public charge.<sup>316</sup> Age is not the

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<sup>314</sup> Pub. L. 90-202, 81 Stat. 602 (1967).

<sup>315</sup> See INA sec. 212(a)(4)(B)(i)(I), 8 U.S.C. 1182(a)(4)(B)(i)(I).

<sup>316</sup> See 8 CFR 212.22(b).

only factor taken into account in a public charge inadmissibility determination and does not automatically determine if a noncitizen is likely at any time to become a public charge.

In order to ensure that DHS officers are making clear, fair, and consistent public charge inadmissibility determinations, the regulations also state that every written denial decision issued by USCIS should reflect consideration of each of the factors outlined in this rule and specific articulation of the reasons for the officer's determination.<sup>317</sup> DHS believes this will help ensure that public charge inadmissibility determinations do not reflect a misunderstanding of age discrimination laws.

*Comment:* A few commenters suggested that children should not be penalized when considering age as a factor, or that age for minor children should not be a consideration, despite the INA not containing an explicit exemption for children. Other commenters similarly suggested that DHS positively interpret the statutory factor of age for children and require officers to apply a heightened standard for finding that a child is likely at any time to become a public charge. Commenters urged that, if a child is found to be inadmissible under the public charge ground of inadmissibility, officers should include specific reasoning including the consideration of this heightened standard.

Some commenters suggested alternatively that DHS create a child-specific framework for the statutory factors for cases that involve children in guidance to officers, not ignoring or exempting children from the statutory minimum factors but acknowledging that children are different from adults and interpreting the factors in a child-appropriate manner. For example, children's dependence on family is normal and not an indication of their likelihood of becoming a public charge in the future. The commenters also suggested that DHS view being in school and having strong family support as factors in a child's favor, as research shows that the earlier a

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<sup>317</sup> See 8 CFR 212.22(c).

child has access to strong social networks and educational opportunities the better their future earnings and outcomes.

*Response:* As noted previously, DHS disagrees with commenters who suggested that the public charge ground of inadmissibility should not be applied to children because it is difficult to predict a child's likelihood of becoming primarily dependent on the government for subsistence. While DHS acknowledges that the public charge inadmissibility determination is a complex assessment, the language of section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), requires that this be a predictive assessment, and only those categories designated by Congress are exempt from the public charge ground of inadmissibility.<sup>318</sup> DHS notes that Congress did not exclude children from the public charge ground of inadmissibility and therefore, unless a child is seeking admission or adjustment of status in a classification that Congress expressly exempted from the public charge ground of inadmissibility, for example adjustment of status as a special immigrant juvenile,<sup>319</sup> DHS must apply the ground to applications for admission or adjustment of status.

DHS recognizes that it must apply the statutory minimum factors to individuals' specific circumstances, and as such, has made clear that a public charge inadmissibility determination should be based on the totality of a noncitizen's circumstances. These factors include the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.<sup>320</sup> As stated throughout this rule, no one factor other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, "should be the sole criterion for determining if an alien is likely to become a public charge"<sup>321</sup> and "DHS may periodically issue guidance to officers to inform the totality of the circumstances assessment."<sup>322</sup> DHS believes that

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<sup>318</sup> See 8 CFR 212.23.

<sup>319</sup> INA sec. 245(h)(2)(A), 8 U.S.C. 1255(h)(2)(A).

<sup>320</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i). The statute also permits, but does not require, the consideration of a sufficient Affidavit of Support Under Section 213A of the INA, if required. See INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

<sup>321</sup> See 8 CFR 212.22(b).

<sup>322</sup> See 8 CFR 212.22(b).

a public charge inadmissibility determination that takes into account the totality of a noncitizen's circumstances, including their age, is consistent with the statute. While DHS will not create a different standard for children, DHS intends to issue guidance as appropriate that will clarify considerations that are relevant to considering a child's receipt of public benefits in the totality of the circumstances.

To address the comment requesting that officers be required to include specific reasoning for a public charge inadmissibility finding for children, DHS notes that the regulations state that every written denial decision issued by USCIS should reflect consideration of each of the factors outlined in this rule and specific articulation of the reasons for the officer's determination, which will help ensure that public charge inadmissibility determinations will be fair and consistent with the law.

#### **b. Health**

*Comment:* Some commenters recommended that DHS not consider health as a factor in public charge inadmissibility determinations because it unfairly hinders all immigrants, especially those with disabilities and chronic health conditions that face heightened healthcare costs as well as disproportionate barriers to education and employment, making them unable to show significant assets or resources. Another commenter stated that a person's health status should never be considered when evaluating whether they are likely to become a public charge because it unfairly discriminates against individuals from communities where preventive care and other services are not widely accessible, as well as against individuals who have chronic health conditions or disabilities. Some commenters stated that any individual may become disabled due to illness, injury, or the development of a condition at any time and the rule does little to protect immigrants who are injured or disabled while working in the United States, or those who may become infected with COVID-19.

*Response:* DHS designed this rule to adhere to, and implement, congressional instructions. DHS did not issue this rule to discriminate against applicants based on their health,

and moreover, did not intend to single out or discriminate against those with disabilities or chronic health conditions or applicants who come from communities where preventive care and other services are not widely accessible. Rather, as noted in the NPRM<sup>323</sup> and above in this preamble, this rule is intended to articulate a policy with respect to the public charge ground of inadmissibility that is fully consistent with law and that is clear, fair, and comprehensible for officers as well as for noncitizens. This rule, and in particular, the consideration of the health factor, is simply a reflection of and wholly consistent with Congress' mandate that DHS consider an applicant's health in every public charge inadmissibility determination.<sup>324</sup>

DHS disagrees with commenters' suggestion that it has the authority to ignore any of the statutorily mandated factors, including the health factor, in making a public charge inadmissibility determination, even if an applicant has a chronic medical condition, disability, or lives in a community where preventive care and other services are not widely accessible. In fact, under the plain language of the statute, Congress requires DHS to review the applicant's health when determining whether the applicant is likely at any time to become a public charge.<sup>325</sup> DHS will not disregard the factors that Congress mandated DHS consider, and DHS therefore declines to adopt this suggestion in this rule.

To the extent that commenters are concerned that DHS, in considering an applicant's health, will treat an applicant's disability or particular health conditions, such as chronic health conditions, as outcome determinative, DHS notes that it lacks the authority to treat any of the statutory minimum factors, including an applicant's health, as outcome determinative. Simply put, DHS will not treat any of the statutory minimum factors as outcome determinative in this rule,<sup>326</sup> and, as reflected in the NPRM,<sup>327</sup> this rule already includes a provision that prohibits

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<sup>323</sup> 87 FR at 10599 (Feb. 24, 2022).

<sup>324</sup> INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>325</sup> See INA sec. 212(a)(4)(B)(i)(II), 8 U.S.C. 1182(a)(4)(B)(i)(II).

<sup>326</sup> 8 CFR 212.22(b).

<sup>327</sup> 87 FR at 10621 (Feb. 24, 2022).

treating any factor, other than the lack of a required Affidavit of Support Under Section 213A of the INA, as outcome determinative.<sup>328</sup> Indeed, under this rule, the mere presence of any medical condition would not, on its own, render an applicant inadmissible as likely at any time to become a public charge. On the contrary, as required by Congress,<sup>329</sup> in this rule, a noncitizen's health is but one factor that DHS must consider when determining whether a noncitizen is likely to become a public charge at any time.<sup>330</sup> Moreover, as noted in the NPRM<sup>331</sup> and as reflected in this final rule, the fact that an applicant has a disability as defined by Section 504 of the Rehabilitation Act will never alone be a sufficient basis to determine whether the noncitizen is likely at any time to become a public charge.<sup>332</sup>

*Comment:* One commenter remarked that being denied entry into the United States based on a disability violates noncitizens' human rights. Another commenter stated that "the regulation of public charge goes beyond immigration control and prevention of abuse of public services . . . and is a threat to the human rights of every human being. . . ." This commenter provided testimonials from members of the Disability and Immigration Justice Coalition to describe how the public charge ground of inadmissibility negatively affects their lives. The commenter also stated that the proposed rule encourages and supports social and cultural ableism, destroying decades of social justice work for disabled lives to be included, and that no human being is a public charge.

*Response:* The term "public charge" is a statutory term and part of a ground of inadmissibility that DHS administers pursuant to duly enacted laws. DHS notes that while it is required to administer the public charge ground of inadmissibility to all noncitizens who are subject to the ground, DHS does not intend to suggest through this rulemaking that a noncitizen's

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<sup>328</sup> See 8 CFR 212.22(b).

<sup>329</sup> See INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

<sup>330</sup> 8 CFR 212.22(a)(1)(ii).

<sup>331</sup> 87 FR at 10620 (Feb. 24, 2022).

<sup>332</sup> 8 CFR 212.22(a)(4).



worth or value to society is in any way tied to a noncitizen being determined to be likely at any time to become a public charge.

With respect to comments and testimonials opposing the regulation of public charge as a threat to human rights, DHS notes that it was not clear from the comment whether the commenter objects to the application of the public charge ground of inadmissibility, or DHS's proposed rule – the commenter did not specifically address any aspect of the proposed rule. Nevertheless, DHS disagrees that this rule violates noncitizens' human rights, encourages ableism, or would deny admission or adjustment of status based on a noncitizen's disability. In fact, under this rule, disability alone is not a sufficient basis to determine that a noncitizen is likely at any time to become a public charge.<sup>333</sup> Although the statute requires DHS to consider an applicant's health when assessing the applicant's likelihood at any time of becoming a public charge,<sup>334</sup> which may include consideration of any disabilities identified in the report of medical examination in the record,<sup>335</sup> there is no presumption under the statute or in this rule that having a disability in and of itself means that the applicant is in poor health or is likely at any time to become a public charge. DHS will not, under this rule, presume that an applicant's disability in and of itself negatively impacts the applicant's health or any of the other statutory minimum factors that DHS considers as part of the public charge inadmissibility determination.<sup>336</sup> For example, as noted in the NPRM,<sup>337</sup> many disabilities do not impact an individual's health or require extensive medical care, and the vast majority of people with disabilities do not use institutional care.

Simply put, under this rule, DHS will not deny admission or adjustment of status to any applicant solely based on the applicant's disability. As noted in the NPRM<sup>338</sup> and above, under

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<sup>333</sup> See 8 CFR 212.22(a)(4) and (b).

<sup>334</sup> INA sec. 212(a)(B)(i)(II), 8 U.S.C. 1182(a)(4)(B)(i)(II).

<sup>335</sup> See 8 CFR 212.22(a)(1)(ii).

<sup>336</sup> 8 CFR 212.22(a)(4).

<sup>337</sup> 87 FR at 10620 (Feb. 24, 2022).

<sup>338</sup> 87 FR at 10621 (Feb. 24, 2022).

this rule, no one factor, other than the lack of a required Affidavit of Support Under Section 213A of the INA, is outcome determinative.<sup>339</sup> Indeed, under this rule, the fact that an applicant has a disability as defined by Section 504 of the Rehabilitation Act will never alone be a sufficient basis to determine whether an applicant for admission or adjustment of status is likely at any time to become a public charge.<sup>340</sup> The final rule also includes other provisions to better ensure fair and consistent treatment of individuals with disabilities – for example, long-term institutionalization in the context of Medicaid is limited to “institutional services under section 1905(a) of the Social Security Act,”<sup>341</sup> which, as DHS clarified in the proposed rule, does not include HCBS.<sup>342</sup> In addition, the final rule includes a provision that allows DHS to consider evidence submitted by the applicant that the applicant’s long-term institutionalization violates federal law, including the Americans with Disabilities Act or the Rehabilitation Act.<sup>343</sup> As a result, DHS declines to make any changes to the rule in response to this comment.

*Comment:* One commenter discouraged defining health in a way that would penalize individuals based on the nature or conditions of their work. This commenter remarked that farmworkers, in particular, engage in “difficult, repetitive tasks, often in uncomfortable positions, resulting in musculoskeletal injuries . . . [as well as o]ther dangerous conditions [that] include handling heavy machinery, working with large animals, and working at heights. . . ,” which needs to be accounted for in the definition of health. This commenter also discouraged defining health to include consideration of an applicant’s health insurance coverage in the definition, as few farmworkers have access to comprehensive health insurance. Some commenters, with one pointing to President Biden’s executive order *Advancing Racial Equality*

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<sup>339</sup> See 8 CFR 212.22(b).

<sup>340</sup> 8 CFR 212.22(a)(4).

<sup>341</sup> 8 CFR 212.21(c).

<sup>342</sup> 87 FR at 10614 (Feb. 24, 2022).

<sup>343</sup> 8 CFR 212.22(a)(3).

*and Support for Underserved Communities Through the Federal Government*,<sup>344</sup> stated that DHS should consider how social determinants of health, such as social, economic, and environmental factors, contribute to an applicant’s health in a public charge inadmissibility determination. The commenter stated that poor health and shorter life expectancy concentrate among low-income people of color residing in certain places, including immigrants’ native countries in the global south that have been disadvantaged by historical and structural factors such as colonization and racially discriminatory immigration policies. Another commenter similarly stated that when officers weigh the health factor, they should treat social determinants of health only in a positive manner, consider overall wellness without reference to disability to the extent possible, and should treat other “aspects of health” as irrelevant to the health factor, to avoid considering disability alone as influencing the likelihood of an immigrant being determined likely to become a public charge.

*Response:* DHS notes that it is not, in this rule, defining health to include an assessment of whether an applicant has health insurance coverage.<sup>345</sup> DHS further notes that it is not defining health to specify that any aspect of an applicant’s health, including circumstances that might impact the reasons why an individual has certain health conditions, should be treated as a positive or negative factor. Rather, in response to public comments and feedback received, DHS has amended the rule to clarify that in considering an applicant’s health in the totality of the circumstances, DHS will consider any report of an immigration medical examination performed by a civil surgeon or panel physician in the record.<sup>346</sup> The report of the immigration medical examination will include, as required by HHS regulations, any Class A or Class B medical conditions diagnosed by the physician, as well as “the nature and extent of the abnormality; the degree to which the alien is incapable of normal physical activity; and the extent to which the

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<sup>344</sup> E.O. 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” 86 FR 7009 (Jan. 25, 2021).

<sup>345</sup> 8 CFR 212.22(a)(1)(ii).

<sup>346</sup> 8 CFR 212.22(a)(1)(ii).

condition is remediable . . . [as well as] the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization.”<sup>347</sup> The report of medical examination will also include, as required by the CDC Technical Instructions for Civil Surgeons<sup>348</sup> and the Technical Instructions for Panel Physicians,<sup>349</sup> a notation for any Class B medical condition identified by the physician that although it “does not constitute a specific excludable condition, [it] represents a departure from normal health or well-being that is significant enough to possibly interfere with the person’s ability to care for him- or herself, to attend school or work, or that may require extensive medical treatment or institutionalization in the future.”<sup>350</sup> DHS would rely on any such findings made by the civil surgeon or panel physician as to whether any Class A or Class B medical conditions were identified in the report of medical examination unless there is evidence that the report is incomplete.

DHS believes that this will ensure that DHS officers, who are not trained medical professionals, are assessing the applicant’s health, based on reports from physicians designated to perform immigration medical examinations. DHS believes that the evidence it will consider in assessing an applicant’s health will ensure that applicants understand what DHS will consider as part of the health factor, while minimizing burdensome information collection associated with this factor.

DHS further notes that it does not, through considering any report of medical examination in an applicant’s file in this rule, intend the rule to penalize or negatively affect any particular group, including farmworkers or other workers who may become injured or sick due to job-related conditions or socioeconomic circumstances. Under this rule, being a farmworker who

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<sup>347</sup> 42 CFR 34.4(b)(2) and (c)(2).

<sup>348</sup> CDC, Civil Surgeons, “Medical History and Physical Examination,” <https://www.cdc.gov/immigrantrefugeehealth/civil-surgeons/medical-history-and-physical-exam.html> (last visited Aug. 16, 2022).

<sup>349</sup> CDC, Panel Physicians, “Medical History and Physical Examination,” <https://www.cdc.gov/immigrantrefugeehealth/panel-physicians/medical-history-physical-exam.html> (last visited Aug. 16, 2022).

<sup>350</sup> See CDC, “Technical Instructions for Civil Surgeons,” <https://www.cdc.gov/immigrantrefugeehealth/civil-surgeons.html> (last visited Aug. 16, 2022). See 42 CFR 34.3(i).

has been or is more likely to be injured on the job, or an individual whose socioeconomic circumstances may impact their health, would not on its own result in a finding that an applicant is inadmissible as likely at any time to become a public charge. As is the case with any of the statutory minimum factors, in making a public charge inadmissibility determination in the totality of the circumstances, the mere presence of any medical condition, as diagnosed on a report of medical examination in the record, would not render a noncitizen inadmissible under this rule; under this rule, DHS will, in the totality of the circumstances, take into account all of the factors identified in 8 CFR 212.22, including an applicant's health.<sup>351</sup> DHS would consider the existence of any medical condition and weigh such evidence in the totality of the circumstances.

As a result, DHS disagrees that it would be appropriate to implement commenters' suggestion that DHS give positive weight or favorably consider the social, economic, and environmental factors that go into the applicant's health. Indeed, as noted elsewhere in this rule, each public charge inadmissibility determination is extremely fact-specific and the factors that may weigh heavily in one case may not have equal weight in another case depending on those specific facts in the totality of the applicant's circumstances.<sup>352</sup> This is particularly true when considering an applicant's health. Therefore, DHS declines to implement any of the suggestions from these commenters.

*Comment:* One commenter recommended that evidence of "inadmissibility-creating" drug abuse or addiction be explicitly included as a heavily weighted negative factor in a public charge inadmissibility determination, as it would provide information relevant to a noncitizen's ability to maintain employment, income, and health, all of which are relevant to the noncitizen's ability to demonstrate self-reliance.

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<sup>351</sup> 8 CFR 212.22(b).

<sup>352</sup> 87 FR at 10620 (Feb. 24, 2022).

*Response:* After considering public comments and feedback, DHS is amending the rule to include an express provision that DHS will consider, as part of the mandatory health factor, any report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required.<sup>353</sup> Such a report of an immigration medical examination documents whether the noncitizen has Class A medical conditions, which include drug abuse or addiction, and Class B medical conditions, and whether the applicant has complied with all vaccination requirements, which DHS uses to determine whether an applicant is inadmissible on the health-related grounds.<sup>354</sup> This addition will ensure that DHS officers consider, as part of the totality of the circumstances analysis, any health conditions, including drug abuse or addiction, identified on the report of medical examination.

To the extent that this commenter suggests that DHS needs to assess whether the applicant has demonstrated self-reliance, DHS believes, as noted in the NPRM, that this rulemaking reflects that the long-standing intent of the public charge ground of inadmissibility – reaching noncitizens with significant reliance on the government for support.<sup>355</sup> DHS believes that this rule properly focuses on applicants who are primarily dependent on the government for subsistence (i.e., noncitizens who are unable or unwilling to work to support themselves, and who do not have other nongovernmental means of support such as family members, assets, or sponsors).<sup>356</sup> DHS therefore disagrees with this commenter that it needs to amend the regulation to include any heavily weighted negative (or positive) factor in order to ensure that applicants have demonstrated that they are self-reliant. DHS is not adding any heavily weighted negative factors to this rule because DHS believes, consistent with the statute, that each public charge

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<sup>353</sup> 8 CFR 212.22(a)(1)(ii). Note, however, that while this was not included in the proposed regulatory text, the NPRM indicated that the report would be considered. *See* 87 FR at 10617 (Feb. 24, 2022) (“DHS will collect information relevant to the statutory minimum factors from existing information collections, e.g., information pertaining to the health factor will be obtained from Form I–693, Report of Medical Examination and Vaccination Record”).

<sup>354</sup> 42 CFR 34.3 and 34.4.

<sup>355</sup> 87 FR at 10620 (Feb. 24, 2022).

<sup>356</sup> 8 CFR 212.21(a). 87 FR at 10606 (Feb. 24, 2022).

inadmissibility determination is extremely fact-specific and that declaring factors to be “heavily weighted” in all cases is not calculated to yield fair or consistent results; the factors that may weigh heavily in one case may not have equal weight in another case depending on those specific facts in the totality of the applicant’s circumstances.<sup>357</sup> As a result, DHS declines to add any heavily weighted factors, including a heavily weighted factor for drug abuse or addiction.

*Comment:* One commenter suggested that the health factor be given minimal weight in the totality of the circumstances.

*Response:* DHS disagrees that it would be appropriate to give the health factor minimal weight in every case for the same reason that DHS disagrees that it should treat health as a heavily weighted factor. As noted above, each public charge inadmissibility determination is extremely fact-specific and the factors that may weigh heavily in one case may not have equal weight in another case depending on those specific facts in the totality of the applicant’s circumstances.<sup>358</sup> This is particularly true when considering an applicant’s health. Some applicants, as reflected on a report of medical examination, may not have been diagnosed with any Class A or Class B medical conditions, while others have been diagnosed with Class A medical conditions such drug abuse or addiction or Class B conditions, such those that require extensive medical care or institutionalization. How much weight DHS would give to any of these medical conditions would depend on the exact nature of the condition as well as all of the other factors that DHS must consider in every case under this rule. As a result, DHS declines to add a provision to the rule that instructs officers to give minimal weight to the health factor in every case.

*Comment:* One commenter stated that DHS should narrow the consideration of health in a public charge inadmissibility determination to only include situations in which a person’s health condition is likely to permanently and irreversibly make them primarily reliant on the

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<sup>357</sup> 87 FR at 10620 (Feb. 24, 2022).

<sup>358</sup> 87 FR at 10620 (Feb. 24, 2022).

government, and that this determination should only be made by qualified medical professionals, not officers. Another commenter appeared to suggest that the health factor should be narrowly defined as having a severe or extreme condition that, in the presence of circumstances where the person does not have relatives or friends in the United States indicating their willingness to come to their assistance, would make the person more likely to become a public charge.

*Response:* Congress requires DHS to consider the applicant’s health when determining whether the applicant is likely at any time to become a public charge.<sup>359</sup> DHS disagrees that it should narrowly define the health factor to only include consideration of severe or extreme conditions that in the absence of having friends and family to provide financial support make the applicant more likely to become a public charge, or to conditions, as determined by qualified medical professionals, that permanently and irreversibly make applicants primarily reliant on the government. That Congress determined that an applicant’s health is one of the mandatory factors that is relevant to determining the applicant’s likelihood at any time of becoming a public charge suggests that Congress did not intend to limit the health consideration to any specific medical condition or circumstances. Therefore, DHS declines to narrow the health factor as commenters suggest.

DHS notes, however, as explained above, that it has amended the rule to include an express provision that DHS will consider, as part of the mandatory health factor, any report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required.<sup>360</sup> Such a report of an immigration medical examination documents whether the noncitizen has any Class A medical conditions, which include a current physical or mental disorder (and behavior associated with the disorder that may pose, or has posed, a threat

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<sup>359</sup> See INA sec. 212(a)(4)(B)(i)(II), 8 U.S.C. 1182(a)(4)(B)(i)(II).

<sup>360</sup> 8 CFR 212.22(a)(1)(ii). Note, however, that while this was not included in the proposed regulatory text, the NPRM indicated that the report would be considered. See 87 FR at 10617 (Feb. 24, 2022) (“DHS will collect information relevant to the statutory minimum factors from existing information collections, e.g., information pertaining to the health factor will be obtained from Form I-693, Report of Medical Examination and Vaccination Record”).



to the property, safety, or welfare of the noncitizen or others) and drug abuse or addiction, and Class B medical conditions, including a physical or mental health condition, disease, or disability serious in degree or permanent in nature, and whether the applicant has complied with all vaccination requirements, which DHS uses to determine whether an applicant is inadmissible on the health-related grounds.<sup>361</sup> This addition will ensure that DHS officers consider, as part of the totality of the circumstances analysis, any health conditions identified on the report of medical examination in the totality of the circumstances. The approach that DHS has taken in this rule leverages evidence that will generally already exist in the applicant's record. DHS acknowledges that some information on such a report may not bear significantly upon a determination that a person is or not likely to become a public charge, but in this instance, DHS believes that the matter can be appropriately addressed in guidance.

*Comment:* Many commenters expressed support for the rule's recognition that a noncitizen should not be considered likely at any time to become a public charge simply because the noncitizen has a disability and instead it is only one factor to be considered in the totality of circumstances and cannot be the sole basis for a denial. One of the commenters stated that (1) many disabilities do not impact an individual's health or require extensive medical care (i.e., the presence of the disability is a life condition rather than a health condition); (2) many people have disabilities that do not result in either illness or long-term health conditions (e.g., people with intellectual and developmental disabilities may not have a long-term health-related condition); and (3) many immigration officers are not trained to make disability or health diagnoses and should not assume that people who present with a disability have severe health issues.

*Response:* DHS agrees that officers should not assume that applicants with disabilities have health issues and that DHS officers should not make health diagnoses. After considering comments and public feedback, DHS has included a provision in this rule specifying that when

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<sup>361</sup> 42 CFR 34.3 and 34.4.

considering an applicant’s health, DHS will consider any report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required, to which DHS will generally defer absent evidence that such report is incomplete.<sup>362</sup> The report of the immigration medical examination will include, as required by HHS regulations, any Class A or Class B medical conditions diagnosed by the physician, as well as “the nature and extent of the abnormality; the degree to which the alien is incapable of normal physical activity; and the extent to which the condition is remediable . . . [as well as] the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization.”<sup>363</sup> The report of medical examination will also include, as required by the CDC Technical Instructions for Civil Surgeons<sup>364</sup> and the Technical Instructions for Panel Physicians,<sup>365</sup> a notation for any Class B medical condition identified on the form by the physician, that although it “does not constitute a specific excludable condition, [it] represents a departure from normal health or well-being that is significant enough to possibly interfere with the person’s ability to care for him- or herself, to attend school or work, or that may require extensive medical treatment or institutionalization in the future.”<sup>366</sup> DHS would rely on any such findings made by the civil surgeon or panel physician as to whether any Class A or Class B conditions were identified in the report of medical examination unless there is evidence that the report is incomplete. DHS has amended the regulatory text consistent with this approach.

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<sup>362</sup> 8 CFR 212.22(a)(1)(ii). Note, however, that while this was not included in the proposed regulatory text in the NPRM, the NPRM indicated that the report would be considered. *See* 87 FR at 10617 (Feb. 24, 2022) (“DHS will collect information relevant to the statutory minimum factors from existing information collections, e.g., information pertaining to the health factor will be obtained from Form I-693, Report of Medical Examination and Vaccination Record”).

<sup>363</sup> 42 CFR 34.4(b)(2) and (c)(2).

<sup>364</sup> CDC, Civil Surgeons, “Medical History and Physical Examination,” <https://www.cdc.gov/immigrantrefugeehealth/civil-surgeons/medical-history-and-physical-exam.html> (last visited Aug. 16, 2022).

<sup>365</sup> CDC, Panel Physicians, “Medical History and Physical Examination,” <https://www.cdc.gov/immigrantrefugeehealth/panel-physicians/medical-history-physical-exam.html> (last visited Aug. 16, 2022).

<sup>366</sup> *See* CDC, “Technical Instructions for Civil Surgeons,” <https://www.cdc.gov/immigrantrefugeehealth/civil-surgeons.html> (last visited Aug. 16, 2022); *See* 42 CFR 34.3(i).

DHS notes, however, that in making a public charge inadmissibility determination in the totality of the circumstances, the mere presence of any Class A or Class B condition, diagnosed on a report of medical examination, including a “disability serious in degree or permanent in nature . . .”<sup>367</sup> would not alone render a noncitizen inadmissible under this rule; under this rule, DHS will, in the totality of the circumstances, take into account all of the factors identified in 8 CFR 212.22, including an applicant’s health.<sup>368</sup> Furthermore, under this rule, DHS reiterates that an applicant with a disability would not be found inadmissible on the public charge ground solely on account of that disability.<sup>369</sup> Instead, DHS would look at whether the individual had a medical condition impacting their health and weigh such evidence in the totality of the circumstances.

*Comment:* Commenters stated that disability and chronic health conditions should not be considered in a public charge inadmissibility determination under any circumstances in order to avoid unfair decisions by officers based on misunderstanding or lack of information about a noncitizen’s disability or officers’ implicit bias. Similarly, one commenter stated that consideration of an applicant’s health condition risks disqualifying applicants based on disability.

*Response:* DHS agrees that disability alone can never disqualify an individual but disagrees that it should exclude from consideration all disabilities. Under this rule, USCIS’ approach to the health factor will result in the consideration of some health conditions that are also disabilities. Specifically, in each case, USCIS’ review of the Form I-693 would result in consideration of a Class A or Class B condition reported by a civil surgeon or panel physician on a report of medical examination. Some of these conditions may relate to disabilities. DHS agrees it is important that decisions by its officers be based on objective information and believes the Form I-693 will help. DHS will provide further guidance for officers on how to accurately

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<sup>367</sup> 42 CFR 34.4(c).

<sup>368</sup> 8 CFR 212.22(b).

<sup>369</sup> 8 CFR 212.22(a)(4).

consider whether a disability reported by a civil surgeon or panel physician impacts an applicant's likelihood of becoming a public charge.

Congress requires DHS to review the applicant's health when determining whether the applicant is likely at any time to become a public charge.<sup>370</sup> Congress did not direct DHS to consider disability as such, and DHS will not do so under this rule. That said, Congress also did not provide that DHS's consideration of an applicant's health should exclude consideration of any aspect of an applicant's health that also constitutes a disability. Consistent with the statute, DHS declines to exclude consideration of an applicant's disability as part of the health factor in the totality of the circumstances.

DHS further disagrees that considering any disabilities that are identified on a report of medical examination completed by a civil surgeon or panel physician disability will disqualify such applicants from immigration benefits based on their disability. Under this rule, DHS will not deny admission or adjustment of status to any applicant solely based on the applicant's disability. As noted in the NPRM and above, under this rule, no one factor, other than the lack of a required Affidavit of Support Under Section 213A of the INA, is outcome determinative.<sup>371</sup> Indeed, under this rule, the fact that an applicant has a disability as defined by Section 504 of the Rehabilitation Act will never alone be a sufficient basis to determine whether an applicant for admission or adjustment of status is likely at any time to become a public charge.<sup>372</sup>

In making a public charge inadmissibility determination in the totality of the circumstances, the mere presence of a disability or of a particular Class A or Class B condition diagnosed on a report of medical examination would not alone render a noncitizen inadmissible under this rule; under this rule, DHS will, in the totality of the circumstances, take into account all of the factors identified in 8 CFR 212.22, including an applicant's health.<sup>373</sup> Furthermore,

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<sup>370</sup> See INA sec. 212(a)(4)(B)(i)(II), 8 U.S.C. 1182(a)(4)(B)(i)(II).

<sup>371</sup> See 8 CFR 212.22(b).

<sup>372</sup> 8 CFR 212.22(a)(4).

<sup>373</sup> 8 CFR 212.22(b).

under this rule, DHS reiterates that an applicant with a disability would not be found inadmissible on the public charge ground solely on account of that disability.<sup>374</sup>

*Comment:* A commenter stated that DHS should not use the Report of Medical Examination and Vaccination Record, or evidence of a medical condition, in a public charge inadmissibility determination because disability does not predict employability and does not consider that some disabilities or conditions are temporary and individuals may recover.

*Response:* DHS disagrees that it should not use a report of medical examination in an applicant's record as part of its consideration of an applicant's health in the totality of the circumstances. As noted in the NPRM,<sup>375</sup> consistent with DHS's desire to minimize burdensome and unnecessary evidentiary and information collection requirements pertaining to the statutory minimum factors, DHS believes it appropriate, when considering an applicant's health, to consider evidence that would generally already be in the applicant's record. A report of medical examination would normally be in an adjustment of status applicant's record, either because the adjustment applicant is required to undergo an immigration medical examination conducted by a USCIS-designated civil surgeon, which is documented on the Report of Medical Examination and Vaccination record (Form I-693) as part of the adjustment of status process,<sup>376</sup> or the applicant is exempt from the Form I-693 requirement because they were previously examined by a panel physician prior to entering the United States and has a report of medical examination completed by a panel physician overseas in their record.<sup>377</sup> As noted above, DHS added a provision in this rule, after considering public comments and feedback, to expressly consider any report of medical examination that is in an applicant's record, which DHS believes will ensure that DHS officers consider, as part of the totality of the circumstances analysis, any health

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<sup>374</sup> 8 CFR 212.22(a)(4).

<sup>375</sup> 87 FR at 10617 (Feb. 24, 2022).

<sup>376</sup> INA sec. 232(b), 8 U.S.C. 1222(b); 8 CFR 245.5.

<sup>377</sup> See, e.g., OMB, "Medical Examination for Immigrant or Refugee Applicant," "Report of Medical Examination by Panel Physician (Form DS 2054)" OMB Control No. 1405-0113, <https://omb.report/omb/1405-0113> (last visited Aug. 16, 2022).

conditions that bears on an applicant's likelihood at any time of becoming a public charge. DHS notes, however, that any conditions identified on a report of medical examination in the record will be considered, along with the other factors identified in this rule, in the totality of the circumstances.<sup>378</sup> No condition identified on a report of medical examination is outcome determinative.<sup>379</sup>

*Comment:* One commenter stated that health factors that are not recorded as a Class B certification by the civil surgeon performing the medical screening should be disregarded in a public charge inadmissibility determination.

*Response:* As noted above, when considering the applicant's health, DHS will consider any report of medical examination in the applicant's record as part of a public charge inadmissibility determination.<sup>380</sup> DHS notes, however, that any report of medical examination in the record will only contain diagnoses of Class A and Class B medical conditions.<sup>381</sup> While DHS will not require applicants to submit initial evidence other than any required report of medical examination, an applicant is free to submit any other evidence relevant to the health factor for consideration in the totality of the circumstances.

*Comment:* One commenter recommended that DHS provide further examples to clarify what is meant by "disability alone" in order to confirm that enrollment in programs available to working individuals with disabilities for whom risk of institutionalization is an eligibility criterion is not a sufficient basis for an adverse public charge inadmissibility determination.

*Response:* The provision stating that disability alone is an insufficient basis to determine whether the applicant is likely at any time to become a public charge means that evidence that the applicant has a disability cannot by itself be the basis to find that the applicant is

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<sup>378</sup> 8 CFR 212.22(b).

<sup>379</sup> 8 CFR 212.22(b).

<sup>380</sup> 8 CFR 212.22(a)(1)(ii).

<sup>381</sup> 42 CFR 34.3(b).

inadmissible. As explained more thoroughly in the NPRM,<sup>382</sup> DHS will not presume that if an individual has a disability then the applicant necessarily is likely at any time to receive cash assistance for income maintenance or require long-term institutionalization at government expense, or otherwise presume that their disability in and of itself negatively impacts any of the statutory minimum factors, such as the applicant's education and skills, or assets, resources, and financial status. For example, many disabilities do not impact an individual's health or require extensive medical care and the vast majority of disabilities do not require institutional care at government expense. DHS, in considering an applicant's health, will consider the existence of any medical condition diagnosed on the report of medical examination and weigh such evidence in the totality of the circumstances. Moreover, as in every case, DHS will consider all of the factors set forth in 8 CFR 212.22(a) in determining whether an applicant is likely at any time to become a public charge in the totality of the circumstances.<sup>383</sup>

*Comment:* One commenter stated that DHS must consider a noncitizen's disabilities or chronic health conditions as part of the health factor, because an analysis of a noncitizen's health is incomplete without evaluating whether disabilities or chronic health conditions are present, and DHS should consider the existence of a medical condition in light of the effect that condition is likely to have on a person's ability to attend school or work in the totality of the circumstances. The commenter further stated that considering a noncitizen's disability is not unlawful or discriminatory because Congress requires DHS to consider a noncitizen's health as part of the public charge inadmissibility determination and has not prohibited the application of the public charge ground of inadmissibility to noncitizens with disabilities. The commenter also recommended DHS consider whether the noncitizen has the resources to pay for associated medical costs.

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<sup>382</sup> 87 FR at 10620 (Feb 24, 2022).

<sup>383</sup> See 8 CFR 212.22(b).

*Response:* DHS believes that disability is not necessarily indicative of poor health. DHS agrees that Congress did not specifically provide an exemption from the public charge ground of inadmissibility for individuals with disabilities, and in fact, as noted above, included health as a mandatory factor in the public charge inadmissibility determination.<sup>384</sup> DHS will consider health conditions identified in the record as part of the health factor in the totality of the circumstances. As noted above, Congress requires DHS to review the applicant's health when determining whether the applicant is likely at any time to become a public charge.<sup>385</sup>

DHS declines to add a provision in this rule that requires DHS to consider whether the noncitizen has the resources to pay for medical costs associated with a disability. As DHS noted above, DHS will not presume that an applicant who has a disability will require extensive medical care or treatment as a result of their disability. That said, DHS believes that its consideration of any report of medical examination in the record is adequate evidence of the applicant's health as it relates to whether the applicant requires extensive medical care. Indeed, as noted above, the report of medical examination will include, as required by HHS regulations, any Class A or Class B conditions diagnosed by the physician, as well as "the nature and extent of the abnormality; the degree to which the alien is incapable of normal physical activity; and the extent to which the condition is remediable . . . [as well as] the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization."<sup>386</sup> In diagnosing a Class B condition on a report of medical examination, civil surgeons and panel physicians are required to note that that although it "does not constitute a specific excludable condition, [it] represents a departure from normal health or well-being that is significant enough to possibly interfere with the person's ability to care for him- or herself, to attend school or work,

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<sup>384</sup> INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>385</sup> See INA sec. 212(a)(4)(B)(i)(II), 8 U.S.C. 1182(a)(4)(B)(i)(II).

<sup>386</sup> 42 CFR 34.4(b)(2) and (c)(2).



or that may require extensive medical treatment in the future.”<sup>387</sup> This information, coupled with the noncitizen’s household’s income, assets, and liabilities, which is considered as part of the assets, resources, and financial status factor in the totality of the circumstances,<sup>388</sup> will adequately address whether or not the applicant has sufficient resources to pay for medical costs associated with a disability or any other condition diagnosed on the report of medical examination. As such, DHS will not add any provisions to this rule in response to this comment.

*Comment:* Several commenters stated that consideration of an applicant’s health violates Section 504 of the Rehabilitation Act.

*Response:* DHS disagrees with the comments stating that consideration of an applicant’s health, which includes consideration of any disabilities that are Class A or B conditions, as identified on a report of medical examination, violates the Rehabilitation Act. As noted in the NPRM, in enacting section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), which applies to all noncitizens seeking a visa, admission, or adjustment of status unless exempted by Congress, Congress required DHS to consider, as part of the public charge inadmissibility determination, a noncitizen’s health. Although Congress has, over time, significantly reduced the prohibitions on immigration for noncitizens with mental and physical disabilities and also amended PRWORA to restore the ability of certain noncitizens with disabilities to receive certain public assistance, such as SSI,<sup>389</sup> Congress has never prohibited consideration of a noncitizen’s health as part of a public charge inadmissibility determination if the noncitizen has mental or physical disabilities.

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<sup>387</sup> CDC, Civil Surgeons, “Medical History and Physical Examination,”

<https://www.cdc.gov/immigrantrfugeehealth/civil-surgeons/medical-history-and-physical-exam.html> (last visited Aug. 16, 2022); CDC, Panel Physicians, “Medical History and Physical Examination,”

<https://www.cdc.gov/immigrantrfugeehealth/panel-physicians/medical-history-physical-exam.html> (last viewed Aug. 16, 2022).

<sup>388</sup> See 8 CFR 212.22(a)(1)(iv). Note that an applicant’s household income, assets, and liabilities excludes income from public benefits listed in 8 CFR 212.21(b) as well as income or assets from illegal activities or sources such as proceeds from illegal gambling or drug sales.

<sup>389</sup> See generally Mark Weber, “Opening the Golden Door: Disability and the Law of Immigration,” 8 *Journal of Gender, Race and Justice* 153 (2004), at 4–5, 8 (discussing historical changes in 1986 and 1990 immigration laws that removed various prohibitions on noncitizens with mental and physical disabilities, unless they represented a

This rule is consistent with federal statutes and regulations with respect to discrimination against noncitizens with disabilities. If a disability on a report of medical examination in the record is related to a noncitizen’s health, it is therefore properly considered as part of the public charge inadmissibility determination. However, under this rule, DHS will not presume that a noncitizen having a disability is necessarily in poor health. Furthermore, a noncitizen’s health is never outcome determinative—that is, a noncitizen’s health cannot be the sole basis for a finding that a noncitizen is inadmissible as likely to become a public charge.<sup>390</sup> As such, a disability alone will never result in a public charge inadmissibility finding, and, as noted in the NPRM,<sup>391</sup> the rule expressly prohibits disability being the sole basis for finding an applicant is inadmissible on the public charge ground.<sup>392</sup> If a noncitizen’s disability is a Class A or B condition identified in the report of medical examination, then as with any other such condition, the noncitizen’s disability will be considered along with the other factors in the totality of the circumstances. A noncitizen with a disability will neither be treated differently nor singled out, and the disability itself would not be the sole basis for an inadmissibility finding.<sup>393</sup> DHS will look at each of the statutory minimum factors, any current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense, and the favorably considered sufficient Affidavit of Support Under Section 213A of the INA, where required, in the totality of the circumstances. Therefore, DHS believes that consideration of an applicant’s disability in the context of the totality of circumstances does not violate the Rehabilitation Act’s prohibition on denying a benefit “solely by reason of [an applicant’s] disability.”

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threat to themselves or others; describing restoration of SSI disability benefits to noncitizens who had been receiving them before August 22, 1996). *See also* John Stanton, “The Immigration Laws from a Disability Perspective: Where We Were, Where We Are, Where We Should Be,” 10 *Geo. Immigr. L. J.* 441 (Spring 1996) (pre-PRWORA analysis).

<sup>390</sup> 8 CFR 212.22(b).

<sup>391</sup> 87 FR at 10620 (Feb. 24, 2022).

<sup>392</sup> 8 CFR 212.22(a)(4).

<sup>393</sup> 8 CFR 212.22(a)(4); 8 CFR 212.22(b).

Therefore, DHS will not prohibit the consideration of an applicant's disability in the public charge inadmissibility determination to the extent it impacts their health. The final rule also includes other provisions to better ensure fair and consistent treatment of individuals with disabilities; for example, DHS will direct officers to take into account any evidence that the current or past institutionalization violates the Rehabilitation Act or any other Federal law.<sup>394</sup>

*Comment:* One commenter stated that proposed 8 CFR 212.22(a)(4) is both a reasonable and necessary implementation of Section 504 of the Rehabilitation Act.

*Response:* DHS agrees that the regulation is consistent with Section 504 of the Rehabilitation Act. DHS notes that under this rule, the fact that an applicant has a disability as defined by Section 504 of the Rehabilitation Act will never alone be a sufficient basis to determine whether an applicant for admission or adjustment of status is likely at any time to become a public charge. As explained more in the responses to comments about the health factor, in making a public charge inadmissibility determination in the totality of the circumstances, the mere presence of any disability or a medical condition diagnosed on a report of medical examination<sup>395</sup> would not render a noncitizen inadmissible under this rule.<sup>396</sup> DHS will, in the totality of the circumstances, take into account all of the factors identified in 8 CFR 212.22(a), including an applicant's health.<sup>397</sup> Also under this rule, an applicant with a disability would not be found inadmissible on the public charge ground solely on account of that disability.<sup>398</sup>

### **c. Family Status**

*Comment:* One commenter suggested that "family status" be defined expansively as "family unit" with the end goal of keeping families together. Furthermore this commenter stated

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<sup>394</sup> 8 CFR 212.22(a)(3).

<sup>395</sup> 8 CFR 212.22(a)(1)(ii).

<sup>396</sup> 8 CFR 212.22(b).

<sup>397</sup> 8 CFR 212.22(b).

<sup>398</sup> 8 CFR 212.22(a)(4).

that USCIS should interpret the term “family unit” to mean the noncitizen’s close relatives that can care for the noncitizen such as spouses, parents, siblings, children, grandparents, aunts/uncles, and cousins in keeping with the Congressional goal and strong presumption to interpret immigration statutes in favor of keeping a family unit together.

*Response:* While DHS supports family unity, under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), , officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge, including the noncitizen’s family status.<sup>399</sup> DHS acknowledges that the definition of a family may include a variety of a noncitizen’s relatives and close relations. Therefore, DHS has decided that a noncitizen’s family status will be determined using a noncitizen’s household size, as defined in 8 CFR 212.21(f). This definition includes a noncitizen; the noncitizen’s spouse (if residing with the noncitizen); parents, children, and unmarried siblings under 21 years of age (if residing with the noncitizen); any other individuals not physically residing with the noncitizen but listed as a dependent on a noncitizen’s Federal income tax return; and any other individual who lists the noncitizen as a dependent on that individual’s Federal income tax return. In order to account for the contributions of these household members, DHS will determine a noncitizen’s assets, resources, and financial status based on the household’s income, assets, and liabilities.<sup>400</sup> DHS believes this is the best way to interpret the impact of a noncitizen’s family status and its relation to the noncitizen’s likelihood of becoming a public charge at any time.

*Comment:* One commenter stated that the applicant’s family status should only be taken into consideration in connection with reviewing the noncitizen’s household size consistent with current calculations utilized for the Affidavit of Support Under Section 213A of the INA. Having household members with ties to the United States should be considered a positive factor. Family

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<sup>399</sup> See INA sec. 212(a)(4)(B)(i)(III), 8 U.S.C. 1182(a)(4)(B)(i)(III).

<sup>400</sup> See 8 CFR 212.22(a)(1)(iv).

status should not be regarded as a negative factor except in consideration of assets, resources, and financial status and consistent with the requirements of the Affidavit of Support Under Section 213A of the INA.

*Response:* DHS appreciates this commenter's thorough recommendation for the approach to assessing an applicant's family status. DHS will not be assigning any weight within this rule regarding any of the statutory factors, but will instead indicate what will be considered in relation to each statutory minimum factor and direct officers to make a public charge inadmissibility determination based on the totality of a noncitizen's circumstances. A noncitizen's family status will be determined by that noncitizen's household size.<sup>401</sup>

DHS considered the calculation used to determine a sponsor's household size in connection with an Affidavit of Support Under Section 213A of the INA, but notes that the sponsor's household size calculation is designed to demonstrate that a sponsor's income and assets are sufficient to support their household at the corresponding HHS Poverty Guideline. Because the family status factor is intended for a public charge inadmissibility determination and not a direct comparison of a noncitizen's income with a noncitizen's household size, DHS decided to clarify a simpler definition of household size for use in a public charge inadmissibility determination that would better reflect if an individual is likely at any time to become a public charge in a totality of the circumstances assessment.

#### **d. Assets, Resources, and Financial Status**

*Comment:* One commenter disagreed with evaluating an applicant's assets as part of a public charge inadmissibility determination because some life events could negatively impact a family's finances at one point in time, and therefore availability of assets and resources is not a predictable factor. Another commenter expressed disapproval of using a noncitizen's limited assets or resources when such an assessment is unlikely to conceptualize the impact of low

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<sup>401</sup> See 8 CFR 212.21(f).

income immigrants to communities in the United States since noncitizens contribute greatly to the health of the U.S. economy and sometimes do so in professions that do not traditionally generate high income and therefore do not allow for the accumulation of wealth, assets, and resources, but remain essential to the economy.

*Response:* DHS disagrees that an applicant's assets, resources, and financial status should not be included in a public charge inadmissibility determination, and also disagrees that considering this factor diminishes the importance of certain low wage earners and their contributions to the United States. Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors include the noncitizen's assets, resources, and financial status.<sup>402</sup> DHS appreciates that some noncitizens may not hold significant assets or resources, however, and DHS agrees that this does not necessarily indicate that such a noncitizen is likely to become a public charge. DHS notes that the public charge inadmissibility determination is based on a totality of the noncitizen's circumstances, and no one factor, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, should be the sole criterion for determining if a noncitizen is likely to become a public charge.<sup>403</sup> DHS will review a noncitizen's circumstances, taking into account all of the statutory minimum factors, the Affidavit of Support Under Section 213A of the INA, if required, current and past use of public cash assistance for income maintenance, and long-term institutionalization at government expense in order to make a complete and fair public charge inadmissibility determination.

*Comment:* A farmworker advocacy organization discouraged DHS from considering debts and other financial obligations, stating that many farmworkers, especially H-2A workers,

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<sup>402</sup> See INA sec. 212(a)(4)(B)(i)(IV), 8 U.S.C. 1182(a)(4)(B)(i)(IV).

<sup>403</sup> See 8 CFR 212.22(b).

have accumulated significant debt even though it is illegal for recruiters to charge fees, however, debt does not impact their ability to work and does not create a reliance on the U.S. government. The commenter noted that H-2 workers are not eligible for most public benefits. Other commenters expressed concerns about the consideration of debt and financial liabilities given that some populations are particularly vulnerable to unfair or predatory debt practices. A commenter raised the issue of debt in the context of domestic or immigrant abuse – where partners or others are accruing debt without the consent of the noncitizen.

*Response:* DHS disagrees with commenters that DHS should not consider debts or other financial obligations in a public charge inadmissibility determination. Under this rule, DHS is determining whether a noncitizen is likely at any time to become primarily dependent on the government for subsistence.. DHS also notes that an individual’s financial obligations and debts affect the financial status of the individual, and an evaluation of a noncitizen’s assets without considering the noncitizen’s financial obligations and debts would result in an artificially inflated calculation of the noncitizen’s financial status, as those obligations and debts would decrease the finances that are actually accessible to the noncitizen. DHS agrees that if a noncitizen has financial obligations and debts that it does not necessarily indicate that the noncitizen is likely at any time to become a public charge. DHS will use a totality of the circumstances framework so that officers may assess the noncitizen’s circumstances as a whole. DHS also notes that VAWA noncitizens, T nonimmigrants and U nonimmigrants are exempt from the public charge ground of inadmissibility. With respect to H-2 nonimmigrants, DHS agrees that they are generally not eligible for public benefits. DHS also notes that these nonimmigrants can and should report the charging of unlawful recruitment fees.

*Comment:* One commenter stated that credit history should not be used in a public charge inadmissibility determination because it is an unreliable predictor of a person’s long-term financial stability or future earnings. The same commenter also stated that, absent a refusal to accept work, a person’s history of unemployment also should not be considered.

*Response:* DHS agrees that a noncitizen's credit history is not necessarily a predictor of a noncitizen's likelihood of becoming a public charge. This rule will not require noncitizens to submit evidence in relation to credit history in order to make a public charge inadmissibility determination.

DHS understands the commenter's concern that a person's history of unemployment may be considered negatively. DHS notes that a public charge inadmissibility determination will be made based on the totality of a noncitizen's circumstances, in which a noncitizen's employment history may be considered in light of the noncitizen's degrees, certifications, licenses, skills obtained through work experience or educational programs, and educational certificates that the noncitizen may have received or the income and assets employment may have generated. DHS understands that some noncitizens will have periods of unemployment and emphasizes that a history of unemployment is not a specific factor DHS has identified for a public charge inadmissibility determination but may be considered as part of a review of a noncitizen's assets, resources, and financial status in the totality of circumstances. In assessing a noncitizen's likelihood at any time of becoming a public charge, DHS will consider the statutory minimum factors, the Affidavit of Support Under Section 213A of the INA, if required, current and/or past receipt of public cash assistance for income maintenance, and long-term institutionalization at government expense in the totality of the circumstances.<sup>404</sup>

*Comment:* Several commenters made suggestions about what DHS should consider regarding the assets, resources, and financial status factor. One commenter stated that DHS should consider the assets and resources of all family members, including a sponsor, if the noncitizen has one. Another commenter suggested DHS only require evidence of assets attained most recently, for example during the past 1 to 2 years, to show sufficient assets for the public charge inadmissibility determination. One commenter suggested that DHS make a fair

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<sup>404</sup> See 8 CFR 212.22(b).



assessment of unpaid, volunteer, and other activities individuals undertake without paid compensation, based on effective minimum wage or rates consistent with those paid for similar work in the applicant’s relevant labor market, whichever is highest, and including reasonable paid fringe benefits.

*Response:* DHS agrees that it should consider the assets and resources of all family members, including a sponsor who executed an Affidavit of Support Under Section 213A of the INA, if applicable, but only if such family members are part of the applicant’s household. As such, DHS specifies in this rule that a noncitizen’s assets, resources, and financial status are demonstrated by the income, assets, and liabilities (excluding any income from public benefits listed in 8 CFR 212.21(b) and income or assets from illegal activities or sources such as proceeds from illegal gambling or drug sales) of the noncitizen’s household.<sup>405</sup> The exclusion of income from illegal activities, including illegal gambling or drug sales, is consistent with how USCIS treats sponsors’ household income, as it is defined in 8 CFR 213a.1, in the context of the Affidavit of Support Under Section 213A of the INA. In that context, a sponsor may not include any income from the intending immigrant derived from “unlawful sources”<sup>406</sup> or income from any household member derived “from illegal acts.”<sup>407</sup>

A noncitizen’s household includes the noncitizen as well as the noncitizen’s spouse, children, unmarried siblings under 21 years of age and physically residing with the noncitizen, any other individuals listed as dependents on the noncitizen’s Federal income tax return, and any other individual who lists the noncitizen as dependent on their Federal income tax returns.<sup>408</sup>

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<sup>405</sup> See 8 CFR 212.22(a)(1)(iv).

<sup>406</sup> See 8 CFR 213a.1 (definition of household income prohibits the sponsor including the intending immigrant’s income from unlawful sources as part of the sponsor’s household income).

<sup>407</sup> See USCIS, “Instructions for Affidavit of Support Under Section 213A of the INA,” OMB Control No. 1615-0075 (expires Dec. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-864instr.pdf> (last visited Aug. 16, 2022) (prohibiting the sponsor from “rely[ing] on a household member’s income from illegal acts, such as proceeds from illegal gambling or drug sales, to meet the income requirement even if the household member paid taxes on that income.”). *Cf. also* 8 CFR 204.6(e) and (j)(3) (consistent with section 203(b)(5)(D)(ii) of the INA, 8 U.S.C. 1153(b)(5)(D)(ii), defining “capital” for purposes of EB-5 immigrant petitions to exclude “[a]ssets acquired, directly or indirectly, by unlawful means (such as criminal activities)”).

<sup>408</sup> See 8 CFR 212.21(f).

If the applicant is required to submit an Affidavit of Support Under Section 213A of the INA, and if the sponsor who executed that affidavit is a member of the applicant's household as that term is defined in new 8 CFR 212.21(f), then such sponsor's income would be included in the applicant's household income when making a public charge inadmissibility determination.<sup>409</sup> However, if the sponsor who executed the Affidavit of Support Under Section 213A of the INA is not a member of the applicant's household but nonetheless provides some income to the applicant or another member of the applicant's household, that portion of income would be included in the applicant's household income when making a public charge inadmissibility determination.

DHS disagrees that recently acquired assets should be the only assets considered in a public charge inadmissibility determination. DHS recognizes that some assets are held longer term than others and has not included a time restriction on how long noncitizens have maintained their assets. While considering the assets, resources, and financial status of a noncitizen, DHS will consider the noncitizen's assets alongside the noncitizen's liabilities in order to account for the effect of financial liabilities on an individual's overall financial status in the totality of the circumstances.

DHS recognizes the value of unpaid, volunteer, and other activities individuals undertake without paid compensation. However, DHS is unable to clearly and fairly establish a system that would take into account the labor market and fringe benefits associated with comparable paid positions. DHS acknowledges that some unpaid or volunteer activities may equip a noncitizen with occupational skills, and DHS may therefore consider these skills under the education and skills factor as part of a public charge inadmissibility determination.

*Comment:* One commenter indicated that DHS should be flexible in the criteria and evidence required to demonstrate assets and income, as many noncitizens are unbanked and lack

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<sup>409</sup> See 8 CFR 212.22(a)(iv).

a credit history, and consider an applicant's particular circumstances especially when considering occupations with seasonal fluctuations, historically low wages, and unpredictable availability, such as agricultural work. A different commenter stated that individuals should be able to provide tax returns, even if filed with an ITIN, and should be able to provide evidence of income that resulted from unauthorized employment.

*Response:* DHS agrees that noncitizens should be able to present a variety of evidence to demonstrate their assets, resources, and financial status. DHS has not established any required evidence a noncitizen must submit to establish the income, assets, and liabilities of the noncitizen's household, and as such, will consider any evidence a noncitizen chooses to submit regarding this factor. If more information is needed to make a public charge inadmissibility determination, DHS may request an applicant to submit additional evidence prior to making a decision. DHS also emphasizes that a public charge inadmissibility determination is based on the totality of the noncitizen's circumstances and no one factor, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, is the sole criterion for determining if a noncitizen is likely at any time to become a public charge.<sup>410</sup>

While DHS will review any evidence a noncitizen chooses to submit to support a finding that the noncitizen is not likely at any time to become a public charge, DHS will not consider income or assets from illegal activities or sources. As DHS stated in the 2019 Final Rule, income derived from illegal activities or sources should be excluded from consideration including, but not limited to, income gained illegally from drug sales, gambling, prostitution, or alien smuggling both because of the strong policy interest in excluding consideration of this type of activity, and because it would likely be unwarranted to make a prospective determination that assumes the noncitizen would continue to receive such income in the future.

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<sup>410</sup> See 8 CFR 212.22(b).

As to the suggestion that applicants should be able to provide evidence of income that resulted from unauthorized employment, DHS agrees. Consistent with the approach taken in the 2019 Final Rule, DHS believes that limiting consideration of household income to only income that is derived from authorized employment would go beyond the purpose of this rule, which is aimed at determining whether a noncitizen has the education, skills, or other traits necessary to support themselves in the future. DHS will therefore consider any income derived from employment in the public charge inadmissibility determination in the totality of the circumstances, regardless of whether the household members had employment authorization, as long as the income is not derived from illegal sources, such as illegal gambling. As DHS noted in the 2019 Final Rule, whether or not the applicant or a member of the applicant's household engaged in unauthorized employment, and any immigration consequences flowing from such unauthorized employment, is a separate determination from the public charge inadmissibility determination.<sup>411</sup>

*Comment:* One commenter stated that DHS should prioritize consideration of a noncitizen's income, not just employment, because, according to the commenter, employment alone is not an accurate indication of an individual's ability to self-support. The commenter recommended that DHS should require noncitizens to demonstrate an ability to earn a wage equal to at least three times the federal poverty level. This level was suggested because section 213A of the INA, 8 U.S.C. 1183a, requires sponsors to demonstrate the means to maintain income of at least 125 percent of the Federal Poverty Guidelines, under which individuals may qualify for many means-tested public benefits, and individuals who make below 250 percent of the poverty level typically pay little to no Federal income tax.

*Response:* DHS has determined that no one factor, and no one specific element of a factor, will be prioritized over another in a public charge inadmissibility determination, other

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<sup>411</sup> "Inadmissibility on Public Charge Grounds," 84 FR 41292, 41420 (Aug. 14, 2019).

than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required.<sup>412</sup> DHS will consider a noncitizen's household's income, assets, and liabilities when considering the assets, resources, and financial status factor of a public charge inadmissibility determination. DHS has declined to specify required evidence for each factor, acknowledging that individuals may present a variety of evidence to support that they are not likely to become a public charge, and will consider a noncitizen's circumstances in their totality.

DHS disagrees with establishing a minimum income requirement for noncitizens to establish they are not likely to become a public charge. As stated previously, DHS will consider the noncitizen's household's income, assets, and liabilities. Income is not the sole criterion for establishing noncitizens' assets, resources, and financial status, and noncitizens may include the income, assets, and liabilities of their household members for this factor. DHS believes that considering the entire household creates a more accurate representation of the finances and resources available to a noncitizen, recognizing that multiple household members may contribute to the financial status of the household as a whole.

DHS also disagrees with the commenter's justification that DHS should require individuals to show income of at least 300 percent of the poverty line because individuals who make below 250 percent of the poverty level typically pay little to no Federal income tax. The public charge ground of inadmissibility is not intended to generate tax revenue, but to ensure that an individual is not likely at any time to become a public charge. DHS has interpreted "likely at any time become a public charge" as the likelihood of a noncitizen becoming primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.<sup>413</sup> This analysis requires a consideration of multiple factors, of which assets, resources, and financial status is only one.

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<sup>412</sup> See INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D); INA sec. 213A(a)(1), 8 U.S.C. 1183a(a)(1).

<sup>413</sup> See 8 CFR 212.21(a).

Finally, DHS does not administer the vast majority of public benefits programs and does not control the income eligibility requirements of public benefits programs, which vary from program to program and which may allow for individuals with an income higher than 125 percent of the Federal Poverty Guidelines (FPG) to receive benefits. DHS does not find this concern a persuasive reason to implement a specific minimum income threshold for the public charge inadmissibility determination, however, in part because of the reimbursement requirements of the Affidavit of Support under Section 213A of the INA, and in part because a specific minimum income threshold would be inconsistent with the totality of the circumstances approach taken in this rule. DHS notes that whether a sponsored immigrant ultimately receives public benefits for which they are eligible under PRWORA for which the sponsor should reimburse the benefit-granting agency is an issue addressed by the reimbursement provisions of section 213A of the INA, 8 U.S.C. 1183a, rather than the public charge ground of inadmissibility. Additionally, to the extent that this commenter is suggesting that DHS require an applicant to demonstrate income of at least 300 percent of the FPG because the sponsor's income, which must be at least 125 percent of the FPG, will be attributed to the applicant for determining eligibility for public benefits,<sup>414</sup> DHS notes that such a consideration is not warranted because it is not directly related to the public charge inadmissibility determination.

*Comment:* One commenter stated that where the immigrant's only income is public benefits, DHS should consider this income neutrally, without reference to specific benefits, such as by stating that the immigrant does not earn income rather than referencing the individual benefits used.

*Response:* DHS disagrees with this commenter's suggestion. While DHS agrees that income from public benefits should not be considered as income for the purposes of a public charge inadmissibility determination, DHS disagrees that the specific benefits a noncitizen

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<sup>414</sup> 8 U.S.C. 1631(a)(1).

receives should not be considered. DHS defines likely at any time to become a public charge as likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.<sup>415</sup> As discussed in the NPRM, DHS believes the “primarily dependent” standard is a reasonable interpretation of the statute and properly implements the policy objectives established by Congress.<sup>416</sup> DHS does not believe that the term is best understood to include a person who receives benefits from the government to help to meet some needs but is not primarily dependent on the government and instead has one or more sources of independent income or resources upon which the individual primarily relies.

DHS defines public cash assistance for income maintenance as SSI, TANF, State, Tribal, territorial, or local cash benefit programs for income maintenance.<sup>417</sup> When developing this proposed rule, as in 1999, DHS consulted with benefits-granting agencies, including USDA, which administers SNAP, and HHS, which administers TANF and Medicaid. DHS concluded that cash assistance for income maintenance and long-term institutionalization at government expense constituted the best evidence of whether a noncitizen is primarily dependent on the government for subsistence. By focusing on cash assistance for income maintenance and long-term institutionalization at government expense, DHS can identify those individuals who are likely at any time to become primarily dependent on the government for subsistence, without interfering with the administrability and effectiveness of other benefit programs that serve important public interests.<sup>418</sup>

*Comment:* To simplify a determination of whether a person is likely to become a public charge, one commenter recommended presuming a noncitizen is not likely to become a public charge if the noncitizen can demonstrate a household income of at least 125 percent of the FPG,

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<sup>415</sup> See 8 CFR 212.21(a).

<sup>416</sup> See 87 FR at 10606 (Feb. 24, 2022).

<sup>417</sup> See 8 CFR 212.21(b).

<sup>418</sup> See 87 FR at 10610 (Feb. 24, 2022).

or 100 percent of the FPG for noncitizens who are, or have household members who are, on active duty in the Armed Forces of the United States (other than active duty for training). The commenter recommended an income and asset calculation to account for the domestic and international income of all members of the household, including non-wage income such as child support, alimony, Social Security income, or investment income. The commenter also recommended taking into account expected income based on a labor certification and associated prevailing wage or job offer and estimated salary.

Another commenter similarly agreed that DHS should adopt a presumption of admissibility for noncitizens based on household income and the corresponding FPG, or for noncitizens who have submitted a sufficient Affidavit of Support Under Section 213A of the INA. This commenter proposed that if a noncitizen does not meet the requirements for this presumption, for example noncitizens who are not required to submit an Affidavit of Support Under Section 213A of the INA, they may be allowed to submit a Form I-134, Declaration of Financial Support. The commenter said this proposal will consider the noncitizen's employment or valid job offer and strike the proper balance between incorporating the outcomes created by the 1999 Interim Field Guidance and avoiding the overbreadth, confusion, and chilling impacts of the 2019 Final Rule.

*Response:* With respect to the proposal to establish a presumption that a noncitizen at a specific income level is not likely at any time to become a public charge, DHS declines to make this change. Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors include the noncitizen's age; health; family status;



assets, resources, and financial status; and education and skills.<sup>419</sup> DHS cannot limit a public charge inadmissibility determination to only one factor, but instead must consider all the factors as set forth by Congress. DHS believes that the establishment of a presumption on the basis of the single criterion proposed by the commenter would be unwarranted.

DHS agrees that considering the entire household creates a more accurate representation of the finances and resources available to a noncitizen, recognizing that multiple household members may contribute to the financial status of the household as a whole. Therefore, DHS will consider the income, assets, and liabilities (excluding any income from public benefits listed in 8 CFR 212.21(b) and income or assets from illegal activities or sources such as proceeds from illegal gambling or drug sales) of their household members for this factor.<sup>420</sup> DHS did not specify particular evidence noncitizens may submit to support they are not likely to become a public charge, and will consider all evidence submitted in a public charge inadmissibility determination. Therefore, while DHS will not independently assess a noncitizen's expected income based on a labor certification and associated prevailing wage, DHS may consider this evidence or evidence of a job offer and estimated salary, if submitted, in the totality of a noncitizen's circumstances in a public charge inadmissibility determination. DHS will also not limit the consideration of income to only income that appears on United States Federal income tax forms, and will consider all evidence submitted of income from lawful sources in order to account for income such as child support, alimony, Social Security income, and investment income. DHS will also consider any evidence submitted pertaining to expected future income

To address the recommendation that DHS accept Form I-134, Declaration of Financial Support,<sup>421</sup> as a substitute for noncitizens who are not required to file an Affidavit of Support

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<sup>419</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i). The statute also permits, but does not require, the consideration of a sufficient Affidavit of Support Under Section 213A of the INA, if required. See INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

<sup>420</sup> See 8 CFR 212.22(a)(1)(iv).

<sup>421</sup> DHS notes that Form I-134 was previously titled "Affidavit of Support."

Under Section 213A of the INA, DHS notes that the Declaration of Financial Support is intended to demonstrate financial support during an individual's temporary stay in the United States, and is therefore not a valid substitution. As stated previously, DHS will consider all evidence a noncitizen submits to support that the noncitizen is not inadmissible under the public charge ground, but DHS will not create or require a separate information collection or form to establish admissibility. DHS also notes that many commenters recommended a similar presumption that a sufficient Affidavit of Support Under Section 213A of the INA would establish that a noncitizen is not likely at any time to become a public charge and addresses that suggestion in more detail in Section III.I.2, Affidavit of Support Under Section 213A of the INA.

**e. Education and Skills**

*Comment:* One commenter disagreed with the consideration of education and skills in a public charge inadmissibility determination.

*Response:* DHS disagrees that an applicant's education and skills should not be included in a public charge inadmissibility determination. Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors include the noncitizen's education and skills.<sup>422</sup>

*Comment:* Two commenters wrote that an applicant's inability to speak and understand English does not predict whether an applicant can obtain employment in the United States. One of these commenters recommended DHS consider the educational opportunities available in noncitizens' countries of origin, skills should be broadly defined and not limited to definitions of "high skill" versus "low skill," and proficiency in English should not be included in the

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<sup>422</sup> See INA sec. 212(a)(4)(B)(i)(V), 8 U.S.C. 1182(a)(4)(B)(i)(V).

determination of education and skills, as a person's English proficiency or education level does not necessarily predict their ability to obtain employment in the United States.

*Response:* DHS agrees that the education and skills factor should be broadly defined to include a variety of abilities. Therefore, DHS has determined that education and skills can be evidenced by a noncitizen's degrees, certifications, licenses, skills obtained through work experience (including volunteer and unpaid opportunities) or educational programs, and educational certificates.<sup>423</sup> DHS believes this standard encompasses many abilities that may affect a noncitizen's employability, and therefore may decrease a noncitizen's likelihood of becoming a public charge. DHS also notes that this definition does not specifically define certain skills that would positively or negatively impact a public charge inadmissibility determination, including English language skills. DHS will consider such skills in the context of a totality of the circumstances determination.

*Comment:* One commenter recommended a detailed framework that would demonstrate qualifications associated with gainful employment and self-sufficiency, such as evidence of employment, self-employment, or a job offer, combined with educational achievements or occupational skills and experience. The commenter suggested that this approach would provide positive steps immigrants could follow to be better prepared if subject to a public charge inadmissibility determination.

Another commenter mentioned the education and work experience standards for diversity visa applicants, noting that this standard provides an already accepted framework for demonstrating that a noncitizen is likely to succeed in the United States and that such a showing should be considered a positive factor, and could be applied to a public charge inadmissibility determination with some modification to account for experience in occupations that do not require training or experience.

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<sup>423</sup> See 8 CFR 212.22(a)(1)(v).

*Response:* DHS agrees that a noncitizen may demonstrate their relevant education and skills through the noncitizen's degrees, certifications, licenses, skills obtained through work experience or educational programs, and educational certificates. However, given the differences in achievements and skills in occupational fields, DHS does not believe it can create a comprehensive guide that noncitizens should follow to prepare for a public charge inadmissibility determination. DHS acknowledges that certain immigration categories may require a separate determination of education or work experience, but notes that those specific eligibility requirements are separate from an inadmissibility determination. The public charge inadmissibility determination involves the consideration of a variety of factors, including education and skills, that are considered in the totality of a noncitizen's circumstances. Each determination is unique, and DHS cannot establish a specific framework that would encompass every situation or circumstance that would apply to all noncitizens equally and equitably. DHS believes that by identifying basic information that DHS will collect for the factors, including the education and skills factor, and a consideration of the totality of the circumstances accounts for the diversity of noncitizens' backgrounds in the clearest and fairest manner.

DHS agrees with the commenter that some occupations do not require training or previous experience, and accounts for this by including in the standard for education and skills those skills that noncitizens have obtained through overall work experience. This consideration will benefit those noncitizens who hold occupations that do not require official licenses or certifications but whose occupations impart skills that otherwise affect the noncitizen's overall employability. As previously stated, DHS believes that a broad interpretation of the statutory minimum factors best encompasses the diversity of noncitizens' backgrounds and declines to define specific skills that would positively or negatively impact a public charge inadmissibility determination,

*Comment:* One commenter recommended that DHS create appropriate carve-outs for certain groups of noncitizens who may be adversely affected by their background, including

children, primary caregivers, and certain retirees, and stated that it is not appropriate to apply equivalent standards to these groups as they may not have been able to attain an equivalent educational background or level of work experience due entirely to no fault of their own.

*Response:* DHS disagrees that different standards of the statutory minimum factors should be applied to different groups of people, as determined by their work experience or education background. Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors include the noncitizen's education and skills.<sup>424</sup> However, DHS appreciates commenters' concerns that a person's lack of education or work experience should not be determinative of their likelihood of becoming a public charge. For this reason, under this rule, determining a noncitizen's likelihood at any time of becoming a public charge must be based on the totality of the individual's circumstances.<sup>425</sup> No one factor, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, may be the sole criterion for determining if an individual is likely to become a public charge.<sup>426</sup> Education and skills is not the only factor taken into account in a public charge inadmissibility determination and does not automatically determine if a noncitizen is likely at any time to become a public charge. Additionally, DHS notes that some unpaid labor may equip a noncitizen with occupational skills, and DHS may therefore consider these skills under the education and skills factor as part of a public charge inadmissibility determination.

*Comment:* One commenter stated that considering statutory minimum factors for the public charge ground of inadmissibility is duplicative and unnecessary for those applicants who are subject to the public charge ground but are not required to provide an Affidavit of Support

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<sup>424</sup> See INA sec. 212(a)(4)(B)(i)(V), 8 U.S.C. 1182(a)(4)(B)(i)(V).

<sup>425</sup> See 8 CFR 212.22(b).

<sup>426</sup> See 8 CFR 212.22(b).

Under Section 213A of the INA, such as employment-based immigrants who must establish their work skills and diversity visa applicants who must demonstrate that they have a high school diploma (or the equivalent) or work experience.

Another commenter similarly stated that applicants who have previously obtained an H-1B nonimmigrant visa or an approved Form I-140, Petition for Alien Worker, should not need to provide additional information for the education and skills factor because it has already been documented and considered.

*Response:* DHS disagrees that considering the statutory minimum factors for applicants who are not required to provide an Affidavit of Support Under Section 213A of the INA is duplicative and unnecessary. Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), specifically requires that DHS consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge, which may include an Affidavit of Support Under Section 213A of the INA. The Affidavit of Support Under Section 213A of the INA is a contract between a sponsor and the U.S. Government under which the sponsor agrees that they will provide support to the sponsored immigrant at an annual income not less than 125 percent of the FPG during the period the obligation is in effect, to be jointly and severally liable for any reimbursement obligation incurred as a result of the sponsored immigrant receiving means-tested public benefits during the period of enforcement, and to submit to the jurisdiction of any Federal or State court for the purpose of enforcing the support obligation.<sup>427</sup> The Affidavit of Support Under Section 213A of the INA does not include a consideration of the statutory minimum factors as they relate to a noncitizen's circumstances, and as such, an exemption from this requirement does not automatically indicate that a noncitizen is not inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

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<sup>427</sup> INA sec. 213A(f)(2), 8 U.S.C. 1183a(f)(2).

DHS acknowledges that some noncitizens, including those who have previously obtained nonimmigrant employment visas or those who are applying for adjustment of status based on the diversity visa or employment-based categories, may have previously submitted evidence regarding their work skills, employment history, and education. Under this rule, DHS is updating its information collection to allow applicants for adjustment of status to indicate specifics regarding their education and skills, and will consider all evidence submitted by these noncitizens in order to make a final public charge inadmissibility determination. DHS also reviews the noncitizen's record, including previous applications and petitions and the associated evidence, while making a public charge inadmissibility determination. DHS will not specify particular initial evidence that must be submitted for a public charge inadmissibility determination. However, DHS also notes that the education and skills factor is only one part of a public charge inadmissibility determination and, as such, disagrees that a consideration of all the statutory minimum factors for any noncitizen subject to the public charge ground of inadmissibility is duplicative and unnecessary.

*Comment:* One commenter suggested only requiring applicants to provide evidence of their highest educational degree attained to satisfy the education and skills factor in a public charge inadmissibility determination.

*Response:* While DHS agrees that evidence of completed degrees is one method of demonstrating a noncitizen's education and skills, DHS also acknowledges that this factor not only includes formal education, but also encompasses other aspects that may be demonstrated through other means. DHS has therefore determined that, while a noncitizen may submit the highest degree achieved to support a finding that the noncitizen is not likely to become a public charge, a noncitizen may also provide evidence of certifications, licenses, skills obtained through work experience or educational programs, and educational certificates.<sup>428</sup>

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<sup>428</sup> See 8 CFR 212.22(a)(1)(v).

*Comment:* One commenter stated that noncitizens with a high school education or less should be required to demonstrate that they hold a skill that is in high demand and can be expected to earn a high enough salary that would largely eliminate the possibility of qualifying for any welfare program, with a skill that will earn at least three times the FPG as the standard that would show they will not need taxpayer-funded assistance. Citing an analysis of SIPP data,<sup>429</sup> the commenter indicated that noncitizen households where the head of household had only a high school education or less received public benefits at a higher rate than households where the head of household had at least some college education. The commenter also stated that, of households receiving public benefits (defined as including the Earned Income Tax Credit), 93 percent of noncitizen-headed households have at least one working member, as do 76 percent of households headed by a U.S.-born citizen.<sup>430</sup> The commenter urged that it is important for DHS to consider both employment and the noncitizen's total income, indicating that the primary focus should be on whether or not an immigrant can demonstrate an ability to earn a wage equal to at least three times the federal poverty level.

*Response:* DHS disagrees that it should establish a specific standard based on a noncitizen's education or particular skills or require that a noncitizen demonstrate the ability to earn income three times the Federal Poverty Guideline (FPG). DHS acknowledges that different occupations may encompass a variety of skills that may not be evidenced only through educational degrees, licenses, or certifications, but also through skills obtained through work experience or educational programs. DHS also notes that an assessment of whether a skill is in high demand and the corresponding calculation of an expected salary is a very complex assessment and would require detailed analysis, and possibly consultation with the Department

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<sup>429</sup> Steven Camarota and Karen Zeigler, Center for Immigration Studies, "63% of Non-Citizen Households Access Welfare Programs," Table 3 (Nov. 20, 2018), <https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs> (last visited Aug. 16, 2022).

<sup>430</sup> Steven Camarota and Karen Zeigler, Center for Immigration Studies, "63% of Non-Citizen Households Access Welfare Programs," Table 6 (Nov. 20, 2018), <https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs> (last visited Aug. 16, 2022).



of Labor, for each individual case. This suggested evaluation therefore presents an increased evidentiary burden on noncitizens, as well as an increased adjudicative burden on the agency, with no evidence of a corresponding benefit. Furthermore, the commenter did not present evidence that a higher education level equates to high demand skills.

DHS also disagrees that lack of “high demand” skills—which the commenter defined as job skills that would enable an individual to earn at least three times the federal poverty rate—indicates that a noncitizen is likely at any time to become primarily dependent on the government for subsistence. While the commenter cited to an analysis of SIPP data as support for the request to focus the public charge analysis on employment and income, the analysis cited is methodologically flawed and does not support the commenter’s premise. For one, neither the commenter, nor the analysis it cites, makes any connection between the level of education and “high demand” skills, or between education level and earnings, nor does the commenter explain what it means by “high demand” skills or how a noncitizen would demonstrate that they possess “high demand” skills. While the analysis cited by the commenter shows the percentages of U.S.-born citizen headed and noncitizen headed households that receive benefits relative to the head of household’s education level, the analysis does not account for earnings or family size. The analysis also includes a much broader set of public benefits than what would be considered under this rule (e.g., it includes EITC, WIC, school lunch program, SNAP, public housing). For example, rather than 81 percent of noncitizen households headed by a person with a high school degree or less receiving public benefits, as the commenter states, the analysis cited indicates that only 8.9 percent of noncitizen households headed by a person with no more than a high school degree received TANF and/or SSI.<sup>431</sup> In addition, the commenter does not offer any support for the proposition that all “high demand” skills equate to high pay, or that other factors that DHS

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<sup>431</sup> Steven Camarota and Karen Zeigler, Center for Immigration Studies, “63% of Non-Citizen Households Access Welfare Programs,” Table 3 (Nov. 20, 2018), <https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs> (last visited Aug. 16, 2022).

must examine under the totality of the circumstances could not lead to a determination that a highly skilled individual is likely at any time to become a public charge, for example advanced age, or a health condition preventing an applicant from working and using the “high demand” skill. DHS therefore disagrees that lack of a college education or “high demand” skills would justify a presumption that an applicant would become primarily dependent on the government for subsistence. For that reason, DHS declines to require that applicants demonstrate that they have “high demand” skills.

DHS also declines to include a specific income threshold as part of a public charge inadmissibility determination. A public charge inadmissibility determination is made based on the totality of a noncitizen’s circumstances. As stated previously, income is not the sole criterion for establishing noncitizens’ assets, resources, and financial status, and noncitizens may include the income, assets, and liabilities of their household members for this factor. DHS believes that considering the entire household and their income, assets, and liabilities creates a more accurate representation of the finances and resources available to a noncitizen, recognizing that multiple household members may contribute to the financial status of the household as a whole.

## **2. Affidavit of Support Under Section 213A of the INA**

*Comment:* One commenter stated that sponsors who execute an Affidavit of Support Under Section 213A of the INA on behalf of an intending immigrant should be held accountable to pay medical and other social welfare debts incurred by those immigrants who use public benefits prior to obtaining lawful status in the United States.

*Response:* The comment is outside the scope of the rulemaking. DHS did not propose any changes to the Affidavit of Support Under Section 213A of the INA, and did not propose to impose such a condition upon the public charge inadmissibility determination. Under section 213A of the INA, 8 U.S.C. 1183a, most family-based immigrants and certain employment-based immigrants are required to submit an Affidavit of Support Under Section 213A of the INA to

avoid being found inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).<sup>432</sup> In most cases, the individual who filed the immigrant petition on behalf of the immigrant must execute the Affidavit of Support Under Section 213A of the INA.<sup>433</sup> By executing an Affidavit of Support Under Section 213A of the INA, the sponsor is creating a contract between the sponsor and the U.S. Government under which the sponsor agrees that they will provide support to the sponsored immigrant at an annual income not less than 125 percent of the FPG during the period of time in which the obligation is in effect, be jointly and severally liable for any reimbursement obligation incurred as a result of the sponsored immigrant receiving means-tested public benefits during the period of enforcement, and submit to the jurisdiction of any Federal or State court for the purpose of enforcing the support obligation.<sup>434</sup> These sponsorship obligations, however, do not go into effect until after the intending immigrant's application for admission as an immigrant or application for adjustment of status is granted.<sup>435</sup> Because the comment is outside the scope of the rulemaking, and because a sponsor is not obligated to pay for medical expenses and other social welfare debts incurred by the noncitizen before the noncitizen became a lawful permanent resident, DHS declines to add this suggestion to the final rule.

*Comment:* Many commenters supported the favorable consideration of an Affidavit of Support Under Section 213A of the INA in a public charge inadmissibility determination. One such commenter, citing *Matter of Martinez-Lopez*,<sup>436</sup> noted that giving favorable consideration to an Affidavit of Support Under Section 213A of the INA is consistent with case law and longstanding practice, which recognizes that individuals who are or will be able to work, have

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<sup>432</sup> See INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D); INA sec. 213A(a)(1), 8 U.S.C. 1183a(a)(1).

<sup>433</sup> INA sec. 213A(f)(1)(D), 8 U.S.C. 1183a(f)(1)(D); INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

<sup>434</sup> INA sec. 213A(f)(2), 8 U.S.C. 1183a(f)(2).

<sup>435</sup> See INA sec. 213A, 8 U.S.C. 1183a; 8 CFR 213a.2(d); 8 CFR 213a.2(e)(1); 8 CFR 213a.1 (definition for sponsored immigrant).

<sup>436</sup> 10 I&N Dec. 409, 421 (BIA 1962).

adequate resources, or have a sponsor or other person willing to assist with their financial support should be presumed to be unlikely to become a public charge.

*Response:* As noted in the NPRM, DHS believes that treating a sufficient Affidavit of Support Under Section 213A of the INA favorably is consistent with the statute and precedent,<sup>437</sup> and is supported by the fact that sponsored noncitizens are less likely to turn to the government first for financial support because they can and have been known to successfully enforce the statutory requirement that sponsors provide financial support to the sponsored noncitizen at the level required by statute for the period the obligation is in effect.<sup>438</sup> Additionally, as noted in the NPRM, DHS believes that treating a sufficient Affidavit of Support Under Section 213A of INA favorably is supported by the Federal and State deeming provisions of 8 U.S.C. 1631 and 1632, which may reduce the likelihood that a sponsored noncitizen would be eligible for a means-tested benefit, and therefore, less likely to become a public charge at any time in the future.<sup>439</sup> As a result, under this rule, DHS will favorably consider a sufficient Affidavit of Support Under Section 213A of the INA, along with the statutory minimum factors, in the totality of the circumstances when assessing an applicant’s likelihood at any time to become a public charge.

*Comment:* While some commenters suggested that it would be nonsensical to deem an Affidavit of Support Under Section 213A of the INA alone as sufficient to find an applicant is not likely to become a public charge, many other commenters, including a group of 13 United States Senators, stated that the existence of a valid Affidavit of Support Under Section 213A of the INA should be deemed sufficient in itself to overcome a public charge inadmissibility determination except when significant public charge factors are present under the totality of the circumstances. These commenters stated that a presumption for admissibility upon presentation

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<sup>437</sup> See *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421-22 (BIA 1962) (“A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency.”).

<sup>438</sup> See INA sec. 213A(a)(1)(A), 8 U.S.C. 1183a(a)(1)(A). See, e.g., *Erlor v. Erlor*, 824 F.3d 1173 (9th Cir. 2016); *Belevich v. Thomas*, 17 F.4th 1048 (11th Cir. 2021); *Wenfang Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012).

<sup>439</sup> See 87 FR at 10619 (Feb. 24, 2022).

of a valid affidavit of support would be an administratively neutral, straightforward approach. Another commenter said that the existence of a valid Affidavit of Support Under Section 213A of the INA should normally tip the balance in the applicant's favor, supporting a finding that an applicant is not likely at any time to become a public charge. One commenter stated that, consistent with congressional intent, the rule should only require officers to consider the five statutory minimum factors if the applicant failed to submit a sufficient Affidavit of Support Under Section 213A of the INA.

Similarly, one group of commenters suggested that DHS amend the rule to create a rebuttable presumption that a noncitizen is not likely at any time to become a public charge where a sufficient Affidavit of Support Under Section 213A of the of the INA is submitted. The presumption would only be overcome, the commenters said, if, in the totality of the circumstances, clear and convincing evidence indicates that the applicant's age, health, family status, assets, resources, financial status, education, skills, and current or past receipt of public benefits make the noncitizen likely to become a public charge. These commenters stated that over the past two decades, the submission of a sufficient Affidavit of Support Under Section 213A of the INA has generally been sufficient to avoid a public charge inadmissibility determination. These commenters also wrote that their "[e]xtensive experience indicates that where an applicant for an immigrant visa or adjustment of status has a sufficient Affidavit of Support [Under Section 213A of the INA] or equivalent income or assets, the likelihood that such a person will become a public charge is virtually nonexistent." These commenters said that creating this presumption provides applicants with a clear standard against which they can measure the likelihood of success in overcoming the public charge ground of inadmissibility, facilitates streamlined adjudication of applications, and allows officers to focus their time and attention on cases in which substantive issues may exist.

*Response:* DHS disagrees with the suggestion that a sufficient Affidavit of Support Under Section 213A of the INA, alone, is enough to determine an applicant is not inadmissible under

section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). DHS further disagrees that it is appropriate to treat a sufficient Affidavit of Support Under Section 213A of the INA as creating a rebuttable presumption that an applicant is not likely at any time to become a public charge. Congress created the statutory minimum factors that DHS must consider as part of a public charge inadmissibility determination, which do not even include the Affidavit of Support Under Section 213A of the INA.<sup>440</sup> Rather, Congress gave DHS the discretion to consider any required Affidavit of Support Under Section 213A of the INA in a public charge inadmissibility determination.<sup>441</sup> Regardless of the existence of a sufficient Affidavit of Support Under Section 213A of the INA, Congress mandated that DHS, in every case, consider all of the statutory minimum factors in assessing whether an applicant is likely at any time to become a public charge without requiring the same for an affidavit.<sup>442</sup> Accordingly, and as noted in the NPRM<sup>443</sup> and the 1999 Interim Field Guidance,<sup>444</sup> DHS believes that a sufficient Affidavit of Support Under Section 213A of the INA does not in and of itself create a presumption that an applicant is not likely at any time to become a public charge or that it should determine the outcome of the public charge inadmissibility determination. Instead, DHS believes a sufficient Affidavit of Support Under Section 213A of the INA should be considered in the totality of the circumstances.<sup>445</sup>

DHS notes that although commenters claim that a sufficient Affidavit of Support Under Section 213A of the INA indicates that the likelihood that such a person will become a public charge is virtually nonexistent, commenters provided no data or evidence to support this statement.

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<sup>440</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>441</sup> See INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

<sup>442</sup> See INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>443</sup> See 87 FR at 10619 (Feb. 24, 2022).

<sup>444</sup> See “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689, 28690 (May 26, 1999).

<sup>445</sup> See 87 FR at 10619 (Feb. 24, 2022).

Therefore, DHS declines to add a provision to this rule that directs officers to treat a sufficient Affidavit of Support Under Section 213A of the INA as either outcome determinative or as creating a presumption that the applicant is not inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). However, under this rule and as noted in the NPRM, in making public charge inadmissibility determinations, DHS will consider the statutory minimum factors as set forth in the rule and favorably consider a sufficient Affidavit of Support Under Section 213A of the INA (i.e., a positive factor that makes an applicant less likely at any time to become a public charge in the totality of the circumstances), and the applicant's current and past receipt of public benefits in the totality of the circumstances.<sup>446</sup>

*Comment:* One commenter stated that a legally sufficient Affidavit of Support Under Section 213A of the INA should overcome any public charge concerns that arise from applicants whose health conditions are recorded as a Class B certification by the civil surgeon performing the immigration medical examination. Another commenter suggested that the Affidavit of Support Under Section 213A of the INA should be used to mitigate issues arising under the statutory factors within the totality of the circumstances, such as the health factor, which would consider an applicant's disability.

*Response:* DHS disagrees that a sufficient Affidavit of Support Under Section 213A of the INA, alone, overcomes any individual factor present in a noncitizen's case, including the health factor. As required under the statute, DHS must consider all of the statutory minimum factors in a public charge inadmissibility determination, including an applicant's health.<sup>447</sup> The statutory minimum factors that must be considered as part of the public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), do not include the Affidavit of Support Under Section 213A of the INA.<sup>448</sup> Rather, Congress provided that any

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<sup>446</sup> 8 CFR 212.22(a)(2), (b).

<sup>447</sup> INA sec. 212(a)(4)(B)(i)(II), 8 U.S.C. 1182(a)(4)(B)(i)(II).

<sup>448</sup> INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

Affidavit of Support Under Section 213A of the INA may be considered in the public charge inadmissibility determination.<sup>449</sup> As a result, under this rule, a sufficient Affidavit of Support Under Section 213A of the INA does not, on its own, outweigh the presence of any other factor, but instead, is considered, along with the statutory minimum factors and the receipt of public benefits, as defined in the rule, in the totality of the circumstances.<sup>450</sup>

DHS declines to mandate, as part of this rule, that a sufficient Affidavit of Support Under Section 213A of the INA, alone, overcomes any statutory minimum factor, including the health factor, as this would be inconsistent with the statute. The sufficient Affidavit of Support Under Section 213A of the INA should instead be considered in the totality of the circumstances. As a result, DHS declines to make any changes to the rule in response to this comment.

To the extent that these commenters are concerned with this rule's impact on individuals with disabilities, DHS notes that as reflected elsewhere in this rule, the final rule includes other provisions that are intended to better ensure fair and consistent treatment of individuals with disabilities – for example, clarifying the definition for long-term institutionalization at government expense, and considering evidence submitted by the applicant that the applicant's long-term institutionalization violates federal law, including the Americans with Disabilities Act or the Rehabilitation Act.<sup>451</sup>

*Comment:* Some commenters recommended that the rule bar immigration officers from questioning the credibility or motives of a sponsor who signs an Affidavit of Support Under Section 213A of the INA, so that officers look only at whether sponsors adequately document their ability to provide support for the sponsored immigrants. Other commenters agreed, arguing that similar to DOS consular officers, USCIS officers should not be permitted to introduce speculation by inquiring about the sponsor's or any joint sponsors' motives or intentions with

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<sup>449</sup> INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

<sup>450</sup> See 8 CFR 212.22(b).



respect to carrying out their support obligation because an Affidavit of Support Under Section 213A of the INA, is enforceable regardless of the sponsor's actual intent.

*Response:* DHS agrees with commenters that this rule should not require officers who are favorably considering a sufficient Affidavit of Support Under Section 213A of the INA as part of a public charge inadmissibility determination to consider the sponsor's credibility or underlying motives in executing that Affidavit. While the sponsor's credibility, intent, or underlying motives in executing that Affidavit of Support Under Section 213A of the INA might be relevant to assessing the sufficiency of the Affidavit of Support Under Section 213A of the INA in the first instance,<sup>452</sup> DHS notes that the sufficiency of an Affidavit of Support Under Section 213A of the INA is a separate threshold determination that occurs before an officer determines, under this rule, whether an applicant is likely at any time to become a public charge based on consideration of the statutory minimum factors, a sufficient Affidavit, and current or past receipt of public benefits.<sup>453</sup>

As set forth in the statute, when an applicant is required to submit an Affidavit of Support Under Section 213A of the INA, DHS determines its sufficiency by assessing whether the sponsor has demonstrated the means to maintain income at the required level.<sup>454</sup> In assessing the sufficiency of an Affidavit of Support Under Section 213A of the INA, DHS will consider whether the sponsor engaged in fraud or material concealment or misrepresentation in executing the Affidavit.<sup>455</sup> If DHS finds such fraud or material concealment or misrepresentation, including forgery, counterfeiting, falsification of documents, or the concealment or misrepresentation of any facts material to the Affidavit, DHS will determine that the Affidavit of Support Under Section 213A of the INA is insufficient.<sup>456</sup> If DHS determines that an Affidavit of Support Under

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<sup>452</sup> INA sec. 213A(f)(6)(A), 8 U.S.C. 1183a(f)(6)(A). 8 CFR 213a.2(c)(2)(ii).

<sup>453</sup> INA sec. 212(a)(4)(A) and (B), 8 U.S.C. 1182(a)(4)(A) and (B); 8 CFR 213a.2(c)(2)(iv); 8 CFR 212.22(a), (b).

<sup>454</sup> INA sec. 213A(f)(6)(A), 8 U.S.C. 1183a(f)(6)(A). 8 CFR 213a.2(c)(2)(ii).

<sup>455</sup> 8 CFR 213a.2(c)(2)(vi).

<sup>456</sup> 8 CFR 213a.2(c)(2)(vi).

Section 213A of the INA, when required, is insufficient, DHS will automatically determine that the applicant is inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), without consideration of the statutory minimum factors.<sup>457</sup>

However, under this rule,<sup>458</sup> once DHS determines that the Affidavit of Support Under Section 213A of the INA is sufficient, DHS would not consider the sponsor's credibility or motives in determining whether the applicant is likely at any time to become a public charge because, as explained more fully in the NPRM,<sup>459</sup> it would be duplicative to evaluate these issues that would be considered in assessing the sufficiency of the Affidavit of Support Under Section 213A of the INA in the first instance. DHS believes that such a reevaluation of a sponsor's credibility or underlying motives would create an unnecessary burden for DHS officers and the public and, accordingly, DHS does not intend to separately consider the sponsor's credibility or motives in executing the sufficient Affidavit of Support Under Section 213A of the INA as part of the totality of the circumstances analysis.

*Comment:* Several commenters stated that they believed that DHS should do an evaluation of the sponsor's Affidavit of Support Under Section 213A of the INA as part of the public charge inadmissibility determination. One commenter recommended that DHS require officers to assess the likelihood that a noncitizen's sponsor will actually provide financial support by looking at the closeness of the relationship between the noncitizen and sponsor to ensure sponsors will live up to their obligations in the Affidavit of Support Under Section 213A of the INA. One commenter suggested that DHS should add additional considerations regarding the evaluation of an Affidavit of Support Under Section 213A of the INA due to the "government's longstanding history of failure to hold sponsors accountable and to, where appropriate, take legal action to enforce those contracts."

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<sup>457</sup> INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D); INA sec. 213A(a)(1), 8 U.S.C. 1183a(a)(1).

<sup>458</sup> 8 CFR 212.22(c).

<sup>459</sup> 87 FR at 10618-10619 (Feb. 24, 2022).

*Response:* DHS disagrees that it should evaluate whether the sponsor who executed the Affidavit of Support Under Section 213A of the INA submitted a sufficient affidavit, i.e., has demonstrated the means to maintain income at the required level<sup>460</sup> again as part of determining whether an applicant is likely at any time to become primarily dependent on the government for subsistence. Because DHS already determines that the sponsor has demonstrated the means to maintain income at the required level and, therefore, that the Affidavit of Support Under Section 213A of the INA is sufficient, prior to favorably considering a sufficient Affidavit of Support Under Section 213A of the INA as set forth in this rule,<sup>461</sup> it would be unnecessary and duplicative to subsequently consider whether or not the sponsor's legally binding Affidavit of Support Under Section 213A of the INA is sufficient when conducting the totality of the circumstances analysis under this rule.

Additionally, DHS disagrees that DHS should evaluate whether a sponsor who executed a sufficient Affidavit of Support Under Section 213A of the INA will actually provide financial support by looking at the relationship between the sponsor and the intending immigrant as part of the totality of the circumstances analysis. Whether a sponsor will actually provide support to the intending immigrant is relevant to assessing the sufficiency of the Affidavit of Support Under Section 213A of the INA,<sup>462</sup> but that is a separate determination that occurs before an officer determines, under this rule, whether an applicant is likely at any time to become a public charge based on consideration of the statutory minimum factors, a sufficient affidavit, and any current and/or past receipt of public benefits.<sup>463</sup>

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<sup>460</sup> See INA sec. 213A(f)(1)(E), 8 U.S.C. 1183a(f)(1)(E); 8 CFR 213a.2(c)(2)(ii). DHS notes that a sponsor demonstrates the means to maintain income by presenting Federal income tax returns or by demonstrating significant assets of the sponsored immigrant or of the sponsor, if such assets are available for the support of the sponsored immigrant. See INA sec. 213A(f)(6), 8 U.S.C. 1183a(f)(6); 8 CFR 213a.2(c)(2).

<sup>461</sup> 8 CFR 212.22(a)(2).

<sup>462</sup> INA sec. 213A(f)(6)(A), 8 U.S.C. 1183a(f)(6)(A). 8 CFR 213a.2(c)(2)(ii).

<sup>463</sup> INA sec. 212(a)(4)(A) and (B), 8 U.S.C. 1182(a)(4)(A) and (B); 8 CFR 213a.2(c)(2)(iv); 8 CFR 212.22(a) and (b).

Accordingly, DHS declines to require its officers to consider whether the sponsor who executed the Affidavit of Support Under Section 213A of the INA will actually carry out their legally binding support obligation as part of the totality of the circumstances analysis.

*Comment:* One commenter recommended requiring that a sponsored immigrant who has received public benefits sue the sponsor for reimbursement of the public benefits received. The commenter noted that current regulations give the beneficiary this option but do not require it. This commenter said such provisions would incentivize noncitizens to promptly take action to obtain reimbursement.

*Response:* DHS declines to add a provision in this rule that requires a sponsored immigrant to sue the sponsor who executed the Affidavit of Support Under Section 213A of the INA for reimbursement of public benefits received by the sponsored immigrant. While DHS agrees that section 213A of the INA, 8 U.S.C. 1183a, permits, but does not require, the sponsored immigrant to enforce the support obligations against the sponsor,<sup>464</sup> this rule is not intended to address sponsorship obligations or enforcement of those obligations. Rather, the purpose of this rule is to prescribe how DHS determines whether a noncitizen is inadmissible to the United States under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), because they are likely at any time to become a public charge. Accordingly, DHS declines to include the proposed provision in this rule, which is outside the scope of the current rulemaking.

To the extent that this commenter is also recommending that DHS include a provision that would require a noncitizen subject to the rule to agree to seek reimbursement as part of the public charge inadmissibility determination, DHS notes that the sponsorship obligation and related reimbursement requirements that arise from executing an Affidavit of Support Under Section 213A of the INA are separate and distinct from the public charge inadmissibility determination, because these obligations and requirements do not go into effect until after the

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<sup>464</sup> See INA sec. 213A(a)(1)(B), 8 U.S.C. 1183(a)(1)(B).

public charge inadmissibility determination has been made and the intending immigrant has been admitted as an immigrant or granted adjustment of status. As a result, DHS declines to include a provision that requires a noncitizen subject to the rule to agree to seek reimbursement as part of the public charge inadmissibility determination.

*Comment:* One commenter stated that if DHS is going to treat an Affidavit of Support Under Section 213A of the INA as sufficient evidence that the applicant is not inadmissible, then DHS should include provisions in this rule pertaining to the enforceability of the affidavit.

*Response:* First, as noted above, under this rule, DHS does not treat an Affidavit of Support Under Section 213A of the INA as sufficient evidence on its own that an applicant is not inadmissible as likely at any time to become a public charge. Instead, as required under the statute, DHS will consider all of the statutory minimum factors in a public charge inadmissibility determination.<sup>465</sup> As Congress provided that DHS may consider any Affidavit of Support Under Section 213A of the INA in the public charge inadmissibility determination,<sup>466</sup> under this rule, DHS will favorably consider a sufficient Affidavit of Support Under Section 213A of the INA and the receipt of public benefits, as defined in the rule, in the totality of the circumstances.<sup>467</sup>

Nevertheless, with respect to this commenter's suggestion that DHS include provisions regarding the enforcement of the support obligations, DHS notes that this rulemaking is not intended to address the enforcement of the Affidavit of Support Under Section 213A of the INA. This is because enforcement of the obligations that attach once the application for an immigrant visa or adjustment of status is granted<sup>468</sup> is distinct from and occurs after the actual public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Further, if a sponsor fails to fulfill their support obligations, the sponsored immigrant or any Federal, state, local, or private agency that provided any public benefit to the sponsored immigrant may sue the

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<sup>465</sup> INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>466</sup> INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

<sup>467</sup> See 8 CFR 212.22(b).

<sup>468</sup> See INA sec. 213A, 8 U.S.C. 1183a.

sponsor to enforce the Affidavit of Support Under Section 213A of the INA.<sup>469</sup> Because the statute already allows any interested parties to sue to enforce an Affidavit of Support Under Section 213A of the INA, and because such changes would be outside the scope of the rulemaking, DHS does not believe that further updates to the enforcement procedures for an Affidavit of Support Under Section 213A of the INA would be appropriate at this time. Therefore, DHS will not, in adjudicating an adjustment of status application, consider the sponsor's potential future reimbursement in a public charge inadmissibility determination when there is not yet a reimbursement obligation. As further explained above, DHS declines to address sponsorship obligations or enforcement of those obligations in this rule.

### **3. Current and/or Past Receipt of Public Benefits**

*Comment:* Some commenters stated that children should not be penalized for previous or current receipt of benefits by their adult caregivers or other household members, because the receipt of public benefits during periods when children are vulnerable and economically needy is economically and socially helpful for their development and contributes to healthier adults with better employment outcomes. Another commenter also stated that children are generally not responsible for immigrating to the United States or enrolling in benefits and should therefore not be subject to the public charge ground of inadmissibility. Some commenters also recommended DHS state that the use of benefits as a child should not be included in a public charge inadmissibility determination, as this provides no evidence for future reliance on government programs and access to key supports by children has been associated with improvements in future economic outcomes.

*Response:* DHS appreciates the comments expressing concern about the consideration of past or current public benefit use by children. Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), DHS is required to make a predictive assessment of whether a child is likely at any

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<sup>469</sup> See INA sec. 213A(a)(1)(B), 8 U.S.C. 1183a(a)(1)(B).

time to become a public charge when a child is applying for admission or adjustment of status unless the child is within one of the categories expressly exempted by Congress. Only those categories designated by Congress are exempt from the public charge ground of inadmissibility.<sup>470</sup> DHS notes that Congress did not exclude children from the public charge ground of inadmissibility and therefore, unless a child is seeking admission or adjustment of status in a classification that Congress expressly exempted from the public charge ground of inadmissibility, for example adjustment of status as a special immigrant juvenile,<sup>471</sup> DHS must apply the ground to applications for admission or adjustment of status and must take into account the factors in the totality of the circumstances. A public charge inadmissibility determination takes into account the totality of a noncitizen's circumstances, including the noncitizen's age.

While DHS will not create a different standard for children, DHS intends to issue guidance as appropriate that will clarify considerations that are relevant to a child's receipt of public benefits in the totality of the circumstances.

With respect to commenters' concern that children will be penalized for benefits received by their adult caregivers or household members, DHS also notes that unless the child was a named beneficiary for the public benefits, those public benefits will not be considered. DHS is defining "receipt (of public benefits)" separately from its definition of "likely at any time to become a public charge."<sup>472</sup> In this definition, DHS makes clear that the receipt of public benefits occurs when a public benefits-granting agency provides public benefits to a noncitizen, but only where the noncitizen is listed as a beneficiary. DHS recognizes that this policy differs from the policy announced under the 1999 Interim Field Guidance and the IRCA legalization regulations,<sup>473</sup> but notes that the statute does not require a determination that includes benefits

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<sup>470</sup> See 8 CFR 212.23.

<sup>471</sup> INA sec. 245(h)(2)(A), 8 U.S.C. 1255(h)(2)(A).

<sup>472</sup> See 8 CFR 212.21.

<sup>473</sup> See discussion in Definitions—Receipt of Public Benefits.

where only the applicant's relatives are listed as beneficiaries, and that there are strong public policy reasons to avoid chilling effects in this context.

In addition, and similarly to the 2019 Final Rule, applying for a public benefit on one's own behalf or on behalf of another would not constitute receipt of public benefits by the noncitizen applicant, nor would approval for future receipt of a public benefit on the noncitizen's own behalf or on behalf of another. If, however, a noncitizen has been approved for future receipt of a public benefit that would be considered under this rule, that information may be considered by an officer in the totality of the circumstances. Any evidence of approval for future receipt of a public benefit on behalf of an applicant, while not constituting receipt of public benefits, would indicate a probability of future receipt of public benefits and be considered by DHS as probative of being likely of becoming a public charge in the future. Finally, this definition would make clear that a noncitizen's receipt of public benefits solely on behalf of another, or the receipt of public benefits by another individual (even if the noncitizen assists in the application process), would also not constitute receipt of public benefits by a noncitizen. Therefore, under this rule, noncitizens will not be penalized for previous or current use of benefits by their adult caregivers or other household members where they were not named beneficiaries.

*Comment:* Some commenters recommended that DHS exclude from consideration in public charge inadmissibility determinations the receipt of public benefits by active-duty U.S. service members and their spouses and children, as was done in the 2019 Final Rule. Although these commenters alleged that the NPRM is generally too lenient, they expressed concern that the NPRM if finalized might operate to the detriment of some active-duty service members and their families. These commenters stated that DHS should provide a special dispensation for service members and their families, regardless of DHS's belief that they would not generally be receiving the benefits that would be considered, given the expansive list of exemptions and



exclusions for a number of benefits and classes of noncitizens. The commenters did not provide data regarding the receipt of public benefits by this particular population.

*Response:* DHS appreciates the commenters' expression of concern for U.S. service members and their spouses and children and shares this concern. The exclusion of consideration of public benefits used by active-duty members of the U.S. military in the 2019 Final Rule relied significantly on the fact that that rule included the consideration of non-cash benefits, in particular SNAP, a supplemental program that this rule does not include in the public charge inadmissibility determination.<sup>474</sup> DHS agrees that receipt of non-cash benefits by U.S. service members and their spouses and children does not provide a good indication that those service member and their families are likely at any time to become public charges. Unlike these commenters, however, DHS believes that the same is also true of other members of the public.

Because this rule generally excludes consideration of non-cash benefits (other than long-term institutionalization at government expense), DHS does not believe that there is a need to create the sort of specialized exception for service members that it determined was required under the 2019 Rule. According to data provided by DOD, as of April 30, 2022, a total of 99 active-duty personnel use TANF and 572 use SSI, out of approximately 1.34 million active-duty service members.<sup>475</sup> Also according to DOD, as of April 30, 2022, a total of 1 active-duty service

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<sup>474</sup> See "Inadmissibility on Public Charge Grounds," 84 FR 41292, 41371 (Aug. 14, 2019); U.S. Gov't Accountability Office, GAO-16-561, "Military Personnel: DOD Needs More Complete Data on Active-Duty Servicemembers' Use of Food Assistance Programs" (July 2016), <https://www.gao.gov/assets/680/678474.pdf> (last visited July 13, 2022) (reporting estimates ranging from 2,000 active duty servicemembers receiving SNAP to 22,000 such servicemembers receiving SNAP). Effective FY16, Congress implemented a recommendation by the Military Compensation and Retirement Modernization Commission to sunset DOD's Family Subsistence Supplemental Allowance Program within the United States, Puerto Rico, the U.S. Virgin Islands, and Guam; SNAP receipt may have increased somewhat following termination of the program. See Pub. L. 114-92, div. A, sec. 602, 129 Stat. 726, 836 (Nov. 25, 2015); Military Comp. & Ret. Modernization Comm'n, Final Report 187 (Jan. 2015) ("The [Family Subsistence Supplemental Allowance Program] should be sunset in the United States, Puerto Rico, Guam, and other U.S. territories where SNAP or similar programs exist, thereby reducing the administrative costs of a duplicative program.").

<sup>475</sup> Benefit use data provided by the Defense Manpower Data Center to DHS on July 12, 2022. The total number of active-duty service members is publicly available at Defense Manpower Data Center, "Active Duty Military Strength Summary," <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports> (last visited July 12, 2022).

member who is not a U.S. citizen or U.S. national uses TANF, and no active-duty service members who are not U.S. citizens or U.S. nationals use SSI.<sup>476</sup>

As a result, DHS does not believe that it is necessary to specifically exclude from consideration benefits received by active-duty U.S. service members and their spouses and children in the public charge inadmissibility determination because it does not believe that active-duty U.S. service members would generally be affected by the public benefits considered under this rule. DHS is adopting a standard similar to the one used in the 1999 Interim Field Guidance and NPRM, which defined “public charge” based on primary dependence on the government for subsistence as demonstrated by the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. DHS is not considering the receipt of SNAP benefits, which are frequently utilized by service members and their families, in this rule.

USCIS notes that noncitizens must generally be LPRs<sup>477</sup> in order to join the United States military and LPRs only are subject to the public charge ground of inadmissibility in limited circumstances.<sup>478</sup> Further, under section 329 of the INA, 8 U.S.C. 1440, all noncitizens honorably serving in the U.S. military at the present time, which is a specifically designated period of hostilities, may be eligible to naturalize (without spending a specific period of time as an LPR or having been lawfully admitted to the United States for permanent residence) if they meet the other eligibility requirements.<sup>479</sup> In accordance with E.O. 14012, DHS and DOD are working together diligently to facilitate naturalization for eligible noncitizen service members

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<sup>476</sup> Benefit use data provided by the Defense Manpower Data Center to DHS on July 14, 2022.

<sup>477</sup> See USA.gov, “Join the Military,” <https://www.usa.gov/join-military> (last visited July 12, 2022). However, under the Military Accessions Vital to National Interest (MAVNI) program, certain noncitizens who were asylees, refugees, TPS beneficiaries, deferred action beneficiaries, or nonimmigrants in certain categories could enlist. DOD ceased recruiting service members through the MAVNI program in 2016.

<sup>478</sup> LPRs do not apply for adjustment of status and they are generally not considered to be applicants for admission when they return from a trip abroad. However, in certain limited circumstances, an LPR will be considered an applicant for admission and subject to an inadmissibility determination upon their return to the United States. See INA sec. 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C).

<sup>479</sup> See USCIS Policy Manual, Vol. 12, Part I, Ch. 3, “Military Service during Hostilities (INA 329),” <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3> (last visited July 12, 2022).

and are dedicated to making naturalization services available to all noncitizen service members as soon as they are eligible.<sup>480</sup>

In summary, noncitizens make up a very small percentage of active duty service members, those who are serving are generally LPRs, those who are serving are eligible to naturalize immediately if they meet the other eligibility requirements, and DHS/DOD are taking steps to make naturalization available to them as soon as they are eligible, and even if not yet naturalized the LPR service members are only subject to the public charge ground of inadmissibility in exceptionally limited circumstances. Finally, as noted above, only one active-duty service member who is not a U.S. citizen or U.S. national uses TANF, and no active-duty service members who are not U.S. citizens or U.S. nationals use SSI. Given these facts, it is highly unlikely that any active-duty noncitizen service member would use SSI or TANF and also be considered an applicant for admission and subject to a public charge inadmissibility determination prior to their naturalization.

Moreover, in all cases, DHS is only considering receipt of public cash assistance for income maintenance received by the applicant and not the receipt of such assistance by the applicant's family members, including the applicant's spouse and children. DHS is defining "receipt (of public benefits)" separately from its definition of "likely at any time to become a public charge."<sup>481</sup> In this definition, DHS makes clear that the receipt of public benefits occurs when a public benefit granting agency provides public benefits to a noncitizen, but only where the noncitizen is listed as a beneficiary. In addition, applying for a public benefit on one's own behalf or on behalf of another would not constitute receipt of public benefits by the noncitizen

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<sup>480</sup> See "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans," 86 FR 8277 (Feb. 5, 2021). See "Oversight of Immigrant Military Members and Veterans," Subcomm. on Immigr. and Citizenship, H. Comm. on the Judiciary, 117th Cong. (2022) (statement of Debra Rogers, Director of the Immigrant Military Members and Veterans Initiative, DHS, and statement of Stephanie P. Miller, Director, Office of Enlisted Personnel Policy, DOD), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4935> (last visited July 13, 2022).

<sup>481</sup> See 8 CFR 212.21(d) and (a), respectively.

applicant, nor would approval for future receipt of a public benefit on the noncitizen's own behalf or on behalf of another. This definition for receipt (of public benefits) makes clear that the noncitizen's receipt of public benefits solely on behalf of another, or the receipt of public benefits by another individual (even if the noncitizen assists in the application process), will also not constitute receipt of public benefits by the noncitizen. DHS believes that including a further, explicit confirmation that this definition applies to active-duty U.S. military spouses and children may create confusion, because doing so could imply that those benefits would be considered for other non-active duty U.S. military spouses and children when in fact that is not the case.

Finally, to the extent that commenters were suggesting that DHS should fully exempt active-duty service members, their spouses, and their children from the public charge ground of inadmissibility, DHS reiterates the discussion above in section III.G in response to other comments requesting exemptions for certain categories of noncitizens. Only those categories designated by Congress are exempt from the public charge ground of inadmissibility,<sup>482</sup> and although DHS can and will issue guidance that will clarify considerations that are relevant to current and/or past receipt of public benefits by active duty servicemembers and their families, DHS declines to exempt the whole category from the public charge ground of inadmissibility.

*Comment:* One commenter expressed concern about the DHS statement that the longer a noncitizen had received benefits in the past and the greater the amount of benefits, the stronger the implication that a noncitizen is likely to become a public charge, because the amount of benefits and length of time benefits are available varies by locality and State for TANF, General Assistance, and Guaranteed Income pilots. Furthermore, the commenter stated that a calculation that considers these factors would necessarily discriminate against immigrants living in States or localities with more generous benefits than those with more limited programs available to them, and setting guidelines based on amount and time on aid creates a disproportionate harm to

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<sup>482</sup> See 8 CFR 212.23.

immigrants who live and receive support in States and localities that prioritize their wellbeing through more robust programs. Other commenters also recommended a clarification to the regulatory text that institutionalization at government expense for short periods of time for rehabilitation purposes should not be considered in a public charge inadmissibility determination, and that only Medicaid section 1905(a) institutional services will be considered.

*Response:* DHS notes and appreciates the commenter's concern about the differences in availability and guidelines pertaining to public benefit programs in different localities and States and how that could impact the public charge inadmissibility determination. DHS believes, however, that consideration of public cash assistance for income maintenance and long-term institutionalization at government expense should remain a part of the public charge inadmissibility determination. Even with the differences that exist throughout the country on the local and State level, past public benefit receipt, including long-term institutionalization at government expense, has long been considered in the public charge inadmissibility determination. During development of this rule, DHS consulted with HHS, which administers TANF and Medicaid. As part of that consultation, HHS provided an on-the-record letter to DHS included with the NPRM expressing their general support for the approach to public charge inadmissibility taken by INS in the 1999 Interim Field Guidance and 1999 NPRM, and specifically supported an understanding of public charge linked to being primarily dependent on the government for subsistence as demonstrated by the receipt of cash assistance for income maintenance or long-term institutionalization at government expense. As suggested by HHS in its on-the-record consultation letter, DHS is replacing the term "institutionalization for long-term care at government expense," used in the 1999 Interim Field Guidance and 1999 NPRM, with "long-term institutionalization at government expense," in order to better describe the specific types of services covered and the duration for receiving them. Consistent with the 1999 Interim Field Guidance and 1999 NPRM, and included in regulation text at section 212.21(c), long-term

institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods or for rehabilitation purposes.

The vast majority of public comments received in response to the 2021 ANPRM and the 2022 NPRM supported excluding past or current use of, or eligibility for, HCBS from the public charge inadmissibility determination. This approach is also supported by HHS. In its on-the-record consultation letter included with the NPRM, HHS encouraged DHS to “consider clarifications to its public-charge framework that would account for advancements over the last two decades in the way that care is provided to people with disabilities and in the laws that protect such individuals.” Specifically, HHS suggested that HCBS should not be considered in public charge inadmissibility determinations. HHS affirmed, as discussed above, that “HCBS help older adults and persons with disabilities live, work, and fully participate in their communities, promoting employment and decreasing reliance on costly government-funded institutional care.” The HHS letter also distinguished HCBS from long-term institutionalization at government expense by stating that HCBS do not provide “total care for basic needs” because they do not pay for room and board. In its letter, HHS also encouraged DHS to take into account “legal developments in the application of Section 504 since 1999,” including looking at whether a person might have been institutionalized at government expense in violation of their rights. As a result of these considerations, DHS believes that it is important to exclude consideration of HCBS, but continue to include consideration of long-term institutionalization at government expense, as well as public cash assistance for income maintenance.

DHS further notes that “long-term institutionalization” is the only category of Medicaid-funded services to be considered in public charge inadmissibility determinations.<sup>483</sup> The 1999 Interim Field Guidance indicates that “short term rehabilitation services” are not to be considered for public charge purposes, but it does not otherwise describe the length of stay that is relevant

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<sup>483</sup> Defined as institutional services under section 1905(a) of the Social Security Act.

for a public charge inadmissibility determination. Generally, DHS considers “long-term institutionalization” to be characterized by uninterrupted, extended periods of stay in an institution, such as a nursing home or a mental health institution. Under this approach, DHS, for example, would not consider a person to be institutionalized long term if that person had sporadic stays in a mental health institution, where the person was discharged after each stay. On the other hand, DHS would consider a person to be institutionalized long-term if the person remained in the institution over a long period of time, even if that period included off-site trips or visits without discharge.

*Comment:* One commenter said that receiving benefits for a period of time allows people to get their health back on track and can be beneficial to both the individual and society. Commenters also stated that receiving benefits for a short period of time, or receiving temporary benefits, does not show a prospective likelihood of primary dependence on governmental support but did not provide a citation for that statement. One commenter recommended DHS impose a minimum 5-year window for past benefit usage in the public charge inadmissibility determination, which would be in line with PRWORA’s 5-year waiting period required for an individual to become a “qualified alien” to obtain eligibility for most Federal public benefits, while another commenter suggested a time limit of 1 year.

Another commenter cited a 2017 survey of service providers that showed 85% of respondents said that TANF is a very critical resource for a significant number of domestic violence and sexual assault victims, so the commenter recommended the rule explicitly exclude past benefits use that has been short-term or time-limited, or for emergent needs, including cash assistance for survivors who need short-term income maintenance. One commenter recommended also that if DHS considers past receipt of benefits, the officer should consider whether the assistance was used by survivors of domestic violence, serious crimes, disasters, an accident, pregnant or recently pregnant persons, or children, in that public benefits may have been used to overcome hardships caused by a temporary situation that no longer applies and does

not predict future use. Some commenters emphasized that DHS should not consider these benefits at all.

*Response:* DHS appreciates the comment and concern for individuals who use public benefits on a short-term, set term, or temporary basis. DHS does not believe that it would be fair or equitable to set an arbitrary time frame on the use of benefits (such as five years); rather, DHS believes that short-term or temporary use of benefits is best considered under the totality of circumstances framework that this rule will promulgate and that has been used by DHS (and the former INS) for over 20 years. With this rule, DHS makes clear in the regulatory text that DHS will consider the amount, duration, and recency of receipt, and that the current and/or past receipt of these public benefits is not alone sufficient for determining whether an individual is inadmissible because DHS would also consider the statutory minimum factors in each case before making a determination under the totality of the circumstances.<sup>484</sup>

Furthermore, as for the comment that recommends not considering public benefit use from certain vulnerable populations, DHS clarifies, in this rule, which classes of individuals are exempt from the public charge ground of inadmissibility or for whom a waiver is available. DHS agrees that it is important in this rule to make clear who is exempted from the public charge ground of inadmissibility, such as those who are VAWA self-petitioners under section 212(a)(4)(E)(i) of the Act. A list of those who are exempted from 212(a)(4) of the Act can be found at 8 CFR 212.23. Additionally, in this rule DHS has identified the following groups for exclusion from consideration of receipt of certain public benefits: (1) receipt of public benefits when a noncitizen is in a category exempt from public charge;<sup>485</sup> and (2) receipt of public benefits by those granted refugee benefits.<sup>486</sup> If an applicant is not exempt from the public charge

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<sup>484</sup> See 8 CFR 212.21(a).

<sup>485</sup> See 8 CFR 212.22(d).

<sup>486</sup> See 8 CFR 212.22(e).



ground of inadmissibility and no waiver is available, the applicant can nonetheless describe their temporary circumstances to DHS, which DHS will consider in the totality of the circumstances.

*Comment:* A commenter stated that utilization of TANF and SSI alone should not make someone likely to become a public charge. Another commenter stated that cash assistance should not be more heavily weighted than other types of assistance because the totality of the individual's circumstances should be taken into account. Other commenters stated that DHS should explicitly state that use of SSI or TANF alone is not determinative in a public charge inadmissibility determination. One comment also stated that use of such benefits should be considered in the context of why they are received, along with any positive factors under the forward-looking totality of circumstances test.

*Response:* DHS reiterates, as stated in the NPRM, that it intends to continue the longstanding approach to the public charge ground of inadmissibility that does not rely on any one factor alone in making a public charge inadmissibility determination. DHS understands that there is confusion about how receipt of public benefits is considered as a result of the concept of “heavily weighted factors” that was included in the 2019 Final Rule. As noted elsewhere in this preamble, that rule is no longer in effect and DHS does not propose any heavily weighted factors in this current rule. DHS appreciates the commenter's suggestion that DHS should explicitly state that use of SSI or TANF alone is not determinative in a public charge inadmissibility determination. Instead of singling out SSI and TANF, however, DHS is making clear in the regulatory text that current and/or past receipt of public cash assistance for income maintenance (as well as long-term institutionalization at government expense) will not alone be a sufficient basis to determine whether an applicant is likely at any time to become a public charge.<sup>487</sup> As the rule defines “public cash assistance for income maintenance,” this provision already includes SSI and TANF (as well as State, Tribal, territorial, or local cash benefit programs for income

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<sup>487</sup> See 8 CFR 212.22(a)(3).

maintenance). The regulatory text further states that DHS will consider such receipt in the totality of the circumstances, along with the other factors, and will consider the amount and duration of receipt, as well as how recently the noncitizen received the benefits,<sup>488</sup> to determine whether the noncitizen is likely at any time to become a public charge. This rule also clearly states that no one factor, including current or past receipt of public benefits, apart from the lack of a sufficient Affidavit of Support Under Section 213A of the INA where required, should be the sole criterion for determining whether an applicant is likely to become a public charge.

*Comment:* Many commenters stated that DHS should only consider current receipt of TANF and SSI in a public charge inadmissibility determination, as any consideration of past receipt of benefits would create a chilling effect that would harm immigrants and their families and put public health at risk. Similarly one commenter stated that the ability to predict future public benefit use based on past use of SSI is weak because low-income noncitizen immigrants are much less likely to receive SSI benefits than similar U.S.-born adults and their use of benefits lessens over time. The commenter stated that past receipt of public benefits is not relevant in the prospective public charge inadmissibility determination because, generally, a person who has received public benefits in the past and is not receiving them currently has experienced a change in circumstances. For example, a person who previously relied on TANF may have secured employment after completing a degree or vocational program. Moreover, the commenter stated that benefits are not mentioned in the INA's public charge inadmissibility provisions and arguably could be excluded from consideration altogether. One of these commenters stated that DHS should not consider any past use of benefits in the prospective public charge inadmissibility determination and should strike questions about past receipt of public benefits from the I-485 form.

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<sup>488</sup> See 8 CFR 212.22(a)(3).

*Response:* DHS appreciates but disagrees with the comments that stated that past public benefit use should not be considered in the public charge inadmissibility determination. DHS notes that it has limited which past benefits are relevant to the determination that an individual will be likely at any time to become a public charge. Past long-term institutionalization at government expense has long been considered in the public charge inadmissibility determination. DHS will consider past or current long-term institutionalization at government expense in the totality of the circumstances. DHS further notes that changes in an individual's circumstances, as well as changes in the availability of different types of public benefits, can impact an individual's public benefit usage. While DHS agrees that past use is not determinative of future use, it is a factor that DHS believes is necessary to take into account along with the other factors, in the totality of the circumstances. To the extent that the commenter above describes an individual who at one point in the past relied on TANF, but now has steady employment that allows them to support their needs after they gained a degree or vocational program, under the rule, those considerations would be taken into account on a case-by-case basis considering those factors as well as the others set forth in the statute and these regulations in the totality of circumstances. To the extent that circumstances have changed since the period of past long-term institutionalization, those changed circumstances will be considered.

*Comment:* Several commenters recommended that DHS clarify that only current long-term institutionalization be considered, as past institutionalization may reflect a medical issue that has since been resolved, a lack of access to community-based services that have since been provided, a lack of accessible housing, or other factors that do not suggest a likelihood of future institutionalization.

*Response:* DHS disagrees that only current long-term institutionalization should be considered. Past long-term institutionalization at government expense has long been considered in the public charge inadmissibility determination. DHS notes that long-term institutionalization is the only category of Medicaid-funded services to be considered in public charge

inadmissibility determinations.<sup>489</sup> Although the 1999 Interim Field Guidance indicated that “short term rehabilitation services” are not to be considered for public charge purposes, it did not otherwise describe the length of stay that is relevant for a public charge inadmissibility determination. In this rule, generally, DHS will consider “long-term institutionalization” to be characterized by uninterrupted, extended periods of stay in an institution, such as a nursing home or a mental health institution. Under this approach, DHS, for example, would not consider a person to be institutionalized long-term if that person had sporadic stays in a mental health institution, where the person was discharged after each stay. On the other hand, DHS would consider a person to be institutionalized long term if the person remained in the institution over a long period of time, even if that period included off-site trips or visits without discharge. DHS would also note that, given advances in alternatives to receiving care in institutional settings, prior receipt of long-term institutional services, even for extended periods of time, is not necessarily determinative of requiring institutional care in the future. In this rule, DHS will consider past or current receipt of long-term institutional services in the totality of the circumstances.

*Comment:* One commenter stated that immigrants should be allowed to benefit from the same assistance that citizens benefit from, stating that it will be more difficult for immigrants to integrate into society if they are not able to access the same benefits as citizens, imposing an artificial barrier to success for the immigrants. One commenter suggested that consideration of receipt of public benefits is dehumanizing. This commenter said that immigrants are less likely to use government benefits than U.S. citizens and a law that only views them as takers, not givers, is dehumanizing.

Similarly, another commenter stated that the current law punishes poor immigrants by penalizing government assistance usage, which leads to families not applying for benefits for

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<sup>489</sup> Defined as institutional services under section 1905(a) of the Social Security Act.

which they are eligible, making it harder for them to integrate into society due to the economic strain. Another commenter stated that while some people will only need public benefits for a short period, others may need to rely on them indefinitely, and it would be inhumane and discriminatory to uphold regulations that reject people in either circumstance if they are in need of public assistance.

*Response:* DHS appreciates the comments about the importance of public benefits to immigrants and that taking into account past or current benefit use in the immigration admissibility determination can have negative effects on immigrants subject to the ground of inadmissibility. Congress, however, created the public charge ground of inadmissibility at section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and the ground of inadmissibility must be applied except where Congress indicated otherwise. As discussed elsewhere in this preamble, DHS believes that it is important to consider a noncitizen's past or current receipt of certain benefits, to the extent that such receipt occurs, as part of the public charge inadmissibility determination. DHS opts for an approach in which DHS considers past or current receipt of the benefits most indicative of primary dependence on the government for subsistence but excludes from consideration a range of benefits that are less indicative of primary dependence, and for which applicants for admission and adjustment of status are likely ineligible in any event. This rule is an effort to faithfully implement the public charge ground of inadmissibility without unnecessarily and at this point, predictably, harming separate efforts related to health and well-being of people whom Congress made eligible for supplemental supports.

DHS understands that certain individuals may be less likely to become a public charge in the long term after a certain duration of benefits use and that individuals may use benefits for shorter or longer periods of time. However, the material question in a public charge inadmissibility determination is whether the person is likely to become a public charge at some point in the future. Thus, DHS has chosen not to limit its definition of public charge based on the potential that a noncitizen who is currently a public charge may not remain so indefinitely.

Instead, the appropriate way to address that nuance is through the totality of the circumstances prospective determination.

#### **4. Long-term Institutionalization in Violation of Federal Law**

*Comment:* One commenter stated that USCIS decisionmakers who predict institutionalization in the future for a currently institutionalized person would be incorrectly assuming that the institution is a proper placement and not in violation of Federal law when, in fact, these individuals can and should be receiving HCBS. The commenter stated that the only situation in which institutionalization would not violate Federal law would be when it is directly chosen by the person with a disability, and thus recommends DHS remove the consideration of long-term institutionalization at government expense from the public charge inadmissibility determination.

*Response:* DHS disagrees that the only institutionalization at government expense that does not violate Federal law would be institutionalization that is directly chosen by the person with a disability, as Federal law does not impose this type of requirement with respect to institutionalization.<sup>490</sup> Indeed, as noted in the NPRM, Federal law requires placement of individuals in the most integrated setting appropriate to their needs, which does not indicate that only patient-requested institutionalization complies with Federal law. While some institutionalization of individuals with disabilities may occur in violation of Federal law, commenters provided no evidence that suggests that institutionalization is almost always in violation of Federal law.<sup>491</sup> To the extent that institutions, including nursing homes and mental health facilities, generally assume total care of the basic living requirements of individuals who are admitted, including room and board,<sup>492</sup> DHS believes that such long-term institutionalization

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<sup>490</sup> 87 FR at 10613 (Feb. 24, 2022).

<sup>491</sup> 87 FR at 10613 (Feb. 24, 2022).

<sup>492</sup> See Ctrs. for Medicare & Medicaid Services, Medicaid.gov, “Institutional Long Term Care,” <https://www.medicare.gov/medicaid/ltss/institutional/index.html> (last visited Aug. 16, 2022). See also 42 CFR 435.700 et seq.

at government expense (at any level of government) is properly considered under this rule because, as noted by HHS in its consultation letter,<sup>493</sup> it is evidence of being or likely to become primarily dependent on the government for subsistence.

DHS notes that, consistent with the NPRM,<sup>494</sup> it has excluded Medicaid-funded HCBS that help older adults and people with disabilities live, work, and fully participate in their communities, as HCBS do not include payments for room and board, and therefore do not provide the total care for basic needs provided by institutions.

*Comment:* One commenter stated that the provision that officers consider whether a person's current or past institutionalization would violate Federal law does not reflect the true circumstances of institutionalized people and incorrectly assumes there are cases in which institutionalization is ever required. The commenter further stated that there is no reason any person with a disability needs to be institutionalized, citing a study that shows even those with the highest support needs and most significant disabilities can live in the community when the supports and services they need are provided there. The commenter opined that given this, there is never a situation where institutionalization is the most integrated setting appropriate and therefore all institutionalization at government expense would violate the Americans with Disabilities Act's integration mandate as required by *Olmstead v. L.C.* and thus Federal law.

*Response:* DHS disagrees that all institutionalization at government expense is a per se violation of the Americans with Disabilities Act (ADA) and Section 504. As DHS noted in the NPRM,<sup>495</sup> although the ADA requires public entities, and Section 504 requires recipients of Federal financial assistance to provide services to individuals in the most integrated setting appropriate to their needs, DHS understands that some institutionalization of individuals with disabilities may occur in violation of the Federal laws. But DHS does not believe that all

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<sup>493</sup> 87 FR at 10613 (Feb. 24, 2022).

<sup>494</sup> See 87 FR at 10614 (Feb. 24, 2022).

<sup>495</sup> 87 FR at 10614-10615 (Feb. 24, 2022).

institutionalization necessarily violates the ADA and Section 504, and the commenters have not provided evidence that this is the case. As a result, DHS continues to believe that while it is appropriate to consider current or past institutionalization along with the other factors listed in 8 CFR 212.22(a) when determining the likelihood at any time of becoming a public charge in the totality of the circumstances, the best way to ensure that DHS is not considering institutionalization that violates Federal law is to ensure that applicants are provided a meaningful opportunity to provide evidence that current or past institutionalization is in violation of Federal law, including the ADA or the Rehabilitation Act. DHS notes that the fact that an applicant is or has been long-term institutionalized at government expense is not outcome determinative under this rule.<sup>496</sup> Instead, under this rule, DHS will, in the totality of the circumstances, take into account all of the statutory minimum factors, the applicant's current or past receipt of public benefits considered in the rule, as well as the sufficient Affidavit of Support Under Section 213A of the INA, if required, in determining the noncitizen's likelihood at any time of becoming a public charge.<sup>497</sup>

## **5. Other Factors to Consider**

*Comment:* One commenter suggested DHS clearly indicate that it will not consider any submission or receipt of a fee waiver in the public charge inadmissibility determination because USCIS fee waivers are limited to certain forms and applications and this chilling effect punishes noncitizens not subject to the public charge ground of inadmissibility and that DHS should include this information in an update to the instructions for Form I-912, Request for Fee Waiver.

*Response:* DHS understands the commenter's concern regarding the chilling effects associated with a public charge inadmissibility determination that considers requesting or receiving a fee waiver. Under this rule, DHS will consider the five statutory minimum factors,<sup>498</sup>

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<sup>496</sup> 8 CFR 212.22(a)(3); 8 CFR 212.22(b).

<sup>497</sup> 8 CFR 212.22(b).

<sup>498</sup> See 8 CFR 212.22(a)(1).



a sufficient Affidavit of Support Under Section 213A of the INA, when required, and a noncitizen's current and/or past receipt of public cash assistance for income maintenance<sup>499</sup> or long-term institutionalization at government expense,<sup>500</sup> in the totality of the circumstances.<sup>501</sup> However, DHS notes that the totality of the circumstances analysis includes all information or evidence in the record before the officer that is relevant to a public charge inadmissibility determination. DHS is only collecting initial information from applicants as related to the factors as outlined in new 8 CFR 212.22(a) and the accompanying application, which does not ask for information regarding past requests for and receipt of fee waivers. However, DHS may generally consider all evidence and information in the record that is relevant to making a public charge inadmissibility determination, including evidence that the noncitizen previously applied for and received a fee waiver. Such consideration is consistent with the understanding of the totality of the circumstances approach from the administrative decisions, as well as with the approach taken by the former INS when it promulgated 8 CFR 245a.3. Accordingly, DHS declines to adopt the commenter's suggestions regarding fee waivers.

*Comment:* One commenter suggested that whether a person has paid taxes should be considered in a public charge inadmissibility determination.

*Response:* DHS appreciates the suggestion that paying taxes should be considered in a public charge inadmissibility determination. While taxes are not a minimum factor designated by Congress or contained in the rule, a public charge inadmissibility determination includes a review of a noncitizen's assets, resources, and financial status. Noncitizens may submit tax documents if they wish to provide additional information about their income or other financial information, however, DHS will not require specific evidence from applicants to make a public charge inadmissibility determination for adjustment of status apart from the questions on the

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<sup>499</sup> See 8 CFR 212.21(b).

<sup>500</sup> See 8 CFR 212.21(c).

<sup>501</sup> See 8 CFR 212.22(b).

Form I-485, Application to Register Permanent Residence or Adjust Status. Additionally, as noted above, DHS may generally consider all evidence and information in the record that is relevant to making a public charge inadmissibility determination, including evidence that the noncitizen failed to file taxes.

*Comment:* One commenter stated that country of origin should never be a considered in a public charge inadmissibility determination. Another commenter stated that there are shortcomings with assessing immigration applicants based on race.

*Response:* DHS agrees that race and country of origin should never be considered in a public charge inadmissibility determination and has not included either as a factor to be considered. DHS will make a public charge inadmissibility determination in the totality of circumstances, considering the statutory minimum factors, an Affidavit of Support Under Section 213A of the INA, when required, and current and/or past receipt of public cash for income maintenance and long-term institutionalization at government expense.<sup>502</sup>

*Comment:* One commenter stated that even if a person is found to be at risk of becoming a public charge, opportunities in the United States may allow them to learn new skills and can end their dependency on public assistance and suggested this potential for added value to the United States should be considered.

*Response:* DHS understands that opportunities in the United States may give noncitizens new opportunities to learn skills that may end their primary dependence on public assistance. However, DHS is required to determine if an applicant for admission or adjustment of status is likely at any time to become a public charge, following consideration of the minimum factors established by Congress in section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). DHS determined that a reasonable implementation of this statute is to consider the statutory minimum factors, a sufficient Affidavit of Support Under Section 213A of the INA, where required, and a

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<sup>502</sup> See 8 CFR 212.22.

noncitizen's current and/or past receipt of cash assistance for income maintenance and long-term institutionalization at government expense. Noncitizens are inadmissible to the United States if they are subject to the public charge ground of inadmissibility and are unable to establish, in the totality of the circumstances, that they are not likely at any time to become primarily dependent on the government for subsistence based on a consideration of these factors, and as noted above, any other information or evidence in the record that is relevant to a public charge inadmissibility determination.

This means that DHS may take into account a noncitizen's potential in certain circumstances, for example a noncitizen's education and skills may suggest potential future employment that would generate sufficient income for that noncitizen to not be primarily dependent on the government for subsistence, but does not mean that potential alone is determinative that a noncitizen is not inadmissible under the public charge ground.

## **J. Totality of the Circumstances**

### **1. General Comments in Support of the Totality of the Circumstances Language**

*Comment:* One commenter commended DHS on its return to the totality of the circumstances standard, which in their view better aligns with congressional intent than what was promulgated by the past administration in the 2019 Final Rule. Another commenter said that they supported the focus on the totality of the circumstances and favorable consideration of the affidavit of support. Another commenter stated that they support and recommend that DHS retain the proposed rule's language that an applicant's use of countable benefits and any one statutory factor do not automatically make an individual a public charge. One commenter stated that they support the proposed language regarding the term, "totality of the circumstances," where no one factor other than the failure to provide a legally sufficient affidavit of support, where one is required, should determine whether the applicant is likely to become a public charge.

Commenters stated that the totality of the circumstances framework is straightforward and has

resulted in efficient, consistent, and predictable public charge inadmissibility determinations in the past.

*Response:* DHS appreciates the support for the totality of the circumstances framework proposed in the NPRM. DHS plans to maintain the longstanding and straightforward framework set forth in the 1999 Interim Field Guidance, under which officers consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, where required, in the totality of the circumstances, without separately codifying the standard and evidence required for each factor as was done in the 2019 Final Rule. This proposal received widespread support in the comments in response to the NPRM and DHS believes that including elements consistent with the standard previously in place for over 20 years, under which officers will consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA (when required) in the totality of the circumstances, along with other elements of the rule, will lead to more consistent and fair inadmissibility determinations.

*Comment:* A commenter stated that it is inequitable to distinguish between long-term institutionalization and HCBS because States differ in what they offer to treat someone's needs and that the mere presence of someone long-term in an institution should not weigh more heavily than other factors in the public charge inadmissibility determination. That commenter stated that some States are more likely to default to long-term institutionalization even though HCBS are shown to be more effective such as for people with brain injuries, mental illness, developmental disabilities, autism, and older adults, because there are not more appropriate options available.

*Response:* DHS appreciates the comment and reiterates, as stated in the NPRM, that it intends to continue the longstanding approach to the public charge ground of inadmissibility that does not rely on any one factor alone in making a public charge inadmissibility determination. DHS understands that there is confusion as a result of the heavily weighted factors that were included in the 2019 Public Charge Final Rule. That rule, where heavily weighted factors were included, is no longer in effect and DHS does not propose any heavily weighted factors in this

current rule. The fact that an individual is long-term institutionalized will not by itself establish that they are likely to become a public charge. Generally, DHS considers “long-term institutionalization” to be characterized by uninterrupted, extended periods of stay in an institution, such as a nursing home or a mental health institution. Under this approach, DHS, for example, would not consider a person to be institutionalized long term if that person had sporadic stays in a mental health institution, where the person was discharged after each stay. On the other hand, DHS would consider a person to be institutionalized long term if the person remained in the institution over a long period of time, even if that period included off-site trips or visits without discharge. Some public comments received in response to the 2021 ANPRM supported excluding past or current use, or eligibility for, HCBS from the public charge inadmissibility determination. In response to the NPRM, many commenters, including this commenter, noted that there is inconsistent access to HCBS, which may affect whether an individual is using HCBS or institutional care. DHS made the decision to exclude HCBS after consultation with HHS. In its on-the-record consultation letter, HHS encouraged DHS to “consider clarifications to its public-charge framework that would account for advancements over the last two decades in the way that care is provided to people with disabilities and in the laws that protect such individuals.” Specifically, HHS suggested that HCBS should not be considered in public charge inadmissibility determinations. HHS affirmed, as discussed above, that “HCBS help older adults and persons with disabilities live, work, and fully participate in their communities, promoting employment and decreasing reliance on costly government-funded institutional care.” The HHS letter also distinguished HCBS from long-term institutionalization at government expense by stating that HCBS do not provide “total care for basic needs” because they do not pay for room and board. In its letter, HHS also encouraged DHS to take into account “legal developments in the application of Section 504 since 1999,” including looking at whether a person might have been institutionalized at government expense in violation of their rights.

*Comment:* One commenter stated that they support the elimination of the provision in the 2019 Final Rule that gave additional negative weight to children under the age of 18 and to an individual's disability or health condition in the "totality of circumstances" test, as those additional weights were discriminatory to children who are vulnerable and require specialized medical services. Furthermore, the commenter stated that the reversal of those provisions is a critical and important step to securing the health and well-being of millions of children in immigrant families.

*Response:* DHS agrees that the rule should not assign particular weight to any individual factor in the totality of the circumstances analysis. In addition to the evidentiary and paperwork burdens established by the 2019 Final Rule and discussed above, DHS has determined that the adjudicative framework established by the 2019 Final Rule was unduly prescriptive. As reflected in Congress's instruction that several factors specific to the applicant must be considered, each public charge inadmissibility determination must be individualized and based on the evidence presented in the specific case, and the relative weight of each factor and associated evidence is necessarily determined by the presence or absence of specific facts. Consequently, the designation of some factors as always "heavily weighted" suggested a level of mathematical precision that would be unfounded and inconsistent with the long-standing standard of considering the totality of the individual's circumstances. DHS may periodically issue guidance that will help officers determine how the different factors may affect the likelihood that a noncitizen will become a public charge at any time, including an empirical analysis of the best available data, as appropriate.

## **2. Recommendations to Improve the Totality of the Circumstances Framework**

*Comment:* Several commenters stated that DHS failed to recognize that the 2019 Final Rule standards better instructed officers how to conduct adjudications instead of providing nothing more than a list of factors absent additional guidance. These commenters appear to suggest that DHS should return to the standards set forth in the 2019 Final Rule. Another

commenter stated that by removing the concept of weighted evidence, and failing to justify any policy determination or provide a reasoned analysis, the proposed rule makes it impossible for an adjudicator to determine that a noncitizen is a public charge. Commenters also stated that the lack of clear guidance for officers led to the underutilization of the public charge ground of inadmissibility.

*Response:* DHS disagrees with the commenters' suggestion that it should return to the 2019 Final Rule's standards, which codified a limited number of heavily weighted negative and positive factors, but did not provide meaningful guidance as to how such "heavy weight" would be applied in the context of an individual case, relative to other factors that would also be assigned weight in the analysis. As noted in the NPRM,<sup>503</sup> DHS believes that the straightforward and clear approach taken in this rule reflects the longstanding approach to making public charge inadmissibility determinations and will reduce the burdensome and unnecessary evidentiary and information collection requirements pertaining to the factors under the 2019 Final Rule. DHS believes the simplified approach in this rule better ensures that DHS officers making public charge inadmissibility determinations make the most efficient and fair decisions. Therefore, DHS declines to adopt these commenters' suggestions.

*Comment:* One commenter recommended explicit language that warns of the degree to which implicit bias and stereotypes about the quality of life of people with significant disabilities could color any assessment of the total circumstances of a person with a disability, including an undervaluation of that person's education, skills, and present state of health. One commenter further encouraged DHS to incorporate into its regulations or guidance instructions that direct officers, where applicable, to consider the circumstances underlying a person's use of the relevant benefits or limited resources, including having experienced domestic violence or other crimes, a public health or natural disaster or economic downturn, or being pregnant, a child or

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<sup>503</sup> 87 FR at 10617 (Feb. 24, 2022).

having a new child. Under these circumstances, the temporary use of benefits can help individuals and families regain stability, health or safety, and does not predict (and may even prevent) an individual's need for this assistance in the future. One commenter further expressed concern that since there is little guidance on how the statutory factors interrelate, officers may bring the same biases against people with disabilities as shared by the general public. Another commenter stated that DHS must make sure to look at the totality of the individual's circumstances in a nondiscriminatory manner. A couple of commenters stated that the evaluation of the likelihood at any time of becoming a public charge is a prospective determination based on the totality of circumstances that requires an officer to guess as to what may happen in the future and guarantees that the officer's own subjective opinions will muddle the analysis.

*Response:* DHS appreciates the comments that express concern about subjectivity, discrimination, and bias. However, with this rule, DHS intends to maintain the totality of the circumstances framework that has been in place for over 20 years with the 1999 Interim Field Guidance and has been developed in several Service, BIA and Attorney General decisions and codified in INS regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986.<sup>504</sup>

The 1999 Interim Field Guidance required officers to make public charge inadmissibility determinations in the totality of the circumstances and indicated that no single factor, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, when required, would control the decision.<sup>505</sup> As a departure from the 1999 Interim Field Guidance and the 1999 NPRM, in this rule, DHS also recognizes that there are some circumstances where an individual may be institutionalized on a long-term basis in violation of Federal anti-discrimination laws,

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<sup>504</sup> See "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689, 28690 (May 26, 1999); see also, e.g., *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974) ("The determination of whether an alien is likely to become a public charge under section 212(a)(15) is a prediction based upon the totality of the alien's circumstances at the time he or she applies for an immigrant visa or admission to the United States.").

<sup>505</sup> "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689, 28690 (May 26, 1999).



including the ADA and Section 504. The possibility that an individual will be confined without justification thus should not contribute to the likelihood that the person will be a public charge, and to this end, the rule provides that officers who are assessing the probative value of past or current institutionalization will take into account, when applicable and in the totality of the circumstances, any evidence that past or current institutionalization is in violation of Federal law, including the ADA or the Rehabilitation Act.<sup>506</sup> In this rule, DHS also clarifies that the presence of a disability, as defined by section 504 of the Rehabilitation Act, is not alone a sufficient basis to determine that a noncitizen is likely at any time to become a public charge, including that the individual is likely to require long-term institutionalization at government expense. Instead, under this rule, DHS will, in the totality of the circumstances, take into account all of the statutory minimum factors, including the applicant's health, as well as the sufficient Affidavit of Support Under Section 213A of the INA, if required, in determining the noncitizen's likelihood at any time of becoming a public charge.

Furthermore, in regards to concerns about bias by individual officers, DHS notes that there is a general regulatory requirement that USCIS officers "explain in writing the specific reasons for a denial."<sup>507</sup> This requirement applies to all applications and petitions adjudicated by USCIS, including denials based on a public charge inadmissibility determination.<sup>508</sup> DHS is now codifying the language set forth in the 1999 Interim Field Guidance that reiterated more specifically the general requirement that every written denial decision issued by USCIS based on the public charge ground of inadmissibility include a discussion of each of the factors. In this rule, DHS intends that every written denial decision issued by USCIS based on the totality of the

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<sup>506</sup> See *Olmstead v. L.C.*, 421 527 U.S. 581 (1999); U.S. Department of Justice, Civil Rights Division, Disability Rights Section, "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*," Feb. 25, 2020, [https://www.ada.gov/olmstead/q&a\\_olmstead.htm](https://www.ada.gov/olmstead/q&a_olmstead.htm) (last visited Aug. 16, 2022)..

<sup>507</sup> INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B). See "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689 (May 26, 1999). See "Inadmissibility on Public Charge Grounds," 84 FR 41292, 41502 (Aug. 14, 2019).

<sup>508</sup> 8 CFR 103.3(a)(1)(i).

circumstances will “reflect consideration of each of the factors . . . and specifically articulate the reasons for the officer’s determination.”<sup>509</sup> Although existing DHS regulations and policy already require USCIS officers to specify in written denials the basis for the denial,<sup>510</sup> DHS believes that a provision explicitly requiring a discussion of the factors considered in the denial is consistent with the statute and is necessary to ensure that any denial based on this ground of inadmissibility is made on a case-by-case basis in light of the totality of the circumstances. DHS believes these safeguards help ensure that the officer’s decision is based on the statutory factors and guidance.

*Comment:* One commenter stated that age and health are statutory factors that cannot be changed through rulemaking, but that those factors, as well as SSI and long-term institutionalization, disproportionately impact older adults and persons with disabilities, with higher rates in communities of color. Therefore, this commenter suggested that to limit the discriminatory impact of the rule, it is important that no one factor be given determinative weight.

*Response:* DHS designed this rule to adhere to, and implement, congressional instructions. DHS notes that it does not intend for this rule to have a discriminatory effect on applicants with disabilities, and emphasizes that disability, as defined by section 504 of the Rehabilitation Act, will not alone be a sufficient basis to determine whether a noncitizen is likely at any time to become a public charge.<sup>511</sup> Also, as stated previously, for long-term institutionalization at government expense, DHS will consider evidence submitted by noncitizens to support a declaration that their institutionalization violated Federal law.<sup>512</sup> DHS cannot rule out the possibility of disproportionate impacts on certain groups (whether as a consequence of

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<sup>509</sup> See 8 CFR 212.22(c).

<sup>510</sup> See 8 CFR 103.3(a)(1)(i). See also USCIS Policy Manual, Vol. 7, Part A, Ch. 11, “Decision Procedures,” <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-11> (last visited Aug. 16, 2022).

<sup>511</sup> See 8 CFR 212.22(a)(4).

<sup>512</sup> See 8 CFR 212.22(a)(3).

the policy contained in this rule, the 1999 Interim Field Guidance, or any other policy), but this rule is neutral on its face and DHS in no way intends that it will have such impacts on any protected group. DHS is committed to applying this rule neutrally and fairly to all noncitizens who are subject to it and has included a provision requiring that USCIS denials on public charge grounds be accompanied by a written explanation that specifically articulates the reasons for the officer's determination.<sup>513</sup> In addition, and as stated throughout this rule, DHS requires the analysis of the totality of the applicant's circumstances, taking into consideration all of the factors, with no single factor being outcome determinative.

*Comment:* One commenter recommended that the final rule include guidance that officers consider the impact of domestic violence, sexual assault, human trafficking, and other gender-based violence in the totality of the circumstances, and DHS should provide guidance for limiting consideration of factors that would unfairly penalize survivors for the violence they have experienced, or make it more difficult for them to escape abuse. The commenter also suggested that the final rule consider the supportive and protective effects of access to secure legal status for survivors, as recognized in VAWA, as adjustment of status or admission increases a survivor's ability to escape the violence or overcome trauma as well as provide access to employment and supportive networks.

*Response:* While DHS appreciates the comments and suggestions as they relate to survivors of domestic violence, sexual assault, human trafficking, and other gender-based violence, in general, these survivors, and those applying for immigration benefits who fall under certain humanitarian categories, are exempt from the public charge ground of inadmissibility. With this rule, DHS intends to clarify that these individuals are exempt by specifically listing the statutory and regulatory exemptions to the ground of inadmissibility in the regulation. For the

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<sup>513</sup> See 8 CFR 212.22(c).

most part, the categories of individuals mentioned by the commenter are included in the listed exemptions found at 8 CFR 212.23.

Furthermore, Congress expressed a policy preference that individuals in certain categories should be able to receive public benefits without risking adverse immigration consequences. DHS believes that Congress did not intend to later penalize such noncitizens for using benefits while in these categories because doing so would undermine the intent of their exemption. Given the nature of these populations and the fact that if they were applying for admission or, as permitted, adjustment of status under those categories they would be exempt from the public charge ground of inadmissibility, it is reasonable for DHS to exclude from consideration those benefits that an applicant received while in a status that is exempt from the public charge ground of inadmissibility. Therefore, DHS is setting forth a final rule that states that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as listed in 8 CFR 212.23(a), or for which the noncitizen received a waiver of public charge inadmissibility, as stated in 8 CFR 212.23(c).<sup>514</sup> However, under this rule, any benefits received prior to or subsequent to the noncitizen being in an exempt status would be considered in a public charge inadmissibility determination in the totality of the circumstances, including consideration of any mitigating information that the applicant may wish to bring to DHS's attention.

*Comment:* Two commenters stated that DHS should clarify the standards for a public charge inadmissibility determination and how officials will employ them within the rule itself, not in later guidance. One of the commenters remarked that because the rule proposes to issue guidance later as to how the totality of the circumstances should be assessed, those affected still

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<sup>514</sup> See 8 CFR 212.22(a) and (c).

have no knowledge, clarity, or certainty as to how the factors will be weighed, and the use of future guidance to determine who is likely to become a public charge allows DHS to change the standards without the use of the full notice and comment rulemaking process, avoiding accountability and compromising consistency, and further stating that the rule's content regarding the totality of the circumstances test is vague. Another commenter similarly stated that while a totality of the circumstances standard gives USCIS maximum flexibility, the commenter expressed concern that this standard is subject to extreme varying interpretations in agency adjudications and its implementation could subject to the uncertainties of the political process. The commenter stated that an unmodified totality of the circumstances standard is an invitation for policy changes based on arbitrary political interpretations rather than sound legal analysis and established precedent.

*Response:* DHS appreciates commenters' concern regarding the perceived lack of specificity concerning how the factors will be applied in the totality of the circumstances in the proposed regulatory text. Following receipt of public comments, DHS has made changes to the provisions addressing four out of the five statutory minimum factors to identify information relevant to such factors. In accordance with those changes, DHS has made changes to Form I-485 to implement these provisions. The collection of this relevant information will help officers make public charge inadmissibility determinations without being unnecessarily burdensome for the public and for DHS, and will provide clarity to the public regarding what information is generally relevant and needed to make public charge inadmissibility determinations. In this final rule, DHS also amended the provisions relating to the consideration of current and/or past receipt of public benefits to provide additional clarity to the public and to officers about what will be considered when making a public charge inadmissibility determination in the totality of the circumstances. In this final rule, DHS is also retaining the regulatory content stating that no one factor described in this rule, other than the lack of a sufficient Affidavit of Support Under

Section 213A of the INA, if required, should be the sole criterion for determining if a noncitizen is likely to become a public charge.

DHS plans to issue guidance, as well as periodically update guidance, that will consider how these factors may affect the likelihood at any time of becoming a public charge based on an empirical analysis of the best-available data as appropriate.<sup>515</sup> Furthermore, USCIS plans to conduct robust training for officers on the new regulations and guidance. In general, officers receive specialized training in every aspect of the adjudicative process. Public charge inadmissibility determinations are no exception. Furthermore, there are numerous levels of oversight and quality control to provide guardrails and ensure fair and consistent decisions. However, because each noncitizen's individual circumstances constitute a unique fact pattern, outcomes in public charge determinations will appropriately vary. USCIS continues its ongoing data collection efforts on its adjudications as well as other information relevant to the adjudication, to continually assess and improve the adjudication processes, procedures, and training.

*Comment:* Several commenters stated that the five factors should be used primarily as exculpatory or mitigating considerations that help an applicant overcome any potentially adverse public charge issues. Another commenter stated that the judicial and administrative decisions that informed the codification of the five factors in 1996 overwhelmingly found immigrants not excludable based on one or more of the factors when considering the totality of circumstances. For example, the commenter stated, in *Matter of Martinez-Lopez*, the Attorney General affirmed that the respondent was not excludable as likely to become a public charge because he was “an able-bodied man in his early twenties, without dependents; that he had no physical or mental [disability] which might affect his earning capacity, and that he had performed agricultural work for nearly 10 years.”<sup>516</sup> In that case, the respondent's age, family, health, employment, and

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<sup>515</sup> See 8 CFR 212.22(b).

<sup>516</sup> 10 I&N Dec. 409, 421 (BIA 1962).

support from a family member were all favorable factors that justified the finding that he was not likely to become a public charge.<sup>517</sup> The commenter stated that in its review of the legislative history of the public charge ground of inadmissibility, the Second Circuit confirmed that Congress had ratified prior administrative and judicial interpretations in 1996 when it codified the five factors. The panel explained: “...our review of the historical administrative and judicial interpretations of the ground over the years leaves us convinced that there was a settled meaning of ‘public charge’ well before Congress enacted IIRIRA. The absolute bulk of the case law, from the Supreme Court, the circuit courts, and the BIA interprets ‘public charge’ to mean a person who is unable to support herself, either through work, savings, or family ties. *See, e.g., [United States ex rel. Iorio v. Day, 34 F.2d 920, 922 (2d Cir. 1929)]; Harutunian, 14 I. & N. Dec. at 588-89.* Indeed, we think this interpretation was established early enough that it was ratified by Congress in the INA of 1952. But the subsequent and consistent administrative interpretations of the term from the 1960s and 1970s remove any doubt that it was adopted by Congress in IIRIRA.”<sup>518</sup> The commenter stated that, in other words, the five statutory factors and totality of circumstances test provided ways to demonstrate that an applicant would not be inadmissible as likely at any time to become a public charge and were never intended to be a list of negative and positive factors to be weighed individually in every case.

*Response:* DHS believes that the commenters’ suggested approach would be inconsistent with the longstanding approach to the public charge ground of inadmissibility. The administrative cases cited by the commenter do not stand for the proposition that the factors may only be used to mitigate adverse circumstances. The adverse circumstances themselves are part of the totality of the circumstances determination. DHS notes that the 2019 Final Rule, as one of the commenters noted, had a list of negative and positive factors, which the vast majority of commenters found confusing and which, in DHS’s experience, ultimately did little to clarify the

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<sup>517</sup> 10 I&N Dec. 409, 421 (BIA 1962).

<sup>518</sup> *New York v. DHS*, 969 F.3d 42, 71 (2d Cir. 2020).

operation of the totality of the circumstances analysis. In the end, officers were still required to assess the individual circumstances of each case on their own merits. DHS has not included such a list in this rule because DHS believes that such an approach would very likely result in confusion, and because the statute does not require it and does not indicate the circumstances under which any of the factors are to be treated positively or negatively, how much weight the factors should be given, or what evidence or information is relevant to each of the statutory factors. With this rule, DHS intends to continue with the longstanding approach set forth in the 1999 Interim Field Guidance, which is a totality of the circumstances analysis.

*Comment:* One commenter stated that officers should be directed to look at all factors holistically, consistent with the settled meaning of public charge and, on balance, give due weight to all circumstances that demonstrate an individual would not be inadmissible as likely at any time to become a public charge.

*Response:* DHS appreciates the commenter's suggestion that officers should be directed to review the factors holistically and give due weight to all circumstances that demonstrate an individual would not be inadmissible under the public charge ground. As noted in the NPRM, a series of administrative decisions have clarified that a totality of the circumstances review is the proper framework for making public charge inadmissibility determinations.<sup>519</sup> In light of public comments, DHS is clarifying what DHS officers will consider in the totality of the circumstances. The totality of the circumstances includes all information or evidence in the record before the adjudicator relevant to a public charge inadmissibility determination. DHS is only collecting initial information from applicants as related to the enumerated factors as outlined in this rule and accompanying form, and the only initial supporting evidence required of applicants is evidence that their institutionalization violated Federal law, if applicable. However, DHS may generally consider all evidence and information in the record that is relevant to

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<sup>519</sup> See 87 FR at 10579-10580 (Feb. 24, 2022).



making a public charge inadmissibility determination. Such information or evidence may include evidence that the noncitizen has been certified or approved to receive public cash assistance for income maintenance or long-term institutionalization. As noted in response to the comment about the past or current use of public benefits by certain victims when not in an immigration category exempt from the public charge ground of inadmissibility, such information or evidence may also include mitigating information that the applicant may wish to bring to DHS's attention. This approach is consistent with the understanding of the totality of the circumstances approach from the administrative decisions, as well as with the approach taken by the former INS when it promulgated 8 CFR 245a.3.

### **3. Recommendations for the Creation of Presumptions in the Totality of the Circumstances Analysis**

*Comment:* One commenter expressed concern that the totality of the circumstances standard would be subject to extreme varying interpretations in agency adjudications, and that the implementation of the standard could be subject to the uncertainties of the political process. Instead of using the totality of circumstances standard, they proposed that DHS create legal presumptions that, barring extraordinary facts related to the statutory factors, would simplify a determination of whether a person is likely to become a public charge. They proposed that DHS create presumptions regarding the Affidavit of Support Under Section 213A of the INA and assets and resources. The commenter also suggested that, when a presumption exists, a finding by DHS that a noncitizen is likely to become a public charge must explain the clear and convincing factual evidence relevant to the statutory factors that led to a determination of inadmissibility.

*Response:* As addressed elsewhere in this preamble, the plain language of section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), calls for the consideration of, at a minimum, age, health, family status, assets, resources and financial status, and education and skills, and allows DHS to also consider an Affidavit of Support under Section 213A of the INA. As DHS explained

when responding to comments suggesting that it create weighted factors akin to those codified in the 2019 Final Rule, DHS believes that the totality of the circumstances approach without assigning weight to any particular facts or circumstance is more effective than specific codified presumptions (or weighted factors), as it accounts for varying individual circumstances of applicants. Such an approach also enables officers to adapt the public charge inadmissibility determination to the specific facts of each case, and all relevant information in the record. DHS has decided to proceed without presumptions because in many circumstances any specific presumption (such as a presumption with respect to assets and resources) would likely be overcome in any event (such as by an applicant's age, health, and/or education and skills). That said, the NPRM and this final rule do state that DHS will favorably consider in the totality of the circumstances a sufficient Affidavit of Support Under Section 213A of the INA, where such affidavit is required. DHS believes that the long-standing totality of the circumstances framework allows officers to adequately consider the statutory minimum factors, the Affidavit of Support Under Section 213A of the INA (when required), and past and/or current receipt of public benefits, in the totality of the circumstances, while also allowing for the consideration of empirical data, where relevant and appropriate.

As indicated throughout this final rule, DHS intends to issue guidance to generally inform the predictive nature of the factors set forth in this rule as an objective aspect of the analysis, declining to take a categorical approach of weighing the relevant factors or creating presumptions. DHS believes this will best enable officers to fully consider the applicant's individual circumstances and evidence presented, thereby better achieving the goals of the public charge inadmissibility determination. Therefore, DHS declines to codify specific regulatory presumptions.

*Comment:* One commenter suggested that DHS clearly state that incoming international graduate students, medical residents, physicians, scientists, and researchers, with a letter from a sponsoring institution stating that the individual will meet federal income and insurance

requirements be given a presumption that they are not likely to become a public charge at any time under the totality of circumstances.

*Response:* DHS believes that the long-standing totality of the circumstances framework allows officers to consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA (when required) in the totality of the circumstances, while also allowing for an empirical element as appropriate. Even where an Affidavit of Support Under Section 213A of the INA is not required, DHS will consider the other statutory factors concerning those individuals, including education and skills and assets, resources, and financial status of those individuals. DHS intends to issue guidance to generally inform the predictive nature of the statutory factors as an objective aspect of the analysis, declining to take a categorical approach of weighting the relevant factors or creating presumptions. DHS believes this will best enable officers to fully consider the applicant's individual circumstances and evidence presented, thereby better achieving the goals of the public charge inadmissibility determination. However, and as stated throughout this rule, although DHS is not requiring the submission of initial supporting evidence (except in the case of disability discrimination), and is not creating new presumptions, DHS has the discretion to consider relevant information in the record in the totality of the circumstances. Such information may include a letter from a sponsoring institution related to the applicant's income or benefits, since this information would be relevant to the public charge inadmissibility determination, and the assets, resources, and financial status factor, in particular.

*Comment:* One commenter suggested DHS presume that a noncitizen applying for an immigrant visa or adjustment of status under section 203(c)(18) of the INA, 8 U.S.C. 1153(c)(18), the Diversity Visa Program, is unlikely to become a public charge where the noncitizen meets the educational and/or employment experience requirements of section 203(c)(2) of the INA, 8 U.S.C. 1153(c)(2).

*Response:* DHS believes that the long-standing totality of the circumstances framework allows officers to consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA (when required) in the totality of the circumstances, while also allowing for an empirical element as appropriate. As stated previously, DHS acknowledges that certain immigration categories may require a separate determination of education or work experience, but notes that those specific eligibility requirements are separate from an inadmissibility determination. The public charge inadmissibility determination involves the consideration of a variety of factors, including education and skills, that are considered in the totality of a noncitizen's circumstances, and DHS will consider such factors for all noncitizens subject to the public charge ground of inadmissibility who are applying for adjustment of status.

*Comment:* One commenter recommended that DHS require officers to give more weight to the education and income factors in determining whether a noncitizen is likely to become a public charge, as a noncitizen's education and income levels are the most reliable predictors of whether a noncitizen is likely to become a public charge, according to an analysis of data from the Survey of Income and Program Participation (SIPP), from the U.S. Census Bureau.

*Response:* DHS disagrees that the education and income factors should be given different weight than other factors under the rule. DHS disagrees that the SIPP data shows that a noncitizen's education and income level are the most reliable predictors of whether a noncitizen is likely to become a public charge.

In support of their claims about the relative significance of education in a public charge inadmissibility determination, the commenter pointed to an analysis that examined SIPP data to show welfare utilization by different education levels. The analysis examined benefit use by "non-citizen-headed households" rather than by noncitizens themselves.<sup>520</sup> While that analysis

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<sup>520</sup> Steven Camarota and Karen Zeigler, Center for Immigration Studies, "63% of Non-Citizen Households Access Welfare Programs," Table 6 (Nov. 20, 2018), <https://cis.org/Report/63-NonCitizen-Households-Access-Welfare-Programs> (last visited Aug. 16, 2022).

showed generally low use of SSI and TANF by such households, even those low rates of use are misleading in the context of a public charge inadmissibility determination. Under both the 2019 Final Rule, favored by the commenter, and this rule, only public benefits received by the noncitizen, where the noncitizen is listed as a beneficiary, are considered in a public charge inadmissibility determination. Although the analysis cited by the commenter attributes to the noncitizen “head of household” any receipt of benefits by any member of the household, including U.S. citizens, the rates of SSI and TANF receipt by such households, as such, does not correspond to public charge inadmissibility determinations under both the 2019 Final Rule and this rule. Since Congress sharply limited the eligibility for public benefits for noncitizens in PRWORA (and, as noted, provided exceptions to the public charge ground of inadmissibility for most categories of noncitizens eligible for benefits), the members of the “non-citizen-headed households” actually receiving the SSI and TANF in this analysis are most likely not the noncitizen heading the household but rather other members of the family, such as U.S. citizen children. The analysis cited by the commenter, however, only looks at the education level of the head of the household, rather than the education level of the person receiving the benefits.

The analysis cited by the commenter, in defense of the “household” approach, argued that since eligibility for benefits (or at least means-tested benefits) is generally based on the income of the entire household, and that since benefits provided to a household member lessen the need for other members of the household to financially support them, all benefit use in a household should be attributed to all of the members. This is in line with the suggestion of this commenter that DHS should expand the “receipt (of public benefits)” definition to attribute all benefit use by dependents to a noncitizen applicant. However, DHS largely rejected such an approach to the attribution of benefit use by others in the 1999 Interim Field Guidance, wholly rejected it in the 2019 Final Rule, and has wholly rejected it again in this rule. DHS responded to those comments suggesting that benefit use by other household members be attributed to the applicant in the Definitions section above. As other analysts have noted, the “household” is not the proper unit of

analysis when examining public benefits use, particularly for households with a mixture of native-born U.S. citizens, naturalized or derived U.S. citizens, and noncitizens.<sup>521</sup>

Since Congress sharply limited the eligibility for public benefits for noncitizens in PRWORA (and, as noted, provided exceptions to the public charge ground of inadmissibility for most categories of noncitizens eligible for benefits), the members of the “non-citizen-headed households” actually receiving the SSI and TANF in this analysis are most likely not the noncitizen heading the household but rather other members of the family, such as U.S. citizen children. The analysis cited by the commenter, however, only looks at the education level of the head of the household, rather than the education level of the person receiving the benefits.

Finally, although the commenter recommended that DHS give significant weight to education and income, the commenter did not offer an analysis of these factors relative to most of the other statutory factors, or an analysis of the actual likelihood that a noncitizen will become a public charge based on these factors.

In short, the analysis does not support the commenter’s statement that education is one of the most reliable predictors (along with income) of whether a noncitizen is likely at any time to become a public charge.

As for the commenter’s statement that income is one of the two reliable predictors (alongside education) of whether a noncitizen is likely to become a public charge, the analysis cited by the commenter did not contain any quantitative evidence regarding the connection between income and benefit use.<sup>522</sup>

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<sup>521</sup> See CATO Institute, “Center for Immigration Studies Overstates Immigrant, Non-citizen, and Native Welfare Use” (Dec. 6, 2018), <https://www.cato.org/blog/center-immigration-studies-overstates-immigrant-non-citizen-native-welfare-use> (last visited Aug. 16, 2022). See also National Academies of Sciences, Engineering, and Medicine, “The Economic and Fiscal Consequences of Immigration” (2017), <https://nap.nationalacademies.org/catalog/23550/the-economic-and-fiscal-consequences-of-immigration> (last visited Aug. 16, 2022)

<sup>522</sup> The analysis included two tables examining benefit use by households “with at least one worker,” but did not include any analysis based on household or individual income.

Finally, the commenter and the analysis cited by the commenter does not compare education and income to other factors (such as age; health; skills; and assets, resources, and financial status) to predict a person’s likelihood of becoming a public charge. While the analysis cited by the commenter shows that education might be important, it does not show that it is more important than any other factors, and as noted it does not address income at all. In summary, the analysis fails to support the commenter’s conclusion that income and education are the most reliable predictors of public benefit use.

DHS does agree that evidence should inform the public charge analysis and, as indicated in the rule, DHS may periodically issue guidance to officers to inform the totality of the circumstances assessment and such guidance will consider how these factors affect the likelihood that the noncitizen will become a public charge at any time based on an empirical analysis of the best-available data as appropriate.<sup>523</sup>

#### **4. Empirical Analysis of Best Available Data**

*Comment:* One commenter stated that DHS could collect data on denials based on the public charge ground of inadmissibility, regularly analyze the data for disproportionate negative impacts, and use the data to better train and supervise officers to avoid explicit and implicit bias.

*Response:* USCIS adjudicative systems do not currently allow the agency to collect comprehensive data concerning public charge inadmissibility determinations in a fully automated way, i.e., without at least some manual review of administrative files. Only a portion of adjustment of status applications are currently adjudicated in our Electronic Immigration System (ELIS), which allows officers to indicate “212(a)(4) Public Charge” as a denial reason. When adjudicating applications in the older CLAIMS3 system, officers are unable to indicate whether a denial under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), was based on a review of the factors identified in section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), as well the receipt

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<sup>523</sup> See 8 CFR 212.22(b).

of any other factors identified in a public charge rule, or was based on the lack of a sufficient Affidavit of Support Under Section 213A of the INA without a manual review of the case.<sup>524</sup> In addition, the CLAIMS3 system does not track the race/ethnicity of applicants (though other data points relevant to the suggestion, including sex and country of birth, are available). Once all varieties of adjustment of status applications are transitioned into ELIS, DHS will be able to regularly analyze the data for disproportionate negative impacts as the commenter suggests.

*Comment:* Another commenter emphasized that any analysis of various statutory factors must include the perspective of experts in those fields, such as medical researchers for an analysis of the health factor, and cautioned against any approaches that would consider a noncitizen as a member of a specific group for purposes of analysis, for example, noncitizens with diabetes considered as an aggregate. This commenter also suggested DHS collect data on who is determined to be a public charge so the data can be examined by both DHS and in collaboration with external scientific collaborators. Another commenter stated that DHS could adjust its guidance and its standardized procedures regarding the totality of the circumstances based on the latest data available and fine-tune the process as needed.

*Response:* DHS appreciates the support for using available data, as appropriate, to guide the public charge inadmissibility determination. DHS has included a provision in the final rule stating that DHS may periodically issue guidance that will consider how these factors affect the likelihood that the noncitizen will become a public charge at any time based on an empirical analysis of the best-available data as appropriate.<sup>525</sup> DHS also appreciates the request to use external scientific collaborators and notes that DHS has internal economists that process both internal and external data to determine its utility for the public charge inadmissibility

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<sup>524</sup> DHS notes that the data presented in this rule that reflects that no cases were ultimately denied based on the totality of the circumstances analysis under the 2019 Final Rule was obtained by identifying cases denied under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and manually reviewing each of the cases to ascertain whether they were denials based solely on the totality of the circumstances approach.

<sup>525</sup> See 8 CFR 212.22(b).



determination, and may engage the public in a variety of ways in developing and seeking input on guidance. Additionally, DHS appreciates the suggestion that it use external experts in particular regarding the health factor. DHS notes that it will collect information relevant to the statutory minimum factors from existing information collections (e.g., information pertaining to the health factor will be obtained from Form I-693, Report of Medical Examination and Vaccination Record, which, when completed in the United States, is prepared by a civil surgeon). Civil surgeons assess whether applicants have any health conditions that could result in exclusion from the United States.<sup>526</sup> USCIS designates certain doctors (also known as civil surgeons) to perform the medical exam required for most individuals applying for adjustment of status in the United States; these professionals, however, are not employees of the U.S. government.

DHS also requested data and information from the public during this rulemaking process for consideration in the development of this final rule. For instance, as early as the ANPRM, DHS solicited comment on a published article that sought to use available data and machine-learning tools to estimate the probability of a noncitizen becoming a public charge (as that term was defined under the 2019 Final Rule).<sup>527</sup> DHS also asked for any data and information it should consider about the direct and indirect effects of past public charge policies in this regard. In addition, DHS asked about data that it could use to estimate any potential direct and indirect effects, economic or otherwise, of the public charge ground of inadmissibility related to the 2019 Final Rule. DHS also specifically sought information from State, territorial, local, and Tribal benefit granting agencies regarding impacts of the 2019 Final Rule on the application for or

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<sup>526</sup> USCIS Policy Manual, Vol. 8, Part C, Ch. 1, “Purpose and Background,” <https://www.uscis.gov/policy-manual/volume-8-part-c-chapter-1> (last visited Aug. 16, 2022).

<sup>527</sup> See “Public Charge Ground of Inadmissibility,” 86 FR 47025, 47028 (Aug. 23, 2021) (citing Mitra Akhtari et al., “Estimating the Empirical Likelihood of Becoming a ‘Public Charge,’” N.Y.U. J. Legis. & Pub. Pol’y Quorum (Aug. 2, 2021), <https://nyujlpp.org/quorum/estimating-the-empirical-likelihood-of-becoming-a-public-charge/> (last visited Aug. 17, 2022)).

disenrollment from public benefit programs. The majority of the data received concerned the chilling effects of the 2019 Final Rule.

Regardless, DHS will consider the request to collect and analyze data concerning who is likely to become a public charge. Once all varieties of adjustment of status applications are transitioned into ELIS, DHS may be able to more easily analyze the data and potentially share it with external analysts to the extent appropriate and consistent with law. DHS may also consider adjusting its policy, if appropriate, in response to new data and analyses.

**K. Receipt of Public Benefits While Noncitizen Is in an Immigration Category Exempt from Public Charge Inadmissibility**

*Comment:* One commenter did not agree with this exemption and recommended that DHS consider a noncitizen's past and current use of public benefits, regardless of the noncitizen's previous or current immigration status; the commenter stated that not considering all benefits received would require officers to ignore relevant information with significant evidentiary value for the determination of whether the noncitizen will be able to provide for their own needs in the future.

*Response:* DHS disagrees that officers should consider public benefits received while a noncitizen is in an immigration category exempt from the public charge ground of inadmissibility. Although many noncitizens who are eligible for Federal, State, Tribal, territorial, or local benefits receive those benefits while present in an immigration classification or category that is exempt from the public charge ground of inadmissibility or after the noncitizen obtained a waiver of the public charge ground of inadmissibility, such noncitizens may later apply for an immigration benefit that subjects them to the public charge ground of inadmissibility. For example, a noncitizen admitted as a refugee may have received benefits on that basis but may later apply for adjustment of status based on marriage to a U.S. citizen and will be subject to the public charge ground of inadmissibility.

The 1999 Interim Field Guidance did not expressly address how to treat an applicant's receipt of public benefits while present in an immigration category that is exempt from the public charge ground of inadmissibility or for which the noncitizen received a waiver of the public charge ground of inadmissibility. The 2019 Final Rule, however, excluded from consideration the receipt of such public benefits in public charge inadmissibility determinations.<sup>528</sup>

Congress, not DHS, has specified which categories of noncitizens are subject to or are exempt from the public charge ground of inadmissibility. Congress did not exempt from the public charge ground of inadmissibility noncitizens who are applying for admission or adjustment in a category subject to the public charge ground but who, in the past, were in a category of noncitizen exempt from the ground. However, as DHS concluded in 2019, DHS believes that it has the authority, in promulgating the public charge inadmissibility framework, to determine which public benefits should be considered as part of a public charge inadmissibility determination.<sup>529</sup>

A review of the categories of noncitizens that are exempt from the public charge ground of inadmissibility or eligible for waivers provides an indication of the concerns that Congress had when establishing these exemptions and waivers. The categories comprise a long list of vulnerable populations or groups of noncitizens of particular policy significance for the United States.<sup>530</sup> Congress expressed a policy preference that individuals in these categories should be able to receive public benefits without risking adverse immigration consequences. DHS believes that Congress did not intend to later penalize such noncitizens for using benefits while in these categories because doing so would undermine the intent of their exemption. Given the nature of these populations and the fact that if they were applying for admission or, as permitted,

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<sup>528</sup> See "Inadmissibility on Public Charge Grounds," 84 FR 41292, 41501 (Aug. 14, 2019).

<sup>529</sup> See INA sec. 103, 8 U.S.C. 1103; *see also* "Inadmissibility on Public Charge Grounds," 84 FR 41292 (Aug. 14, 2019).

<sup>530</sup> For example, refugees, asylees, Afghans and Iraqis employed by the U.S. government, special immigrant juveniles, Temporary Protected Status recipients, and trafficking and crime victims.

adjustment of status under those categories they would be exempt from the public charge ground of inadmissibility, it is appropriate for DHS to exclude from consideration those benefits that an applicant received while in a status that is exempt from the public charge ground of inadmissibility.

This rule will prohibit DHS from considering any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in proposed 8 CFR 212.23(a), or for which the noncitizen received a waiver of public charge inadmissibility, as set forth in proposed 8 CFR 212.23(c).<sup>531</sup> However, under the rule, any public cash assistance for income maintenance or long-term institutionalization at government expense received prior to or subsequent to the noncitizen's being in an exempt status would be considered in a public charge inadmissibility determination.

*Comment:* Many commenters supported DHS's proposal that benefits received while in an exempt status will not be considered in a public charge inadmissibility determination. However, a number of those commenters recommended that DHS also include other noncitizens such as those granted withholding of removal or deportation, Deferred Enforced Departure (DED), deferred action, and parolees among those for whom benefits received will not be considered in a public charge inadmissibility determination because immigrants granted such humanitarian relief are qualified immigrants for many federal and State benefits. The commenters also recommended DHS clarify that officers may not consider underlying reasons for which these exempt groups receive benefits and instead expressly state that these benefits will not be considered in a public charge inadmissibility determination, to mitigate the risk of officers misapplying this provision or allowing the officers' personal bias or animus against applicants to affect the determination.

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<sup>531</sup> See 8 CFR 212.22(a) and (c).

*Response:* DHS agrees with the many commenters who support exempting consideration of the receipt of public benefits while a noncitizen is in a category exempt from a public charge inadmissibility determination. However, DHS disagrees with the recommendation to expand this exemption to other populations such as those granted withholding of removal or deportation, DED, deferred action or other general parolees. Congress expressly exempted certain vulnerable populations from the public charge ground of inadmissibility by statute such as refugees, asylees, and applicants for admission based on refugee or asylee status.<sup>532</sup> The categories comprise a long list of vulnerable populations or groups of noncitizens of particular policy significance for the United States.<sup>533</sup> The examples of categories mentioned by commenters are not populations that Congress has chosen to expressly exempt from the public charge ground of inadmissibility. Thus, DHS will not further expand the population of noncitizens whose receipt of public benefits will not be considered in a public charge ground of inadmissibility.

DHS also disagrees with the commenters who recommend a clarification that officers may not consider underlying reasons for which these exempt groups receive benefits. DHS does not believe that rule requires any further clarification as the language in 8 CFR 212.22(d) is clear, precise, and absolute in stating that DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility or for which the noncitizen received a waiver of public charge inadmissibility in a public charge inadmissibility determination.<sup>534</sup> If benefits were received by a noncitizen when they were in one of the exempt categories or categories eligible for an inadmissibility waiver identified in 8 CFR 212.23, USCIS will not consider the benefits they received while in those categories. When they apply for admission or adjustment of status in a category to which the public charge ground of

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<sup>532</sup> See INA secs. 207, 208, and 209; 8 U.S.C. 1157, 1158, and 1159.

<sup>533</sup> For example, refugees, asylees, Afghans and Iraqis employed by the U.S. government, special immigrant juveniles, Temporary Protected Status recipients, and trafficking and crime victims.

<sup>534</sup> See 8 CFR 212.22(d).

inadmissibility applies, DHS will still consider the other factors set forth in this rule in the totality of the circumstances in order to determine whether the noncitizen is likely at any time to become a public charge. As stated throughout this final rule, no single factor alone will be dispositive, and to the extent there is evidence of temporary health issues USCIS adjudicators will be able to take the surrounding circumstances into consideration.

#### **L. Receipt of Public Benefits by Those Granted Refugee Benefits**

*Comment:* Many commenters supported the exclusion of the receipt of public benefits by those granted refugee benefits from consideration under a public charge inadmissibility determination, as it will provide vulnerable populations with safer access to the benefits they may need to recover from the conditions that qualified them for humanitarian protection.

*Response:* DHS agrees that the receipt of public benefits by those granted refugee benefits should not be considered in a public charge inadmissibility determination. Under this rule, when making public charge inadmissibility determinations, DHS will not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under section 412(d)(2) of the INA, 8 U.S.C. 1522(d)(2), provided to an “unaccompanied alien child” as defined under section 462(g)(2) of the HSA, 6 U.S.C. 279(g)(2).<sup>535</sup> This provision would only apply to those categories of noncitizens who are eligible for all three of the types of support listed (resettlement assistance, entitlement programs, and other benefits) typically reserved for refugees.

As these commenters stated, DHS believes that Congress intended to encourage these vulnerable populations to apply for and receive the benefits they may need to recover from the conditions that qualified them for humanitarian protection. For example, the U.S. government has resettled and continues to resettle our Afghan allies. This is a population invited by the

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<sup>535</sup> See 8 CFR 212.22(e).

government to come to the United States at the government's expense in recognition of their assistance over the past two decades or their unique vulnerability were they to remain in Afghanistan.<sup>536</sup> In recognition of the unique needs of this population and the manner of their arrival in the United States, Congress explicitly extended benefits normally reserved for refugees to our Afghan allies. DHS serves as the lead for coordinating the ongoing efforts, across the Federal Government, to support vulnerable Afghans under Operation Allies Welcome (OAW). As such, DHS has been actively communicating and promoting the various benefits that this vulnerable population may be eligible for depending on their admission, status in the United States, or both, including SSI, TANF, and various other public benefits.

Similarly, the U.S. government has expressed its strong concern for the victims of severe forms of trafficking in persons and a dedication to stabilizing them. The Trafficking Victims Protection Act (TVPA), part of the Victims of Trafficking and Violence Protection Act of 2000, was enacted to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute trafficking in persons, while offering protections to victims of such trafficking, including temporary protections from removal, access to certain federal and State public benefits and services, and the ability to apply for T nonimmigrant status. With the passage of the TVPA, Congress intended to protect victims of trafficking and to take steps to try to meet victim's needs regarding health care, housing, education, and legal assistance.<sup>537</sup>

DHS strongly encourages these populations to access any and all services and benefits available to them without fear of a future negative impact. Thus, this rule will exempt from consideration receipt of public benefits by those granted refugee benefits by Congress, even when those individuals are not refugees admitted under section 207 of the INA, 8 U.S.C. 1157,

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<sup>536</sup> DHS, "Operation Allies Welcome" (2021), [https://www.dhs.gov/sites/default/files/publications/21\\_1110-opa-dhs-resettlement-of-at-risk-afghans.pdf](https://www.dhs.gov/sites/default/files/publications/21_1110-opa-dhs-resettlement-of-at-risk-afghans.pdf) (last visited Aug. 16, 2022).

<sup>537</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, sec. 102(b), 114 Stat. 1464, 1466 (2000).

such as the Afghans that have been recently resettled in the United States pursuant to OAW and noncitizen victims of a severe form of trafficking in persons.

### **M. Denial Decision**

*Comment:* Many commenters supported DHS's proposed language that every denial decision be in writing, reflect consideration of each of the five statutory minimum factors, as well as the affidavit of support, and articulate a reason for the determination, as it will reduce the risk of officers applying the wrong standards and provide sufficient justification for the decision.

*Response:* DHS appreciates commenters' support and believes that requiring every written denial decision issued by USCIS reflect consideration of each of the factors outlined in this rule and specific articulation of the reasons for the officer's determination will help ensure that public charge inadmissibility determinations will be fair, transparent, and consistent with the law.

*Comment:* One commenter recommended DHS maintain these records in a way that allows public access to the decision-making behind the denials and tracking of outcomes through Freedom of Information Act requests.

*Response:* DHS will not be establishing a mechanism in which the public may request all denials related to denials for adjustment of status under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), due to the privacy implications and potential administrative burden.

*Comment:* One commenter stated that DHS should consider including a specific requirement that written denial decisions include documentation that age and health or disability status were not unduly weighted to ensure that denials are not discriminatory to children, including those with special health care needs or disabilities. Another commenter recommended that all denial decisions be written in plain language or Easy Read format so that the decisions may be read by immigrants with significant cognitive disabilities or who do not speak or read English well.



*Response:* DHS agrees that denial decisions should include relevant information that reflects consideration of each of the factors outlined in this rule and specific articulation of the reasons for the officer's determination. DHS notes that, as discussed above, public charge inadmissibility determinations are based on the totality of a noncitizen's circumstances. No one factor described in this rule, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, should be the sole criterion for determining if a noncitizen is likely to become a public charge.<sup>538</sup> Although the commenter expressed concern that an officer may unduly weigh age and health or disability status unfairly for children, including those with special health care needs or disabilities, DHS believes that the regulatory language directing officers to demonstrate their consideration of each factor, including age and health, already addresses this concern.

To the suggestion that DHS issue denial decisions in a plain, easy to read format, DHS notes that it is bound by the Plain Writing Act of 2010,<sup>539</sup> which requires DHS, in issuing "any document that is necessary for obtaining any Federal Government benefit or service. . ."<sup>540</sup> to use "writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience."<sup>541</sup> Consistent with the Plain Writing Act of 2010, USCIS has an internal plain language program to help improve the clarity of USCIS communications. USCIS follows the policies and procedures established by the USCIS plain language program for all of its denial decisions so that they are easy to read and understand, and includes citations to relevant sections of law or court decisions to support officers' decisions.

*Comment:* One commenter recommended that officers should be required to provide a written explanation that specifically articulates each factor considered in the determination and the reason for the officer's determination in all cases in which the public charge ground of

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<sup>538</sup> See 8 CFR 212.22(b).

<sup>539</sup> Pub. L. 117-274 (Oct. 13, 2010).

<sup>540</sup> Pub. L. 117-274 Sec. 3(2) (Oct. 13, 2010).

<sup>541</sup> Pub. L. 117-274, Sec. 3(3) (Oct. 13, 2010).

inadmissibility applies, regardless of whether the adjudicator finds that the noncitizen is inadmissible under the public charge ground or not. The commenter reasoned that only requiring a written analysis for cases where a noncitizen is found to be inadmissible under the public charge ground of inadmissibility, coupled with USCIS' initiatives to address the agency backlog and impose new internal cycle time goals,<sup>542</sup> would incentivize officers to provide positive public charge inadmissibility determinations for noncitizens who may not warrant such determination.

*Response:* The commenter's argument that requiring a written analysis by an officer for a determination that a noncitizen is not inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), coupled with USCIS' internal goals, incentivizes officers to fail to correctly apply the law is without basis. The requirement that officers write decisions explaining the specific reasons for denials of adjustment of status is a long-standing requirement that has been in the regulation for decades.<sup>543</sup> This rule does not expand or contract the circumstances when officers are required to issue a written decision explaining the specific reason for a decision regarding the public charge ground. This rule adds the requirement that officers include a discussion of each of the statutory factors in the already required written denial decision.

DHS does not agree that the long-standing requirement that officers explain in writing the specific reasons for denials inappropriately incentivizes officers to issue approvals. First, a requirement for an administrative agency to provide notice and an opportunity to respond is a common feature of administrative practice, and is intended to promote fairness and consistency, not to incentivize particular outcomes. Second, USCIS officers are dedicated to USCIS' core values of integrity, respect, innovation, and vigilance, and, to that end, officers strive to deliver fair decisions that are consistent with the law, regardless of internal cycle time goals. USCIS

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<sup>542</sup> See USCIS, "USCIS Announces New Actions to Reduce Backlogs, Expand Premium Processing, and Provide Relief to Work Permit Holders" (Mar. 29, 2022), <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work> (last visited Aug. 16, 2022).

<sup>543</sup> 8 CFR 103.3(a)(1)(i); see also "Oral Argument and Appeals," 31 FR 3062 (Feb. 24, 1966).

officers receive specialized training and regularly adjudicate a variety of immigration benefit applications. Further, requiring written decisions stating the specific reasons for approvals in all cases where a USCIS officer determines that an applicant is not inadmissible under the public charge ground would be unnecessarily burdensome and inconsistent with USCIS practice for all other grounds of inadmissibility. By granting a person adjustment of status to lawful permanent resident, the USCIS officer is confirming that they have reviewed the eligibility requirements and any applicable grounds of inadmissibility, including the public charge ground of inadmissibility, where applicable, and determined that the applicant is admissible to the United States.

#### **N. Information Collection (Forms)**

*Comment:* Several commenters recommended that DHS not change the initial evidence adjustment of status applicants currently provide on Form I-485 and recommended against additional questions being added to the form, stating that all of the information needed is already included in the information collection.

Some commenters stated that if DHS chooses to include any questions, DHS should ensure that any additional questions are on their face related to a statutory ground and do not elicit potentially extraneous information or evidence, and recommended that applicants be given an opportunity to provide a substantive answer to explain any additional circumstances. One of those commenters also suggested that the instructions to Form I-485 should provide a detailed explanation related to which noncitizen applicants are exempt from the public charge ground for inadmissibility.

Other commenters stated that asking if a person has used public assistance from any source is overly broad and irrelevant and creates unnecessary work for applicants, officers, and State benefit granting agencies, as well as contributing to the chilling effect.

*Response:* DHS disagrees that additional questions are not required on Form I-485. DHS reviewed the current form and has decided to add several additional questions regarding the

factors used to make a public charge inadmissibility determination that were not already included in the form's information collection, including information about an applicant's household size, income, assets, liabilities, an applicant's education or skills, an applicant's use of TANF or SSI, and any long-term institutionalization of the applicant at government expense. The form also informs applicants that additional space is available if applicants need to provide more information. Additionally, USCIS policy instructs officers to issue Requests for Evidence in cases involving insufficient evidence before denying such cases unless the officer determined that there was no possibility that the benefit requestor could overcome a finding of ineligibility by submitting additional evidence.<sup>544</sup> DHS did not include additional questions or request additional evidence from applicants that is not related to a public charge inadmissibility determination. In order to reduce the burden on applicants not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), DHS also included a question asking applicants if they are subject to the public charge ground of inadmissibility and, if not, directing them that they may skip the subsequent related questions.

DHS disagrees that a full list of applicants who are not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), should be included in the Form I-485 instructions. New 8 CFR 212.23 lists 29 classes of noncitizens who are exempt from the public charge ground of inadmissibility. Including this full list in the form instructions would impose a burden on all applicants reviewing them. DHS instead included the list in the regulations, and will include a list of exemptions within sub-regulatory guidance.

DHS agrees that asking applicants within the form if they have used any public assistance is overly broad and would contribute to chilling effects. DHS therefore limited any additional questions to the use of public benefits that would be considered in a public charge inadmissibility determination: TANF; SSI; State, Tribal, territorial, or local cash benefit programs for income

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<sup>544</sup> See USCIS Policy Manual, Vol. 1, Part E, Ch. 6, Section F, "Requests for Evidence and Notices of Intent to Deny," <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6> (last visited Aug. 16, 2022).

maintenance (which often are called “General Assistance” in the State context but also exist under other names); and long-term institutionalization at government expense. Due to the variety of State, Tribal, territorial, or local noncash benefit programs, DHS is unable to provide within the form or instructions an exhaustive list of noncash public benefits programs, but plans to issue future guidance with some examples to address widely used noncash programs such as SNAP, CHIP, and Medicaid, other than Medicaid for long-term institutionalization.

*Comment:* One commenter recommended that USCIS continue to use the questions included in the current Form I-864 and Form I-864A to calculate household size, income from the household, and, if needed, assets from the household. The commenter stated that this information should only be collected in cases subject to the public charge ground of inadmissibility in which an Affidavit of Support is not otherwise filed.

The commenter also stated that USCIS should consider whether the creation of a Form I-485 supplement form to collect this information is warranted in this specific scenario in order to provide both the agency and applicants with a simple, efficient, and familiar method of providing required information and achieves DHS’s goal of not unduly imposing barriers on noncitizens seeking adjustment of status or admission to the United States as lawful permanent residents.

*Response:* DHS notes that no changes have been proposed to Form I-864, Affidavit of Support Under Section 213A of the INA, or Form I-864A, Contract Between Sponsor and Household Member. DHS also notes that the Affidavit of Support Under Section 213A of the INA and the Contract Between Sponsor and Household Member collect information regarding the household size, income, and assets of the sponsor and household members, respectively. These forms do not collect information regarding the intending immigrant. DHS also notes that some noncitizens applying to adjust status to lawful permanent resident may not be required to submit an Affidavit of Support Under Section 213A of the INA but are still subject to the public charge ground of inadmissibility, for example, applicants applying under the Diversity Visa program.

In the NPRM, DHS proposed changes to Form I-485 to include questions that would collect public charge-related information from applicants who are subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). The first of these questions asks applicants to indicate if they are subject to the public charge ground of inadmissibility, and if they are not, directs that they may skip the subsequent related questions. Therefore, noncitizens who are not subject to a public charge inadmissibility determination, which includes most noncitizens not required to file an Affidavit of Support Under Section 213A of the INA, will not need to provide information specifically related to making this determination.

DHS has determined that the Form I-485 sufficiently collects information regarding the factors that will be considered in a public charge inadmissibility determination. Further, DHS believes the creation of a supplement to Form I-485 would increase the burden on the agency and applicants, as it would require additional consideration by stakeholders and officers in order to complete and submit any additional evidence. Therefore, DHS believes that not creating a supplement for Form I-485 is reducing barriers on noncitizens seeking adjustment of status.

DHS has reduced the estimated time burden for completing the revised Form I-485 from 7.92 hours to 7.16 hours. Open-ended questions requiring narrative-style responses that were proposed in the information collection instrument (Form I-485) associated with the NPRM have been changed to multiple-choice style questions that will require less time for an applicant to answer.

#### **O. Bonds and Bond Procedures**

*Comment:* One commenter stated that if a sponsor on an Affidavit of Support Under Section 213A of the INA cannot meet the threshold amount for income/assets and the applicant has no qualifying joint sponsor, the applicant should be permitted to post a negligible bond amount of \$100 in lieu of providing tax returns or pay stubs in order to overcome the public charge ground of inadmissibility.

*Response:* DHS disagrees that it should permit an applicant for adjustment of status who has failed to submit a required Affidavit of Support Under Section 213A of the INA, and is therefore per se inadmissible under section 212(a)(4)(A) of the INA, 8 U.S.C. 1182(a)(4)(A), to post a negligible bond of \$100 to overcome inadmissibility. As noted above, under section 213A of the INA, 8 U.S.C. 1183a, most family-based immigrants and certain employment-based immigrants are required to submit an Affidavit of Support Under Section 213A of the INA to avoid being found inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).<sup>545</sup> Under section 213 of the INA, 8 U.S.C. 1183, subject to the requirement to submit an Affidavit of Support Under Section 213A of the INA, a noncitizen who is inadmissible under only section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), can be admitted at DHS's discretion upon the giving of a suitable and proper bond, in the amount and conditions set by DHS in its discretion. Additionally, under this rule, and for consistency with prior agency practice with respect to the bond amount (with the exception of the period in which the 2019 Final Rule was in effect), the minimum bond amount that DHS will set is \$1,000, which reflects the minimum amount to ensure that Federal, State, local, and tribal governments are held harmless against the noncitizen becoming a public charge.<sup>546</sup> DHS believes that setting the bond amount to a minimum of \$1,000 is a reasonable starting point. Accordingly, DHS declines to set the bond amount at \$100.

*Comment:* One commenter appears to suggest that immigration bonds should be used to pay for such medical care and other social welfare debts incurred by those who enter the United States.

*Response:* To the extent that this commenter is suggesting that DHS utilize public charge bonds to ensure that any medical expenses and benefits paid by the government are reimbursed, DHS notes that the purpose of a public charge bond is to hold the United States, States, territories, counties, towns, and municipalities, and districts harmless against bonded immigrants

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<sup>545</sup> See INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D); INA sec. 213A(a)(1), 8 U.S.C. 1183a(a)(1).

<sup>546</sup> 8 CFR 213.1(c).

becoming public charges.<sup>547</sup> Consistent with this purpose, under the rule, receiving public cash assistance for income maintenance or long-term institutionalization at government expense, would result in a breach determination.<sup>548</sup> This provision ensures that the purpose of public charge bonds is carried out.

*Comment:* One commenter agreed that DHS should utilize its discretion to offer bonds, noting that this would only impact a small number of cases.

*Response:* DHS agrees that it should exercise its bond authority under section 213 of the INA, 8 U.S.C. 1183, and has included a provision in this rule that would permit officers to consider offering public charge bonds, in their discretion, to adjustment of status applicants inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).<sup>549</sup> To the extent that this commenter suggests that DHS limit offering bonds to a small number of cases, DHS notes that the decision to offer an adjustment of status applicant a public charge bond is determined on a case-by-case basis in the exercise of discretion. Each decision is an individualized determination and as a result, DHS will not mandate that its bond authority be limited only to a specific number of cases, as DHS believes that this would unreasonably exclude from the possibility of a public charge bond adjustment of status applicants who might otherwise warrant our discretion.

*Comment:* Some commenters disagreed with DHS's statement in the NPRM that existing public charge bonds are adequate and opposed DHS's decision against adding any public charge bond provisions to existing regulations. One commenter reasoned that the existing bond regulations are only adequate if DHS intends to never issue public charge bonds. Other commenters stated that public charge bonds are tools to ensure compliance with the immigration laws and that, by not amending the regulations to include public charge bond provisions, DHS is

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<sup>547</sup> INA sec. 213, 8 U.S.C. 1183.

<sup>548</sup> 8 CFR 103.6(c).

<sup>549</sup> 8 CFR 213.1.



ignoring its discretion under this authority without justification, and in the process, eviscerating the public charge ground of inadmissibility. These commenters requested that DHS reconsider its position on public charge bonds and amend the regulations in the same manner as was found in the 2019 Final Rule.

*Response:* DHS disagrees that this rule ignores its public charge bond authority or eliminates a key part of public charge ground of inadmissibility. On the contrary, DHS acknowledged its discretionary bond authority in the NPRM,<sup>550</sup> and DHS reiterates, in this rule, that it has authority, under section 213 of the INA, 8 U.S.C. 1183, to consider whether to exercise its discretion on a case-by-case basis to admit noncitizens who are inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), upon the submission of a suitable and proper public charge bond. But DHS acknowledges that, as noted by commenters, existing regulations that implement the statutory public charge bond provisions do not address the manner in which USCIS will exercise this discretion.

Accordingly, following consideration of public comments received, DHS has determined, similar to the 2019 Final Rule, that it is appropriate to include provisions in the rule pertaining to USCIS' exercise of its public charge bond authority in adjustment of status applications, as well as provisions pertaining to public charge bond cancellation and breach determination. These provisions will ensure that USCIS is exercising its discretionary public charge bond authority in the context of adjustment of status applications, and will ensure that public charge bonds remain operationally feasible in such cases.

Under this rule, DHS will consider offering adjustment of status applicants who are inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), to submit a bond as a condition of adjustment of status.<sup>551</sup> When USCIS determines, in its discretion, to offer an adjustment of status applicant a public charge bond, USCIS will set the bond amount at an

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<sup>550</sup> 87 FR at 10597 (Feb. 24, 2022).

<sup>551</sup> See 8 CFR 213.1(a) and (c).

amount of no less than \$1,000 and provide instructions for the submission of a public charge bond.<sup>552</sup> USCIS will provide officers with guidance and training to ensure that this discretionary authority is exercised in a fair, efficient, and consistent manner.

#### **P. Economic Analysis Comments & Responses**

*Comment:* One commenter remarked that while the rule seems to have a high cost for codifying a policy already in place, the benefits of the rule outweigh the costs. The commenter stated that most changes do not appear to have an associated cost, but in turn create benefits for noncitizens without taking away their rights, and that the benefits of changes that do have associated costs outweigh those costs.

*Response:* DHS acknowledges this commenter's support of the rule. However, as explained at length in the section below on E.O. 12866 (Regulatory Planning and Review) and E.O. 13563 (Improving Regulation and Regulatory Review), DHS is unable to provide a full quantified estimate of the rule's costs and benefits due to data availability and the qualitative nature of some of the costs and benefits identified for this final rule.

*Comment:* One commenter cited the estimated savings to States' social-welfare budgets from the 2019 Final Rule and stated that the proposed rule ignores substantial effects on the States, costing significant funds rather than conserving Medicaid and related social-welfare budgets. An advocacy group, a State representative, and some State Attorneys General stated that while DHS focuses on a reduction of transfer payments as a net negative, it fails to explore the savings to State or Federal taxpayers, and that the 2019 Final Rule estimated an approximate savings for States of \$1.01 billion annually. The commenters remarked that any reduction in payments due to a DHS rule concerning implementation of the public charge ground of inadmissibility must result in a savings to taxpayers that is quantifiable and should be included to provide a more complete analysis.

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<sup>552</sup> 8 CFR 213.1(a) and (c).

*Response:* As an initial matter, to the extent the commenters suggest that the 2019 Final Rule is the existing baseline against which the effects of this rule should be evaluated, DHS disagrees. The 2019 Final Rule is no longer in effect. The 2019 Final Rule does not represent the agency’s best assessment of “the way the world would look absent the proposed action,” which is the OMB Circular A-4<sup>553</sup> definition of an analysis’ baseline. Therefore, the 2019 Final Rule is not the baseline against which DHS is directed to compare the rule’s effects for purposes of OMB Circular A-4.

The distinction does not affect DHS’s analysis, however, because in both the NPRM and Section IV.A.5.d of this Final Rule, DHS has considered a similar rule to the 2019 Final Rule as a regulatory alternative (the Alternative) and discussed its effects. Specifically, a decrease in State public benefit expenditures due to chilling effects was discussed as a transfer payment in that section. Transfer payments are reallocations of money from one group to another that do not affect total resources. A reduction of transfer payments is a reallocation of money from individuals to Federal or State governments.

The commenter stated that the 2019 Final Rule estimated an approximate savings for States of \$1.01 billion annually. As discussed in the 2019 Final Rule, however, the \$1.01 billion was the estimated State-level share of reduction in the annual transfer payments, not an estimated net savings, and represents a significantly broader effect than any disenrollment that would result among people actually regulated by the rule.

DHS acknowledged in the 2019 Final Rule that the reduction in transfer payments due to disenrollment or forgone enrollment in a public benefit program would have lasting impacts on the health and safety of our communities. As described in Section IV.A.5.d. of this rule, disenrollment or forgone enrollment in public benefit programs due to fear or confusion—i.e., the chilling effect—could lead to worsening health outcomes, increased use of emergency rooms

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<sup>553</sup> See OMB, “Circular A-4” (Sept. 17, 2003), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf).

and emergency care as a method of primary health care due to delayed treatment, increased prevalence of communicable diseases, increased uncompensated care, increased rates of poverty and housing instability, and reduced productivity and educational attainment. DHS also recognized that reductions in Federal and State transfers under Federal benefit programs may have impacts on State and local economies, large and small businesses, and individuals. For example, the chilling effect might result in reduced revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.<sup>554</sup>

The commenter also stated that any reduction in payments due to a DHS rule concerning implementation of the public charge ground of inadmissibility must result in a savings to taxpayers. DHS disagrees that any reduction in public benefit payments must result in a savings to taxpayers. Transfer payments associated with disenrollment or forgone enrollment in public benefit programs represents only one of many potential consequences for taxpayers. The reduction in public benefit payments could be reallocated in many different ways. It is out of the scope of this rule to determine how any reduction in public benefit payments is ultimately reallocated.

This public charge rule intends to administer the statute faithfully and fairly, while avoiding predictable adverse and indirect consequences such as disenrollment or forgone enrollment by individuals who would not be subject to the public charge ground of inadmissibility in any event. The 2019 Final Rule was associated with widespread indirect effects, primarily with respect to those who were not subject to the 2019 Final Rule in the first

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<sup>554</sup> See DHS, “Regulatory Impact Analysis: Inadmissibility on Public Charge Grounds Final Rule,” RIN 1615-AA22, at 6 (Aug. 2019), <https://www.regulations.gov/document/USCIS-2010-0012-63741> (hereinafter 2019 Final Rule RIA).

place, such as U.S.-citizen children in mixed-status households, longtime lawful permanent residents who are only subject to the public charge ground of inadmissibility in limited circumstances, and noncitizens in a humanitarian status who would be exempt from the public charge ground of inadmissibility in the context of adjustment of status. A rule similar to the 2019 Final Rule would likely produce similar adverse effects on vulnerable populations not subject to the public charge ground of inadmissibility, and DHS has sought to avoid such effects in this rulemaking while remaining entirely faithful to the statute and historical practice.

*Comment:* Other commenters stated that the 2019 Final Rule increased the administrative costs to the States and caused economic harm to immigrant families and the entities that serve them. In particular, commenters stated that the inclusion of core health, nutrition, and housing assistance programs in the 2019 Final Rule caused a chilling effect, and the subsequent disenrollment or forgoing of benefits imposed significant costs as families were deprived of benefits from Medicaid and SNAP, and costs on society from worsened health outcomes, increased use of emergency rooms, increased uncompensated health care, increased rates of poverty and homelessness, and reduced productivity and educational attainment. Commenters stated that the inclusion of SNAP, Medicaid, and housing benefits in the 2019 Final Rule and the accompanying documentation requirements for immigrants also created a substantial administrative burden on State staff and resulted in significant costs in addressing the needs of immigrant-serving community organizations. One commenter added that in fiscal year 2019, they provided \$1.3 million in grants to establish capacity within community organizations across their State to conduct community education and individual family counseling, and for fiscal years 2020 and 2021, they funded \$2.1 million in grants to ensure continued capacity to provide those services related to the 2019 Final Rule.

*Response:* DHS acknowledges the impact of the 2019 Final Rule. A discussion of the impact of the 2019 Final Rule is described in Section IV.A.5.d. as the Alternative. Although DHS is not able to quantify all the effects of the Alternative, for many of the effects that are not

quantifiable DHS provides qualitative discussion. DHS incorporated the detailed information on the State administrative costs due to the 2019 Final Rule provided by the commenter into Section IV.A.5.d. Also, DHS provided detailed information in the 2019 Final Rule Regulatory Impact Analysis on familiarization costs and compliance costs as indirect effects of the 2019 Final Rule.<sup>555</sup> DHS believes that under this rule, the types of effects described by the commenter are likely to decrease over time.

*Comment:* Multiple commenters, writing separately but in substantially similar language, stated that the economic analysis provided in the NPRM fails to consider the actual administrative burdens placed on each State, which undertake much of the responsibility in administering the public benefits considered in the analysis. The commenters remarked that the economic analysis focuses on the chilling effect of implementing a public charge definition more expansive than what is proposed and contends that disenrollment or forgoing enrollment would have downstream economic impacts that would negatively affect the economy. The commenters stated that DHS acknowledged that it is unable to quantify the State portion of the transfer payment due to a lack of data related to State-level administration of these public benefit programs. The commenter stated that the economic analysis performed by DHS was therefore incomplete. The commenter also stated that DHS failed to analyze the effect of any alternative that in the commenter's opinion was more consistent with Congressional intent and ensures a noncitizen seeking admission or other benefits does not become a public charge. The commenter stated that such an analysis should not be limited to the chilling effect for noncitizens already present in the United States, but also consider the benefit for the taxpayers and the lessening burdens on already overwhelmed systems of public benefits. The commenter said that DHS's limited analysis belied its true intent to facilitate mass migration and ignored DHS's charge to faithfully execute U.S. immigration laws.

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<sup>555</sup> See [2019 Final Rule RIA](#).

*Response:* DHS does not agree with the commenter's claim that its intent with this rulemaking is to facilitate mass migration. This final rule establishes regulations to align public charge policy with the statute and Congressional purpose and collect the appropriate information to make public charge inadmissibility determinations. The rule is designed, in part, to avoid the unnecessary indirect effects that would be associated with a rule similar to the 2019 Final Rule.

DHS does not agree with the commenter's claim that the NPRM's analysis is incomplete. DHS completed the analysis consistent with OMB standards—the same standards that applied to the 2019 Final Rule—and the analysis is informed by a range of sources and information received in response to the 2021 ANPRM, NPRM and otherwise collected in connection with the rulemaking. DHS notes that none of the above-referenced commenters provided the data that would be necessary to fully quantify the administrative costs associated with this or any other public charge rule, nor did the commenters participate in the comment period for the 2021 ANPRM.

It is not at all uncommon for a regulatory analysis to address matters quantitatively and where a quantitative analysis is not possible, to address matters qualitatively. This was the case for the 2019 Final Rule as well. In the NPRM and again in Section IV.A.5.d. of this preamble, DHS estimates State annual transfer payments for Medicaid and the proportion of State contributions for SNAP and TANF but cannot estimate State contributions to SSI and Federal Rental Assistance because the proportion of State contributions varies widely across States and by year. DHS notes that the analysis presented in the NPRM and below represents DHS's best effort to assess the costs, benefits, and transfers of the regulatory alternative.

The commenter stated that DHS failed to analyze the effect of any alternative. However, commenters did not provide any actionable alternative with which DHS could consider. DHS considered an alternative similar to the 2019 Final Rule, and also assessed the effects of the rule against two baselines. DHS believes that the analysis presented in this final rule is more than sufficient.

As it relates to alternative contained in the NPRM analysis, DHS considered the costs, benefits, and transfer effects associated with a potential rulemaking similar to the 2019 Final Rule (the Alternative). Like the 2019 Final Rule, the Alternative would expand the definition of “public charge” by providing that receipt of the certain designated benefits for more than 12 months in the aggregate within a 36-month period would render a person a public charge and designating a broader range of public benefits for consideration. Detailed analysis of the Alternative is included in Section IV.A.5.D.

*Comment:* A commenter asserted that there is no functional or economic difference between a cash benefit and a non-cash benefit received in-kind such as Medicaid benefits and that the rule therefore wholly ignores State costs, specifically the costs of States providing Medicaid to low-income individuals. The commenter stated that the analysis should focus on how much the government spends on benefits received by noncitizens, not simply whether the benefit is income-deriving, and emphasized that there is no practical or economic distinction between the simple provision of benefits in cash or in-kind.

*Response:* DHS is drawing a reasonable line between cash assistance for income maintenance that alone can be indicative of primary dependence on the government for subsistence, and supplemental and special-purpose non-cash benefits that are less probative of such dependence. As noted above, Congress itself previously distinguished between cash and non-cash benefits in the same manner as this rule in the IRCA legalization provision, which provided that “[a]n alien is not ineligible for adjustment of status under [that provision] due to being [a public charge] if the alien demonstrates a history of employment in the United States evidencing self-support *without receipt of public cash assistance*.”<sup>556</sup> Further, INS made this same distinction in the 1999 Interim Field Guidance, after which Congress amended the

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<sup>556</sup> Pub. L. No. 99-603, tit. II, sec. 201 (Nov. 6, 1986) (codified at section 245A(d)(2)(B)(ii)(IV) of the INA, 8 U.S.C. 1255a(d)(2)(B)(ii)(IV)) (emphasis added); *see also id.* at sec. 302, 303 (similar provision for Special Agricultural Workers).



applicability of section 212(a)(4) of the INA multiple times, but only to limit the application of the ground of inadmissibility to certain populations or to limit consideration of certain benefits in certain circumstances.<sup>557</sup> As noted previously, Congress has long deferred to the Executive to interpret the meaning of “likely at any time to become a public charge.” DHS is not treading new ground by exercising that discretion in the way presented in this rule.

As a technical matter, DHS disagrees that the provision of Medicaid to low-income individuals is a cost of the rule, for two reasons. First, payments made by State or Federal governments are considered transfer payments rather than costs or cost savings for the purposes of the RIA.<sup>558</sup> A reduction in Medicaid enrollment is a reallocation of money from individuals to State governments. Second, the reduction in transfers payments referred to by the commenter represents the difference between the commenters’ preferred policy and the policy outlined here. They are therefore presented in the discussion of the Alternative, rather than as an effect of the rule itself as compared to the No Action Baseline or the Pre-Guidance baseline.

In Section IV.A.5.d. of this rule, DHS discussed the consequences of individuals’ disenrollment or forgone enrollment in Medicaid as distributional effects. As DHS explained, the inclusion of non-cash benefits in the 2019 Final Rule had a chilling effect on enrollment in State and Federal public benefits, including Medicaid, resulting in fear and confusion in the immigrant community. Chilling effects in public benefit programs could lead to significant indirect effects on State and local economies, large and small businesses, and individuals. Although the analysis quantifies transfer effects as proposed by the commenter, it also considers other downstream effects. Such effects may include worsening health outcomes, increased use of emergency rooms and emergency care as method of primary health care due to delayed treatment, increased

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<sup>557</sup> See, e.g., Pub. L. No. 113-4, sec. 804 (2013) (codified as amended at section 212(a)(4)(E)(i) - (iii) of the INA, 8 U.S.C. 1182(a)(4)(E)(i) - (iii)); Pub. L. No. 106-386, sec. 1505(f). (2000) (codified as amended at section 212(s) of the INA, 8 U.S.C. 1182(s)).

<sup>558</sup> See OMB, “Circular A-4” (Sept. 17, 2003), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf).

prevalence of communicable diseases, increased uncompensated care, increased rates of poverty and housing instability, and reduced productivity and educational attainment. DHS also recognized that reductions in federal and State transfers under federal benefit programs may have impacts on State and local economies, large and small businesses, and individuals. In light of the evidence of the effects of the 2019 Final Rule, DHS takes the prospect of such outcomes seriously, particularly as it relates to populations that this rule does not regulate, such as U.S. citizen children in mixed-citizenship households.

**1. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)**

*Comment:* Regarding methodology and adequacy, some State Attorneys General, and an advocacy group wrote that DHS did not adequately analyze the effect of alternative versions of the rule that, in the commenters' view, would be consistent with congressional intent to ensure noncitizens seeking admission do not become public charges. They stated that an analysis of the public charge rule should not be limited to chilling effects and suggested that the analysis include the benefits for taxpayers and reduction of burdens on the public benefit systems.,

*Response:* In the analysis of the Alternative referenced above, DHS considers the reduction in transfer payments and the potential reduction of burdens on the public benefit system in Section IV.A.5.d. However, under OMB Circular A-4, the reduction of burdens on the public benefit system is not a benefit, but rather appropriately accounted for as transfer payments. Transfer payments are neither costs nor savings; they do not affect total resources available to society. They are payments from one group to another. A decrease in transfer payments from the Federal or State government reduces burdens on the public benefit system but at the same time increases burden to the individuals. Therefore, the reduction in transfer payments increases indirect costs to the Federal or State government. DHS considers the costs and benefits of available regulatory alternatives as discussed in Section IV.A.5.d.

The Alternative would also impose new costs on the population applying to adjust status using Form I-485 that are subject to the public charge ground of inadmissibility who would be required to file Form I-944, Declaration of Self-Sufficiency, as part of the public charge inadmissibility determination. In addition, the Alternative would impose additional costs for completing Forms I-485, I-129, I-129CW, and I-539 as the associated time burden estimate for completing these forms would increase. Moreover, the Alternative would impose additional costs associated with the public charge bond process, including costs for completing and filing Forms I-945 and I-356. DHS estimates the total annual direct costs of the Alternative would be approximately \$62 million compared to \$6 million under the Final Rule.

Under the Alternative, DHS estimates that the total annual transfer payments from the Federal Government to public benefits recipients who are members of households that include noncitizens would be approximately \$3.79 billion lower due to disenrollment or forgone enrollment of the public benefit programs. DHS understands that some commenters may view this outcome as preferable, potentially due to its implications for government spending on public assistance programs. At the same time, DHS notes that these transfer payments largely affect populations that are not subject to public charge inadmissibility determinations, such as U.S. citizen children in mixed-status households. DHS also recognizes that many of the indirect effects of the Alternative could lead to worsening health outcomes, increased use of emergency rooms and emergency care as method of primary health care due to delayed treatment, increased prevalence of communicable diseases, increased uncompensated care, increased rates of poverty and housing instability, and reduced productivity and educational attainment. DHS also recognizes that, under the Alternative, reductions in federal and State transfers under federal benefit programs may have impacts on State and local economies, large and small businesses, and individuals. Other indirect costs of the Alternative include administrative costs incurred by States. DHS received a detailed comment on State administrative costs. The commenter stated that the State incurred significant costs in addressing the needs of immigrant-serving community

organizations, responding to the fear and confusion caused by the 2019 Final Rule, conducting community education and individual family counseling, and planning and training the State caseworkers related to 2019 Final Rule. Since the Alternative is similar to the 2019 Final Rule, DHS believes these administrative costs in this comment are similar to administrative costs that would be imposed by the Alternative.

*Comment:* Citing numerous studies, some of which DHS included in the proposed rule, an advocacy group described un-insurance trends fueled by the 2019 Final Rule that reversed substantial gains in insurance rates leading up to 2019. The advocacy group and a research organization cited findings from a 2020 Urban Institute survey,<sup>559</sup> which indicated that immigrant families avoided noncash public benefit programs in 2020, despite facing hardships resulting from the COVID pandemic. The research organization further remarked that a variety of sources, including individual surveys, reports from service providers, and analyses of enrollment data demonstrate the chilling effect of the previous public charge rule on participation across public benefit programs. Citing data from a New York City focus group and a Protecting Immigrant Families Campaign and BSP Research survey, the commenter underscored the widespread and lasting impact of the 2019 public charge rule on families that include immigrants. Also citing numerous studies, an advocacy group provided data contextualizing the impact of the 2019 Final Rule on Asian American and Pacific Islander (AAPI) communities, including Compact of Free Association (COFA) migrants and survivors of violence. Relatedly, a healthcare provider and an advocacy group commented on the negative impacts of the 2019 Final Rule on eligible immigrants. They stated that the 2019 Final Rule harmed marginalized immigrants and increased burdens on the nation’s healthcare system.

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<sup>559</sup> Hamutal Bernstein et al., “Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019,” Urban Institute (2020), [https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019\\_3.pdf](https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_3.pdf) (last visited Aug. 16, 2022).

*Response:* DHS acknowledges that the 2019 Final Rule caused fear and confusion among U.S. citizens and noncitizens and had chilling effects on the use of public benefits by noncitizens and U.S. citizens in mixed-status families. As several commenters mentioned, numerous studies have discussed the impact of the 2019 Final Rule on immigrants, families of immigrants, and marginalized immigrants.

*Comment:* An individual commenter expressed concern with the increase in costs for applicants affected by the proposed rule, reasoning that the cost of the application is already inflated and that any additional increase would prevent applicants from obtaining legal status.

*Response:* DHS did not propose and is not increasing the I-485 fee through this final rule. Similarly, DHS does not expect the number of applicants will decrease due to the increase in time burden to complete Form I-485. DHS estimated the direct costs of the rule to complete Form I-485 for applicants who are subject to the public charge ground of inadmissibility. The increase in cost to the applicants is due to the 0.75 hour increase in time burden to complete Form I-485, not a fee increase. The time burden includes the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application. Additionally, DHS does not expect the increase in time burden to complete the form will prevent applicants from obtaining legal status.

The 2019 Final Rule imposed additional costs on the population applying to adjust status using Form I-485 by requiring the applicants to file Form I-944, Declaration of Self-Sufficiency. The 2019 Final Rule also imposed additional costs for completing Forms I-485, I-129, I-129CW, and I-539 as the associated time burden estimate for completing each of these forms was projected to increase. In contrast to the 2019 Final Rule, this final rule only increases the time burden for completing Forms I-485 and does not introduce a Form I-944 or change the Forms I-129, I-129CW, or I-539 at all.

*Comment:* In response to DHS's request for comments on ways to estimate the value of non-paid time, an individual commenter stated that a fair assessment of unpaid, volunteer, and other non-paid activities individuals undertake may be based on effective minimum wage or rates consistent with those paid for similar work in the candidate's relevant labor market, whichever is highest. The commenter further suggested that DHS include "reasonable" paid fringe benefits in the valuation, reasoning that this approach would be consistent with the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards at 2 CFR 200.306(e).

*Response:* DHS uses the effective minimum wage but declines to consider in this analysis rates consistent with those paid for similar work in the candidate's relevant labor market. DHS uses the effective minimum wage rate as a single objective measure since it is difficult to estimate the value of the time associated with the wide variety of non-paid activities an individual could pursue. In addition, DHS uses the benefits-to-wage multiplier, which incorporates the full cost of benefits, including paid leave, supplemental pay, insurance, retirement, and savings.

*Comment:* Multiple commenters, including State governments, an attorney, and an advocacy group, said that the proposed rule's narrow definition of a public charge places heavy costs on Federal, State, Tribal, or local governments that administer benefits to immigrants. These commenters remarked that the proposed rule's economic analysis fails to consider the administrative burdens placed on each State that undertakes the responsibility of administering the public benefits. However, a legal services provider said that the rule's detractors who focus on the savings to State and local governments from being able to avoid providing benefits to eligible noncitizens and their families make the inappropriate objection that the NPRM should be revised to allow State and local governments to reap the benefits of frightening their residents into forgoing benefits that those governments are obligated to provide.

*Response:* In the proposed rule, DHS gave more thorough consideration to the potential chilling effects of promulgating regulations governing the public charge inadmissibility determination. In considering such effects, DHS took into account the former INS's approach to chilling effects in the 1999 Interim Field Guidance and the 1999 NPRM, the 2019 Final Rule's discussion of chilling effects, judicial opinions on the role of chilling effects, evidence of chilling effects following the 2019 Final Rule, and public comments on chilling effects following the August 2021 Advance Notice of Proposed Rulemaking (ANPRM).

DHS acknowledges that the 2019 Final Rule caused fear and confusion among U.S. citizens and noncitizens and had a chilling effect on the receipt of public benefits, even among those who were not subject to the rule and with respect to public benefits that were not covered by the rule such as U.S. citizen children in mixed-status households, longtime lawful permanent residents who are only subject to the public charge ground of inadmissibility in limited circumstances, and noncitizens in a humanitarian status who would be exempt from the public charge ground of inadmissibility in the context of adjustment of status. DHS estimates the reduction in transfer payments due to the chilling effects in Section IV.A.5.d. Commenters stated that this reduction in transfer payments from the Federal and State government to public benefit recipients are savings. DHS recognizes the commenters' observation that the reduction in transfer payment will reduce State expenditures on public benefit programs. However, DHS analyzes this effect as a transfer payment under OMB Circular A-4.<sup>560</sup> As OMB Circular A-4 prescribes, changes in transfer payments are neither costs nor benefits of the rule and are treated separately in the analysis. The impacts to States of the potential change in transfer payments is also discussed in Section IV.A.5.d. Also, disenrollment or forgone enrollment in public benefit programs could lead to worsening health outcomes, increased use of emergency rooms and emergency care as methods of primary health care due to delayed treatment, increased

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<sup>560</sup> See OMB, "Circular A-4" (Sept. 17, 2003), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf).

prevalence of communicable diseases, increased uncompensated care, increased rates of poverty and housing instability, and reduced productivity and educational attainment. DHS also recognizes that reductions in federal and State transfers under federal benefit programs may have impacts on State and local economies, large and small businesses, and individuals.

Moreover, DHS emphasizes that neither the statutory public charge ground of inadmissibility nor this final rule governs eligibility for public benefits. This final rule does not address which noncitizens are, or should be, eligible to receive public benefits. DHS is committed to making clear in this rule and in any communication materials and implementing guidance who is and is not subject to the public charge ground of inadmissibility. With this final rule, DHS intends to faithfully apply the public charge ground of inadmissibility without causing undue confusion among the public. This final rule implements the statute lawfully while minimizing chilling effects in order to avoid widespread societal issues that result from food insecurity, forgone medical care, and uncompensated healthcare costs among immigrant and mixed status families.

*Comment:* A State health department said that while it expects some additional costs to be incurred due to additional changes in the proposed rule, these costs are likely to be modest. Overall, the commenter said State costs would be minimized by a simple, clearly understandable rule that excludes all benefits and does not require detailed analyses of which programs are and are not considered in a public charge assessment. Further, the commenter expressed support for language in the NPRM stating that the only receipt that counts is the intending immigrant being named as a beneficiary for one or more of the countable benefits themselves.

*Response:* DHS agrees that the direct cost of the rule is relatively modest. This is in part due to similarities between the rule and the approach taken in the 1999 Interim Field Guidance. DHS agrees that a simple and clearly understandable rule would minimize familiarization costs as well as administrative costs incurred by planning and training caseworkers and call center workers and by decreasing the number of customers to the caseworker services. However, as



discussed elsewhere in this rule, DHS is declining to exclude from consideration past or current receipt of all public benefits.

*Comment:* A State government remarked that 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. The commenter stated that in 2018, it awarded a State-fund grant of \$1.2 million to provide technical assistance and training materials for legal service providers and community advocates on public charge. An additional \$1 million was issued in 2019, among other funding. The commenter emphasized the complex nature of immigration law and the difficulty encountered by the commenter in developing public engagement materials due to the complex nature of immigration law and repeated changes to public charge policy.

*Response:* DHS acknowledges that some States have chosen to engage in outreach to social service providers and the general public regarding public charge matters. DHS agrees that the removal of consideration of past receipt of public benefits from the proposed rule may mitigate the need for such outreach. Such an approach could also simplify the administration of public benefit programs to the extent that public benefit granting agencies would not need to respond to recipient or applicant inquiries regarding immigration consequences of public benefit receipt. DHS also acknowledges that collecting information from applicants for adjustment of status on past or current benefit use has resulted in an increase to the time burden for completing the Form I-485. Also, the revised Form I-485 may indirectly increase administrative costs for benefit granting agencies due to an increase in workload to respond to some beneficiaries who may inquire about their history of public benefit receipts. However, DHS notes that under this final rule, it has streamlined this information collection, and the increase in time burden is less than the time burden increase under the 2019 Final Rule when applicants were required to complete Form I-944 Declaration of Self Sufficiency and provide supporting evidence.

As explained in more detail earlier in this preamble, DHS has determined that it should continue to consider past and current receipt of public cash assistance for income maintenance and long-term institutionalization at government expense because these may be indicative of primary dependence on the government for subsistence. DHS has consistently considered the past and current receipt of such benefits in making public charge inadmissibility determinations and has consistently considered such receipt in the totality of the circumstances, taking into account the amount, duration, and recency of the receipt. DHS has also consistently stated that the past or current receipt of benefits alone is not a sufficient basis to determine whether an applicant is likely at any time to become a public charge.

*Comment:* A State government and a local government commented that DHS should remove all Medicaid coverage and services from public charge inadmissibility determinations, reasoning that when patients lose coverage, overall costs to State or city governments increase.

*Response:* DHS acknowledges that when patients lose medical coverage, overall costs to State or local governments may increase, and there may be long-term consequences for patients and their families and communities. As described in Section IV.A.5.d., disenrollment or forgoing enrollment in Medicaid due to a chilling effect could lead to worse health outcomes, increase use of emergency rooms and emergent care as methods of primary health care due to delayed treatment, increase prevalence of communicable diseases, increase uncompensated care, and reduce productivity and educational attainment. DHS also recognizes that reductions in Medicaid coverage might result in reduced revenues for healthcare providers participating in Medicaid and companies that manufacture medical supplies or pharmaceuticals. DHS notes that it is excluding from consideration nearly all forms of Medicaid, except for long-term institutionalization at government expense.

DHS has determined that, like cash assistance for income maintenance, long-term institutionalization at government expense is indicative of primary dependence on the government for subsistence. However, DHS also recognizes that there may be instances when

individuals are institutionalized in violation of federal law due to the unavailability of alternative services, such as HCBS. Recognizing that some instances of institutionalization may violate federal law, DHS will accept evidence that institutionalization violates the individual's rights under disability laws, including the ADA and section 504. In addition, this final rule retains a clarification that disability will never alone form the basis for determining that a noncitizen is likely at any time to become a public charge. DHS does not have data to assess how many individuals are both subject to the public charge ground of inadmissibility and are institutionalized on a long-term basis at government expense (including when such services are covered by Medicaid) so is unable to quantify the impact of retaining this long-standing policy in the final rule. However, DHS believes that the impact is small.

*Comment:* A State government agency stated that it had experienced the immense administrative burden of the 2019 Final Rule and expressed concern over staff and customers continuing to be adversely affected by the administrative burden of implementing measures aimed at mitigating the chilling effect of a public charge rule, by the need to counsel eligible enrollees and recipients of their rights to receive benefits, and by the expected loss of enrollees and recipients.

*Response:* DHS acknowledges the concerns over staff and customers continuing to be adversely affected by the administrative burden of implementing measures aimed at mitigating the chilling effect of a public charge rule. DHS is keenly aware of the established effects of its actions in this policy area and wishes to ensure that the final rule faithfully applies the public charge ground of inadmissibility without causing undue confusion among the public.

*Comment:* An advocacy group acknowledged that the "proposed rule would not have a significant economic impact on a substantial number of small entities."

*Response:* DHS agrees that the rule does not directly regulate small entities and is not expected to have a direct effect on small entities. It does not mandate any actions or requirements for small entities in the process of filing a Form I-485 Adjustment of Status by a requestor

seeking immigration benefits. This rule regulates individuals, who are not defined as “small entities.”

*Comment:* One commenter stated that immigrants create economic growth and increase tax revenue to better the nation, and in general, having immigrants become successful is better for the country.

*Response:* DHS acknowledges the economic impact of immigrants as many researchers have discussed. While DHS agrees that having immigrants become successful is better for the country, DHS does not expect that this rule would change the overall level of immigration as DHS does not expect the population seeking adjustment of status or admission at a port of entry would change due to this rule.

*Comment:* An advocacy group remarked that, given the positive impact immigrants have on the U.S. economy, the changes in the proposed rule are sensible and would further support the success of immigrants and their contributions to the U.S. economy. An anonymous commenter said the proposed rule positively effects supply and demand in the United States, as “...immigrants who increase the supply of labor also demand goods and services, causing the demand for labor to increase.”

*Response:* For the regulatory analysis, DHS estimated the No Action Baseline using existing policy and compared the estimated costs and benefits of the provisions set forth in the rule to this baseline. DHS estimated that the projected average annual total population of adjustment of status applicants and applicants for admission that would be subject to review for inadmissibility on the public charge ground would not change due to the rule. DHS does not expect that the rule would change the overall level of immigration.

*Comment:* A few commenters, including a group of Attorneys General, State governments, and an anonymous commenter, said that compared to the 2019 Final Rule, the proposed rule would increase access to health care and nutritional services, resulting in long-term net benefits for the States and their residents. Similarly, a local government remarked that broad

access to public benefits by eligible individuals leads to better health outcomes for individuals and communities, while minimizing costs of emergency care often borne by local governments.

*Response:* This final rule would implement a different policy from the 2019 Final Rule. DHS believes that, in contrast to the 2019 Final Rule, this rule would effectuate a more faithful interpretation of the statutory phrase “likely at any time to become a public charge”; avoid unnecessary burdens on applicants, officers, and benefits-granting agencies; and mitigate the possibility of widespread “chilling effects” with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible, especially with respect to individuals who are not subject to the public charge ground of inadmissibility.

## **2. Family Assessment**

*Comment:* One commenter stated that DHS must issue an assessment explaining the benefits of the proposed rule on family well-being, stating that section 654 of the Treasury and General Government Appropriations Act, 1999 directs federal agencies to issue a family policymaking assessment for any rule that may affect family well-being and that, under the law, the agency must evaluate a regulatory action’s impact on the stability or safety of the family, on the family’s ability to perform its function, and on disposable income, poverty, or any other financial impact for families and children. This commenter stated that DHS incorrectly assumed that a family well-being assessment must only be issued if a rule negatively impacts family well-being, but that the legislative language makes clear that agencies’ assessment should look at both positive and negative impacts.

*Response:* Section 654 of the Treasury and General Government Appropriations Act, 1999 requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Agencies must assess whether: (1) The action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and

supervision of their children; (3) the action helps the family perform its functions, or substitutes governmental activity for the function; (4) the action increases or decreases disposable income or poverty of families and children; (5) the proposed benefits of the action justify the financial impact on the family; (6) the action may be carried out by State or local government or by the family; and (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

In the NPRM, DHS stated that “DHS has analyzed this proposed regulatory action in accordance with the requirements of section 654 and determined that this proposed rule does not affect family well-being, and therefore DHS is not issuing a Family Policymaking Assessment.”<sup>561</sup> In the NPRM and in this Final Rule, DHS has focused on all of the effects of the rule, not just the negative effects, nor does DHS misunderstand the requirements applicable to this assessment. DHS agrees that not generally considering non-cash benefits in public charge inadmissibility determinations may reduce chilling effects for low-income individuals enrolling or remaining enrolled in such programs and may indirectly support children and families’ access to health care, nutrition, and housing assistance by excluding those benefits from consideration for a public charge inadmissibility determination. This final rule also includes a definition of receipt of public benefits that clarifies that only public cash assistance for income maintenance and long-term institutionalization at government expense received by a noncitizen applying for admission or adjustment of status will be considered in a public charge inadmissibility determination, but not if received by a noncitizen’s family members. The final rule similarly clarifies that applying for these public benefits on behalf of another would not be considered as receiving the public benefit unless the noncitizen is also a named recipient.

When issuing the 2019 Final Rule, DHS determined that the 2019 Final Rule might result in decreased disposable income and increased the poverty of certain families and children,

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<sup>561</sup> 87 FR at 10667 (Feb. 24, 2022).

including U.S. citizen children, and that the rule would likely increase the number of noncitizens found inadmissible on the public charge ground. DHS ultimately decided that it was justified in issuing the 2019 Final Rule notwithstanding the potential financial impact on the family and increase in the number of inadmissibility determinations.

In contrast, the determination reflected in the NPRM that no Family Policy Assessment is required was based on the fact that DHS proposed a rule that, as it relates to the potential effects on the family, is substantively similar to how DHS is currently administering the public charge ground of inadmissibility under section 212(a)(4) of the INA, consistent with the 1999 Interim Field Guidance. Therefore, DHS determined that this rule would not affect family well-being.

*Comment:* One commenter disagreed that the proposed rule does not affect family well-being due to the documented chilling effects and families subsequently choosing to not enroll eligible children into public benefits programs.

*Response:* DHS acknowledges the documented chilling effects described by the commenter. However, the documented chilling effects are impacts of previous public charge policies enacted by the now vacated 2019 Final Rule. This final rule is similar to the approach outlined in the 1999 Interim Field Guidance, which is the basis for USCIS' current operations regarding public charge. Relative to the No Action Baseline of this final rule, DHS does not believe this new rule would have a substantial chilling effect. Therefore, DHS determined that this rule will not have a deleterious effect on family well-being.

#### **Q. Out-of-Scope Comments**

*Comment:* Several commenters provided comments outside the scope of this rulemaking. These included support for increasing the capacity of the Executive Office for Immigration Review (EOIR). Another commenter stated that immigrants who come to the United States have lower delinquency and are better behaved than individuals who are raised in the United States. One commenter indicated that benefit-granting agencies should improve their systems to better

detect fraud used to obtain benefits. This commenter also indicated that the FPG should be adjusted to account for current inflation.

*Response:* The comments are outside the scope of the rulemaking.

*Comment:* One commenter stated the rule punishes victims of the United States' historical economic and immigration policies with respect to Mexico, which, according to the commenter, damaged the Mexican economy and encouraged Mexicans to leave their country and seek assistance in the United States.

*Response:* To the extent that the comment seeks changes in U.S. policy towards Mexico or an assessment of historical policies, it is outside the scope of the rulemaking.

*Comment:* One commenter suggested a range of outreach activities to educate immigrants and their families about this rulemaking, including joint grant initiatives between multiple federal agencies.

*Response:* Comments about such implementation activities are outside the scope of the rulemaking, but DHS has taken the comment under advisement as it relates to post-rule implementation and outreach activities.

*Comment:* Two commenters suggested allowing immigrants to apply for citizenship at the U.S. border, with one commenter proposing the rule allow immigrants to file for citizenship as a family group, rather than individually, in order to slow the separation of families at the border and allow families to enter the United States together. Another commenter suggested a program through which noncitizens could obtain citizenship through volunteering in communities. Similarly, one commenter stated that systemic changes in the immigration system are needed and stated that DHS should consider the disadvantages of returning to a system created in the 1990s and consider creating a path for undocumented immigrants to become full citizens to improve the efficiency of the labor market, allow for creation of new businesses, and the filling in of less desirable labor positions.

*Response:* The comments are outside the scope of the rulemaking.



*Comment:* One commenter suggested immigrants be provided easier access to jobs that accept non-English speaking workers. Similarly, a commenter stated that the solution to allow immigrants to help with the economy is to give immigrants access to government-funded job opportunities such as community service.

*Response:* The commenters' proposals are outside the scope of the rulemaking.

*Comment:* One commenter questioned why DHS is making immigration more difficult when many terrorist plots and attacks in the United States are committed by white supremacists and other like-minded extremists born in the United States. This commenter also stated that the U.S. economy will be negatively impacted if immigrant workers feel that their livelihoods are in jeopardy. Another commenter also stated that immigration regulations were too strict, and described a family circumstance involving a completely different provision of the immigration laws.

*Response:* To the extent that the comments suggest that DHS should avoid enforcing the public charge ground of inadmissibility entirely, DHS has addressed them earlier in the preamble. To the extent that the comments suggest revising implementation of other provisions of the INA or providing a greater sense of security to immigrants in their work, they are outside the scope of the rulemaking.

*Comment:* One commenter suggested DHS work with the Rehabilitation Services Administration to ensure immigrants with disabilities applying for admission can access vocational rehabilitation services that will help them support themselves.

*Response:* While interagency discussions are a part of the internal deliberative process associated with the rulemaking, this suggestion is outside the scope of this rule.

*Comment:* One commenter indicated that any changes made to a public charge inadmissibility determination by DHS should be made in an identical manner by DOS in the Foreign Affairs Manual. Another commenter similarly requested DOS also participate in

rulemaking to establish a consistent public charge inadmissibility determination process and reduce burdens on applicants.

*Response:* This rule only pertains to DHS operations, and regulates noncitizens who seek admission into the United States as a nonimmigrant, or as an immigrant, or who seek adjustment of status.

#### **IV. Statutory and Regulatory Requirements**

##### **A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)**

E.O. 12866 and E.O. 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, to the extent permitted by law, to proceed only if the benefits justify the costs. They also direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In particular, E.O. 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also considering equity, fairness, distributive impacts, and human dignity.

The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has determined that this final rule is an economically significant regulatory action under section 3(f)(1) of E.O. 12866. Accordingly, OMB has reviewed this regulation.

##### **1. Summary of the Final Rule**

The final rule describes how DHS will determine whether a noncitizen is inadmissible because they are likely at any time to become a public charge (i.e., likely to become primarily dependent on the government for subsistence). The final rule also clarifies the types of public benefits that are considered in public charge inadmissibility determinations. This rule will limit such consideration to public cash assistance for income maintenance and long-term

institutionalization at government expense.<sup>562, 563</sup> Public cash assistance for income maintenance would include cash assistance provided under TANF, SSI, and general assistance. This is the same list of public benefits that are considered under the 1999 Interim Field Guidance, which served as the operative standard for nearly 20 years until the 2019 Final Rule (no longer in effect) was promulgated. This rule also defines key terms and codifies a list of categories of noncitizens who are statutorily exempt from the public charge ground of inadmissibility, or eligible for a waiver.

The final rule uses a framework similar to the one set forth in the 1999 Interim Field Guidance, under which officers consider past or current receipt of certain public benefits, as well as the statutory minimum factors (the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills) and the Affidavit of Support Under Section 213A of the INA, where required, as part of a totality of the circumstances framework. The final rule maintains the language set forth in the 1999 Interim Field Guidance that reiterated more specifically the general requirement that every written denial decision issued by USCIS based on the public charge ground of inadmissibility include a discussion of each of the statutory factors. The final rule establishes three exclusions from consideration of public benefits received by certain noncitizens. First, the final rule clarifies that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility. Second, when making a public charge inadmissibility determination under the final rule, DHS also will not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits

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<sup>562</sup> See 8 CFR 212.21(a).

<sup>563</sup> As noted in the public benefits section above, DHS is replacing the term "institutionalization for long-term care at government expense" with "long-term institutionalization," which better describes the specific types of services covered and the duration for receiving them. The terms are not meant to be substantively different.

available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under section 412(d)(2) of the INA, 8 U.S.C. 1522(d)(2), provided to an “unaccompanied alien child” as defined under section 462(g)(2) of the HSA, 6 U.S.C. 279(g)(2). This exclusion would only apply to those categories of noncitizens who are eligible for all three of the types of support listed (resettlement assistance, entitlement programs, and other benefits) typically reserved for refugees. Third, applying for a public benefit on one’s own behalf or on behalf of another would not constitute receipt of public benefits by the noncitizen applicant. This definition would make clear that the noncitizen’s receipt of public benefits solely on behalf of another, or the receipt of public benefits by another individual (even if the noncitizen assists in the application process), would also not constitute receipt of public benefits by the noncitizen.

*Summary of Changes from the NPRM to the Final Rule*

In light of public comments, DHS is making several changes from the NPRM to the final rule. DHS does not expect these changes will affect the population consisting of individuals who are applying for adjustment of status using Form I-485 as these changes are additional provisions to include a public charge bond process, additional definitions, and clarifications pertaining to the statutory minimum factors and consideration of receipt of public benefits. The rest of this section discusses these changes in detail.

DHS is adding a provision in this rule that would permit officers to consider offering public charge bonds, in its discretion, to adjustment of status applicants inadmissible only under section 212(a)(4) of the INA, 8 U.S.C. 1183.<sup>564</sup> DHS is including provisions in the rule pertaining to public charge bond cancellation and breach determination. These provisions will ensure that DHS is exercising its discretionary public charge bond authority in the context of adjustment of status applications and will ensure that public charge bonds remain operationally feasible in such cases. Also, these provisions will enable a noncitizen who was found

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<sup>564</sup> 8 CFR 213.1.

inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS. With the creation of a form designated by USCIS for the purpose of public charge bond and using the Form I-356, Request for Cancellation of Public Charge Bond, DHS expects that there will be a cost to bond applicants associated with completing the forms. However, DHS expects the population of using the public charge bond form designated by USCIS and Form I-356 to be de minimis. DHS expects the population of using these forms to be de minimis because while the 2019 Final Rule was in effect DHS did not receive any filings of the public charge bond form and I-356 form.

Following review of public comments, DHS is also modifying provisions related to statutory minimum factors (health, family status, assets, resources, and financial status, and education and skills) from the NPRM.

DHS will consider the noncitizen's health using the Report of Medical Examination and Vaccination record (Form I-693). This report of medical examination would normally be in an adjustment of status applicant's record because an adjustment applicant is required to undergo an immigration medical examination conducted by a USCIS-designated civil surgeon or the applicant is exempt from the Form I-693 requirement because they were previously examined by a panel physician prior to entering the United States and has a report of medical examination completed by a panel physician overseas in their record. Since the Form I-693 is already required for filers of Form I-485, using the Form I-693 as evidence for the noncitizen's health condition does not impose additional direct cost to the public. This change will provide direct benefits to the public by reducing uncertainty over what DHS will consider as part of the health factor, while minimizing burdensome information collection associated with this factor.

DHS will consider the noncitizen's family status using household size. DHS will consider the noncitizen's assets, resources, and financial status using household's income, assets, and liabilities (excluding any income from public benefits listed in 8 CFR 212.21(b) and income or assets from illegal activities or sources such as proceeds from illegal gambling or drug sales).

DHS will consider the noncitizen's education and skills using degrees, certifications, licenses, skills obtained through work experience or educational programs, and educational certificates. DHS is adding a definition of household to be used in connection with the family status and assets, resources, and financial status factors. For the changes to provisions addressing these statutory minimum factors to identify information relevant to such factors, DHS made changes to Form I-485 to effectuate the relevant information collection. In the final rule compared to the NPRM, DHS has reduced the estimated increase in the time burden for completing the revised Form I-485 from 1.5 hours to 0.75 hours (thereby reducing the estimated total time burden for completing the revised Form I-485 from 7.92 hours to 7.17 hours). Open-ended questions requiring narrative-style responses that were proposed in the information collection instrument (Form I-485) associated with the NPRM have been changed to multiple-choice style questions that will require less time for an applicant to answer. Therefore, the final rule cost estimate has changed since the NPRM cost estimate. DHS estimates the annual direct cost of the final rule will be approximately \$6,435,755, rather than \$12,856,152, based on the change in the opportunity cost for the I-485.

Finally, in the final rule, DHS clarified in the regulatory text that DHS will not consider the receipt of, or certification or approval for future receipt of, public benefits not referenced in 8 CFR 212.21(b) or (c), such as Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs, Children's Health Insurance Program (CHIP), Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits. This clarification will reduce uncertainty and confusion for those who make decisions on whether to adjust status or to enroll or disenroll in public benefit programs.

This final rule makes important clarifications and changes as compared to the 1999 Interim Field Guidance. This rule clarifies DHS's approach to consideration of disability and

long-term institutionalization at government expense; states a bright-line rule against considering the receipt of public benefits by an applicant's dependents (such as a U.S. citizen child in a mixed-status household); and changes the Form I-485 to collect additional information relevant to the public charge inadmissibility determination. DHS also added streamlined provisions to clarify acceptance, form, and amount of USCIS public charge bonds, as well as cancellation of public charge bonds. Finally, later in this preamble, in response to public comments, DHS further clarifies that primary dependence connotes significant reliance on the government for support and means something more than dependence that is merely transient or supplementary.

## **2. Summary of the Costs and Benefits of the Final Rule**

The final rule will result in new costs, benefits, and transfers. To provide a full understanding of the impacts of the final rule, DHS considers the potential impacts of this final rule relative to two baselines, as well the potential impact of a regulatory alternative. The No Action Baseline represents a state of the world under the 1999 Interim Field Guidance, which is the policy currently in effect. The second baseline is the Pre-Guidance Baseline, which represents a trajectory established before the issuance of the 1999 Interim Field Guidance (i.e., a state of the world in which the 1999 Interim Field Guidance did not exist). The alternative analysis presented below relates to an alternative consistent with the 2019 Final Rule.

Relative to the No Action Baseline, the primary source of quantified new direct costs for the final rule is the increase in the time required to complete Form I-485. DHS estimates that the final rule will impose additional new direct costs of approximately \$6,435,755 annually to applicants filing Form I-485. In addition, the final rule results in an annual savings for a subpopulation of affected individuals: T nonimmigrants applying for adjustment of status will no longer need to submit Form I-601 to seek a waiver of the public charge ground of

inadmissibility. DHS estimates the total annual savings for this population will be approximately \$15,359. DHS estimates that the total annual net costs will be approximately \$6,420,396.<sup>565</sup>

Over the first 10 years of implementation, DHS estimates the total net costs of the final rule will be approximately \$64,203,960 (undiscounted). In addition, DHS estimates that the 10-year discounted total net costs of this final rule will be approximately \$54,767,280 at a 3-percent discount rate and approximately \$45,094,175 at a 7-percent discount rate.

DHS expects the primary benefit of this final rule to be the non-quantified benefit of increased clarity in the rules governing public charge inadmissibility determinations. By codifying into regulations, the current practice under the No Action Baseline (the 1999 Interim Field Guidance) with some changes, the final rule reduces uncertainty and confusion.

The following two tables provide a more detailed summary of the provisions and their impacts relative to the No Action Baseline and Pre-Guidance Baseline, respectively.

<b>Table 4. Summary of Major Provisions and Economic Impacts of the Rule, FY 2022 – FY 2032 (Relative to the No Action Baseline)</b>		
<b>Provision</b>	<b>Purpose</b>	<b>Expected Impact of Rule</b>
Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of noncitizens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	<p><b>Quantitative:</b></p> <p><u>Cost Savings:</u></p> <ul style="list-style-type: none"> <li>• Total savings of approximately \$15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul>

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<sup>565</sup> Calculations: Total annual net costs (\$6,420,396) = Total annual costs (\$6,435,755) – Total annual savings (\$15,359).



<p>Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.</p>	<p>To define the categories of noncitizens that are subject to the public charge inadmissibility determination.</p>	<p><b>Qualitative:</b>  <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• The rule will reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul>
<p>Adding 8 CFR 212.21. Definitions.</p>	<p>To establish key definitions, including “likely at any time to become a public charge,” “receipt (of public benefits),” “public cash assistance for income maintenance,” “long-term institutionalization at government expense,” and “government.”</p>	<p><b>Quantitative:</b>  <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Qualitative:</b>  <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The final rule could lead to an increase in transfer payments, primarily due to increased public benefit participation by individuals who are not subject to the public charge ground of inadmissibility, but for whom the final rule offers some additional measure of clarity or certainty regarding the immigration-related effects of public benefits enrollment. This could include, for instance, U.S. citizen children in mixed status families, who would receive greater assurance that their receipt of public benefits may not be considered in their relatives’ public charge inadmissibility determinations.</li> </ul>

<p>Adding 8 CFR 212.22. Public charge inadmissibility determination.</p>	<p>To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.</p>	<p><b>Quantitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Total annual direct costs of the rule will be approximately \$6,435,755 to applicants applying to adjust status using Form I-485 with an increased time burden.</li> </ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the rule may reduce time spent by the affected population in deciding whether to apply for adjustment of status or enroll in or disenroll from public benefit programs.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Costs to various entities and individuals associated with regulatory familiarization with the rule. Costs will include the opportunity cost of time to read the rule and subsequently determine applicability of the rule's provisions. DHS estimates that the time to read this rule in its entirety will be 8 to 9 hours per individual.</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The rule could lead to an increase in transfer payments associated with public benefit participation, predominantly by individuals who would not be subject to the public charge ground of inadmissibility in any event. This increase would be the result of better clarity around which noncitizens are exempt from the public charge ground of inadmissibility, and which benefits are considered under this rule.</li> </ul>
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<p>Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.</p>	<p>Outlines exemptions and waivers for inadmissibility based on the public charge ground.</p>	<p><b>Qualitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• The rule will reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens who are in a status that is exempt from the public charge ground of inadmissibility or who are made eligible by Congress for certain benefits made available to refugees, may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.</li> </ul>
<p>Amending 8 CFR 103.6. Immigration bonds. Amending 8 CFR 213.1. Admission under bond or cash deposit.</p>	<p>To clarify cancellation and breach of public charge bonds. To add specifics to the public charge bond provision for noncitizens who are seeking adjustment of status for a public charge bond.</p>	<p><b>Qualitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Potentially enable a noncitizen who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• DHS expects that there will be a cost to bond applicants associated with completing the forms. However, DHS expects the population using the public charge bond form and bond cancellation form to be de minimis.</li> </ul>
<p>Source: USCIS analysis.</p>		

<p><b>Table 5. Summary of Major Provisions and Economic Impacts of the Rule, FY 2022 – FY 2032 (Relative to the Pre-Guidance Baseline)</b></p>		
<p><b>Provision</b></p>	<p><b>Purpose</b></p>	<p><b>Expected Impact of Rule</b></p>

<p>Revising 8 CFR 212.18. Application for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders.</p> <p>Revising 8 CFR 245.23. Adjustment of noncitizens in T nonimmigrant classification.</p>	<p>To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.</p>	<p><b>Quantitative:</b> <u>Cost Savings:</u></p> <ul style="list-style-type: none"> <li>• Total savings of approximately \$15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul>
<p>Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.</p>	<p>To define the categories of noncitizens that are subject to the public charge inadmissibility determination.</p>	<p><b>Qualitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• The rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul>
<p>Adding 8 CFR 212.21. Definitions.</p>	<p>To establish key definitions, including “likely at any time to become a public charge,” “receipt (of public benefits),” “public cash assistance for income maintenance,” “long-term institutionalization at government expense,” and “government,” and “household.”</p>	<p><b>Quantitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Qualitative:</b> <u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The final rule could lead to an increase in transfer payments, primarily due to increased public benefit participation by individuals who are not subject to the public charge ground of inadmissibility, but for whom the final rule offers some additional measure of clarity or certainty regarding the immigration-related effects of public benefits enrollment. This could include,</li> </ul>

		<p>for instance, U.S. citizen children in mixed status families, who would receive greater assurance that their receipt of public benefits may not be considered in their relatives' public charge inadmissibility determinations.</p>
<p>Adding 8 CFR 212.22. Public charge inadmissibility determination.</p>	<p>To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.</p>	<p><b>Quantitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Total annual direct costs of the rule will be approximately \$6,435,755 to applicants applying to adjust status using Form I-485 with an increased time burden.</li> </ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the rule may reduce time spent by the affected population in deciding whether to apply for adjustment of status or enroll in or disenroll from public benefit programs.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• Costs to various entities and individuals associated with regulatory familiarization with the rule. Costs will include the opportunity cost of time to read the rule and subsequently determine applicability of the rule's provisions. DHS estimates that the time to read this rule in its entirety will be 8 to 9 hours per individual.</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The rule could lead to an increase in transfer payments associated with public benefit participation, predominantly by individuals who are not subject to the public charge ground of inadmissibility in any event. This increase would be the result of better clarity around which noncitizens are exempt from the</li> </ul>

		<p>public charge ground of inadmissibility and which benefits are considered under the rule.</p>
<p>Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.</p>	<p>Outlines exemptions and waivers for inadmissibility based on the public charge ground.</p>	<p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• The rule will reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• None</li> </ul> <p><b>Transfer Payments:</b></p> <ul style="list-style-type: none"> <li>• The primary economic impact of the rule relative to the Pre-Guidance Baseline will be an increase in transfer payments from the Federal and State governments to individuals. However, DHS is unable to quantify these effects given how much time has passed between the issuance of the 1999 Interim Field Guidance and this rulemaking.</li> <li>• The rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens who are in a status that is exempt from the public charge ground of inadmissibility or who are made eligible by Congress for certain benefits made available to refugees, may be more likely to participate in public benefit programs for the limited</li> </ul>

		period that they are in such status or eligible for such benefits.
Amending 8 CFR 103.6. Immigration bonds. Amending 8 CFR 213.1. Admission under bond or cash deposit.	To clarify cancellation and breach of public charge bonds. To add specifics to the public charge bond provision for noncitizens who are seeking adjustment of status for a public charge bond.	<b>Qualitative:</b> <u>Benefits</u> <ul style="list-style-type: none"> <li>Potentially enable a noncitizen who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li> </ul> <u>Costs</u> <ul style="list-style-type: none"> <li>DHS expects that there will be a cost to bond applicants associated with completing the forms. However, DHS expects the population using the public charge bond form and bond cancellation form to be de minimis.</li> </ul>
Source: USCIS analysis.		

In addition to the impacts summarized above, and as required by OMB Circular A-4, the following two tables present the prepared accounting statement showing the costs associated with this final rule.<sup>566</sup>

<b>Table 6. OMB A-4 Accounting Statement (\$ in millions, 2021; No Action Baseline, FY 2022 – FY 2032)</b>				
<b>Category</b>	<b>Primary Estimate</b>	<b>Minimum Estimate</b>	<b>Maximum Estimate</b>	<b>Source Citation</b>
<b>BENEFITS</b>				
Monetized Benefits	N/A			RIA
Annualized quantified, but un-monetized, benefits	N/A	N/A	N/A	RIA

<sup>566</sup> See OMB, “Circular A-4” (Sept. 17, 2003), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf).

Unquantified Benefits	<ul style="list-style-type: none"> <li>• By clarifying rules governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the final rule will reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs.</li> <li>• The final rule will reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.</li> <li>• The rule will reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground.</li> <li>• Potentially enable a noncitizen who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li> </ul>			RIA
<b>COSTS</b>				
Annualized monetized net costs (discount rate in parenthesis)	(3%) \$6.4	N/A	N/A	RIA
	(7%) \$6.4	N/A	N/A	
Annualized quantified, but un-monetized, costs	N/A			
Qualitative (unquantified) costs	<ul style="list-style-type: none"> <li>• Costs to various entities and individuals associated with regulatory familiarization with the rule. Costs will include the opportunity cost of time to read the final rule and subsequently determine applicability of the rule's provisions. DHS estimates that the time to read this final rule in its entirety will be 8 to 9 hours per individual. DHS estimates that the opportunity cost of time will range from about \$316.40 to \$355.95 per individual who will read and review the final rule. However, DHS cannot determine the number of individuals who will read the final rule.</li> <li>• DHS expects that there will be a cost to bond applicants associated with completing the forms. However, DHS expects the population</li> </ul>			RIA



	using the public charge bond form and bond cancellation form to be de minimis.			
<b>TRANSFERS</b>				
Relative to the No Action Baseline, the final rule could lead to an increase in transfer payments, primarily due to increased public benefit participation by individuals who are not subject to the public charge ground of inadmissibility, but for whom the final rule offers some additional measure of clarity or certainty regarding the immigration-related effects of public benefits enrollment. This could include, for instance, U.S. citizen children in mixed status families, who would receive greater assurance that their receipt of public benefits may not be considered in their relatives' public charge inadmissibility determinations. This increase in transfer payments would also be the result of better clarity around which noncitizens are exempt from the public charge ground of inadmissibility, and which benefits are considered under this rule.				
Annualized monetized transfers: "on budget"	N/A	N/A	N/A	RIA
From whom to whom?				RIA
Annualized monetized transfers: "off-budget"	N/A	N/A	N/A	
From whom to whom?				
<i>Miscellaneous Analyses/Category</i>	<i>Effects</i>			<i>Source Citation</i>
Effects on State, local, and/or Tribal governments	The potential increase in transfer payments will produce indirect impacts such as administrative costs to the State and local benefit granting agencies. However, DHS is unable to quantify the net effect on States' administrative costs.			None
Effects on small businesses	None			RIA
Effects on wages	None			None
Effects on growth	None			None

<b>Table 7. OMB A-4 Accounting Statement (\$ in millions, 2021; Pre-Guidance Baseline, FY2022-FY2032)</b>				
<b>Category</b>	<b>Primary Estimate</b>	<b>Minimum Estimate</b>	<b>Maximum Estimate</b>	<b>Source Citation</b>
<b>BENEFITS</b>				
Monetized Benefits	N/A			RIA
Annualized quantified, but	N/A	N/A	N/A	RIA

un-monetized, benefits				
Unquantified Benefits	<ul style="list-style-type: none"> <li>• By clarifying rules governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the final rule will reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs.</li> <li>• The final rule will reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.</li> <li>• The rule will reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground.</li> <li>• Potentially enable a noncitizen who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li> </ul>			RIA
<b>COSTS</b>				
Annualized monetized costs (discount rate in parenthesis)	(3%)			RIA
	\$ 6.4	N/A	N/A	
	(7%)			
	\$ 6.4	N/A	N/A	RIA
Annualized quantified, but un-monetized, costs	N/A			
Qualitative (unquantified) costs	<ul style="list-style-type: none"> <li>• Costs to various entities and individuals associated with regulatory familiarization with the rule. Costs will include the opportunity cost of time to read the final rule and subsequently determine applicability of the rule's provisions. DHS estimates that the time to read this final rule in its entirety will be 8 to 9 hours per individual. DHS estimates that the opportunity cost of time will range from about \$316.40 to \$355.95 per individual who will read and review the final rule. However, DHS cannot determine the number of individuals who will read the final rule.</li> </ul>			RIA

	<ul style="list-style-type: none"> <li>DHS expects that there will be a cost to bond applicants associated with completing the forms. However, DHS expects the population using the public charge bond form and bond cancellation form to be de minimis.</li> </ul>			
<p><b>TRANSFERS</b></p> <ul style="list-style-type: none"> <li>The primary economic impact of the rule relative to the Pre-Guidance Baseline will be an increase in transfer payments from the Federal and State governments to individuals. However, DHS is unable to quantify these effects given how much time has passed between the issuance of the 1999 Interim Field Guidance and this rulemaking.</li> <li>The final rule could lead to an increase in transfer payments, primarily due to increased public benefit participation by individuals who are not subject to the public charge ground of inadmissibility, but for whom the final rule offers some additional measure of clarity or certainty regarding the immigration-related effects of public benefits enrollment. This could include, for instance, U.S. citizen children in mixed status families, who would receive greater assurance that their receipt of public benefits may not be considered in their relatives' public charge inadmissibility determinations. This increase in transfer payments would also be the result of better clarity around which noncitizens are exempt from the public charge ground of inadmissibility, and which benefits are considered under this rule.</li> </ul>				
Annualized monetized transfers: "on budget"	N/A	N/A	N/A	RIA
From whom to whom?				RIA
Annualized monetized transfers: "off-budget"	N/A	N/A	N/A	
From whom to whom?				
<i>Miscellaneous Analyses/Category</i>	<i>Effects</i>			<i>Source Citation</i>
Effects on State, local, and/or Tribal governments	<p>DHS believes that the rule may have indirect effects on State, local, and/or Tribal government, but DHS does not know the full extent of the effect on State, local, and/or Tribal governments as compared to the Pre-Guidance Baseline. There may be costs to various entities associated with familiarization of and compliance with the provisions of the rule, including salaries and opportunity costs of time to monitor and understand regulation requirements, disseminate information, and develop or modify information technology (IT) systems as needed. It may be necessary for many government agencies to update guidance documents, forms, and web pages. It may be necessary to prepare training materials and retrain</p>			RIA

	staff at each level of government, which will require additional staff time and will generate associated costs. However, DHS is unable to quantify these effects.	
Effects on small businesses	DHS believes that the rule may have indirect effects on small businesses and nonprofits in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits. However, DHS is unable to quantify these effects.	RIA
Effects on wages	None	None
Effects on growth	None	None

### 3. Background and Purpose of the Rule

As discussed in the preamble, DHS seeks to administer the public charge ground of inadmissibility in a manner that will be clear and comprehensible and will lead to fair and consistent adjudications. Under the INA, a noncitizen who, at the time of application for a visa, admission, or adjustment of status, is deemed likely at any time to become a public charge is ineligible for a visa, inadmissible, or ineligible for adjustment of status.<sup>567</sup>

While the INA does not define public charge, Congress has specified that, when determining if a noncitizen is likely at any time to become a public charge, immigration officers must, at a minimum, consider certain factors, namely the noncitizen’s age; health; and family status; assets, resources, and financial status; and education and skills.<sup>568</sup> Additionally, DHS may consider any affidavit of support submitted under section 213A of the INA, 8 U.S.C. 1183a, on behalf of the applicant when determining whether the applicant may become a public charge.<sup>569</sup> For most family-based and some employment-based immigrant visas or adjustment of status

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<sup>567</sup> See INA sec. 212(a)(4); 8 U.S.C. 1182(a)(4).

<sup>568</sup> See INA sec. 212(a)(4)(B)(i); 8 U.S.C. 1182(a)(4)(B)(i).

<sup>569</sup> See INA sec. 212(a)(4)(B)(ii). When required, the applicant must submit Form I-864, Affidavit of Support Under Section 213A of the INA.

applications, applicants must have a sufficient affidavit of support or they will be found inadmissible as likely to become a public charge.<sup>570</sup>

The estimation of costs and benefits for this final rule focuses on individuals applying for adjustment of status with USCIS using Form I-485. Such individuals would be applying from within the United States, rather than applying for a visa from a DOS consular officer at a U.S. embassy or consulate abroad. Moreover, DHS notes that CBP may incur costs pursuant to this final rule, but it is unable to determine this potential cost at this time due to data limitations. DHS is not able to quantify the number of noncitizens who would possibly be deemed inadmissible at or between the ports of entry based on a public charge determination pursuant to this final rule. DHS is qualitatively acknowledging this potential impact.

#### **4. Population**

This final rule will affect individuals who are present in the United States who are seeking adjustment of status to that of a lawful permanent resident. By statute, an individual who is seeking adjustment of status and is at any time likely to become a public charge is ineligible for such adjustment, unless the individual is exempt from or has received a waiver of the public charge ground of inadmissibility.<sup>571</sup> The grounds of inadmissibility set forth in section 212 of the INA, 8 U.S.C. 1182, also apply when certain noncitizens seek admission to the United States, whether for a temporary purpose or permanently. However, the public charge inadmissibility ground (including ineligibility for adjustment of status) does not apply to all applicants since there are various categories of applicants that Congress expressly exempted from the public charge inadmissibility ground. Within USCIS, this final rule will affect individuals who apply for adjustment of status because these individuals would be required to be reviewed for a determination of inadmissibility based on public charge grounds as long as the individual is not in a category of applicant that is exempt from the public charge ground of inadmissibility. DHS

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<sup>570</sup> See INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

<sup>571</sup> See INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).

notes that the population estimates are based on noncitizens present in the United States who are applying for adjustment of status and, due to data limitations, does not include individuals seeking admission at or between a port of entry. These limitations could result in underestimation of the cost, benefit, or transfer payments of the final rule. However, DHS is unable to quantify the magnitude.

**a. Population Seeking Adjustment of Status**

The population affected by this rule consists of individuals who are applying for adjustment of status using Form I-485. Under the final rule, a subset of these individuals (i.e., those who are not exempt from the public charge ground of inadmissibility) will undergo review for determination of inadmissibility based on public charge grounds, unless an individual is in a category of applicant that is exempt from the public charge ground of inadmissibility. The following table shows the total number of Form I-485 applications received for FY 2014 to FY 2021. DHS selects the period FY 2014 - FY 2018 to project the number of applications to be filed for the next 10 years for the reasons discussed below. Between FY 2014 and FY 2018, the population of individuals applying for adjustment of status ranged from a low of 637,138 in FY 2014 to a high of 763,192 in FY 2017. In addition, the average population of individuals who applied for adjustment of status over this period was 690,837.

<b>Table 8. Total Population that Applied for Adjustment of Status, FY 2014 to FY 2021.</b>	
<b>Fiscal Year</b>	<b>Total Population Applying for Adjustment of Status</b>
2014	637,138
2015	638,018
2016	711,431
2017	763,192
2018	704,407
2019	600,079
2020	577,920
2021	726,566
<b>Total (FY 2014 – FY 2018)</b>	<b>3,454,186</b>
<b>5-year average (FY 2014 – FY 2018)</b>	<b>690,837</b>

For this analysis, DHS projects the affected population for the 10-year period from the beginning of FY 2022. DHS bases its population projection on the historical number of Form I-485 applications received over the period FY 2014–FY 2018.<sup>572</sup>

*i. Exemptions from Determination of Inadmissibility Based on Public Charge Ground*

There are exemptions and waivers for certain categories of noncitizens that are not subject to a determination of inadmissibility based on the public charge ground. The following table shows the classes of applicants for admission, adjustment of status, or registry according to statute or regulation that are exempt from inadmissibility based on the public charge ground.

<b>Table 9. Categories of Applicants for Admission, Adjustment of Status, or Registry Exempt from Inadmissibility Based on Public Charge According to Statute or Regulation.</b>	
<ul style="list-style-type: none"> <li>Refugees and asylees as follows: at the time admission under section 207 of the Act (refugees) or grant under section 208 of the Act (asylees); for both refugees and asylees, at the time of adjustment of status to lawful permanent resident under sections 207(c)(3) and 209(c) of the Act;</li> </ul>	<ul style="list-style-type: none"> <li>Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202, 101 Stat. 1329-183, sec. 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note 5;</li> </ul>
<ul style="list-style-type: none"> <li>Afghan and Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year</li> </ul>	<ul style="list-style-type: none"> <li>Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-</li> </ul>

<sup>572</sup> USCIS excluded data from FY 2019-FY 2021 due to data anomalies similar to trends that affected other form types during this timeframe (such as Form I-765, Form N-400, Form I-130, and Form I-131). Generally, the trend for these forms is a peak in receipts in FY 2016-2018, followed by a decrease in FY 2019, a sharp reduction at the beginning of the pandemic, and a recovery to previous levels since that time. As shown in the table, the population of adjustment of status applicants in FY 2019 and FY 2020 decreased significantly, followed by an increase beginning at the end of FY 2020 and beginning of FY 2021. By far the most significant increase in FY 2021 occurred in October 2020, during which receipts reached 184,779, as compared to 86,911 in October 2019, and 55,483 in October 2018. The level of receipts in October 2020 was substantially higher than the level of receipts for any other month since FY 2014. This increase in receipts appears to have been driven in part by the publication of the October 2020 Visa Bulletin by DOS, which allowed many noncitizens to apply for adjustment of status in the employment-based categories. Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022); USCIS analysis of data provided by USCIS, Office of Performance and Quality (Aug. 15, 2022).

<p>2006 Pub. L. 109–163 (Jan. 6, 2006), as amended, section 602(b) of the Afghan Allies Protection Act of 2009, Pub. L. 111–8, title VI (Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Pub. L. 110-181 (Jan. 28, 2008);</p>	<p>603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;</p>
<ul style="list-style-type: none"> <li>• Aliens applying for adjustment of status under the Cuban Adjustment Act, Pub. L. 89-732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;</li> </ul>	<ul style="list-style-type: none"> <li>• Nicaraguans and other Central Americans applying for adjustment of status under section 202(a) and section 203 of NACARA, Pub. L. 105-100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;</li> </ul>
<ul style="list-style-type: none"> <li>• Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;</li> </ul>	<ul style="list-style-type: none"> <li>• Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;</li> </ul>
<ul style="list-style-type: none"> <li>• Special immigrant juveniles as described in section 245(h) of the Act;</li> </ul>	<ul style="list-style-type: none"> <li>• Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the INA, 8 U.S.C. 1259, and 8 CFR part 249 (Registry);</li> </ul>
<ul style="list-style-type: none"> <li>• Aliens applying for or reregistering for Temporary Protected Status, pursuant to section 244(c)(2)(ii) of the INA, 8 U.S.C. 1254a(c)(2)(ii) and 8 CFR 244.3(a)</li> </ul>	<ul style="list-style-type: none"> <li>• Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 97-429 (Jan. 8, 1983)</li> </ul>
<ul style="list-style-type: none"> <li>• Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the INA, 8 U.S.C. 1101(a)(15)(A)(i) and (ii) (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), pursuant to section 102 of the INA, 8 U.S.C. 1102, and 22 CFR 41.21(d)</li> </ul>	<ul style="list-style-type: none"> <li>• Nonimmigrants classifiable as C-2 (alien in transit to U.N. Headquarters) or C-3 (foreign government official), pursuant to 22 CFR 41.21(d)</li> </ul>
<ul style="list-style-type: none"> <li>• Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the INA (Principal Resident Representative of Recognized</li> </ul>	<ul style="list-style-type: none"> <li>• Nonimmigrants classifiable as a NATO representatives and related categories, pursuant to 22 CFR 41.21(d)</li> </ul>



<p>Foreign Government to International Organization, and related categories), 8 U.S.C. 1101(a)(15)(G)(i), (ii), (iii), and (iv), pursuant to section 102 of the INA, 8 U.S.C. 1102, and 22 CFR 41.21(d)</p>	
<ul style="list-style-type: none"> <li>• Individuals with a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the INA (Victim of Severe Form of Trafficking), 8 U.S.C. 1101(a)(15)(T), pursuant to section 212(d)(13)(A) of the INA, 8 U.S.C. 1182(d)(13)(A), as well as individuals in T nonimmigrant status who are seeking an immigration benefit for which inadmissibility is required</li> </ul>	<ul style="list-style-type: none"> <li>• Petitioners for, or individuals who are granted, nonimmigrant status under section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U) (Victim of Criminal Activity), pursuant to section 212(a)(4)(E)(ii) of the INA, 8 U.S.C. 1182(a)(4)(E)(ii), who are seeking an immigration benefit for which inadmissibility is required</li> </ul>
<ul style="list-style-type: none"> <li>• Certain Syrian nationals adjusting status under Pub. L. 106-378</li> </ul>	<ul style="list-style-type: none"> <li>• Applicants adjusting status who qualify for a benefit under Liberian Refugee Immigration Fairness, pursuant to Section 7611 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. 116-92, 113 Stat. 1198, 2309 (Dec. 20, 2019), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Pub. L. 116-260 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension)</li> </ul>
<ul style="list-style-type: none"> <li>• Noncitizens who are VAWA self-petitioners as defined in section 101(a)(51) of the INA, 8 U.S.C. 1101, pursuant to section 212(a)(4)(E)(i) of the INA, 8 U.S.C. 1182(a)(4)(E)(i)</li> </ul>	<ul style="list-style-type: none"> <li>• A “qualified alien” described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), in accordance with section 212(a)(4)(E)(iii) of the Act;</li> </ul>
<ul style="list-style-type: none"> <li>• Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Pub. L. 108-136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents)</li> </ul>	<ul style="list-style-type: none"> <li>• American Indians Born in Canada as described in section 289 of the INA, 8 U.S.C. 1359;</li> </ul>
<ul style="list-style-type: none"> <li>• Nationals of Vietnam, Cambodia, and Laos applying for adjustment</li> </ul>	<ul style="list-style-type: none"> <li>• Polish and Hungarian Parolees who were paroled into the United</li> </ul>

of status under section 586 of Pub. L. 106-429 under 8 CFR 245.21	States from November 1, 1989, to December 31, 1991, under section 646(b) of IIRIRA, Pub. L. 104-208, div. C, title VI, subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note
<ul style="list-style-type: none"> <li>Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).</li> </ul>	
Source: USCIS.	

To estimate the annual total population of individuals seeking to adjust status who would be subject to review for inadmissibility based on the public charge ground, DHS examined the annual total population of individuals who applied for adjustment of status for FY 2014 - FY 2018. As noted above, the most recent fiscal years, FY 2019 - FY 2021, are not considered for this analysis because they may include data anomalies.

For each fiscal year, DHS removed individuals from the population whose category of applicants is exempt from review for inadmissibility on the public charge ground, as shown in Table 9 below, leaving the total population that would be subject to such review. Further discussion of these exempt categories can be found in the preamble.

Table 10 shows the total estimated population of individuals seeking to adjust status under a category of applicant that is exempt from review for inadmissibility on the public charge ground for FY 2014 – FY 2018 as well as the total estimated population that would be subject to public charge review.<sup>573</sup> In FY 2018, for example, the total number of persons who applied for adjustment of status across various classes of admission was 704,407. After removing individuals from this population whose category of applicant is exempt from review for

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<sup>573</sup> Calculation of total estimated population that would be subject to public charge review: (Total Population Applying for Adjustment of Status) – (Total Population Seeking Adjustment of Status that is Exempt from Public Charge Review for Inadmissibility) = Total Population Subject to Public Charge Review for Inadmissibility.

inadmissibility on the public charge ground, DHS estimates the total population of adjustment of status applicants in FY 2018 who would be subject to review for inadmissibility on the public charge ground is 524,228.<sup>574</sup>

<b>Table 10. Total Estimated Population of Individuals Seeking Adjustment of Status Who Were Exempt from or Subject to Public Charge Inadmissibility.</b>			
<b>Fiscal Year</b>	<b>Total Population Applying for Adjustment of Status</b>	<b>Total Population Seeking Adjustment of Status that is Exempt from Review for Inadmissibility on the Public Charge Ground</b>	<b>Total Population Subject to Review for Inadmissibility on the Public Charge Ground</b>
<b>2014</b>	637,138	178,007	459,131
<b>2015</b>	638,018	170,681	467,337
<b>2016</b>	711,431	196,090	515,341
<b>2017</b>	763,192	221,629	541,563
<b>2018</b>	704,407	180,179	524,228
<b>Total</b>	<b>3,454,186</b>	<b>946,586</b>	<b>2,507,600</b>
<b>5-year average</b>	<b>690,837</b>	<b>189,317</b>	<b>501,520</b>

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).

DHS estimates the projected annual average total population of adjustment of status applicants that would be subject to review for inadmissibility on the public charge ground is 501,520. This estimate is based on the 5-year average of the annual estimated total population subject to review for inadmissibility on the public charge ground from FY 2014 – FY 2018. Over this 5-year period, the estimated population of individuals who applied for adjustment of status subject to review for inadmissibility on the public charge ground ranged from a low of 459,131 in FY 2014 to a high of 541,563 in FY 2017. DHS notes that the population estimates are based on noncitizens present in the United States who are applying for adjustment of status, rather than noncitizens who apply for an immigrant visa through consular processing at a U.S. embassy or consulate abroad.

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<sup>574</sup> Calculation of total population subject to public charge review for inadmissibility for fiscal year 2018: 704,407 – 180,179 = 524,228.

ii. *Requirement to Submit an Affidavit of Support Under Section 213A of the INA*

Certain noncitizens seeking immigrant visas or adjustment of status are required to submit an Affidavit of Support Under Section 213A of the INA executed by a sponsor on their behalf. This requirement applies to most family-sponsored immigrants and some employment-based immigrants.<sup>575</sup> Even within the family-sponsored and employment-based classes of admission, some noncitizens are not required to submit an Affidavit of Support Under Section 213A executed by a sponsor on their behalf. A failure to meet the requirement for a sufficient Affidavit of Support Under Section 213A of the INA will result in the noncitizen being found inadmissible under the public charge ground of inadmissibility without review of the statutory minimum factors discussed above.<sup>576</sup> When a sponsor executes an Affidavit of Support Under Section 213A of the INA on behalf of an applicant, they establish a legally enforceable contract between the sponsor and the U.S. Government with an obligation to financially support the applicant and reimburse benefit granting agencies if the sponsored immigrant receives certain benefits during the period of enforceability.<sup>577</sup>

Table 11 shows the estimated total population of individuals seeking adjustment of status who were required or not required to have a sponsor execute an Affidavit of Support Under Section 213A of the INA on their behalf over the period FY 2014 – FY 2018. The estimated annual average population of individuals seeking to adjust status who were required to have a sponsor submit an affidavit of support on their behalf over the 5-year period was 297,998. Over this 5-year period, the estimated total population of individuals required to submit an affidavit of support from a sponsor ranged from a low of 268,091 in FY 2014 to a high of 329,011 in FY 2017.

**Table 11. Total Estimated Population of Individuals Seeking Adjustment of Status Who Are Required or Not Required to Submit an Affidavit of Support.**

<sup>575</sup> See INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

<sup>576</sup> See INA secs. 212(a)(4)(C) and (D), 213A(a), 8 U.S.C. 1182(a)(4)(C) and (D), 1183a(a).

<sup>577</sup> See INA sec. 213A(a) and (b), 8 U.S.C. 1183a(a) and (b).

<b>Fiscal Year</b>	<b>Total Population Not Required to Submit Affidavit of Support</b>	<b>Total Population Required to Submit Affidavit of Support</b>
<b>2014</b>	369,047	268,091
<b>2015</b>	365,066	272,952
<b>2016</b>	391,035	320,396
<b>2017</b>	434,181	329,011
<b>2018</b>	404,865	299,542
<b>Total</b>	<b>1,964,194</b>	<b>1,489,992</b>
<b>5-year average</b>	<b>392,839</b>	<b>297,998</b>
Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)		

## 5. Cost-Benefit Analysis

DHS expects this final rule to produce costs and benefits associated with the procedures for administering the public charge ground of inadmissibility.

For this final rule, DHS generally uses the effective minimum wage plus weighted average benefits of \$17.11 per hour (\$11.80 effective minimum wage base plus \$5.31 weighted average benefits) as a reasonable proxy of the opportunity cost of time for individuals who are applying for adjustment of status.<sup>578</sup> DHS also uses \$17.11 per hour to estimate the opportunity cost of time for individuals who cannot or choose not to participate in the labor market as these individuals incur opportunity costs, assign valuation in deciding how to allocate their time, or both. This analysis uses the effective minimum wage rate since approximately 80 percent of the total number of individuals who applied for lawful permanent resident status were in a category of applicant under the family-sponsored categories (including immediate relatives of U.S. citizens) and other non-employment-based classifications such as diversity, refugees and asylees, and parolees.<sup>579</sup> Even when an individual is not working for wages, their time has value. For example, if someone performs childcare, housework, or other activities without paid

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<sup>578</sup> See Ernie Tedeschi, “Americans Are Seeing Highest Minimum Wage in History (Without Federal Help),” New York Times (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html> (last visited Aug. 17, 2022).

<sup>579</sup> USCIS analysis of data provided by USCIS, Policy and Research Division (Dec. 2021).

compensation, that time still has value. Due to the wide variety of non-paid activities an individual could pursue, it is difficult to estimate the value of that time. DHS requested comments on this issue and received one comment. The commenter suggested that DHS consider rates consistent with those paid for similar work in the candidate's relevant labor market. However, the commenter did not provide any more detailed suggestions on such rates. DHS elected to use the effective minimum wage rate for this time as a general measure since it is difficult to estimate the value of the time associated with the wide variety of activities an individual could pursue.

The effective minimum wage of \$11.80 is an unweighted hourly wage that does not account for worker benefits. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent Department of Labor, Bureau of Labor Statistics (BLS) report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.45, which incorporates employee wages and salaries and the full cost of benefits, such as paid leave, insurance, and retirement.<sup>580</sup> DHS notes that there is no requirement that an individual be employed in order to file Form I-485 and many applicants may not be employed. Therefore, in this final rule, DHS calculates the total rate of compensation for individuals applying for adjustment of status as \$17.11 per hour in this final rule using the benefits-to-wage multiplier, where the mean hourly wage is \$11.80 per hour worked and average benefits are \$5.31 per hour.<sup>581</sup>

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<sup>580</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour) =  $\$39.55 / \$27.35 = 1.446 = 1.45$  (rounded). See BLS, Economic News Release, "Employer Cost for Employee Compensation," Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, (September 2001) [https://www.bls.gov/news.release/archives/ecec\\_09162021.pdf](https://www.bls.gov/news.release/archives/ecec_09162021.pdf) (viewed Aug. 17, 2022).

<sup>581</sup> The calculation of the weighted Federal minimum hourly wage for applicants: \$11.80 per hour \* 1.45 benefits-to-wage multiplier = \$17.11 (rounded) per hour.

### **a. Establishing the Baselines**

DHS discusses the potential impacts of this final rule relative to two baselines. The first baseline is a No Action Baseline that represents a state of the world in which DHS is implementing the public charge ground of inadmissibility consistent with the 1999 Interim Field Guidance.

The second baseline is a Pre-Guidance Baseline, which represents a state of the world in which the 1999 NPRM,<sup>582</sup> the 1999 Interim Field Guidance,<sup>583</sup> and the 2019 Final Rule were not enacted.

### **b. No Action Baseline**

The No Action Baseline represents the current state of the world in which DHS applies the public charge ground of inadmissibility consistent with the 1999 Interim Field Guidance. For this final rule, DHS estimates the No Action Baseline according to current operations and requirements and compares the estimated costs and benefits of the provisions set forth in this final rule to this baseline. DHS notes that costs detailed as part of the No Action Baseline include all current costs associated with completing and filing Form I-485, including required biometrics collection and medical examination (Form I-693), as well as any affidavits of support (Forms I-864, I-864A, I-864EZ, and I-864W) or requested fee waivers (Form I-912). These costs are part of the baseline costs and are not attributable to the rule.

As noted previously in this analysis, DHS estimates the projected average annual total population of adjustment of status applicants that would be subject to review for inadmissibility on the public charge ground is 501,520. This estimate is based on the 5-year average of the annual estimated total population subject to review for inadmissibility on the public charge

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<sup>582</sup> See “Inadmissibility and Deportability on Public Charge Grounds,” 64 FR 28676 (May 26, 1999).

<sup>583</sup> See “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999). Due to a printing error, the *Federal Register* version of the Field Guidance is dated “March 26, 1999,” even though the guidance was signed May 20, 1999, became effective May 21, 1999, and was published in the *Federal Register* on May 26, 1999.

ground from FY 2014 – FY 2018. Table 12 shows the estimated population and annual costs of filing for adjustment of status for the final rule. These costs primarily result from the process of applying for adjustment of status, including filing Form I-485 and Form I-693 as well as filing an affidavit of support or Form I-912 or both, if necessary.

<b>Table 12. Average Annual No Action Baseline (Current) Costs.</b>		
<b>Form</b>	<b>Estimated Average Annual Population</b>	<b>Annual Cost</b>
<b>I-485, Application to Register Permanent Residence or Adjust Status</b>	<b>501,520</b>	<b>\$715,613,873</b>
Filing Fee		\$571,732,800
Opportunity Cost of Time (OCT)		\$55,091,972
Biometrics Services Fee		\$42,629,200
Biometrics Services OCT		\$31,490,441
Biometrics Services Travel Costs		\$14,669,460
<b>I-693, Report of Medical Examination and Vaccination Record</b>	<b>501,520</b>	<b>\$269,080,526</b>
Medical Exam Cost		\$247,625,500
Opportunity Cost of Time (OCT)		\$21,455,026
<b>I-912, Request for Fee Waiver</b>	<b>69,194</b>	<b>\$1,385,264</b>
Opportunity Cost of Time (OCT)		\$1,385,264
<b>Affidavit of Support Forms (I-864, I-864A, I-864EZ, I-864W)</b>	<b>297,998</b>	<b>\$70,714,925</b>
Opportunity Cost of Time (OCT)		\$70,714,925
<b>Total Annual No Action Baseline Costs</b>		<b>\$1,056,794,588</b>
Source: USCIS analysis.		

*i. Forms Relevant to This Final Rule*

Form I-485, Application to Register Permanent Residence or Adjust Status

The basis of the quantitative costs estimated for this final rule is the cost of filing for adjustment of status using Form I-485, the opportunity cost of time for completing this form, any other required forms, and the cost for any other incidental costs (e.g., travel costs) an individual must bear that are required in the filing process. DHS reiterates that costs examined in this section are not additional costs that the final rule will impose; rather, they are costs applicants



incur as part of the current application process to adjust status. The current filing fee for Form I-485 is \$1,140. The fee is set at a level to recover the processing costs to DHS. As previously discussed in the population section, the estimated average annual population of individuals who apply for adjustment of status using Form I-485 is 501,520. Therefore, DHS estimates that the annual filing fee costs associated for Form I-485 is approximately \$571,732,800.<sup>584</sup>

DHS estimates the time burden of completing Form I-485 is 6.42 hours per response, including the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.<sup>585</sup> Using the total rate of compensation for minimum wage of \$17.11 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-485 will be \$109.85 per applicant.<sup>586</sup> Therefore, using the total population estimate of 501,520 annual filings for Form I-485, DHS estimates the total opportunity cost of time associated with completing Form I-485 is approximately \$55,091,972 annually.<sup>587</sup>

USCIS requires applicants who file Form I-485 to submit biometric information (fingerprints and signature) by attending a biometrics services appointment at a designated USCIS Application Support Center (ASC). The biometrics services processing fee is \$85.00 per applicant. Therefore, DHS estimates that the annual cost associated with biometrics services processing for the estimated average annual population of 501,520 individuals applying for adjustment of status is approximately \$42,629,200.<sup>588</sup>

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<sup>584</sup> Calculation: Form I-485 filing fee (\$1,140) \* Estimated annual population filing Form I-485 (501,520) = \$571,732,800 annual cost for filing Form I-485.

<sup>585</sup> USCIS, "Instructions for Application to Register Permanent Residence or Adjust Status (Form I-485)," OMB No. 1615-0023 (expires Mar. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf> (last visited Aug. 17, 2022).

<sup>586</sup> Calculation for opportunity cost of time for filing Form I-485: (\$17.11 per hour \* 6.42 hours) = \$109.85 (rounded) per applicant.

<sup>587</sup> Calculation: Form I-485 estimated opportunity cost of time (\$109.85) \* Estimated annual population filing Form I-485 (501,520) = \$55,091,972 (rounded) annual opportunity cost of time for filing Form I-485.

<sup>588</sup> Calculation: Biometrics services processing fee (\$85) \* Estimated annual population filing Form I-485 (501,520) = \$42,629,200 annual cost for associated with Form I-485 biometrics services processing.

In addition to the biometrics services fee, the applicant will incur the costs to comply with the biometrics submission requirement as well as the opportunity cost of time for traveling to an ASC, the mileage cost of traveling to an ASC, and the opportunity cost of time for submitting their biometrics. While travel times and distances vary, DHS estimates that an applicant's average roundtrip distance to an ASC is 50 miles and takes 2.5 hours on average to complete the trip.<sup>589</sup> Furthermore, DHS estimates that an applicant waits an average of 1.17 hours for service and to have their biometrics collected at an ASC,<sup>590</sup> adding up to a total biometrics-related time burden of 3.67 hours. Using the total rate of compensation of the effective minimum wage of \$17.11 per hour, DHS estimates the opportunity cost of time for completing the biometrics collection requirements for Form I-485 is \$62.79 per applicant.<sup>591</sup> Therefore, using the total population estimate of 501,520 annual filings for Form I-485, DHS estimates the total opportunity cost of time associated with completing the biometrics collection requirements for Form I-485 is approximately \$31,490,441 annually.<sup>592</sup>

In addition to the opportunity cost of providing biometrics, applicants will incur travel costs related to biometrics collection. The cost of travel related to biometrics collection is approximately \$29.25 per trip, based on the estimated average 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of \$0.585 per mile.<sup>593</sup> DHS assumes that each applicant will travel independently to an ASC to submit their biometrics, meaning that this rule will impose a travel cost on each of these applicants. Therefore, DHS

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<sup>589</sup> See "Employment Authorization for Certain H-4 Dependent Spouses," 80 FR 10284 (Feb. 25, 2015); and "Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives," 78 FR 536, 572 (Jan. 3, 2013).

<sup>590</sup> Source for biometric time burden estimate: USCIS, "Instructions for Application to Register Permanent Residence or Adjust Status (Form I-485)," OMB No. 1615-0023 (expires Mar. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf> (last visited Aug. 17, 2022).

<sup>591</sup> Calculation for opportunity cost of time to comply with biometrics submission for Form I-485: (\$17.11 per hour \* 3.67 hours) = \$62.79 (rounded) per applicant.

<sup>592</sup> Calculation: Estimated opportunity cost of time to comply with biometrics submission for Form I-485 (\$62.79) \* Estimated annual population filing Form I-485 (501,520) = \$31,490,441 (rounded) annual opportunity cost of time for filing Form I-485.

<sup>593</sup> See U.S. General Services Administration, "Privately Owned Vehicle (POV) Mileage Rates (Archived)," Previous automobile rates (January 1, 2022) <https://www.gsa.gov/travel/plan-book/transportation-airfare-pov-etc/privately-owned-vehicle-mileage-rates/pov-mileage-rates-archived> (last visited Aug. 17, 2022).

estimates that the total annual cost associated with travel related to biometrics collection for the estimated average annual population of 501,520 individuals applying for adjustment of status is approximately \$14,669,460.<sup>594</sup>

In sum, DHS estimates the total current annual cost for filing Form I-485 is \$715,613,873, which includes Form I-485 filing fees, biometrics services fees, opportunity cost of time for completing Form I-485 and submitting biometrics information, and travel cost associated with biometrics collection.<sup>595</sup> DHS notes that a medical examination is generally required as part of the application process to adjust status. Costs associated with the medical examination are detailed in the next section. Moreover, costs associated with submitting an affidavit of support and requesting a fee waiver are also detailed in subsequent sections since such costs are not required for every individual applying for an adjustment of status.

#### Form I-693, Report of Medical Examination and Vaccination Record

USCIS requires most applicants who file Form I-485 seeking adjustment of status to submit Form I-693 as completed by a USCIS-designated civil surgeon. Form I-693 is used to report results of an immigration medical examination to USCIS. For this analysis, DHS assumes that all individuals who apply for adjustment of status using Form I-485 will also submit Form I-693. DHS reiterates that costs examined in this section are not additional costs that the final rule will impose, but costs that applicants currently incur as part of the application process to adjust status. Form I-693 is required for adjustment of status applicants to establish that they are not inadmissible to the United States on health-related grounds. While there is no filing fee associated with Form I-693, the applicant is responsible for paying all costs of the immigration

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<sup>594</sup> Calculation: (Biometrics collection travel costs) \* (Estimated annual population filing Form I-485) = \$29.25 \* 501,520 = \$14,669,460 annual travel costs related to biometrics collection for Form I-485.

<sup>595</sup> Calculation: \$571,732,800 (Annual filing fees for Form I-485) + \$55,091,972 (Opportunity cost of time for filing Form I-485) + \$42,629,200 (Biometrics services fees) + \$31,490,441 (Opportunity cost of time for biometrics collection requirements) + \$14,669,460 (Travel costs for biometrics collection) = \$715,613,873 total current annual cost for filing Form I-485.

medical examination, including the cost of any follow-up tests or treatment that is required, and must make payments directly to the civil surgeon or other health care provider. In addition, applicants bear the opportunity cost of time for completing the applicant portions of Form I-693, as well as sitting for the immigration medical exam and the time waiting to be examined.

USCIS does not regulate the fees charged by civil surgeons for the completion of an immigration medical examination. In addition, immigration medical examination fees vary widely by civil surgeon, from as little as \$20 to as much as \$1,000 per applicant (including vaccinations, additional medical evaluations, and testing that may be required based on the medical conditions of the applicant).<sup>596</sup> DHS estimates that the average cost for these activities is \$493.75 and that all applicants will incur this cost.<sup>597</sup> Since DHS assumes that all applicants who apply for adjustment of status using Form I-485 must also submit Form I-693, DHS estimates that based on the estimated average annual population of 501,520 the annual cost associated with filing Form I-693 is approximately \$247,625,500.<sup>598</sup>

DHS estimates the time burden associated with filing Form I-693 is 2.5 hours per applicant, which includes understanding and completing the form, setting an appointment with a civil surgeon for a medical exam, sitting for the medical exam, learning about and understanding the results of medical tests, allowing the civil surgeon to report the results of the medical exam on the form, and submitting the medical exam report to USCIS.<sup>599</sup> DHS estimates the

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<sup>596</sup> Source for immigration medical examination cost range: Paperwork Reduction Act (PRA) Report of Medical Examination and Vaccination Record (Form I-693) (OMB control number 1615-0033). The PRA Supporting Statement can be found at [Reginfo.gov](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004), ICR Documents, I693-009EMG Supporting Statement, Question 13, (Sept. 7, 2021) [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202108-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004) (last visited Aug. 17, 2022).

<sup>597</sup> Source for immigration medical examination cost estimate: Paperwork Reduction Act (PRA) Report of Medical Examination and Vaccination Record (Form I-693) (OMB control number 1615-0033). The PRA Supporting Statement can be found at [Reginfo.gov](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004), ICR Documents, I693-009EMG Supporting Statement, Question 13, (Sept. 7, 2021) [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202108-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004) (last visited Aug. 17, 2022).

<sup>598</sup> Calculation: (Estimated immigration medical examination cost for Form I-693) \* (Estimated annual population filing Form I-485) = \$493.75 \* 501,520 = \$247,625,500 annual estimated medical exam costs for Form I-693.

<sup>599</sup> Source for immigration medical examination time burden estimate: USCIS, "Instructions for Report of Medical Examination and Vaccination Record (Form I-693)," OMB No. 1615-0033 (expires Mar. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-693instr.pdf> (last visited Aug. 17, 2022).

opportunity cost of time for completing and submitting Form I-693 is \$42.78 per applicant based on the total rate of compensation of minimum wage of \$17.11 per hour.<sup>600</sup> Therefore, using the total population estimate of 501,520 annual filings for Form I-485, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-693 is approximately \$21,455,026 annually.<sup>601</sup>

In sum, DHS estimates the total current annual cost for filing Form I-693 is \$260,805,446, including medical exam costs, the opportunity cost of time for completing Form I-693, and cost of postage to mail the Form I-693 package to USCIS.<sup>602</sup>

#### Form I-912, Request for Fee Waiver

Some applicants seeking an adjustment of status may be eligible for a fee waiver when filing Form I-485. An applicant who is unable to pay the filing fees or biometric services fees for an application or petition may be eligible for a fee waiver by filing Form I-912. If an applicant's Form I-912 is approved, USCIS, as a component of DHS, will waive both the filing fee and biometric services fee. Therefore, DHS assumes for the purposes of this economic analysis that the filing fees and biometric services fees required for Form I-485 are waived if an approved Form I-912 accompanies the application. Filing Form I-912 is not required for applications and petitions that do not have a filing fee. DHS also notes that costs examined in this section are not additional costs that will be imposed by the final rule but costs that applicants currently could incur as part of the application process to adjust status.

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<sup>600</sup> Calculation for immigration medical examination opportunity cost of time: ( $\$17.11$  per hour \* 2.5 hours) = \$42.78 per applicant.

<sup>601</sup> Calculation: (Estimated immigration medical examination opportunity cost of time for Form I-693) \* (Estimated annual population filing Form I-485) =  $\$42.78 * 501,520 = \$21,455,026$  (rounded) annual opportunity cost of time for filing Form I-485.

<sup>602</sup> Calculation:  $\$247,625,500$  (Medical exam costs) +  $\$21,455,026$  (Opportunity cost of time for Form I-693) =  $\$269,080,526$  total current annual cost for filing Form I-693.

Table 13 shows the estimated population of individuals that requested a fee waiver (Form I-912), based on receipts, when applying for adjustment of status in FY 2014–FY 2018, as well as the number of requests that were approved or denied each fiscal year. During this period, the number of individuals who requested a fee waiver when applying for adjustment of status ranged from a low of 49,292 in FY 2014 to a high of 95,476 in FY 2017. In addition, the estimated average population of individuals applying to adjust status who requested a fee waiver for Form I-485 over the 5-year period FY 2014 – FY 2018 was 69,194. DHS estimates that 69,194 is the average annual projected population of individuals who will request a fee waiver using Form I-912 when filing Form I-485 to apply for an adjustment of status.<sup>603</sup>

<b>Table 13. Total Population Requesting a Fee Waiver (Form I-912) when Filing Form I-485, Adjustment of Status.</b>			
<b>Fiscal Year</b>	<b>Receipts</b>	<b>Approvals</b>	<b>Denials</b>
2014	49,292	47,535	1,546
2015	52,815	50,927	1,556
2016	87,377	81,946	4,156
2017	95,476	88,486	4,704
2018	61,010	54,496	3,425
<b>Total</b>	<b>345,970</b>	<b>323,390</b>	<b>15,387</b>
<b>5-year average</b>	<b>69,194</b>	<b>64,678</b>	<b>3,077</b>
Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).			
Note: The number of requests adjudicated in a fiscal year will not be equal to the number of received requests. A request received in one fiscal year may not be adjudicated until a subsequent fiscal year.			

To provide a reasonable proxy of time valuation for applicants, as described previously, DHS assumes that applicants requesting a fee waiver for Form I-485 earn the total rate of

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<sup>603</sup> DHS notes that the estimated population of individuals who would request a fee waiver for filing Form I-485 includes all visa classifications for those applying for adjustment of status. DHS is unable to determine the number of fee waiver requests for filing Form I-485 that are associated with specific visa classifications that are subject to public charge review.

compensation for individuals applying for adjustment of status as \$17.11 per hour, where the value of \$10.51 per hour represents the effective minimum wage with an upward adjustment for benefits.

DHS estimates the time burden associated with filing Form I-912 is 1 hour and 10 minutes per applicant (1.17 hours), including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.<sup>604</sup> Therefore, using \$17.11 per hour as the total rate of compensation, DHS estimates the opportunity cost of time for completing and submitting Form I-912 is \$20.02 per applicant.<sup>605</sup> Using the total population estimate of 69,194 requests for a fee waiver for Form I-485, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-912 is approximately \$1,385,264 annually.<sup>606</sup>

#### Form I-864, Affidavit of Support Under Section 213A of the INA, and Related Forms

As previously discussed, submitting a Form I-864 is required for most family-based immigrants and some employment-based immigrants to show that they have adequate means of financial support and are not likely to become a public charge. Additionally, Form I-864 can include Form I-864A, which may be filed when a sponsor's income and assets do not meet the income requirements of Form I-864 and the qualifying household member chooses to combine their resources with the sponsor's income, assets, or both to meet those requirements. Some sponsors for applicants filing applications for adjustment of status may be able to execute Form I-864EZ rather than Form I-864, provided certain criteria are met. Moreover, certain classes of

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<sup>604</sup> Source for fee waiver time burden estimate: USCIS, "Instructions for Fee Waiver Request (Form I-912)," OMB No. 1615-0116 (expires Sept. 30, 2024), <https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf> (last visited Aug. 17, 2022).

<sup>605</sup> Calculation for fee waiver opportunity cost of time: ( $\$17.11 \text{ per hour} * 1.17 \text{ hours}$ ) = \$20.02 (rounded).

<sup>606</sup> Calculation: (Estimated opportunity cost of time for Form I-912) \* (Estimated annual population of approved Form I-912) =  $\$20.02 * 69,194 = \$1,385,264$  (rounded) annual opportunity cost of time for filing Form I-912 that are approved.

immigrants currently are exempt from the requirement to file Form I-864 or Form I-864EZ and therefore must file Form I-864W, Request for Exemption for Intending Immigrant's Affidavit of Support.

There is no filing fee associated with filing Form I-864 with USCIS. However, DHS estimates the time burden associated with a sponsor executing Form I-864 is 6 hours per adjustment applicant, including the time for reviewing instructions, gathering the required documentation and information, completing the affidavit, preparing statements, attaching necessary documentation, and submitting the Form I-864.<sup>607</sup>

To estimate the opportunity cost of time associated with filings of I-864, this analysis uses \$39.55 per hour, the total compensation amount including costs for wages and salaries and benefits from the BLS report on Employer Costs for Employee Compensation detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries.<sup>608</sup> DHS uses this wage rate because DHS expects that sponsors who file affidavits of support have adequate means of financial support and are likely to be employed.

Using the average total rate of compensation of \$39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864 will be \$237.30 per petitioner.<sup>609</sup> DHS assumes that the average rate of total compensation used to calculate the opportunity cost of time for Form I-864 is appropriate since the sponsor of an immigrant, who is agreeing to provide financial and material support, is instructed to complete and submit the form. Using the estimated annual total population of 297,998 individuals seeking to adjust status who

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<sup>607</sup> Source for Form I-864 time burden estimate: USCIS, "Instructions for Affidavit of Support Under Section 213A of the INA (Form I-864)," OMB No. 1615-0075 (expires Dec. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-864instr.pdf> (last visited Aug. 17, 2022).

<sup>608</sup> See BLS, Economic News Release, "Employer Cost for Employee Compensation," Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (Sept. 16, 2021) [https://www.bls.gov/news.release/archives/ecec\\_12162021.pdf](https://www.bls.gov/news.release/archives/ecec_12162021.pdf) (last visited Aug. 17, 2021).

<sup>609</sup> Calculation for opportunity cost of time for completing and submitting Form I-864, Affidavit of Support Under Section 213A of the INA: (\$39.55 per hour \* 6.0 hours) = \$237.30 per applicant.



are required to submit an Affidavit of Support Under Section 213A of the INA using Form I-864, DHS estimates the opportunity cost of time associated with completing and submitting Form I-864 \$70,714,925 annually.<sup>610</sup> DHS estimates this amount as the total current annual cost for filing Form I-864, as required when applying to adjust status.

There is also no filing fee associated with filing Form I-864A with USCIS. However, DHS estimates the time burden associated with filing Form I-864A is 1 hour and 45 minutes (1.75 hours) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the contract, preparing statements, attaching necessary documentation, and submitting the contract.<sup>611</sup> Therefore, using the average total rate of compensation of \$39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864A will be \$69.21 per petitioner.<sup>612</sup> DHS assumes the average total rate of compensation used for calculating the opportunity cost of time for Form I-864 since both the sponsor and another household member agree to provide financial support to an immigrant seeking to adjust status. However, the household member also may be the intending immigrant. While Form I-864A must be filed with Form I-864, DHS notes that it is unable to determine the number of filings of Form I-864A since not all individuals filing I-864 need to file Form I-864A with a household member.

As with Form I-864, there is no filing fee associated with filing Form I-864EZ with USCIS. However, DHS estimates the time burden associated with filing Form I-864EZ is 2 hours and 30 minutes (2.5 hours) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the affidavit, preparing statements,

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<sup>610</sup> Calculation: (Form I-864 estimated opportunity cost of time) \* (Estimated annual population filing Form I-864) = \$237.30 \* 297,998 = \$70,714,925 (rounded) total annual opportunity cost of time for filing Form I-864.

<sup>611</sup> Source for I-864A time burden estimate: USCIS, "Instructions for Contract Between Sponsor and Household Member (Form I-864A)," OMB No. 1615-0075 (expires Dec. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-864ainstr.pdf> (last visited Aug. 17, 2022).

<sup>612</sup> Calculation for opportunity cost of time for completing and submitting Form I-864A, Contract Between Sponsor and Household Member: (\$39.55 per hour \* 1.75 hours) = \$69.21 (rounded) per petitioner.

attaching necessary documentation, and submitting the affidavit.<sup>613</sup> Therefore, using the average total rate of compensation of \$39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864EZ will be \$98.88 per petitioner.<sup>614</sup> However, DHS notes that it is unable to determine the number of filings of Form I-864EZ and, therefore, rely on the annual cost estimate developed for Form I-864.

There is also no filing fee associated with filing Form I-864W with USCIS. However, DHS estimates the time burden associated with filing this form is 60 minutes (1 hour) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.<sup>615</sup> Therefore, using the average total rate of compensation of \$39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864EZ will be \$39.55 per petitioner.<sup>616</sup> However, DHS notes that it is unable to determine the number of filings of Form I-864W and, therefore, rely on the annual cost estimate developed for Form I-864.

#### *ii. Costs of Final Regulatory Changes*

In this section, DHS estimates costs of the final rule relative to No Action Baseline. The primary source of quantified new costs for the final rule will be from an additional 0.75 hours increase in the time burden estimate to complete Form I-485 for applicants who are subject to the public charge ground of inadmissibility.<sup>617</sup> The additional time burden is required to collect

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<sup>613</sup> Source for I-864EZ time burden estimate: USCIS, “Instructions for Affidavit of Support Under Section 213A of the INA (Form I-864EZ),” OMB No. 1615-0075 (expires Dec. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-864ezinstr.pdf> (last visited Aug. 17, 2022).

<sup>614</sup> Calculation for opportunity cost of time for completing and submitting Form I-864EZ, Affidavit of Support Under Section 213A of the INA: (\$39.55 per hour \* 2.5 hours) = \$98.88 (rounded).

<sup>615</sup> Source for I-864W time burden estimate: USCIS, “Instructions for Request for Exemption for Intending Immigrant’s Affidavit of Support (Form I-864W),” OMB No. 1615-0075 (expires Dec. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf> (last visited Aug. 17, 2022).

<sup>616</sup> Calculation for opportunity cost of time for completing and submitting Form I-864W: (\$39.55 per hour \* 1.0 hours) = \$39.55.

<sup>617</sup> To be clear, these form changes will not affect applicants who are exempt from the public charge ground of inadmissibility listed in new 8 CFR 212.23.

information based on factors such as age; health; family status; assets, resources, and financial status; and education and skills, so that USCIS could determine whether an applicant would be inadmissible to the United States based on the public charge ground.

The final rule will include additional instructions as well as additional questions for filing Form I-485 for applicants who are subject to the public charge ground of inadmissibility and, as a result, those applicants would spend additional time reading the instructions increasing the estimated time to complete the form. The current estimated time to complete Form I-485 is 6 hours and 25 minutes (6.42 hours). For the final rule, DHS estimates that the time burden for completing Form I-485 will increase by 45 minutes (0.75 hours). As explained above, DHS reduced the estimated time burden for completing the revised Form I-485 from 7.92 hours to 7.17 hours. Open-ended questions requiring narrative-style responses that were included in the information collection instrument associated with the NPRM have been changed to multiple-choice style questions that will require less time for an applicant to answer.

Therefore, in the final rule, the time burden to complete Form I-485 will be 7 hours and 10 minutes (7.17 hours).

The following cost is a new cost that would be imposed on the population applying to adjust status using Form I-485 for applicants who are subject to the public charge ground of inadmissibility. Table 14 shows the estimated new annual costs that the final rule will impose on individuals seeking to adjust status using Form I-485 for applicants who are subject to the public charge ground of inadmissibility with a 0.75 hour increase in the time burden estimate for completing Form I-485.

<b>Table 14. Total New Quantified Direct Costs of the Final Rule.</b>	
<b>Form I-485, Application to Register Permanent Residence or Adjust Status</b>	
Estimated annual population	501,520
Opportunity Cost of Time – Additional to No Action Baseline (Current) Costs	0.75 hour
Total Rate of Compensation for Minimum Wage	\$17.11

Total New Quantified Costs of the Final Rule*	\$6,435,755
Source: USCIS analysis.	
*Calculation: \$17.11 * 0.75 hour * 501,520= \$6,435,755 (rounded)	

The time burden includes the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.<sup>618</sup> Using the total rate of compensation for minimum wage of \$17.11 per hour, DHS currently estimates the opportunity cost of time for completing and filing Form I-485 will be \$12.83 per applicant.<sup>619</sup> Therefore, using the total population estimate of 501,520 annual filings for Form I-485 for applicants who are subject to the public charge ground of inadmissibility, DHS estimates the current total opportunity cost of time associated with completing Form I-485 is approximately \$6,435,755 annually.<sup>620</sup>

*iii. Cost Savings of the Final Regulatory Changes*

DHS anticipates that the final rule will produce some quantitative cost savings relative to both baselines. With this rule, T nonimmigrants applying for adjustment of status will no longer need to submit Form I-601 seeking a waiver on public charge grounds of inadmissibility. The existing regulations at 8 CFR 212.18 and 8 CFR 245.23 stating that T nonimmigrants are required to obtain waivers are not in line with the Violence Against Women Act Reauthorization Act of 2013 (VAWA 2013).<sup>621</sup> T nonimmigrants are exempt from public charge inadmissibility under the statute, and therefore never should have required a waiver in order to adjust status. The final rule will align the regulation with the statute. DHS estimates the cost savings for this population will be approximately \$15,359 annually.

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<sup>618</sup> Source: USCIS, “Instructions for Application to Register Permanent Residence or Adjust Status (Form I-485),” OMB No. 1615-0023 (expires Mar. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf> (last visited Aug. 17,, 2022).

<sup>619</sup> Calculation for opportunity cost of time for filing Form I-485: (\$17.11 per hour \* 0.75 hours) = \$12.83 (rounded) per applicant.

<sup>620</sup> Calculation: Form I-485 estimated opportunity cost of time (\$17.11 per hour \* 0.75 hours) \* Estimated annual population filing Form I-485 (501,520) = \$17.11 \* 0.75 \* 501,520 = \$6,435,755 (rounded) annual opportunity cost of time for filing Form I-485.

<sup>621</sup> See Pub. L. 113–4, 127 Stat. 54 (2013).

Table 15 shows the total population between FY 2014 and FY 2018 that filed form I-601. Over the 5-year period the population of individuals who have applied for adjustment of status ranged from a low of 6 in FY 2018 to a high of 35 in FY 2014. On average, the annual population of individuals over five fiscal years who filed Form I-601 and applied for adjustment of status with a T nonimmigrant status is 16.

<b>Table 15. Total Population who filed Form I-601, Application for Waiver of Grounds of Inadmissibility and Applied for Adjustment of Status with T Nonimmigrant Status, Fiscal Years 2014 to 2018.</b>	
<b>Fiscal Year</b>	<b>Total Receipts</b>
2014	35
2015	11
2016	9
2017	19
2018	6
<b>Total</b>	<b>80</b>
<b>5-year average</b>	<b>16</b>
Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)	

DHS considers the historical data from FY 2014 to FY 2018 as the basis to form an estimated population projection of receipts for Form I-601 for T nonimmigrants who are adjusting status for the 10-year period beginning in FY 2022. Based on the average annual population of I-601 filers between FY 2014 and FY 2018, DHS projects that 16 T nonimmigrants who are applying for adjustment of status will no longer need to file Form I-601. DHS uses the effective minimum wage base plus weighted average benefit of \$17.11 per hour to estimate the opportunity cost of time for these individuals since they are not likely to be participating in the labor market. DHS estimated the time burden to complete the Form I-601 as 1.75 hours, including the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary

documentation, and submitting the application.<sup>622</sup> Thus, DHS estimates the opportunity cost of time for completing Form I-601 to be \$479.08.<sup>623</sup> Based on the population estimate and the filing fee of \$930 for Form I-601, the total estimated cost for filing fees for the all 16 estimated filers will be approximately \$14,880.<sup>624</sup> The sum of the filing fee results in an estimated total annual savings of approximately \$15,359 resulting from the final rule, including the opportunity cost of time and filing fees.<sup>625</sup>

*iv. Familiarization Costs*

A likely impact of the final rule relative to both baselines is that various individuals and other entities will incur costs associated with familiarization with the provisions of the rule. Familiarization costs involve the time spent reviewing a rule. A noncitizen might review the rule to determine whether they are subject to the final rule. To the extent an individual who is directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule.

In addition to those being directly regulated by the rule, a wide variety of other entities would likely choose to read the rule and incur familiarization costs. For example, immigration lawyers, immigration advocacy groups, benefits-administering agencies, nonprofit organizations, nongovernmental organizations, and religious organizations, among others, may want to become familiar with the provisions of this final rule. DHS believes such nonprofit organizations and other advocacy groups might choose to read the rule to provide information to noncitizens and associated households who may be subject to the rule. Familiarization costs incurred by those not directly regulated are indirect costs. Indirect impacts are borne by entities that are not

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<sup>622</sup> Source: USCIS, “Instructions for Application for Waiver of Grounds of Inadmissibility (Form I-601),” OMB No. 1615-0029 (expires July. 31, 2023), <https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf> (last visited Aug. 17, 2022).

<sup>623</sup> Calculation: (Form I-601, time burden) \* (Estimated annual applicants for Form I-601) \* (Hourly wage) = 1.75 \* 16 \* \$17.11 = \$479.08 (rounded) per applicant.

<sup>624</sup> Calculation: Filing fee \* Estimated annual applicants for Form I-601 = \$930 \* 16 = \$14,880.

<sup>625</sup> Calculation: Total savings (\$15,359) = \$479.08 + \$14,880 = \$15,359 (rounded).

specifically regulated by this rule but may incur costs due to changes in behavior related to this rule.

DHS estimates the time that will be necessary to read the rule is approximately 8 to 9 hours per person, resulting in opportunity costs of time. DHS assumes the average professional reads technical documents at a rate of about 250 to 300 words per minute. An entity, such as a nonprofit or advocacy group, may have more than one person who reads the final rule. Using the average total rate of compensation as \$39.55 per hour for all occupations, DHS estimates that the opportunity cost of time will range from about \$316.40 to \$355.95 per individual who must read and review the final rule.<sup>626</sup> However, DHS is unable to estimate the number of people that will familiarize themselves with this rule. As such, DHS is unable to quantify this cost. DHS requested comments on other possible indirect impacts of the rule and appropriate methodologies for quantifying these non-monetized potential impacts. DHS received several comments on the indirect impact of the rule at the State level. The discussion is included in the following section.

v. *Transfer Payments and Indirect Impacts of the Final Regulatory Changes*

DHS also considers transfer payments from the Federal and State governments to certain individuals who receive public benefits that may be more likely to occur under the final regulatory changes as compared to the No Action Baseline. While the final rule follows closely the approach taken in the 1999 Interim Field Guidance, it contains three changes that may have an effect on transfer payments. First, the final rule provides that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will

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<sup>626</sup> Calculation: (Average total compensation for all occupations) \* (Time to read rule – lower bound) = (Opportunity cost of time [OCT] to read rule) =  $\$39.55 * 8 \text{ hours} = \$316.40$  OCT per individual to read rule, 8 hours (rounded) = (approximately 140,000 words / 300) / 60.

Calculation: (Average total compensation for all occupations) \* (Time to read rule – upper bound) = (Opportunity cost of time [OCT] to read rule) =  $\$39.55 * 9 \text{ hours} = \$355.95$  OCT per individual to read rule, 9 hours = (approximately 140,000 words / 250) / 60.

Average total compensation for all occupations (\$39.55): See BLS, Economic News Release, “Employer Cost for Employee Compensation,” Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (September 16, 2021), [https://www.bls.gov/news.release/archives/ecec\\_09162021.pdf](https://www.bls.gov/news.release/archives/ecec_09162021.pdf) (last viewed Aug. 17, 2022).

not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility. Second, under the final rule, when making a public charge inadmissibility determination, DHS will also not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under section 412(d)(2) of the INA, 8 U.S.C. 1522(d)(2), provided to an “unaccompanied alien child” as defined under section 462(g)(2) of the HSA, 6 U.S.C. 279(g)(2). Individuals covered by these exclusions may be more likely to participate in public benefit programs for the limited period of time that they are in such status or eligible for such benefits. Third, applying for a public benefit on one’s own behalf or on behalf of another would not constitute receipt of public benefits by the noncitizen applicant. This definition would make clear that the noncitizen’s receipt of public benefits solely on behalf of another, or the receipt of public benefits by another individual (even if the noncitizen assists in the application process), would also not constitute receipt of public benefits by the noncitizen. These clarifications could lead to an increase in public benefit participation by certain persons (most of whom will likely not be subject to the public charge ground of inadmissibility in any event). This change could increase transfer payments from the Federal, State, Tribal, territorial, and local governments to certain individuals. DHS is unable to quantify the effects of these changes.

DHS acknowledges that an increase in transfer payments due to this final rule would produce other indirect impacts. For example, administrative costs to the State and local benefits-granting agencies associated with public benefit program enrollments would likely increase. When public benefit program enrollments increase, the processing of more enrollees results in an increase in costs to those agencies. However, DHS is unable to quantify the increase in administrative costs. DHS received a comment from one State regarding administrative costs for Medicaid participants and SNAP recipients. The State noted that it incurred administrative costs



of \$103 million and \$63 million, respectively in fiscal year 2020, but did not explain how administrative costs might scale up or down as a consequence of enrollment decisions by beneficiaries. DHS notes that these costs represent the State's total annual administrative costs associated with Medicaid and SNAP, not the total direct costs of providing the actual benefit to a recipient (which the commenter also provided with respect to Medicaid), or costs from which a per-enrollee marginal cost to that State could be calculated. DHS also notes that these administrative costs cannot be reliably applied to every U.S. State. Finally, DHS is unable to quantify the increase in enrollees due to the lack of data.

Another example of an indirect impact of this final rule is that it is likely to increase access to public benefit programs by some eligible individuals, including noncitizens and U.S. citizens in mixed-status households, with a range of downstream indirect effects for public health and community stability and resilience.

*vi. Benefits of Final Regulatory Changes*

The primary benefit of the final rule will be time savings of individuals directly and indirectly affected by the final rule. By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the final rule will reduce time spent by the affected population who are making decisions to apply for adjustment of status or enrolling or disenrolling in public benefit programs. For example, when noncitizens make decisions on whether to adjust status or to enroll or disenroll in public benefit programs, they may spend time gathering information or consulting attorneys. The final rule will reduce the time spent making these decisions. Specifically, the final rule provides clarity on inadmissibility on the public charge ground by codifying certain definitions, standards, and procedures. Listing the categories of noncitizens exempt from the public charge inadmissibility ground adds clarity as to which noncitizens are subject to the public charge determination and will help to reduce uncertainty and confusion. However, DHS is unable to quantify the reduction in time spent gathering information or consulting attorneys. DHS does not have data on how

much time individuals would spend in making a decision on whether to adjust status or to enroll or disenroll in public benefit programs. DHS requested public comments on this issue but did not receive any.

vii. *Total Estimated and Discounted Costs*

To compare costs over time, DHS applied a 3 percent and a 7 percent discount rate to the total estimated costs and savings associated with the final rule.<sup>627</sup> Table 16 presents a summary of the total direct costs, savings, and net costs in the final rule.

<b>Table 16. Summary of Estimated Total Direct Costs and Cost Savings of the Final Rule</b>		
	Total Annual Costs/Savings	Costs/Savings over 10-year Period
Annual Costs	\$6,435,755	\$64,357,550
Annual Cost Savings	\$15,359	\$153,590
Annual Net Costs <sup>1</sup>	\$6,420,396	\$64,203,960
Source: USCIS Analysis		
<sup>1</sup> Annual Net Costs = Annual Costs – Annual Savings		

Over the first 10 years of implementation, DHS estimates the undiscounted direct costs of the final rule will be approximately \$64,357,550, the cost savings \$153,590, and the net costs \$64,203,960. In addition, as seen in Table 17, DHS estimates that the 10-year discounted net cost of this final rule to individuals applying to adjust status who would be required to undergo review for determination of inadmissibility based on public charge will be approximately \$54,767,280 at a 3 percent discount rate and approximately \$45,094,175 at a 7 percent discount rate.

<b>Table 17. Discounted Costs of the Final Rule</b>			
	Costs over 10-year Period	Savings over 10-year Period	Net Costs over 10-year Period

<sup>627</sup> See OMB, “Circular A-4” (Sept. 17, 2003), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A4/a-4.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf).

Total Undiscounted Costs/Savings	\$64,357,550	\$153,590	\$64,203,960
Total Costs/Savings at 3% Discount Rate	\$54,898,296	\$131,015	\$54,767,280
Total Costs/Savings at 7% Discount Rate	\$45,202,050	\$107,875	\$45,094,175
Source: USCIS Analysis.			

*viii. Costs to the Federal Government*

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs and services provided without charge to certain applicants and petitioners. *See* section 286(m) of the INA, 8 U.S.C. 1356(m). DHS notes that USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs, such as salaries and benefits for clerical positions, officers, and managerial positions, plus an amount to recover unassigned overhead (e.g., facility rent, IT equipment and systems) and immigration benefits provided without a fee charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the service in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. Therefore, DHS has established the fee for the adjudication of Form I-485, Application to Register Permanent Residence or Adjust Status.

Time required for USCIS to review the additional information collected in Form I-485 when the final rule is finalized includes the additional time to adjudicate the underlying benefit request. DHS notes that the final rule may increase USCIS' costs associated with adjudicating immigration benefit requests. DHS estimates that the increased time to adjudicate the benefit

request will result in an increased employee cost of approximately \$14 million per year.<sup>628</sup> USCIS currently does not charge a filing fee for other forms affected by this final rule do not currently charge a filing fee, including Form I-693, Medical Examination and Vaccination Record; Affidavit of Support forms (Form I-864, Form I-864A, Form I-864EZ, and I-864W); Form I-912, Request for Fee Waiver, and Form I-407, Record of Abandonment of Lawful Permanent Resident Status. While filing fees are not charged for these forms, the cost to USCIS is captured in the fee for I-485. Future adjustments to the fee schedule may be necessary to recover the additional operating costs and will be determined at USCIS' next comprehensive biennial fee review.

### **c. Pre-Guidance Baseline**

As noted above, the Pre-Guidance Baseline represents a state of the world in which the 1999 NPRM, 1999 Interim Field Guidance, and the 2019 Final Rule were not enacted. The Pre-Guidance Baseline is included in this analysis in accordance with OMB Circular A-4, which directs agencies to include a “pre-statutory” baseline in an analysis if substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action.<sup>629</sup> DHS previously has not performed a regulatory analysis on the regulatory costs and benefits of the 1999 Interim Field Guidance and, therefore, includes a Pre-Guidance Baseline in this analysis for clarity and completeness. DHS presents the Pre-Guidance Baseline to provide a more informed picture on the overall impacts of the 1999 Interim Field Guidance since its inception, while recognizing that many of these impacts have been realized already.

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<sup>628</sup> Office of Performance and Quality data received on December 30, 2021. The increase in employee cost is based on estimates of additional adjudication time due to the rule, at compensation rates approximated by General Schedule wage data for USCIS employees.

<sup>629</sup> See OMB. *Circular A-4*, pp. 15-16, (Sept. 17, 2003) <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

The final rule will affect individuals who apply for adjustment of status because these individuals would be subject to inadmissibility determinations based on the public charge ground as long as the individual is not in a category of applicant that is exempt from the public charge ground of inadmissibility. In order to estimate the effect of the final rule relative to Pre-Guidance baseline, DHS revisits the state of the world for both the Pre-Guidance baseline and the No Action baseline. The state of the world in the Pre-Guidance baseline is one in which the 1999 Interim Field Guidance was never issued. The state of the world in the No Action baseline is one in which the 1999 Interim Field Guidance was issued and has been in practice. In order to estimate the effect of the 2022 final rule relative to the Pre-Guidance baseline, DHS considers the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline as well as the changes in this final rule relative to the No Action Baseline. Since the latter has already been discussed in the No Action Baseline Section, the rest of this section focuses on estimating the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline.

PRWORA and IIRIRA generated considerable public confusion about noncitizen eligibility for public benefits and the related question of whether the receipt of Federal, State, or local public benefits for which a noncitizen may be eligible renders them likely to become a public charge. According to the literature, these laws led to sharp reductions in the use of public benefit programs by immigrants between 1994 and 1997. This phenomenon is referred to as a chilling effect, which describes immigrants disenrolling from or forgoing enrollment in public benefit programs due to fear or confusion regarding: (1) the immigration consequences of public benefit receipt; or (2) the rules regarding noncitizen eligibility for public benefits.<sup>630, 631, 632</sup> The

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<sup>630</sup> Michael Fix and Jeffrey Passel, “Trends in noncitizens’ and citizens’ use of public benefits following welfare reform,” Urban Institute (Mar. 1, 1999), <http://webarchive.urban.org/publications/408086.html> (last visited Aug. 17, 2022).

<sup>631</sup> Stephen Bell, “Why are welfare caseloads falling?,” Urban Institute (March 2001), <https://www.urban.org/research/publication/why-are-welfare-caseloads-falling> (last visited Aug. 17, 2022).

<sup>632</sup> Magnus Lofstrom and Frank Bean, “Assessing immigrant policy options: Labor market conditions and post-reform declines in immigrants’ receipt of welfare,” *Demography* 39(4), 617–63 (Nov. 2002), <https://read.dukeupress.edu/demography/article-pdf/39/4/617/884758/617lofstrom.pdf> (last visited Aug. 17, 2022).

state of the world before the 1999 NPRM and 1999 Field Guidance reflected growing public confusion over the meaning of the term “public charge” in immigration law, which was undefined, and its relationship to the receipt of Federal, State, or local public benefits.

The U.S. Department of Agriculture (USDA) published a study shortly after PRWORA took effect. The study found that the number of people receiving food stamps fell by over 5.9 million between summer 1994 and summer 1997.<sup>633</sup> The study notes that enrollment in the food stamps program was falling during this period, possibly due to strong economic growth, but the decline in enrollment was steepest among legal immigrants. Under PRWORA, legal immigrants were facing significantly stronger restrictions under which most of them would become ineligible to receive food stamps in September 1997. The study found that enrollment of legal immigrants in the food stamps program fell by 54 percent, accounting for 14 percent of the total decline. USDA also observed that

Restrictions on participation by legal immigrants appear to have deterred participation by their children, many of whom retained their eligibility for food stamps. Participation among U.S. born children living with their legal immigrant parents fell faster than participation among children living with native-born parents. The number of [participating] children living with legal immigrants fell by 37 percent, versus 15 percent for children living with native-born parents.<sup>634</sup>

Another study found evidence of a “chilling effect” following enactment of PRWORA and IIRIRA where noncitizen enrollment in public benefits programs declined more steeply than U.S. citizen enrollment over the period 1994 through 1997.<sup>635</sup> The study found that “[w]hen viewed against the backdrop of overall declines in welfare receipt for all households, use of

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<sup>633</sup> See Jenny Genser, “Who is leaving the Food Stamps Program: An analysis of Caseload Changes from 1994 to 1997,” U.S. Department of Agriculture, Food and Nutrition Service, Office of Analysis, Nutrition, and Evaluation (1999), <https://www.fns.usda.gov/snap/who-leaving-food-stamp-program-analysis-caseload-changes-1994-1997> (last visited Aug. 17, 2022).

<sup>634</sup> Jenny Genser, “Who is leaving the Food Stamps Program: An analysis of Caseload Changes from 1994 to 1997,” U.S. Department of Agriculture, Food and Nutrition Service, Office of Analysis, Nutrition, and Evaluation (Mar. 1999), at 2-3 (internal table citation omitted), <https://www.fns.usda.gov/snap/who-leaving-food-stamp-program-analysis-caseload-changes-1994-1997> (last visited Aug. 17, 2022).

<sup>635</sup> See Michael Fix and Jeffrey Passel, “Trends in Noncitizens’ and Citizens’ Use of Public Benefits Following Welfare Reform: 1994 – 1997,” Urban Institute (1999) (Fix and Passel (1999)), <https://www.urban.org/research/publication/trends-noncitizens-and-citizens-use-public-benefits-following-welfare-reform> (last visited Aug. 17, 2022).

public benefits among noncitizen households fell more sharply (35 percent) between 1994 and 1997 than among citizen households (14 percent). These patterns hold for welfare (defined here as TANF, SSI, and General Assistance), food stamps, and Medicaid.”<sup>636</sup> The study authors concluded that rising incomes did not explain the relatively high disenrollment rate and suggested that the steeper declines in noncitizens’ use of benefits was attributable more to the chilling effects of PRWORA and public charge, among other factors. The study authors expected that, over time, eligibility changes would become more important because, under PRWORA, most immigrants admitted after August 22, 1996, would be ineligible for most means-tested public benefits for at least 5 years after their entry to the country.<sup>637</sup>

As described in the 1999 NPRM, the 1999 NPRM sought to reduce the negative public health and nutrition consequences generated by the existing confusion and to provide noncitizens with better guidance as to the types of public benefits that would be considered or not considered in reviews for inadmissibility on the public charge ground.

By providing a clear definition of “likely at any time to become a public charge” and identifying the types of public benefits that would be considered in public charge inadmissibility determinations, the final rule could alleviate confusion and uncertainty with respect to the provision of emergency and other medical assistance, children’s immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants’ fears of obtaining these necessary medical and other benefits not only causes considerable harm, but also can have a range of downstream consequences for the general public. By describing the kinds of public benefits, if received, that could result in a determination that a person is likely at any time to become a public charge, immigrants would be able to maintain available supplemental benefits that are designed to aid individuals in gaining and maintaining employment. The final rule also lists the factors that must be considered in making public charge determinations. The

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<sup>636</sup> Fix and Passel (1999), at 1-2.

<sup>637</sup> Fix and Passel (1999), at 1-2.

final rule makes clear that the past or current receipt of public assistance, by itself, would not lead to a determination of being likely to become a public charge without also considering the minimum statutory factors.

The primary economic impact of the final rule relative to the Pre-Guidance Baseline will be an increase in transfer payments from the Federal and State governments to individuals. As discussed above, the chilling effect due to PRWORA and IIRIRA resulted in a decline in participation in public benefit programs among noncitizens and foreign-born individuals and their families. The final rule will alleviate confusion and uncertainty, as compared to the Pre-Guidance Baseline, by clarifying the ground of public charge inadmissibility. This clarification will lead to an increase in public benefit participation by certain persons (most of whom would likely not be subject to the public charge ground of inadmissibility in any event).<sup>638</sup> Due to the increase in transfer payments, DHS believes that the rule may also have indirect effects on businesses in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, and agricultural producers who grow foods that are eligible for purchase using SNAP benefits. However, DHS is unable to quantify this indirect effect due to the significant passage of time between the 1999 Interim Field Guidance and this final rule.

DHS believes that the rule may have indirect effects on State, local, and/or Tribal government as compared to the Pre-Guidance baseline. There may be costs to various entities associated with familiarization of and compliance with the provisions of the rule, including salaries and opportunity costs of time to monitor and understand regulation requirements, disseminate information, and develop or modify information technology (IT) systems as needed. It may be necessary for many government agencies to update guidance documents, forms, and web pages. It may be necessary to prepare training materials and retrain staff at each level of

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<sup>638</sup> Relatively few noncitizens in the United States are both subject to INA sec. 212(a)(4) and eligible for public benefits prior to adjustment of status (*see* Table 3 above).



government, which will require additional staff time and will generate associated costs.

However, DHS is unable to quantify these effects.

Due to the passage of a significant amount of time between the 1999 Interim Field Guidance and this final rule, DHS cannot quantify the effects that this final rule will have as compared to the Pre-Guidance baseline. For instance, although DHS could estimate the chilling effects of PRWORA and IIRIRA and the countervailing effects of the 1999 Interim Field Guidance, it would be challenging to apply such estimates to the 20-plus years since that time. A wide number of changes in the economy and Federal laws occurred during that time period that might have affected public benefits usage among the population most likely to be affected by the final rule. Thus, DHS is unable to quantify these effects.

#### **d. Regulatory Alternative**

Consistent with E.O. 12866, DHS considered the costs and benefits of an available regulatory alternative. The alternative that DHS considered was a rulemaking similar to the rulemaking that comprised the 2018 NPRM and the 2019 Final Rule (the Alternative). DHS considered both the effects of the 2018 NPRM and the 2019 Final Rule because the indirect disenrollment effects associated with the rulemaking began prior to the publication of the Final Rule. DHS sought to avoid underestimating the full impact the rulemaking had on the public.

As compared to the 1999 Interim Field Guidance, the 2019 Final Rule expanded the criteria used in public charge inadmissibility determinations. The 2019 Final Rule broadened the definition of “public charge,” both by adding new public benefits for consideration and by expanding the definition of public charge to mean “an alien who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period.”

The additional public benefits in the 2019 Final Rule were non-emergency Medicaid for non-pregnant adults, federally funded nutritional assistance (SNAP), and certain housing assistance, subject to certain exclusions for certain populations. In addition, the 2019 Final Rule required noncitizens to submit a declaration of self-sufficiency on a new form designated by

DHS and required the submission of extensive initial evidence relating to the public charge ground of inadmissibility.

The 2019 Final Rule also provided, with limited exceptions, that certain applicants for extension of stay or change of nonimmigrant status would be required to demonstrate that they have not received, since obtaining the nonimmigrant status they seek to extend or change and through the time of filing and adjudication, one or more public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in 1 month counts as 2 months).

In order to estimate the effect of the Alternative relative to the Pre-Guidance baseline, DHS sums the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline with the effect of the Alternative relative to the No Action Baseline. Detailed discussion of the costs, benefits, and transfer payments of the Alternative relative to the No Action baseline is provided below. The effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline under the Alternative is the same as discussed in the assessment of the final rule. This effect is discussed in the Pre-Guidance Baseline Section. Although DHS is not able to quantify all the effects of the Alternative, for those effects that are not quantifiable DHS provides qualitative discussion.

The primary objective of the Alternative would be to ensure that noncitizens who are admitted to the United States or apply for adjustment of status have not received one or more public benefits for longer than the threshold duration established by the rule, and to thereby allow the admission only of noncitizens expected to rely on their own financial resources, and those of family members, sponsors, and private organizations. DHS expects that effects under the Alternative would be similar to those under the 2019 Final Rule. The 2019 Final Rule was associated with widespread indirect effects, primarily with respect to those who were not subject to the 2019 Final Rule in the first place, such as U.S.-citizen children in mixed-status households, longtime lawful permanent residents who are only subject to the public charge

ground of inadmissibility in limited circumstances, and noncitizens in a humanitarian status who would be exempt from the public charge ground of inadmissibility in the context of adjustment of status.

This final rule would implement a different policy than that of the alternative described here. DHS believes that, in contrast to the Alternative, this rule would effectuate a more faithful interpretation of the statutory phrase of “likely at any time to become a public charge”; avoid unnecessary burdens on applicants, adjudicators, and benefits-granting agencies; mitigate the possibility of widespread “chilling effects” with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible, especially with respect to individuals who are not subject to the public charge ground of inadmissibility; and reduce States’ administrative costs by alleviating confusion and simplifying administrative burdens due to the final rule’s clarification concerning public benefits.

*i. Direct Costs*

Total direct costs resulting from the 2019 Final Rule were estimated to be approximately \$35.4 million per year.<sup>639</sup> Total annual transfer payment decreases due to the 2019 Final Rule were estimated to be about \$2.47 billion resulting from individuals (most of whom would likely not have been subject to the 2019 Final Rule) disenrolling from or forgoing enrollment in public benefit programs. The federal-level share of the annual transfer payments decrease was approximately \$1.46 billion, and the state-level share of the annual transfer payments decrease was \$1.01 billion.<sup>640</sup> For purposes of estimating the costs and benefits of the Alternative, DHS updated its estimates of the total annual direct cost of and change in the total annual transfer payment increases related to the 2019 Final Rule.

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<sup>639</sup> See “Inadmissibility on Public Charge Grounds,” 84 FR 41292 (Aug. 14, 2019), as amended by “Inadmissibility on Public Charge Grounds; Correction,” 84 FR 52357 (Oct. 2, 2019).

<sup>640</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292 (Aug. 14, 2019).

After updating the costs from the 2019 Final Rule, DHS estimates the total annual direct costs of the Alternative would be approximately \$62 million, as detailed below. The update in direct costs from the 2019 Final Rule includes an increase in the number of average receipts of form I-485, application to register permanent residence or adjust status and an increase in the average total rate of compensation. These costs would include about \$48,639,917 to the public to fill out and submit a new form I-944,<sup>641</sup> Declaration of Self-Sufficiency, which would require noncitizens to declare self-sufficiency and provide a range of evidence that DHS required for making public charge inadmissibility determinations under the 2019 Final Rule. There is also an estimated additional time burden cost of \$1,458,771 to applicants who would be required to fill out and submit Form I-485;<sup>642</sup> \$40,426 to public charge bond obligors for filing Form I-945, Public Charge Bond<sup>643</sup>; \$946 to filers for submitting Form I-356, Request for Cancellation of Public Charge Bond<sup>644</sup>; and \$7,201,007 to applicants for completing and filing forms I-129, Petition for a Nonimmigrant Worker<sup>645</sup>; \$151,338 for I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker<sup>646</sup>; and \$4,045,372 for I-539, Application to Extend/Change

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<sup>641</sup> Cost to file form I-944: Form I-944 Time burden estimated in the 2019 Final Rule (4.5 hour) \* Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage (\$17.11) \* Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 10 (501,520) = \$38,614,532 (rounded), Cost of obtaining credit report and score cost from Experian (\$19.99) \* Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 10 (501,520) = \$10,025,385 (rounded). Total cost to file form I-944 = \$38,614,532 + \$10,025,385 = \$48,639,917. DHS uses this burden hour estimate for consistency with the analysis in the 2019 Final Rule.

<sup>642</sup> Cost to file form I-485: Form I-485 Time burden increase estimated in the 2019 Final Rule (0.17 hour) \* Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage (\$17.11) \* Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 10 (501,520) = \$1,458,771 (rounded).

<sup>643</sup> Cost to file form I-945: Form I-945 Time burden estimated in the 2019 Final Rule (1 hour) \* Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage (\$17.11) \* Estimated annual population in the 2019 Final Rule who would file Form I-945 (960) = \$16,426 (rounded).

<sup>644</sup> Cost to file form I-356: (Form I-356 Time burden estimated in the 2019 Final Rule (0.75 hour) \* Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage (\$17.11) + Filing fee estimated in the 2019 Final Rule (\$25)) \* Estimated annual population in the 2019 Final Rule who would file Form I-356 (25) = (\$12.83 + \$25) \* 25 = \$946 (rounded).

<sup>645</sup> Cost to file form I-129: Form I-129 Time burden increase estimated in the 2019 Final Rule (0.5 hour) \* the total compensation from BLS discussed in Section VI.A.5 (\$39.55) \* Estimated annual population who would file Form I-129 using FY2014-FY2018 data from USCIS (364,147) = \$7,201,007 (rounded).

<sup>646</sup> Cost to file form I-129CW: Form I-129 CW Time burden increase estimated in the 2019 Final Rule (0.5 hour) \* the total compensation from BLS discussed in Section VI.A.5 (\$39.55) \* Estimated annual population who would file Form I-129CW using FY2014-FY2018 data from USCIS (7,653) = \$151,338 (rounded).

Nonimmigrant Status<sup>647</sup> to demonstrate that the applicant has not received public benefits since obtaining the nonimmigrant status that they are seeking to extend or change.

ii. *Transfer Payments*

As noted above, the 2019 Final Rule was also associated with widespread indirect effects, primarily with respect to those who were not subject to the 2019 Final Rule in the first place, such as U.S.-citizen children in mixed-status households, longtime lawful permanent residents who are only subject to the public charge ground of inadmissibility in limited circumstances, and noncitizens in a humanitarian status who would be exempt from the public charge ground of inadmissibility in the context of adjustment of status.<sup>648</sup> DHS expects that similar effects would occur under the Alternative. DHS estimates that the total annual transfer payments from the Federal Government to public benefits recipients who are members of households that include noncitizens would be approximately \$3.79 billion lower. DHS also estimates that the total annual transfer payments from the State Government to public benefits recipients would be approximately \$2.63 billion lower.<sup>649</sup> DHS notes that as a formal matter, the estimated reduction in annual transfer payments is a transfer, which is a monetary payment from one group to another that does not affect total resources. In addition, the transfers estimated in this analysis relate predominantly to enrollment decisions made by those who are not subject to the public charge ground of inadmissibility. The consequences of reduction in transfer payments represents

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<sup>647</sup> Cost to file form I-539: Form I-539 Time burden increase estimated in the 2019 Final Rule (0.5 hour) \* the total compensation from BLS discussed in Section VI.A.5 (\$39.55) \* Estimated annual population who would file Form I-539 using FY2014-FY2018 data from USCIS (204,570) = \$4,045,372 (rounded).

<sup>648</sup> Hamutal Bernstein et al., “Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis,” Urban Institute (2021), <https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis> (Bernstein et al. (2021)) (last visited Aug. 17, 2022). Several additional studies are cited in the discussion below, repeatedly finding that it was those individuals not subject to INA sec. 212(a)(4) who typically chose to disenroll or refrain from enrolling in public benefits, due to fear of adverse consequences from the 2019 Final Rule throughout its rulemaking process. Relatively few noncitizens in the United States are both subject to INA sec. 212(a)(4) and eligible for public benefits prior to adjustment of status (*see* Table 3 above).

<sup>649</sup> Total annual Federal and State reduction in transfer payment = (Estimated Reduction in Transfer Payments Based on the Federal government from Table 21) / (average Federal Medical Assistance Percentages (FMAP) across all States and U.S. territories) = \$3,786,574,510 / 0.59 = \$6.42 billion (rounded). The State portion of reduction in transfer payments is Total annual Federal and State reduction in transfer payment minus the Federal portion. Calculation: \$2.63 billion=\$6.42 billion-\$3.79 billion.

significantly broader effects than any disenrollment that would result among people actually regulated by this Alternative.

As noted below, DHS is unable to estimate the downstream effects that would result from such decreases. DHS expects that in some cases, a decrease in transfers associated with one program or service would include an increase in transfers associated with other programs or services, such as programs or services delivered by nonprofits.

In the 2019 Final Rule, DHS estimated the reduction in transfer payments by multiplying a disenrollment/forgone enrollment rate of 2.5 percent by an estimate of the number of public benefits recipients who are members of households that include noncitizens (i.e., the population that may disenroll) and then multiplying the estimated population by an estimate of the average annual benefit received per person or household for the covered benefits.

In the 2019 Final Rule, DHS estimated the 2.5 percent disenrollment/forgone enrollment rate by dividing the annual number of approved noncitizens who adjusted status annually by the estimated noncitizen population of the United States.<sup>650</sup> DHS estimated this disenrollment rate as the five-year average annual number of persons adjusting status as a percentage of the estimated noncitizen population in the United States (2.5 percent). This estimate reflected an assumption that 100 percent of such noncitizens and their household members are either enrolled in or eligible for public benefits and will be sufficiently concerned about potential consequences of the policies in this final rule to disenroll or forgo enrollment in public benefits. The resulting transfer estimates would therefore have had a tendency toward overestimation, at least as it relates to the population that would be directly regulated by the 2019 Final Rule.

In the 2019 Final Rule, DHS assumed that the population likely to disenroll from or forgo enrollment in public benefits programs in any year would be public benefits recipients who were members of households (or in the case of rental assistance, households as a unit) including

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<sup>650</sup> “Inadmissibility on Public Charge Grounds,” 83 FR 51114, 51266 (Oct. 10, 2018). “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41463 (Aug. 14, 2019).

foreign-born non-citizens who were adjusting status annually. But as discussed below, this approach may have resulted in an underestimate due to the documented chilling effects associated with the 2019 Final Rule among other parts of the noncitizen and citizen populations who were not included as adjustment applicants or members of households of adjustment applicants as well as other noncitizens who were not adjustment applicants. For the low estimate, DHS uses the same methodology, but with updated data, to estimate that the low rate of disenrollment or forgone enrollment due to the Alternative would be 3.1 percent.<sup>651, 652</sup>

Since the publication of the 2019 Final Rule, several studies have been published that discuss the impact of the 2019 Final Rule on the rate of public benefit disenrollment or forgone enrollment (i.e., a chilling effect). Studies conducted between 2016 and 2020 show reductions in enrollment in public benefits programs due to a chilling effect ranging from 4.1 percent to 48 percent.<sup>653, 654</sup> The results of these studies depend on several factors, such as the sample examined or the period or method of analysis. The Public Charge NPRM was published in late 2018 and the 2019 Final Rule was finalized in August 2019. The 2019 Final Rule became effective in February 2020. However, after subsequent legal challenges to the 2019 Final Rule, it was vacated in March 2021. Given this timeline, several studies show that the largest observed disenrollment from or forgone enrollment in public benefit programs occurred between 2018 and 2019.<sup>655</sup> Capps et al. (2020) looked at benefits usage across all groups and observed that

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<sup>651</sup> Calculation, based on 5-year averages over the period fiscal year 2014–2018: (690,837 receipts for I-485, adjustments of status / 22,289,490 estimated noncitizen population) \* 100 = 3.1 percent (rounded). 22,289,490 (estimated noncitizen population): U.S. Census Bureau American Database, “S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates,” <https://data.census.gov/cedsci> (last visited Aug. 17, 2022).

<sup>652</sup> In the 2019 Final Rule, the rate of disenrollment or forgone enrollment was calculated using number of I-485 approvals rather than receipts. For this analysis DHS elected to use I-485 receipts because the public charge inadmissibility ground is applied to all those who file the application for adjustment of status not just those who are approved.

<sup>653</sup> Randy Capps et al., “Anticipated “Chilling Effects” of the public-charge rule are real: Census data reflect steep decline in benefits use by immigrant families,” Migration Policy Institute (2020), <https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real> (Capps et al. (2020)) (last visited Aug. 17, 2022). Note: This study finds a 4.1-percent decrease in Medicaid/CHIP enrollment from 2016 to 2017 for low-income noncitizens.

<sup>654</sup> Bernstein et al. (2021).

<sup>655</sup> Capps et al. (2020).

enrollment was declining over this time period for all groups (albeit with consistently more significant reductions in enrollment among noncitizens or those in mixed-status households than among the public at large). Capps et al. (2020) attributed the reduction in enrollment in the overall U.S. population to the improving economic conditions between 2016 and 2019, although other factors may also have influenced these rates.<sup>656</sup>

Some studies examined different samples such as low-income noncitizens,<sup>657</sup> low-income citizens,<sup>658</sup> adults in immigrant families,<sup>659</sup> immigrant families with children,<sup>660</sup> or low-income immigrant adults.<sup>661</sup> The studies show that the 2019 Final Rule directly or indirectly affected adult noncitizens and indirectly affected adults in immigrant families who are lawful permanent residents or naturalized citizens.<sup>662</sup> One study shows that immigrant families with children reported a greater reduction in public benefit enrollment (20.4 percent) compared to immigrant families without children (10 percent) in 2019.<sup>663</sup> Another study shows the reduction in public benefit program enrollment also differs by the type of the public benefit program examined.<sup>664</sup> This study found reduced enrollment in SNAP, Medicaid/CHIP, and TANF and General

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<sup>656</sup> See, e.g., Capps et al. (2020).

<sup>657</sup> Capps et al. (2020).

<sup>658</sup> Benjamin Sommers, "Assessment of Perceptions of the Public Charge Rule Among Low-Income Adults in Texas," JAMA Network (July 15, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768245> (last visited Aug. 17, 2022).

<sup>659</sup> Hamutal Bernstein et al., "One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018," Urban Institute (May 2019), [https://www.urban.org/sites/default/files/publication/100270/one\\_in\\_seven\\_adults\\_in\\_immigrant\\_families\\_reported\\_avoiding\\_public\\_benefit\\_programs\\_in\\_2018.pdf](https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_public_benefit_programs_in_2018.pdf) (last visited Aug. 17, 2022).

<sup>660</sup> Jennifer Haley et al., "One in Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019," Urban Institute (2020), <https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019.pdf>.

<sup>661</sup> Susan Babey et al., "One in 4 Low-Income Immigrant Adults in California Avoided Public Programs, Likely Worsening Food Insecurity and Access to Health Care," UCLA Center for Health Policy Research (2021), <https://healthpolicy.ucla.edu/publications/Documents/PDF/2021/publiccharge-policybrief-mar2021.pdf>.

<sup>662</sup> Hamutal Bernstein et al., "One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018," Urban Institute (May 2019), [https://www.urban.org/sites/default/files/publication/100270/one\\_in\\_seven\\_adults\\_in\\_immigrant\\_families\\_reported\\_avoiding\\_public\\_benefit\\_programs\\_in\\_2018.pdf](https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_public_benefit_programs_in_2018.pdf) (last visited Aug. 17, 2022).

<sup>663</sup> Jennifer Haley et al., "One in Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019," Urban Institute (June 2020), <https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019.pdf>.

<sup>664</sup> Capps et al. (2020).



Assistance (TANF/GA), but noted that the reduction was relatively larger for TANF/GA (12 percent annualized reduction among low-income individuals from 2016 to 2019) and SNAP (12 percent annualized reduction), as compared to Medicaid/CHIP (7 percent annualized reduction).<sup>665</sup> The study observed that participation in all three programs fell about twice as fast over the 2016 to 2019 period for U.S.-citizen children with noncitizens in the household as for those with only citizens in the household.

Due to the uncertainty of the rate of disenrollment or forgone enrollment in public benefits programs related to the 2019 Final Rule, DHS uses a range of rates to estimate the change in Federal Government transfer payments that would be associated with the Alternative. For estimating the lower bound of the range, DHS uses a 3.1 percent rate of disenrollment or forgone enrollment in public benefits programs based on the estimation methodology from the 2019 Final Rule (as discussed above).

DHS bases the upper bound of the range on the results of studies by Bernstein, Gonzalez, Karpman, and Zuckerman (Bernstein et al. [2019]<sup>666</sup> and Bernstein et al. [2020]<sup>667</sup>), which provided an average of 14.7 percent rate of disenrollment or forgone enrollment in public benefits programs. These studies observed reductions in the public benefit participation rate for adults in immigrant families in 2018 and 2019. Bernstein et al. (2019; 2020) uses a population of nonelderly adults who are foreign born or living with a foreign-born relative in their household – this matches the population of mixed-status households for which DHS estimates for the

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<sup>665</sup> Capps et al. (2020). See Figure 1 for changes in participation by low-income noncitizens from 2016 to 2019 (37 percent decrease in SNAP, 37 percent decrease in TANF/GA, and 20 percent decrease in Medicaid/CHIP), which are not adjusted to account for other variables. DHS calculates annualized reduction among low-income noncitizen from 2016 to 2019: for TANF/GA (12 percent) = 37 percent / 3 years = 12 (rounded), for SNAP (12 percent) = 37 percent / 3 years = 12 (rounded), and Medicaid/CHIP (7 percent) = 20 percent / 3 years = 7 (rounded).

<sup>666</sup> Hamutal Bernstein et al., “One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018,” Urban Institute (May 2019), [https://www.urban.org/sites/default/files/publication/100270/one\\_in\\_seven\\_adults\\_in\\_immigrant\\_families\\_reported\\_avoiding\\_public\\_benefits\\_in\\_2018.pdf](https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_public_benefits_in_2018.pdf) (last visited Aug. 17, 2022).

<sup>667</sup> Hamutal Bernstein et al., “Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019,” Urban Institute (May 2020), [https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019\\_3.pdf](https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_3.pdf) (last visited Aug. 16, 2022).

Alternative the rate of disenrollment from or forgone future enrollment in a public benefits program. Other studies such as Capps et al. (2020) examined a chilling effect among low-income families, which only covers a subset of the population of interest. One study showed that in 2020, more than one in six adults in immigrant families (17.8 percent) reported avoiding a noncash government benefit program or other help with basic needs because of green card concerns or other worries about immigration status or enforcement, and more than one in three adults in families in which one or more members do not have a green card (36.1 percent) reported these broader chilling effects.<sup>668</sup> Looking at the subset of the noncitizen population, however, shows a larger chilling effect as this smaller group likely experienced a larger disenrollment rate. However, this small population does not capture other noncitizen groups that might have also disenrolled in public benefits. DHS chose to use the two Bernstein studies described below, because the studies analyze the impact on the broader population of noncitizens, which includes the smaller subsets identified in the other studies.

Bernstein et al. (2019; 2020) examined beneficiaries of SNAP, Medicaid, and housing subsidies, which are public benefits programs considered for public charge inadmissibility determinations under the Alternative. However, Bernstein et al. (2019; 2020) does not include other public benefit programs considered for public charge inadmissibility determinations under the Alternative, such as TANF or SSI. Since DHS estimates the change in transfer payments for Medicaid, SNAP, TANF, SSI, and housing subsidies, DHS uses an overall average rate of chilling effect, based on the chilling effects reported by Bernstein et al. (2019; 2020).

Bernstein et al. (2019) showed that 13.7 percent of adults in immigrant families reported that they (i.e., the respondent) or a family member avoided a noncash government benefit program in 2018. Bernstein et al. (2020) showed that 15.6 percent of adults in immigrant families reported that they (the respondent) or a family member avoided a noncash government benefit

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<sup>668</sup> Bernstein et al. (2021).

program in 2019. DHS calculates a simple average of these two percentages (13.7 percent and 15.6 percent) from the Bernstein et al. (2019; 2020) studies to arrive at the estimated annual decrease of 14.7 percent described above.

As with the lower estimate discussed above, DHS acknowledges that this upper estimate could be an underestimate or an overestimate. The upper bound estimate of a 14.7 percent rate of disenrollment or forgone enrollment may result in an underestimate since the Bernstein et al. (2019; 2020) studies did not include all the public benefit programs such as TANF and SSI. As shown in Capps et al. (2020), cash assistance public benefit programs TANF/GA, as well as SNAP experienced a greater rate in disenrollment relative to Medicaid/CHIP. On the other hand, the upper estimate of a 14.7 percent rate of disenrollment or forgone enrollment may result in an overestimate. While Capps et al. (2020) noted that during the period between 2016 and 2019 participation in public benefits was declining for both U.S. citizens and noncitizens (albeit at significantly different rates), the disenrollment rates produced in the Bernstein et al. (2019; 2020) studies did not control for overall trends in the U.S. population at large.

Bernstein et al. (2019; 2020) population estimates are based on a nationally representative survey of nonelderly adults who are foreign born or living with a foreign-born relative in their household. From there, Bernstein et al. (2019; 2020) compare the disenrollment year over year for Medicaid/CHIP, SNAP, or housing subsidies to arrive at an overall disenrollment rate of 13.7 percent in 2018 and 15.6 percent in 2019. Many studies discussed earlier in this section similarly attempted to measure the disenrollment or forgone enrollment rate due to the 2019 Final Rule. These studies show reductions in enrollment in public benefits programs due to a chilling effect ranging from 4.1 percent to 36.1 percent. DHS uses the estimates of the chilling effect by Bernstein et al. (2019; 2020) as a proxy because their population closely matches the population of interest for this analysis whereas the other studies looked at a smaller subset of the population. Compared to other studies, Bernstein et al. (2019;

2020) also measures the chilling effect as either not applying for or stopping participation in public benefit program.

DHS uses 8.9 percent as the primary estimate in order to estimate the annual reduction in Federal Government transfer payments associated with the Alternative, which is the midpoint between the lower estimate (3.1 percent) and the upper estimate (14.7 percent) of disenrollment or forgone enrollment in public benefits programs. DHS chose to provide a range due to the difficulty in estimating the effect on various populations.

Using the primary estimate rate of disenrollment or forgone enrollment in public benefits programs of 8.9 percent, DHS estimates that the total annual reduction in transfer payments from the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs. Based on the data presented below, DHS estimates that the total annual reduction in transfer payments paid by the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately \$3.79 billion for an estimated 819,599 individuals and 31,940 households across the public benefits programs examined.

To estimate the reduction in transfer payments under the Alternative, DHS must multiply the estimated disenrollment/forgone enrollment rate of 8.9 percent by: (1) the population of analysis (i.e., those who may disenroll from or forgo enrollment in Medicaid, SNAP, TANF, SSI, and Federal rental assistance, the programs that would be covered under the Alternative);<sup>669</sup> and (2) the value of the forgone benefits.

Table 17 shows the estimated population of public benefits recipients who are members of households that include noncitizens. DHS assumes that this is the population of individuals

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<sup>669</sup> DHS recognizes that the rule would create a similar disincentive to receipt of TANF and SSI by certain noncitizens, although DHS expects that the scope and relative simplicity of this rule, and the fact that these benefits have been considered in public charge inadmissibility determinations since 1999, would mitigate chilling effects to some extent. Note that the Medicaid enrollment does not include child enrollment because the 2019 Final Rule did not include Medicaid or CHIP for children.

who may disenroll from or forgo enrollment in public benefits under the Alternative. The table also shows estimates of the number of households with at least one noncitizen family member that may have received public benefits.<sup>670, 671</sup> Based on the number of households with at least one noncitizen family member, DHS estimates the number of public benefits recipients who are members of households that include at least one noncitizen who may have received benefits using the U.S. Census Bureau’s estimated average household size for foreign-born households.<sup>672, 673</sup>

In order to estimate the population of public benefits recipients who are members of households that include at least one noncitizen DHS uses a 5-year average of public benefit recipients’ data from FY 2014 to FY 2018. Although data from FY 2019 to FY 2021 were available, DHS opted not to use data from these years because the populations of public benefit recipients in those years were affected by both the 2019 Final Rule and the COVID-19 pandemic.

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<sup>670</sup> See U.S. Census Bureau, “American Community Survey and Puerto Rico Community Survey 2020 Subject Definitions,” [https://www2.census.gov/programs-surveys/acs/tech\\_docs/subject\\_definitions/2020\\_ACSSubjectDefinitions.pdf](https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2020_ACSSubjectDefinitions.pdf) (last visited Aug. 17, 2022). The foreign-born population includes anyone who was not a U.S. citizen or a U.S. national at birth, which includes respondents who indicated they were a U.S. citizen by naturalization or not a U.S. citizen. The ACS questionnaires do not ask about immigration status but uses responses to determine the U.S. citizen and non-U.S.-citizen populations as well as to determine the native and foreign-born populations. The population surveyed includes all people who indicated that the United States was their usual place of residence on the survey date. The foreign-born population includes naturalized U.S. citizens, lawful permanent residents, noncitizens with a nonimmigrant status (e.g., foreign students), noncitizens with a humanitarian status (e.g., refugees), and noncitizens present without a lawful immigration status.

<sup>671</sup> To estimate the number of households with at least 1 foreign-born noncitizen family member that have received public benefits, DHS calculated the overall percentage of total U.S. households that are foreign-born noncitizen as 6.9 percent. Calculation:  $[22,289,490 \text{ (Foreign-born noncitizens)} / 322,903,030 \text{ (Total U.S. population)}] * 100 = 6.9$  percent. See U.S. Census Bureau American Database, “S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates,” <https://data.census.gov/cedsci> (last visited Aug. 17, 2022).

<sup>672</sup> See U.S. Census Bureau American Database, “S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates,” <https://data.census.gov/cedsci> (last visited Aug. 17, 2022). The average foreign-born household size is reported as 3.31 persons. DHS multiplied this figure by the estimated number of benefits-receiving households with at least 1 foreign-born noncitizen receiving benefits to estimate the population living in benefits-receiving households that include a foreign-born noncitizen.

<sup>673</sup> In this analysis, DHS uses the American Community Survey (ACS) to develop population estimates along with beneficiary data from each of the benefits program. DHS notes that the ACS data were used for the purposes of this analysis because it provided a cross-sectional survey based on a random sample of the population each year including current immigration classifications. Both surveys reflect use by noncitizens of the public benefits included in the Alternative.

Consistent with the approach DHS took in the 2019 Final Rule, DHS’s methodology was as follows. First, for most of the public benefits programs analyzed, DHS estimated the number of households with at least one person receiving such benefits by dividing the number of people that received public benefits by the U.S. Census Bureau’s estimated average household size of 2.63 for the U.S. total population.<sup>674</sup> Second, DHS estimated the number of such households with at least one noncitizen resident. According to the U.S. Census Bureau population estimates, the noncitizen population is 6.9 percent of the U.S. total population.<sup>675</sup> While there may be some variation in the percentage of noncitizens who receive public benefits, including depending on which public benefits program one considers, DHS assumes in this economic analysis that the percentage holds across the populations of the various public benefits programs. Therefore, to estimate the number of households with at least one noncitizen who receives public benefits, DHS multiplies the estimated number of households for each public benefits program by 6.9 percent. This step may introduce uncertainty into the estimate because the percentage of households with at least one noncitizen may differ from the percentage of noncitizens in the population. However, if noncitizens tend to be grouped together in households, then an overestimation of households that include at least one noncitizen is more likely.

DHS then estimates the number of noncitizens who received benefits by multiplying the estimated number of households with at least one noncitizen who receives public benefits by the U.S. Census Bureau’s estimated average household size of 3.31 for those who are foreign-born.<sup>676</sup>

<b>Table 18. Estimated Population of Public Benefits Recipients Who Are Members of Households that Include at Least One Noncitizen, FY 2014 – FY 2018</b>
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<sup>674</sup> See U.S. Census Bureau Database, “S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates,” <https://data.census.gov/cedsci> (last visited Aug. 17, 2022).

<sup>675</sup> See U.S. Census Bureau Database, “S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates,” <https://data.census.gov/cedsci>. Calculation:  $[22,289,490 \text{ (Foreign-born noncitizens)} / 322,903,030 \text{ (Total U.S. population)}] * 100 = 6.9 \text{ percent}$ .

<sup>676</sup> See U.S. Census Bureau Database, “S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates,” <https://data.census.gov/cedsci> (last visited Aug. 17, 2022).

<b>Public Benefits Program</b>	<b>Average Annual Total Number of Recipients<sup>1</sup></b>	<b>Households that May Be Receiving Benefits<sup>2</sup></b>	<b>Benefits-Receiving Households with <u>at Least One Noncitizen</u><sup>3</sup></b>	<b>Public Benefits Recipients Who Are Members of Households Including at Least One Noncitizen<sup>4</sup></b>
<b>Medicaid<sup>5</sup></b>	38,070,865	14,475,614	998,817	3,306,084
<b>Supplemental Nutrition Assistance Program (SNAP)<sup>6</sup></b>	<i>N/A</i>	21,630,217	1,492,485	4,940,125
<b>Temporary Assistance for Needy Families (TANF)<sup>7</sup></b>	2,836,073	1,078,355	74,406	246,284
<b>Supplemental Security Income (SSI)<sup>8</sup></b>	8,250,666	3,137,135	216,462	716,489
<b>Federal Rental Assistance<sup>9</sup></b>	<i>N/A</i>	5,199,000	358,731	<i>N/A</i>

Sources and Notes: USCIS analysis of data provided by the Federal agencies that administer each of the listed public benefits program or research organizations.

<sup>1</sup> Figures for the average annual total number of recipients are based on 5-year averages, whenever possible, for the most recent 5-year period for which data are available (2014-2018). For more information, please see the document “Economic Analysis Supplemental Information for Analysis of Public Benefits Programs” in the online docket for the final rule.

<sup>2</sup> DHS estimated the number of households by dividing the number of people that received public benefits by the U.S. Census Bureau’s estimated average household size of 2.63 for the U.S. total population. *See* U.S. Census Bureau Database. “S0501: Selected Characteristics of the Native and Foreign-born Populations 2014 – 2018 American Community Survey (ACS) 5-year Estimates.” Available at <https://data.census.gov/cedsci> (last visited Jan. 14, 2022). Note that HUD Rental Assistance and HUD Housing Choice Vouchers programs report data on the household level. Therefore, DHS did not use this calculation to estimate the average household size and instead used the data as reported.

<sup>3</sup> To estimate the number of benefits-receiving households with at least one foreign-born noncitizen, DHS multiplied the estimated number of households receiving benefits in the United States by 6.9 percent, which is the foreign-born noncitizen population as a percentage of the U.S. total population using U.S. Census Bureau population estimates. *See ibid.*

<sup>4</sup> To estimate the population of public benefits recipients who are members of households that include foreign-born noncitizens, DHS multiplied the estimated number of benefits-receiving households with at least one foreign-born noncitizen by the average household size of 3.31 for those who are foreign-born using the U.S. Census Bureau’s estimate. *See ibid.*

<sup>5</sup> Medicaid – *See* U.S. Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS). Monthly Medicaid & CHIP Application, Eligibility Determination, and Enrollment Reports & Data. Available at

<https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/monthly-reports/index.html>. Last visited Jan. 14, 2022. Note that each annual total was calculated by averaging the monthly enrollment population over each year. The numbers that were used for the average can be found in Table 1A: Medicaid and CHIP for each month, using the number listed as the “Total Across All States.” through the Sept. 2018 report and in the Data.Medicaid.gov interactive database from Oct. 2018 onwards. DHS used “Total Medicaid Enrollment” data for its estimates. Also, note that per enrollee Medicaid costs vary by eligibility group and State. Note that consistent with the analysis conducted for the 2019 Final Rule, the Medicaid enrollment does not include child enrollment. Although DHS did not include Medicaid CHIP for children in the 2019 Final Rule, DHS is aware of evidence of disenrollment effects that would not be captured here

<sup>6</sup> SNAP – See U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program. “National and/or State Level Monthly and/or Annual Data: Persons, Households, Benefits, and Average Monthly Benefit per Person & Household,” “FY69 through FY22.” Available at <https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap>. Last visited Jan. 14, 2022. The number of households receiving SNAP benefits in this table is not calculated using average U.S. household size. Rather, it is 5-year average (FY2014-FY2018) of the number of households as reported by the U.S. Department of Agriculture from the website listed in this footnote.

<sup>7</sup> TANF – See U.S. HHS, Office of Family Assistance. “TANF Caseload Data.” Available at <https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2018>; <https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2017>; <https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2016>; <https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2015>; and <https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2014>. Last visited Jan. 14, 2022. Note: The number of participants is listed for the fiscal year, not calendar year since the dollar amount of assistance received is only presented for fiscal years.

<sup>8</sup> SSI – See U.S. Social Security Administration, Annual Report of the Supplemental Security Income Program, 2021, Table IV.B9., p. 47. Available at <https://www.ssa.gov/OACT/ssir/SSI21/ssi2021.pdf>; Last visited Jan. 14, 2022. See also U.S. Social Security Administration, Office of Research, Evaluation, and Statistics. “SSI Recipients by State and County, 2018,” available at [https://www.ssa.gov/policy/docs/statcomps/ssi\\_sc/2018/index.html](https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2018/index.html). “SSI Monthly Statistics, 2018.” Available at [https://www.ssa.gov/policy/docs/statcomps/ssi\\_monthly/2018/table01.html](https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2018/table01.html). Last visited Jan. 14, 2022. Note that the link shows fiscal year 2018 data, but links to data for other fiscal years can also be accessed.

<sup>9</sup> Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total recipient households: See Center on Budget and Policy Priorities. National and State Housing Fact Sheets & Data. See Federal Rental Assistance, “Download the Data.” and Housing Choice Voucher Program, “Download the Data.” Available at <https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data>. Last visited Jan. 14, 2022. Note that “Federal Rental Assistance” includes HUD Section 8 Project-based Rental Assistance, HUD Section 8 Housing Choice Vouchers, HUD Public Housing, HUD Section 202/811, and USDA Section 521.

In order to estimate the economic impact of disenrollment or forgone enrollment from public benefits programs, it is necessary to estimate the typical annual public benefits a person receives for each public benefits program included in this economic analysis. DHS estimated the



annual benefit received per person for each public benefit program in Table 19. For each benefit but Medicaid, the benefit per person is calculated for each public benefit program by dividing the average annual program payments by the average annual total number of recipients.<sup>677</sup> For Medicaid, DHS uses Centers for Medicare & Medicaid Services’ (CMS) median per capita expenditure estimate across all States for 2018. To the extent that data are available, these estimates are based on 5-year annual averages for the years between FY 2014 and FY 2018.

**Table 19. Estimated Annual Benefit per Person, by Public Benefit Program, FY 2014 – FY 2018.**

<b>Public Benefits Program</b>	<b>Average Annual Total Number of Recipients</b>	<b>Average Annual Public Benefits Payments</b>	<b>Annual Benefit per Person or Household<sup>1</sup></b>
<b>Medicaid<sup>2</sup></b>	<i>N/A</i>	<i>N/A</i>	\$8,168
<b>Supplemental Nutrition Assistance Program (SNAP)<sup>3</sup></b>	43,948,386	\$66,161,985,577	\$1,505
<b>Temporary Assistance for Needy Families (TANF)<sup>4</sup></b>	2,836,073	\$3,840,827,013	\$1,354
<b>Supplemental Security Income (SSI)<sup>5</sup></b>	8,250,666	\$54,684,600,000	\$6,628
<b>Federal Rental Assistance<sup>6</sup></b>	5,199,000	\$43,834,000,000	\$8,431

Sources and notes: USCIS analysis of data provided by the Federal agencies that administer each of the listed public benefits program or research organizations. Note that figures for the average annual total number of recipients and the annual total public benefits payments are based on 5-year averages, whenever possible, for the most recent 5-year period for which data are available (2014-2018). For more information, please see the document “Economic Analysis Supplemental Information for Analysis of Public Benefits Programs” in the online docket for the final rule. Note that DHS acknowledges that there could be overlap among participants in the listed public benefit programs.

<sup>1</sup> Calculation: Average Annual Benefit per Person = (Average Annual Public Benefits Payments) / (Average Annual Total Number of Recipients). Note: Calculations may not be exact due to rounding.

<sup>2</sup> Medicaid- Data on Medicaid Per Capita Expenditures available at <https://www.medicaid.gov/state-overviews/scorecard/how-much-states-spend-per-medicaid-enrollee/index.html>. Last visited Jan. 14, 2022. Table 1. Per capita Expenditure Estimates for States and Data Quality Assessment (2018). Column “Total,” Row “Median”

<sup>677</sup> DHS notes that the amounts presented may not account for overhead costs associated with administering each of these public benefits programs. The costs presented are based on amounts recipients have received in benefits as reported by benefits-granting agencies.

<sup>3</sup> SNAP – Data on the annual program expenditure on public benefits: *See* U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program. “National and/or State Level Monthly and/or Annual Data: Persons, Households, Benefits, and Average Monthly Benefit per Person & Household,” “FY1969 through FY2022 National View Summary.” Available at <https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap>. Last visited Jan. 14, 2022.

<sup>4</sup> TANF – Data on annual program expenditure on public benefits: *See* U.S. HHS, Office of Family Assistance. “TANF Financial Data.” *See* Table A.1.: Federal TANF and State MOE Expenditures Summary by ACF-196 Spending Category, Federal Funds for Basic Assistance. Available at <https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2018>; <https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2017>; <https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2016>; <https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2015>; and <https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2014>. Last visited Jan. 14, 2022.

<sup>5</sup> SSI – Data on the annual program expenditure on public benefits: *See* U.S. Social Security Administration, *Annual Report of the Supplemental Security Income Program, 2021*. Table IV.B9.—SSI Recipients with Federally Administered Payments in Current-Payment Status, p. 47 and Table IV.C1.—SSI Federal Payments in Current Dollars, Calendar years 1975-2021, p. 48. Available at: <https://www.ssa.gov/OACT/ssir/SSI21/ssi2021.pdf>. Last visited Jan. 14, 2022; *See also* U.S. Social Security Administration, Office of Research, Evaluation, and Statistics. “Number of recipients by state or other area, eligibility category, age, and receipt of OASDI benefits, December 2018, Table 1” Available at [https://www.ssa.gov/policy/docs/statcomps/ssi\\_sc/2018/index.html](https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2018/index.html). Last visited Jan. 14, 2022. Note that the link shows fiscal year 2018 data, but links to data for other fiscal years can also be accessed.

<sup>6</sup> Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total expenditure on public benefits: *See* Center on Budget and Policy Priorities. *National and State Housing Fact Sheets & Data*. Federal Rental Assistance, “Download the Data” and Housing Choice Voucher Program, “Download the Data.” Available at <https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data>. Last visited Jan. 14, 2022.

As discussed earlier, using the midpoint reduction rate of 8.9 percent, Table 20 shows the estimated population that would be likely to disenroll or forgo enrollment in a federally funded public benefits program under the Alternative.

<b>Table 20. Estimated Population of Members of Households Including at Least One Noncitizen Likely to Disenroll or Forgo Enrollment in a Public Benefits Program.</b>				
<b>Public Benefits Program</b>	<b>Public Benefits Recipients Who Are Members of</b>	<b>Benefits-Receiving Households with At Least One</b>	<b>Members of Benefits-Receiving Households Including Noncitizens</b>	<b>Benefits-Receiving Households with At Least One Noncitizen Based On an</b>

	<b>Households Including at Least One Noncitizen<sup>1</sup></b>	<b>Noncitizen<sup>1</sup></b>	<b>Based On an 8.9% Rate of Disenrollment or Forgone Enrollment<sup>2</sup></b>	<b>8.9% Rate of Disenrollment or Forgone Enrollment<sup>3</sup></b>
<b>Medicaid</b>	3,306,084		294,241	
<b>Supplemental Nutrition Assistance Program (SNAP)</b>	4,940,125		439,671	
<b>Temporary Assistance for Needy Families (TANF)</b>	246,284		21,919	
<b>Supplemental Security Income (SSI)</b>	716,489		63,768	
<b>Federal Rental Assistance</b>	N/A	358,731	N/A	31,927
<b>Totals</b>	<b>9,208,982</b>	<b>358,731</b>	<b>819,599</b>	<b>31,927</b>

Source: USCIS analysis.

Notes:

<sup>1</sup> See Table 18.

<sup>2</sup> To estimate the population that could choose to disenroll/forgo enrollment, DHS multiplied the population of public benefits recipients who are members of benefits-receiving households including foreign-born noncitizens by 8.9 percent (the midpoint reduction rate). Note that 819,599 total does not include individuals who may have disenrolled from the HUD Federal Rental Assistance. The 31,927 total reports the number of households who may have disenrolled from the HUD Federal Rental Assistance, but the number of individuals affected by the disenrollment from HUD Federal Rental Assistance may be greater than 31,927 because there is more than one member per household.

<sup>3</sup> To estimate the population that could choose to disenroll/forgo enrollment, DHS multiplied the number of households with at least one foreign-born noncitizen by 8.9 percent (the midpoint reduction rate).

Table 20 shows the estimated population that would be likely to disenroll from or forgo enrollment in federally funded public benefits programs due to the Alternative's indirect chilling effect. The table also presents the previously estimated average annual benefit per person who

received benefits for each of the public benefits programs.<sup>678</sup> Multiplying the estimated population that would be likely to disenroll from or forgo enrollment in public benefit programs due to the Alternative by the average annual benefit per person who received benefits for each of the public benefit programs, DHS estimates that the total annual reduction in transfer payments paid by the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately \$3.79 billion for an estimated 819,599 individuals and 31,927 households across the public benefits programs examined. As these estimates reflect only Federal financial participation in programs whose costs are shared by U.S. States, there may also be additional reductions in transfer payments from U.S. States to individuals who may choose to disenroll from or forgo enrollment in a public benefits program.

Since the Federal share of Federal financial participation (FFP) varies from State to State, DHS uses the average Federal Medical Assistance Percentages (FMAP) across all States and U.S. territories of 59 percent to estimate the total reduction of transfer payments for Medicaid.<sup>679</sup> DHS acknowledges that the estimate of 59 percent might be an underestimate because it does not include higher percentage of FMAP for States that were provided enhanced FMAP by the Affordable Care Act's Medicaid expansion nor any additional increase in FMAP due to the Families First Coronavirus Relief Act. Table 21 shows that Federal annual transfer payments for Medicaid would be reduced by about \$2.4 billion under the Alternative. From this amount and the average FMAP of 59 percent, DHS calculates the total reduction in transfer payments from Federal and State governments to individuals to be about \$4.07 billion.<sup>680</sup> From that total

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<sup>678</sup> As previously noted, the average annual benefits per person amounts presented may not account for overhead costs associated with administering each of these public benefits programs since they are based on amounts recipients have received in benefits as reported by benefits-granting agencies. Therefore, the costs presented may underestimate the total amount of transfer payments to the Federal Government.

<sup>679</sup> See "Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2016 Through September 30, 2017," 80 FR 73779 (Nov. 25, 2015).

<sup>680</sup> Total annual Federal and State reduction in transfer payment for Medicaid = (Estimated Reduction in Transfer Payments Based on a 8.9% Rate of Disenrollment or Forgone Enrollment for Medicaid from Table 21) / (average Federal Medical Assistance Percentages (FMAP) across all States and U.S. territories) = \$2,403,360,488 / 0.59 = \$4.07 billion (rounded).

amount, DHS estimates State annual transfer payments would be reduced by approximately \$1.67 billion due to the disenrollment or forgone enrollment of foreign-born noncitizens and their households from Medicaid.<sup>681</sup>

For the purpose of this analysis DHS conservatively assumes that, for SNAP, TANF and Federal Rental Assistance, the Federal Government pays 100 percent of benefits values included in Table 18 and Table 19 above. Therefore, Table 20 shows the Federal share of annual transfer payments would be about \$0.96 billion for SNAP, TANF, and Federal Rental Assistance.<sup>682</sup> For SSI, the maximum Federal benefit changes yearly. Effective January 1, 2022, the maximum Federal benefit was \$841 monthly for an individual and \$1,261 monthly for a couple. Some States supplement the Federal SSI benefit with additional payments, which make the total SSI benefit levels higher in those States.<sup>683</sup> Moreover, the estimates of expenditures for Federal Rental Assistance relate to purely Federal funds, although housing programs are administered by State and local public housing authorities, which may supplement program funding. However, DHS is unable to quantify the State portion of the transfer payment due to a lack of data related to State-level administration of these public benefit programs.

<b>Table 21. Total Estimated Reduction in Transfer Payments Paid by the Federal Government Due to Disenrollment or Forgone Enrollment in Public Benefits Programs.</b>				
<b>Public Benefits Program</b>	<b>Public Benefits Recipients Who Are Members of Households Including Noncitizens Based On an 8.9% Rate of Disenrollment or Forgone Enrollment</b>	<b>Households Receiving Benefits with At Least One Noncitizen Based On an 8.9% Rate of Disenrollment or Forgone Enrollment</b>	<b>Average Annual Benefit per Person or Household</b>	<b>Estimated Reduction in Transfer Payments Based On an 8.9% Rate of Disenrollment or Forgone Enrollment</b>
Medicaid	294,241	294,241	\$8,168	\$2,403,360,488
SNAP				
TANF				
Federal Rental Assistance				
<b>Total</b>				<b>\$1.67 billion.</b>

<sup>682</sup> From Table 21, transfer payment reduction for SNAP is \$661,704,855, for TANF is \$29,678,326, and for Federal Rental Assistance is \$ 269,176,537. Calculation of the sum: \$960,559,718 (\$0.96 billion)

<sup>683</sup> See SSI information available at <https://www.ssa.gov/policy/docs/statcomps/supplement/2021/ssi.html>.

<b>Supplemental Nutrition Assistance Program (SNAP)</b>	439,671		\$1,505	\$661,704,855
<b>Temporary Assistance for Needy Families (TANF)</b>	21,919		\$1,354	\$29,678,326
<b>Supplemental Security Income (SSI)</b>	63,768		\$6,628	\$422,654,304
<b>Federal Rental Assistance</b>		31,927	\$8,431	\$269,176,537
<b>Totals</b>	<b>819,599</b>	<b>31,927</b>	<i>N/A</i>	<b>\$3,786,574,510</b>

Source: USCIS analysis.

Notes:

<sup>1</sup> Neither HHS nor DHS are able to disaggregate emergency and non-emergency Medicaid expenditures. Therefore, this rule considers overall Medicaid expenditures. Note that per enrollee Medicaid costs vary by eligibility group and State.

As shown in Table 21, applying the same calculations using the low estimate of 3.1 percent, DHS estimates that the total annual reduction in transfer payments paid by the Federal government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately \$1.32 billion for an estimated 285,479 individuals and 11,121 households across the public benefits programs examined. For the high estimate of 14.7 percent DHS estimates that the total annual reduction in transfer payments paid by the Federal government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately \$6.25 billion for an estimated 1,353,720 individuals and 52,733 households across the public benefits programs examined.

<b>Table 22. Comparison of the High, Low, and Primary Total Estimated Reduction in Transfer Payments Paid by the Federal Government Due to Disenrollment or Forgone Enrollment in Public Benefits Programs.</b>			
<b>Public Benefits Program</b>	<b>Estimated Annual Reduction in Transfer Payments Based on a 3.1% Rate of Disenrollment or Forgone Enrollment</b>	<b>Estimated Annual Reduction in Transfer Payments Based on an 8.9% Rate of Disenrollment or Forgone Enrollment</b>	<b>Estimated Annual Reduction in Transfer Payments Based on a 14.7% Rate of Disenrollment or Forgone Enrollment</b>

<b>Medicaid<sup>1</sup></b>	\$837,130,152	\$2,403,360,488	\$3,969,598,992
<b>Supplemental Nutrition Assistance Program (SNAP)</b>	\$230,481,720	\$661,704,855	\$1,092,927,990
<b>Temporary Assistance for Needy Families (TANF)</b>	\$10,337,790	\$29,678,326	\$49,020,216
<b>Supplemental Security Income (SSI)</b>	\$147,214,508	\$422,654,304	\$698,087,472
<b>Federal Rental Assistance</b>	\$93,761,151	\$ 269,176,537	\$444,591,923
<b>Totals</b>	<b>\$1,318,925,321</b>	<b>\$3,786,574,510</b>	<b>\$6,254,226,593</b>

In the 2019 Final Rule, DHS anticipated that USCIS’ review of public charge inadmissibility would substantially increase the number of denials for adjustment of status applicants because of the rule’s provisions and process for public charge determinations. However, USCIS data show that the 2019 Final Rule did not result in the anticipated increase in denials of adjustment of status applications based on the public charge ground of inadmissibility during the period it was in effect between February 2020 and March 2021. During the year the 2019 Final Rule was in effect, DHS issued only 3 denials (which were subsequently reopened and approved) and 2 Notices of Intent to Deny (which were ultimately rescinded and the applications were approved) based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A) and (B) of the INA, 8 U.S.C. 1182(a)(4)(A) and (B). The 2019 Final Rule thus ultimately did not result in any adverse determinations in the 47,555 applications for adjustment of status to which it was applied.<sup>684</sup>

Comparison of the total direct annual cost between the current final rule and the Alternative show that the direct cost of the Alternative is greater than that of the final rule. Although the Alternative would indirectly have the effect of a larger reduction of transfer payments than the final rule, likely primarily among those not regulated by the Alternative,

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<sup>684</sup> USCIS Field Operations Directorate (June 2021); USCIS Office of Performance and Quality (June 2021); USCIS Field Office Directorate (Oct. 2021).

transfer payments are not considered to be costs or benefits of a rule. Rather, they are transfers from one group to another group that do not themselves entail a net gain or loss to society.

For instance, Bernstein et al. (2020) found that the chilling effect on public benefits associated with the 2019 Final Rule is partially attributable to confusion and misunderstanding. That study finds that two-thirds of adults in immigrant families (66.6 percent) were aware of the 2019 Final Rule, and 65.5 percent were confident in their understanding about the rule. Yet only 22.7 percent knew it does not apply to applications for naturalization, and only 19.1 percent knew children's enrollment in Medicaid would not be considered in their parents' public charge determinations. These results suggest that under the Alternative, parents might pull their eligible U.S.-citizen children out of crucial benefit programs, and current lawful permanent residents might choose not to enroll in safety net programs for which they might be eligible for fear of risking their citizenship prospects.<sup>685</sup>

*iii. Additional Indirect Effects*

DHS notes that there would likely be additional indirect effects related to increased disenrollment or forgone enrollment in public benefit programs. As individuals disenroll or forgo public benefit program enrollment, costs associated with administration of public benefit programs might decrease insofar as administration costs are correlated with enrollment.<sup>686</sup>

DHS received comments from several States regarding administrative costs due to the disruptions in access to public benefit programs. The disruptions result in increased “churn” as

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<sup>685</sup> Bernstein et al. (2020).

<sup>686</sup> DHS notes that Federal, State, and local governments share administrative costs (with the Federal Government contributing approximately 50 percent) for SNAP. See USDA, “Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2019,” at 1, <https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2019.pdf>, (Mar. 2021) (last visited Aug. 17, 2022). DHS notes that because State participation in these programs may vary depending on the type of benefit provided, it was unable to fully or specifically quantify the impact of State transfers. For example, the Federal Government funds all of SNAP food expenses, but only 50 percent of allowable administrative costs for regular operating expenses (per section 16(a) of the Food and Nutrition Act of 2008). See also USDA, “FNS Handbook 901,” at 41 (Jan 2020), [https://fns-prod.azureedge.net/sites/default/files/apd/FNS\\_HB901\\_v2.2\\_Internet\\_Ready\\_Format.pdf](https://fns-prod.azureedge.net/sites/default/files/apd/FNS_HB901_v2.2_Internet_Ready_Format.pdf)). Federal TANF funds can be used for administrative TANF costs, up to 15 percent of a State's family assistance grant amount. See 45 CFR 263.13(a)(i).



eligible individuals and families cycle on and off public benefit program more frequently (enrolling at times of great need and disenrolling to avoid risk or due to confusion), which will increase States' administrative costs. States will also incur additional administrative costs in order to allocate resources for consistent and targeted outreach and education, available in the individuals' native languages and shared through their social networks, in order to allay fears about the public charge rule. One State provided comment on administrative costs it incurred due to the 2019 Final Rule. For the fiscal year 2019, the State funded \$1.3 million in grants to establish capacity within community organizations across the State to conduct community education and individual and family counseling, including focusing on public charge education and outreach to address the misinformation and fear in communities. For fiscal years 2020 and 2021, the State funded \$2.1 million in grants to ensure continued capacity within community organizations across the State to conduct community education and individual and family counseling on the 2019 Final Rule. State employees dedicated hundreds of hours to planning and training State caseworkers and call center workers related to 2019 Final Rule. According to the State, the estimated administrative cost associated with the State caseworkers is over \$3 million.

DHS also notes that there would likely be additional downstream indirect effects related to increased disenrollment or forgone enrollment in public benefit programs, such as:

- Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment;
- Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated;
- Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient;

- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment.<sup>687</sup>

DHS also

recognize[d] that reductions in federal and state transfers under federal benefit programs may have impacts on state and local economies, large and small businesses, and individuals. For example, the rule might result in reduced revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.<sup>688</sup>

In another section of the 2019 Final Rule, DHS stated that it had “determined that the rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children.”<sup>689</sup>

At the time of the 2019 Final Rule’s issuance, one study estimated that as many as 3.2 million fewer persons might receive Medicaid due to fear and confusion surrounding the 2019 Final Rule, which could lead to as many as 4,000 excess deaths every year.<sup>690</sup> The same study estimated that 1.8 million fewer people would use SNAP benefits, even though many of them are U.S. citizens. In addition, loss of Federal housing security would likely lead to worse health outcomes and dependence on other elements of the social safety net for some persons. As noted above, E.O. 12866 and E.O. 13563 direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In addition, E.O. 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also

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<sup>687</sup> See 2019 Final Rule RIA at 109.

<sup>688</sup> 2019 Final Rule RIA at 6.

<sup>689</sup> “Inadmissibility on Public Charge Grounds,” 84 FR 41292, 41493 (Aug. 14, 2019).

<sup>690</sup> Leighton Ku, “New Evidence Demonstrates That the Public Charge Rule Will Harm Immigrant Families and Others,” Health Affairs (Oct. 9, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20191008.70483/full> (last visited Aug. 12, 2022).

considering equity, fairness, distributive impacts, and human dignity. DHS recognizes that many of the indirect effects discussed in this section implicate values such as equity, fairness, distributive impacts, and human dignity. DHS acknowledges that although many of these effects are difficult to quantify, they would be an indirect cost of the Alternative.

### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (RFA),<sup>691</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),<sup>692</sup> requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.<sup>693</sup>

The final rule does not directly regulate small entities and is not expected to have a direct effect on small entities. It does not mandate any actions or requirements for small entities in the process of a Form I-485 Adjustment of Status requestor seeking immigration benefits. Rather, this final rule regulates individuals, and individuals are not defined as “small entities” by the RFA.<sup>694</sup> Based on the evidence presented in this analysis and throughout this preamble, the Secretary of Homeland Security certifies that this final rule would not have a significant economic impact on a substantial number of small entities.

### **C. Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal

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<sup>691</sup> 5 U.S.C. ch. 6.

<sup>692</sup> Pub. L. 104–121, tit. II, 110 Stat. 847 (5 U.S.C. 601 note).

<sup>693</sup> A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act (15 U.S.C. 632).

<sup>694</sup> 5 U.S.C. 601(6).

governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.<sup>695</sup> The inflation-adjusted value of \$100 million in 1995 is approximately \$177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI-U).<sup>696</sup>

The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate.<sup>697</sup> The term “Federal intergovernmental mandate” means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).<sup>698</sup> The term “Federal private sector mandate” means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).<sup>699</sup>

This final rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices, and the voluntary choices of others, and would not be a consequence of an enforceable duty imposed by this rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.<sup>700</sup> The requirements of title II of UMRA,

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<sup>695</sup> 2 U.S.C. 1532(a).

<sup>696</sup> See BLS, “Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items” (Dec 2021), <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf>. Steps in calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the most recent current year available (2021); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100. Calculation of inflation: [(Average monthly CPI-U for 2021 - Average monthly CPI-U for 1995) / (Average monthly CPI-U for 1995)] \* 100 = [(270.970 - 152.383) / 152.383] \* 100 = (118.587 / 152.383) \* 100 = 0.7782 \* 100 = 77.82 percent = 77.8 percent (rounded). Calculation of inflation-adjusted value: \$100 million in 1995 dollars \* 1.778 = \$177.8 million in 2021 dollars.

<sup>697</sup> See 2 U.S.C. 1502(1), 658(6).

<sup>698</sup> 2 U.S.C. 658(5).

<sup>699</sup> 2 U.S.C. 658(7).

<sup>700</sup> See 2 U.S.C. 1502(1), 658(6).

therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the RIA above.

#### **D. Small Business Regulatory Enforcement Fairness Act of 1996**

The Office of Management and Budget has designated this final rule as a major rule as defined by 5 U.S.C. 804.<sup>701</sup> This final rule likely will result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets. Accordingly, absent exceptional circumstances, this final rule must be effective no earlier than 60 days after the date on which Congress receives a report submitted by DHS as required by 5 U.S.C. 801(a)(1). This final rule will be effective [INSERT DATE 105 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER], which meets this requirement.

#### **E. Executive Order 13132 (Federalism)**

E.O. 13132 was issued to ensure the appropriate division of policymaking authority between the States and the Federal Government and to further the policies of the Unfunded Mandates Act. This final rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of E.O. 13132, this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **F. Executive Order 12988 (Civil Justice Reform)**

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<sup>701</sup> See 5 U.S.C. 804(2).

This final rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this final rule meets the applicable standards provided in section 3 of E.O. 12988.

**G. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)**

This final rule does not have “tribal implications” because, if finalized, it would not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, although there are references to Indian Tribes in this final rule. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

**H. Family Assessment**

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Agencies must assess whether the regulatory action: (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) financially impacts families, if at all, only to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; and (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the determination is affirmative, then the agency must prepare an impact assessment to address criteria specified in the law.

DHS has analyzed this final regulatory action in accordance with the requirements of section 654 and determined that this final rule does not affect family well-being, and therefore DHS is not issuing a Family Policymaking Assessment.

### **I. National Environmental Policy Act**

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023-01 Rev. 01 and Instruction Manual 023-01-001-01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) that experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an environmental assessment or environmental impact statement. 40 CFR 1507.3(e)(2)(ii) and 1501.4. The Instruction Manual, Appendix A, Table 1 lists categorical exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual, section V.B.2(a-c).

This final rule applies to applicants for admission or adjustment of status as long as the individual is applying for an immigration status that is subject to the public charge ground of inadmissibility. As discussed in detail above, this final rule establishes a definition of public charge and specifies the types of public benefits that DHS would consider as part of its public charge inadmissibility determinations. This list of benefits is the same as under the 1999 Interim Field Guidance that governed public charge inadmissibility determinations for over 20 years.

This list of public benefits is narrower than under the 2019 Final Rule. This final rule codifies a totality of the circumstances framework for the analysis of the factors, including statutory minimum factors, used to make public charge inadmissibility determinations. This final rule makes changes to the regulations governing public charge bonds.

Given the similarity between this final rule and the 1999 Interim Field Guidance with respect to public charge inadmissibility determinations, DHS does not anticipate any change in the number of individuals admitted to the United States or adjusting status under this final rule. DHS does not expect that this final rule would change the level of immigration as compared to the No Action Baseline.

DHS believes this final rule will not result in any meaningful, calculable change in environmental effect. This final rule implements the public charge ground of inadmissibility in a way that is consistent with how DHS has applied the statute since 1999, and the differences between the policies in this final rule and the 1999 Interim Field Guidance do not change the environmental effect of DHS's current approach. DHS has therefore determined that this final rule clearly fits within Categorical Exclusion A3(d) in DHS Instruction Manual 023-01-001-01, the Department's procedures for implementing NEPA issued November 6, 2014 (available at [https://www.dhs.gov/sites/default/files/publications/DHS\\_Instruction%20Manual%20023-01-001-01%20Rev%2001\\_508%20Admin%20Rev.pdf](https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf)), because it interprets or amends a regulation without changing its environmental effect. This final rule will not result in any major Federal action that will significantly affect the quality of the human environment. The new regulations are not a part of any larger action, and present no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

DHS explicitly requested comments on NEPA in the NPRM, and only one commenter addressed it by expressing their understanding that DHS has determined that the rule fits within the Categorical Exclusions.



## **J. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 through 3512, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule unless they are exempt. In this final rule, DHS invites written comments and recommendations for the proposed information collection outlined below within 30 days of publication of this notice to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function.

DHS and USCIS invited the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice was published in the *Federal Register* to obtain comments regarding the proposed edits to the information collection instrument. Comments were accepted for 60 days from the publication date of the proposed rule. See Section III.N of this preamble for summaries of and responses to the comments received regarding the information collection.

### Overview of information collection:

- (1) Type of Information Collection: Revision of a Currently Approved Collection.
- (2) Title of the Form/Collection: Application to Register Permanent Residence or Adjust Status.
- (3) Agency form number, if any, and the applicable component of DHS sponsoring the collection: I-485, Supplement A, and Supplement J; USCIS.
- (4) Affected public who will be asked or required to respond, as well as a brief abstract:  
Primary: Individuals or households. The information on Form I-485 will be used to request and determine eligibility for adjustment of permanent residence status. Supplement A is used to adjust status under section 245(i) of the Immigration and Nationality Act. Supplement J is used by employment-based applicants for adjustment of status who are filing or have previously filed

Form I-485 as the principal beneficiary of a valid Form I-140 in an employment-based immigrant visa category that requires a job offer.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-485 is 690,837 and the estimated hour burden per response is 7.17 hours. The estimated total number of respondents for the information collection Supplement A is 29,213 and the estimated hour burden per response is 1.25 hour. The estimated total number of respondents for the information collection Supplement J is 37,358 and the estimated hour burden per response is 1 hour. The estimated total number of respondents for the information collection of Biometrics is 690,837 and the estimated hour burden per response is 1.17 hour.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 5,835,455 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is \$236,957,091.

## **V. List of Subjects and Regulatory Amendments**

### **List of Subjects**

#### **8 CFR Part 103**

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Immigration, Immigration and Naturalization Service, Reporting and recordkeeping requirements, Surety bonds.

#### **8 CFR Part 212**

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

#### **8 CFR Part 213**

Immigration, Surety bonds.

## **8 CFR Part 245**

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

### **PART 103 - IMMIGRATION BENEFIT REQUESTS; USCIS FILING**

#### **REQUIREMENTS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS**

1. The authority in part 103 continues to read:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 et seq.); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2; Pub. L. 112–54; 125 Stat. 550; 31 CFR part 223.

2. Section 103.6 is amended by revising the paragraph (c) heading and paragraph (c)(1) to read as follows:

#### **§ 103.6 – Immigration Bonds**

\* \* \* \* \*

(c) *Cancellation and breach--(1) Public charge bonds.* A public charge bond posted for an alien will be cancelled when the alien dies, departs permanently from the United States, or is naturalized, provided the alien did not breach such bond by receiving either public cash assistance for income maintenance or long-term institutionalization at government expense prior to death, permanent departure, or naturalization. USCIS may cancel a public charge bond at any time after determining that the alien is not likely at any time to become a public charge. A bond may also be cancelled in order to allow substitution of another bond. A public charge bond will be cancelled by USCIS upon review following the fifth anniversary of the admission or adjustment of status of the alien, provided that the alien has filed Form I-356, Request for Cancellation of Public Charge Bond, and USCIS finds that the alien did not receive either public cash assistance for income maintenance or long-term institutionalization at government expense

prior to the fifth anniversary. If Form I-356 is not filed, the public charge bond will remain in effect until the form is filed and USCIS reviews the evidence supporting the form, and renders a decision regarding the breach of the bond, or a decision to cancel the bond.

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**PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS;  
ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

3. The authority citation for part 212 continues to read as follows:

**Authority:** 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; section 7209 of Pub. L. 108-458 (8 U.S.C. 1185 note); Title VII of Pub. L. 110-229 (8 U.S.C. 1185 note); 8 CFR part 2; Pub. L. 115-218.

Section 212.1(q) also issued under section 702, Pub. L. 110-229, 122 Stat. 754, 854.

4. Amend § 212.18 by revising paragraph (b)(2) and (3) to read as follows:

**§ 212.18 Application for Waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders**

\* \* \* \* \*

(b) \* \* \*

(2) If an applicant is inadmissible under section 212(a)(1) of the Act, USCIS may waive such inadmissibility if it determines that granting a waiver is in the national interest.

(3) If any other applicable provision of section 212(a) renders the applicant inadmissible, USCIS may grant a waiver of inadmissibility if the activities rendering the applicant inadmissible were caused by or were incident to the victimization and USCIS determines that it is in the national interest to waive the applicable ground or grounds of inadmissibility.

5. Add §§ 212.20 through 212.23 to read as follows:

Sec.

\* \* \* \* \*

212.20 Applicability of public charge inadmissibility.

212.21 Definitions.

212.22 Public charge inadmissibility determination.

212.23 Exemptions and waivers for public charge ground of inadmissibility.

**§ 212.20 Applicability of public charge inadmissibility.**

8 CFR 212.20 through 212.23 address the public charge ground of inadmissibility under section 212(a)(4) of the Act. Unless the alien requesting the immigration benefit or classification has been exempted from section 212(a)(4) of the Act as listed in § 212.23(a), the provisions of §§ 212.20 through 212.23 of this part apply to an applicant for admission or adjustment of status to that of a lawful permanent resident.

**§ 212.21 Definitions.**

For the purposes of §§ 212.20 through 212.23, the following definitions apply:

(a) *Likely at any time to become a public charge* means likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

(b) *Public cash assistance for income maintenance* means:

(1) Supplemental Security Income (SSI), 42 U.S.C. 1381 *et seq.*;

(2) Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF) program, 42 U.S.C. 601 *et seq.*; or

(3) 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).

(c) *Long-term institutionalization at government expense* means government assistance for long-term institutionalization (in the case of Medicaid, limited to institutional services under section 1905(a) of the Social Security Act) received by a beneficiary, including in a nursing facility or mental health institution. Long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods for rehabilitation purposes.

(d) *Receipt (of public benefits)*. An individual's receipt of public benefits occurs when a public benefit-granting agency provides either public cash assistance for income maintenance or long-term institutionalization at government expense to the individual, where the individual is listed as a beneficiary of such benefits. An individual's application for a public benefit on their own behalf or on behalf of another does not constitute receipt of public benefits by such individual. Approval for future receipt of a public benefit that an individual applied for on their own behalf or on behalf of another does not constitute receipt of public benefits by such an individual. An individual's receipt of public benefits solely on behalf of a third party (including a member of the alien's household as defined in paragraph (f) of this section) does not constitute receipt of public benefits by such individual. The receipt of public benefits solely by a third party (including a member of the alien's household as defined in paragraph (f) of this section), even if an individual assists with the application process, does not constitute receipt for such individual.

(e) *Government* means any Federal, State, Tribal, territorial, or local government entity or entities of the United States.

(f) *Household*: The alien's household includes:

(1) The alien;

(2) The alien's spouse, if physically residing with the alien;

(3) If physically residing with the alien, the alien's parents, the alien's unmarried siblings under 21 years of age, and the alien's children as defined in section 101(b)(1) of the Act;

(4) Any other individuals (including a spouse or child as defined in section 101(b)(1) of the Act not physically residing with the alien) who are listed as dependents on the alien's federal income tax return; and

(5) Any other individual(s) who lists the alien as a dependent on their federal income tax return.

**§ 212.22 Public charge inadmissibility determination.**

(a) *Factors to consider--(1) Consideration of minimum factors:* For purposes of a public charge inadmissibility determination, DHS will consider the alien's:

(i) Age;

(ii) Health, as evidenced by a report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required (to which DHS will generally defer absent evidence that such report is incomplete);

(iii) Family status, as evidenced by the alien's household size, based on the definition of household in § 212.21(f);

(iv) Assets, resources, and financial status, as evidenced by the alien's household's income, assets, and liabilities (excluding any income from public benefits listed in § 212.21(b) and income or assets from illegal activities or sources such as proceeds from illegal gambling or drug sales); and

(v) Education and skills, as evidenced by the alien's degrees, certifications, licenses, skills obtained through work experience or educational programs, and educational certificates.

(2) *Consideration of affidavit of support.* DHS will favorably consider an Affidavit of Support Under Section 213A of the INA, when required under section 212(a)(4)(C) or (D) of the Act, that meets the requirements of section 213A of the Act and 8 CFR part 213a, in making a public charge inadmissibility determination.

(3) *Consideration of current and/or past receipt of public benefits:* DHS will consider the alien's current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense (consistent with § 212.21(c)). DHS will consider such receipt in the totality of the circumstances, along with the other factors. DHS will consider the amount and duration of receipt, as well as how recently the alien received the benefits, and for long-term institutionalization at government expense, evidence submitted by the alien that the alien's institutionalization violates federal law, including the Americans with Disabilities Act or the Rehabilitation Act. However, current and/or past receipt of these benefits will not alone be a

sufficient basis to determine whether the alien is likely at any time to become a public charge. DHS will not consider receipt of, or certification or approval for future receipt of, public benefits not referenced in § 212.21(b) and (c)), such as Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs, Children's Health Insurance Program (CHIP), Medicaid (other than for long-term use of institutional services under section 1905(a) of the Social Security Act), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits.

(4) *Disability alone not sufficient.* A finding that an alien has a disability, as defined by Section 504 of the Rehabilitation Act, will not alone be a sufficient basis to determine whether the alien is likely at any time to become a public charge.

(b) *Totality of the circumstances.* The determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances. No one factor outlined in paragraph (a) of this section, other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, should be the sole criterion for determining if an alien is likely to become a public charge. DHS may periodically issue guidance to adjudicators to inform the totality of the circumstances assessment. Such guidance will consider how these factors affect the likelihood that the alien will become a public charge at any time based on an empirical analysis of the best-available data as appropriate.

(c) *Denial Decision.* Every written denial decision issued by USCIS based on the totality of the circumstances set forth in paragraph (b) of this section will reflect consideration of each of the factors outlined in paragraph (a) of this section and specifically articulate the reasons for the officer's determination.

(d) *Receipt of public benefits while an alien is in an immigration category exempt from public charge inadmissibility.* In an adjudication for an immigration benefit for which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by an alien during periods in which the alien was present in the United States in an immigration



category that is exempt from the public charge ground of inadmissibility, as set forth in § 212.23(a), or for which the alien received a waiver of public charge inadmissibility, as set forth in § 212.23(c).

(e) *Receipt of benefits available to refugees.* DHS will not consider any public benefits that were received by an alien who, while not a refugee admitted under section 207 of the Act, is eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the Act, including services described under section 412(d)(2) of the Act provided to an unaccompanied alien child as defined under 6 U.S.C. 279(g)(2).

**§ 212.23 Exemptions and waivers for public charge ground of inadmissibility.**

(a) *Exemptions.* The public charge ground of inadmissibility under section 212(a)(4) of the Act does not apply, based on statutory or regulatory authority, to the following categories of aliens:

(1) Refugees at the time of admission under section 207 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(2) Asylees at the time of grant under section 208 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(3) Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202, 101 Stat. 1329–183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;

(4) Afghan and Iraqi Interpreters, or Afghan or Iraqi nationals employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109–163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111–8, title VI (Mar. 11, 2009), as

amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Public Law 110–181 (Jan. 28, 2008);

(5) Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

(6) Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89–732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;

(7) Nicaraguans and other Central Americans applying for adjustment of status under section 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;

(8) Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

(9) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101–167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;

(10) Special immigrant juveniles as described in section 245(h) of the Act;

(11) Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(12) Aliens applying for or reregistering for Temporary Protected Status as described in section 244 of the Act in accordance with section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);

(13) Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the Act (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or

Other Foreign Government Official or Employee, or Immediate Family), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(14) Nonimmigrants classifiable as C-2 (alien in transit to U.N. Headquarters) or C-3 (foreign government official), 22 CFR 41.21(d);

(15) Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(16) Nonimmigrants classifiable as NATO-1, NATO-2, NATO-3, NATO-4 (NATO representatives), and NATO-6 in accordance with 22 CFR 41.21(d);

(17) Applicants for nonimmigrant status under section 101(a)(15)(T) of the Act, in accordance with § 212.16(b);

(18) Except as provided in paragraph (b) of this section, individuals who are seeking an immigration benefit for which admissibility is required, including but not limited to adjustment of status under section 245(a) of the Act and section 245(l) of the Act and who:

(i) Have a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the Act, or

(ii) Have been granted nonimmigrant status under section 101(a)(15)(T) of the Act, provided that the individual is in valid T nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(19) Except as provided in paragraph (b) of this section:

(i) Petitioners for nonimmigrant status under section 101(a)(15)(U) of the Act, in accordance with section 212(a)(4)(E)(ii) of the Act; or

(ii) Individuals who are granted nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act, who are seeking an immigration benefit for which admissibility is required, including, but not limited to, adjustment of status

under section 245(a) of the Act, provided that the individuals are in valid U nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(20) Except as provided in paragraph (b) of this section, any aliens who are VAWA self-petitioners under section 212(a)(4)(E)(i) of the Act;

(21) Except as provided in paragraph (b) of this section, qualified aliens described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under section 212(a)(4)(E)(iii) of the Act;

(22) Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108–136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents);

(23) American Indians born in Canada determined to fall under section 289 of the Act;

(24) Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Public Law 97–429 (Jan. 8, 1983);

(25) Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106–429 under 8 CFR 245.21;

(26) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991, under section 646(b) of the IIRIRA, Public Law 104–208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note;

(27) Applicants adjusting status who qualify for a benefit under Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92, 113 Stat. 1198, 2309 (December 20, 2019) (Liberian Refugee Immigration Fairness), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116-260 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension);

(28) Certain Syrian nationals adjusting status under Public Law 106-378; and

(29) Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

(b) *Limited Exemption.* Aliens described in paragraphs (a)(18) through (21) of this section must submit an Affidavit of Support Under Section 213A of the INA if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support as described in section 212(a)(4)(D) of the Act.

(c) *Waivers.* A waiver for the public charge ground of inadmissibility may be authorized based on statutory or regulatory authority, for the following categories of aliens:

(1) Applicants for admission as nonimmigrants under 101(a)(15)(S) of the Act;

(2) Nonimmigrants admitted under section 101(a)(15)(S) of the Act applying for adjustment of status under section 245(j) of the Act (witnesses or informants); and

(3) Any other category of aliens who are eligible to receive a waiver of the public charge ground of inadmissibility.

## **PART 213—PUBLIC CHARGE BONDS**

6. The authority citation for part 213 is revised to read as follows:

**Authority:** 8 U.S.C. 1103; 1183; 8 CFR part 2.

7. Revise § 213.1 to read as follows:

### **§ 213.1 Admission under bond or cash deposit.**

(a) *Public charge bonds for adjustment of status applicants.* If, in the course of adjudicating an application for adjustment of status to that of a lawful permanent resident, USCIS determines that the alien is inadmissible only under section 212(a)(4) of the Act, and that the application for adjustment of status is otherwise approvable, USCIS may invite the alien to submit a public charge bond as a condition of approval of the adjustment of status application. Subject to the requirements of paragraph (c) of this section and 8 CFR 103.6, USCIS will set the bond amount and provide instructions for the submission of a public charge bond. Public charge bonds may be in the form of a surety bond or an agreement covering cash deposits.

(b) *Public charge bonds requested by consular officers.* USCIS may accept a public charge bond before the issuance of an immigrant visa to the alien upon receipt of a request directly from a United States consular officer or upon presentation by an interested person of a notification from the consular officer requiring such a bond. The consular officer will set the amount of any such bond subject to paragraph (c) of this section and will provide instructions for the submission of a public charge bond. Upon acceptance of such a bond, USCIS will notify the U.S. consular officer who requested the bond, giving the date and place of acceptance and the amount of the bond.

(c) *Form and amount of public charge bonds.* All bonds and agreements covering cash deposits given as a condition of admission or adjustment of status of an alien under section 213 of the Act must be executed on a form designated by USCIS for that purpose and be in the sum set by USCIS under paragraph (a) of this section for adjustment of status applicants or the consular officer under paragraph (b) of this section for immigrant visa applicants but not less than \$1,000. USCIS will provide a receipt to the alien or an interested person acting on the alien's behalf on a form designated by USCIS for such purpose. All public charge bonds are subject to the procedures established in 8 CFR 103.6 relating to bond riders, acceptable sureties, cancellation of bonds, and breach of bonds.

## **PART 245—ADJUSTMENT OF STATUS TO THAT OF A PERSON ADMITTED FOR PERMANENT RESIDENCE**

8. The authority citation for part 245 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

9. In § 245.23, revise paragraph (c)(3) to read as follows:

### **§ 245.23 Adjustment of aliens in T nonimmigrant classification.**

\* \* \* \* \*

(c) \* \* \*

(3) The alien is inadmissible under any applicable provisions of section 212(a) of the Act and has not obtained a waiver of inadmissibility in accordance with 8 CFR 212.18 or 214.11(j). Where the alien establishes that the victimization was a central reason for the alien's unlawful presence in the United States, section 212(a)(9)(B)(iii) of the Act is not applicable, and the alien need not obtain a waiver of that ground of inadmissibility. The alien, however, must submit with the Form I-485 evidence sufficient to demonstrate that the victimization suffered was a central reason for the unlawful presence in the United States. To qualify for this exception, the victimization need not be the sole reason for the unlawful presence but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial.

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Dated: August 26, 2022

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**Alejandro N. Mayorkas,**

Secretary of Homeland Security.

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