**No. 19-17213**

**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

CITY AND COUNTY OF SAN FRANCISCO, and
COUNTY OF SANTA CLARA,

Plaintiffs-Appellees,

v.

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

# BRIEF FOR APPELLANTS

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# INTRODUCTION

The Immigration and Nationality Act (INA) provides that an alien is inadmissible if the alien is, in the Executive Branch's opinion, "likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). On August 14, 2019, the Department of Homeland Security (DHS) published a final rule implementing the public-charge inadmissibility provision. The Rule defines "public charge" to mean an alien who receives one or more specified public benefits, including certain noncash benefits, for more than twelve months in the aggregate within any thirty-six month period. The Rule also sets forth a framework DHS will use to determine whether an alien is likely at any time to become a public charge. On October 11, 2019, the district court entered a preliminary injunction barring DHS from enforcing the Rule.

The district court's injunction should be set aside, as none of the traditional factors supports the entry of an injunction here. As a threshold matter, plaintiffs—several state and local governments—have not established standing to sue under Article III and zone-of-interest principles. Plaintiffs allege that the Rule will burden their budgets because some of their residents will respond to the Rule by disenrolling from public-benefit programs. Their allegations fail to account for factors that would mitigate costs or generate savings, and seek to further an interest—greater use of public benefits by aliens—diametrically opposed to the interests Congress sought to further through the public-charge statute.

Nor are plaintiffs likely to succeed on the merits of their claim that the Rule's definition of "public charge" is inconsistent with the INA. Numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens to obtain sponsors who must promise to reimburse the government for public benefits the alien receives, and declared any alien who fails to obtain a required sponsor automatically likely to become a public charge. Congress also made it difficult for most aliens to obtain most public benefits after they enter the country, underscoring its stated goal of "assur[ing] that aliens [are] self-reliant in accordance with [national] immigration policy," 8 U.S.C. § 1601(5).

The Rule—which renders inadmissible aliens who are likely to rely on government support for a significant period to meet basic needs—fully accords with Congress's intent. Congress has not required DHS to adopt a narrow definition of "public charge," but rather has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch.

Plaintiffs are also unlikely to succeed in showing that the Rule is arbitrary and capricious. The agency more than adequately explained its reasons for adopting the Rule, analyzed the costs and benefits associated with the Rule, and reasonably concluded that the Rule's benefits justified its costs.

The remaining preliminary-injunction factors likewise weigh against a preliminary injunction. So long as the Rule cannot take effect, the government will

grant lawful-permanent-resident status to aliens who DHS believes are inadmissible as likely to become public charges under the Rule. Any harm plaintiffs might experience does not constitute irreparable injury, let alone irreparable injury sufficient to outweigh that harm to the federal government and taxpayers.[1]

## STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331, raising claims under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Excerpts of Record (ER) 104, 130. Plaintiffs' standing is contested. *See infra* Part I. The district court entered a preliminary injunction on October 11, 2019. ER 1-93. The government filed a timely notice of appeal on October 30, 2019. ER 94-95. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES

1. Whether plaintiffs—states and local governments—are appropriate parties to challenge the Rule.

2. Whether the Rule's definition of "public charge" is based on a permissible construction of the INA.

3. Whether the Rule is arbitrary and capricious.

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[1] Four other district courts have issued preliminary injunctions, all of which the government has appealed. *See Washington v. DHS*, No. 19-35914 (9th Cir.); *New York v. DHS*, 19-cv-7777 (S.D.N.Y), and *Make the Road New York v. Cuccinelli*, 19-cv-7993 (S.D.N.Y.) (nationwide); *Casa de Maryland, Inc. v. Trump*, 19-cv-2715 (D. Md.) (nationwide); *Cook County, Illinois v. McAleenan*, 19-cv-6334 (N.D. Ill.) (Illinois).

## PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

**1.** The INA provides that "[a]ny alien who, . . . in the opinion of the [Secretary of Homeland Security] at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A).[2] That assessment "shall at a minimum consider the alien's (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills." *Id.* § 1182(a)(4)(B). A separate INA provision provides that an alien is deportable if, within five years of entry, the alien "has become a public charge from causes not affirmatively shown to have arisen" since entry. *Id.* § 1227(a)(5).

Three agencies make public-charge inadmissibility determinations under § 1182(a)(4). DHS makes such determinations with respect to aliens seeking admission at the border and aliens within the country who apply to adjust their status to that of a lawful permanent resident. *See* 84 Fed. Reg. 41,292, 41,294 n.3 (Aug. 14, 2019). The Department of State's consular offices apply the public-charge ground of inadmissibility when evaluating visa applications filed by aliens abroad. *See id.* The

[2] The statute refers to the Attorney General, but in 2002, Congress transferred the Attorney General's authority to make inadmissibility determinations in the relevant circumstances to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557; *see also* 6 U.S.C. § 211(c)(8).

Department of Justice enforces the statute when the question whether an alien is inadmissible on public-charge grounds arises during removal proceedings. *See id.* The Rule at issue governs DHS's public-charge inadmissibility determinations. *See id.* The State Department and Department of Justice are expected to promulgate rules and guidance that are consistent with the Rule. *See id.*

**2.** Although the public-charge ground of inadmissibility dates back to the first immigration statutes, Congress has never defined the term "public charge," instead leaving the term's definition and application to the Executive Branch's discretion. In 1999, the Immigration and Naturalization Service (INS), a DHS predecessor, proposed a rule to "for the first time define 'public charge,'" 64 Fed. Reg. 28,676 28,689 (May 26, 1999) (1999 Guidance), a term that the INS noted was "ambiguous" and had "never been defined in statute or regulation," *id.* at 28,676-77. The proposed rule would have defined "public charge" to mean an alien "who is likely to become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense." *Id.* at 28,681. When it announced the proposed rule, INS also issued "field guidance" adopting the proposed rule's definition of "public charge." *Id.* at 28,689. The proposed rule was never finalized, leaving the 1999 Guidance as the default definition of "public charge" since its issuance. 84 Fed. Reg. at 41,348 n.295.

In October 2018, DHS announced a proposed new approach to public-charge inadmissibility determinations. It did so through a proposed rule subject to notice and comment. 83 Fed. Reg. 51,114 (Oct. 10, 2018) (NPRM). After responding to the numerous comments it received during the notice-and-comment period, DHS promulgated the final Rule at issue here in August 2019. *See* 84 Fed. Reg. at 41,501. The Rule is the first time the Executive Branch has defined the term "public charge" and established a framework for evaluating whether an alien is likely to become a public charge in a final rule following notice and comment.

The Rule defines "public charge" to mean "an alien who receives one or more [specified] public benefits . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." 84 Fed. Reg. at 41,501. The specified public benefits include cash assistance for income maintenance and certain noncash benefits, including most Medicaid benefits, Supplemental Nutrition Assistance Program benefits, and federal housing assistance. *Id.* As the agency explained, the Rule's definition of "public charge" differs from the 1999 Guidance in that: (1) it incorporates certain noncash benefits; and (2) it replaces the "primarily dependent" standard with the 12-month/36-month measure of dependence. *Id.* at 41,294-95.

The Rule also sets forth a framework the agency will use to evaluate whether, considering the "totality of an alien's individual circumstances," the alien is "likely at any time in the future to become a public charge." 84 Fed. Reg. at 41,369, 41,501-04.

Among other things, the framework identifies a number of factors an adjudicator must consider in making a public-charge inadmissibility determination, such as the alien's age, financial resources, employment history, education, and health. *Id.* at 41,501-04. The Rule was set to take effect on October 15, 2019, and would have applied prospectively to applications and petitions postmarked (or, if applicable, submitted electronically) on or after that date. *Id.* at 41,292.

### B. Prior Proceedings

In two separate lawsuits that the district court handled together, plaintiffs—the City and County of San Francisco and the County of Santa Clara in one case, and California, Maine, Oregon, Pennsylvania, and the District of Columbia in the other—challenged the Rule. In the interest of judicial economy, we are submitting identical briefs in both cases.

As relevant here, plaintiffs allege that the Rule's definition of "public charge" is not a permissible construction of the INA. Plaintiffs urge that the term unambiguously includes only persons primarily dependent on government assistance. ER 106, 150. Plaintiffs further allege that the Rule is arbitrary and capricious.

On October 11, 2019, the district court granted plaintiffs' request for a preliminary injunction barring DHS from implementing the Rule. ER 92-93. The court concluded that plaintiffs had standing to pursue their claims because they anticipate experiencing economic injury when, in response to the Rule, aliens and other residents disenroll from public benefits. ER 78-83. Specifically, the court

determined that plaintiffs would be harmed because benefit disenrollment would cause them to lose Medicaid funding provided by the federal government, ER 78-81, and because plaintiffs would have to spend time and resources "answering questions about the Rule, processing disenrollment, analyzing the impact of the rule on their services and undertaking community education and outreach," ER 81. The court also concluded that plaintiffs had asserted injuries within the zone of interests protected by the public-charge provision, reasoning that Congress enacted the public-charge statute and related provisions "to protect states and their political subdivisions' coffers." ER 70. The court noted, in particular, that the statute was designed to protect state and local governments from having to "pay[] means-tested public benefits" to aliens within their jurisdictions. *Id.*

On the merits, the court concluded that plaintiffs were likely to prevail on their claim that the Rule's definition of "public charge" is not a reasonable interpretation of the statute. ER 43-49. The court reasoned that, in defining "public charge" to include individuals who receive noncash benefits for more than twelve months in aggregate within a thirty-six month period, the Rule was at odds with the term's purportedly "long-standing focus on the individual's ability and willingness to work or otherwise support himself" and its "longstanding allowance for short-term aid." ER 46. The court also found it significant that Congress, in 1996 and 2013, did not adopt legislative proposals that would have defined "public charge" to include consideration of an alien's receipt of noncash benefits. ER 45-46. The court additionally concluded

that the Rule's "likely unreasonableness" was "further demonstrated" by the fact that, "in a single year, roughly a quarter of U.S.-born citizens receive one or more benefits used to define who is a public charge under the Rule." ER 48.

The court also concluded that plaintiffs were likely to succeed in demonstrating that the Rule is arbitrary and capricious. ER 53-63. In the court's view, DHS failed to adequately consider the adverse economic costs and public-health-related effects of the Rule. *Id.* According to the court, "DHS failed to grapple with the Rule's predictable effects on local governments, and instead concluded that the harms" were "an acceptable price to pay." ER 55. The court also found that DHS failed to adequately explain why it was departing from the 1999 Guidance and why it did not give greater weight to the potential impact on public health (including, in particular, a reduction in vaccination rates among those who disenroll from public benefits) that the Rule might have. ER 59-62.

Regarding the other preliminary-injunction factors, the court concluded that the harms plaintiffs anticipated experiencing as a result of the Rule—the loss of federal funds and increased operational costs—were irreparable. ER 83. The court also found that the balance of equities and hardships "tip[ped] sharply" in plaintiffs' favor. In the court's view, allowing the Rule to go into effect "would upend state and local governments' operations as they support immigrants while determining how to adjust to the new Rule," while, on the other hand, enjoining the Rule would do "little" harm to the government. ER 86, 87. The court similarly concluded that an injunction

was in the public interest because "the predictable disenrollment from Medicaid" that the Rule would cause "would have adverse health consequences not only to those who disenroll, but to the entire populations of the plaintiff states." ER 87.

The court enjoined enforcement of the Rule within the plaintiffs' jurisdictions, but declined to enjoin the Rule's enforcement nationwide. ER 92. The government sought a stay of the injunction from this Court on November 15, 2019. The government's motion remains pending.

## SUMMARY OF ARGUMENT

The district court erred in entering a preliminary injunction barring enforcement of the Rule.

**I.** As a threshold matter, plaintiffs have neither established standing to sue under Article III nor asserted injuries that fall within the public-charge provision's zone of interests. Plaintiffs allege that the Rule will burden their budgets because some of their residents will respond to the Rule by disenrolling from public-benefit programs, which will, in turn, purportedly deprive plaintiffs of federal funds and increase administrative and other costs. Plaintiffs' allegations fail to account for factors that would mitigate costs or generate savings, such as the Medicaid savings for States and the budgetary savings on services plaintiffs will no longer have to provide to those rendered inadmissible under the Rule. Plaintiffs' claim that the Rule will be a net drain on their fiscal resources is thus speculative and insufficient to support their standing.

Plaintiffs also have not identified any injury that falls within the public-charge statute's zone of interests because their purported interest in this litigation is fundamentally at odds with the goal of that statute. As the district court recognized, the clear purpose of the public-charge statute is to protect federal and state governments from having to expend taxpayer resources to support aliens admitted to the country as immigrants or allowed to adjust to lawful-permanent-resident status. The interest plaintiffs seek to further through this lawsuit—more widespread use of taxpayer-funded benefits by aliens—is thus diametrically opposed to the interests Congress sought to further through the public-charge inadmissibility statute.

**II.A.** Even if plaintiffs had standing, they are not likely to prevail on the merits of their claims. Numerous statutory provisions demonstrate that Congress intended to require aliens to rely on their own resources, rather than taxpayer-supported benefits, to meet their basic needs. For example, Congress required many aliens to obtain sponsors who must promise to reimburse the government for any means-tested public benefits the alien receives, and declared any alien who fails to obtain a required sponsor automatically likely to become a public charge, no matter the alien's individual circumstances. Congress also restricted the ability of certain aliens within the United States to obtain public benefits, and allowed aliens who receive such benefits and fail to reimburse the government to be subject to removal from the country.

The Rule—which renders inadmissible aliens who are likely to rely on public benefits for several months to meet basic needs—fully accords with Congress's intent and adopts a permissible construction of the public-charge inadmissibility provision. In concluding otherwise, the district court determined that the term "public charge" has a longstanding meaning, implicitly adopted by Congress, with which the Rule is inconsistent. But, far from adopting the fixed, narrow definition of "public charge" that the court identified, Congress has repeatedly and intentionally left the definition and application of the term to the discretion of the Executive Branch. And, in any event, the restricted definition of "public charge" offered by plaintiffs and accepted by the court cannot be squared with Congress's 1996 immigration and welfare-reform legislation, which made clear that Congress did not adopt plaintiffs' cramped view of the term "public charge."

**B.** The district court likewise erred in concluding that plaintiffs were likely to succeed in showing that the Rule is arbitrary and capricious. In adopting the Rule, DHS acknowledged that it was departing from previous guidance and explained its reasons for doing so. The agency also analyzed the benefits and costs of the Rule (including the Rule's potential impact on state and local governments and communities) at length before rationally concluding that the Rule's benefits from promoting self-sufficiency among aliens outweighed its possible costs. In light of Congress's clear emphasis on ensuring that aliens admitted to the country rely on

private resources and not public benefits, the agency's decision to prioritize self-reliance among aliens was plainly reasonable.

**III.** The remaining preliminary-injunction factors also weigh against the issuance of an injunction. Plaintiffs' predictions about the possible future harms to their fiscal interests that the Rule will allegedly cause do not establish the type of immediate, irreparable harm that justifies preliminary injunctive relief. And even if plaintiffs could establish the necessary injury, that injury would be outweighed by the harm to the government and the public that the Rule's injunction creates. So long as the Rule cannot take effect, the government will grant lawful-permanent-resident status to aliens who DHS would consider likely to become public charges under the Rule. Because the government has no viable means of revisiting these adjustments of status once made, those decisions cannot later be reversed.

## STANDARD OF REVIEW

"[T]he legal premises underlying a preliminary injunction" are reviewed de novo. *Federal Trade Comm'n v. Enforma Nat. Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004). Otherwise, the district court's entry of the preliminary injunction is reviewed for abuse of discretion. *Id.*

## ARGUMENT

The district court erred in entering a preliminary injunction barring enforcement of the Rule. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). None of these factors is satisfied here.

## I. Plaintiffs Lack A Cognizable Injury Sufficient To Support This Suit

As a threshold matter, plaintiffs lack standing to pursue injunctive relief because they have not adequately alleged a cognizable injury within the zone of interests protected by the public-charge statute.

To establish Article III standing, plaintiffs must demonstrate an injury that is "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). "[A]llegations of *possible* future injury are not sufficient." *Id.* Where, as here, "the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

To bring suit under the Administrative Procedure Act (APA), a plaintiff "must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). A plaintiff fails that test where its asserted

interests are only "marginally related to" or "inconsistent" with the purposes of the relevant statute. *Id.* at 225.

Plaintiffs' alleged fiscal injuries do not meet these requirements. According to plaintiffs, they will suffer imminent injury because the Rule will decrease enrollment in public-benefit programs, which plaintiffs allege will cause them to suffer fiscal harms such as reduced Medicaid reimbursements and increased costs due to poorer public health. ER 78-80. But these allegations at best establish a "*possible* future injury," not one that is "certainly impending." *Clapper*, 568 U.S. at 409. Plaintiffs' alleged injuries assume, for example, that those who disenroll from public-benefit programs will forgo medical care, thus reducing plaintiffs' receipt of federal Medicaid funds and leading to poorer long-term health outcomes. But any funds plaintiffs lose will be offset by a reduction in the costs they would have incurred to provide public benefits, medical care, and other services to aliens who will be rendered inadmissible under the Rule or who decline to take advantage of benefits funded by plaintiffs in whole or in part. Indeed, although DHS predicted that state and local government would incur *some* costs, it also estimated that the Rule would *decrease* public benefit outlays by several billion dollars. 83 Fed. Reg. at 51,228. As the district court itself recognized, the Rule "could potentially work out as a total budgetary savings for the plaintiff entities." ER 80. Thus, whether the Rule will have an adverse impact on plaintiffs' budgets is far from "certain[]," *Clapper*, 568 U.S. at 409. Plaintiffs' alleged harms thus fail to establish their standing.

The district court also concluded that plaintiffs were harmed by the Rule because they would have to spend time and resources "answering questions about the Rule, processing disenrollment, analyzing the impact of the rule on their services and undertaking community education and outreach." ER 81-83. But if such administrative costs were sufficient to establish a state or local government's standing to challenge a federal regulation, States and localities could challenge *any* change in federal policy having any effect on their residents, as all such changes are likely to require States and localities to answer questions about the new policy, analyze the policy's impact on its residents, and to educate the public about the policy. Under plaintiffs' theory, there would be no limits on a State or local government's ability to challenge any federal policy. No court has recognized such sweeping state or local government authority to bring suit against the federal government. *Cf. Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011) (rejecting standing theory that would have permitted "each state [to] become a roving constitutional watchdog" of the federal government).

In any event, plaintiffs' putative injuries are outside the zone of interests the public-charge inadmissibility ground is designed to protect. The public-charge inadmissibility provision is designed to ensure that aliens who are admitted to the country or become lawful permanent residents do not rely on public benefits. *See infra* Part II. The district court recognized as much, acknowledging that Congress enacted the public-charge provision to protect federal and state governments from having to

"pay[] means-tested public benefits" to aliens. ER 70. The provision does not create judicially cognizable interests for anyone outside the federal government, except for an alien in the United States who otherwise has a right to challenge a determination of inadmissibility, for Congress has not given any third party a judicially enforceable interest in the admission or removal of an alien.

In direct contravention to that clear purpose, plaintiffs here seek to further an alleged interest in *greater* use of public benefits by aliens and those residing in households containing foreign-born individuals. *See, e.g.,* ER 103 (asserting that the Rule harms plaintiffs by "caus[ing] residents to forgo or disenroll from benefit programs"); ER 128. The public-charge statute's objective is to reduce public-benefit use by aliens, not to safeguard state and local government resources by requiring the federal government to expend more money on public benefits. Plaintiffs cannot bring a lawsuit to promote "the very . . . interest" that "Congress sought to restrain." *National Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1051 (D.C. Cir. 1989); *see also Patchak*, 567 U.S. at 209 (litigant's interests must not be "inconsistent with the purposes implicit in the statute"). To the extent plaintiffs assert an interest in avoiding the administrative costs they may incur to update their own internal procedures, that alleged injury is a mere incidental consequence of a change in federal law that does not furnish a basis to challenge the substance of the Rule itself. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990). It is not even "marginally related" to the interests protected by the statute. *See Patchak*, 567 U.S. at 225; *City of*

*Los Angeles v. County of Kern*, 581 F.3d 841, 848 (9th Cir. 2009) (dismissing plaintiffs' constitutional claim on zone-of-interest grounds because the court could not "conclude that the [plaintiffs'] alleged injury [was] tied to the purposes animating the dormant Commerce Clause").

## II. Plaintiffs Are Not Likely To Succeed On The Merits

Even assuming plaintiffs could pursue their claims, the district court erred in concluding that they are likely to succeed on the merits. The Rule is a reasonable construction of the undefined term "public charge," and the agency both acknowledged that it was changing its approach and adequately explained its reasons for doing so. The district court's conclusions to the contrary lack merit.

### A. The Rule Adopts A Permissible Construction of "Public Charge"

**1.** The INA renders inadmissible "[a]ny alien who . . . in the opinion of the [Secretary] . . . is likely at any time to become a public charge." 8 U.S.C. § 1182(a)(4)(A). In determining whether an alien is likely at any time to become a public charge, DHS must review the alien's individual circumstances, which must include consideration of the alien's "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills." *Id.* § 1182(a)(4)(B)(i).

Related provisions of the INA illustrate that the receipt of public benefits, including noncash benefits, is relevant to the determination whether an alien is likely to become a public charge. Congress expressly instructed that, when making a public-charge inadmissibility determination, DHS "shall not consider any benefits the alien

may have received," 8 U.S.C. § 1182(s), including various noncash benefits, if the alien "has been battered or subjected to extreme cruelty in the United States by [specified persons]," *id.* § 1641(c); *see also id.* §§ 1611-1613 (specifying the public benefits for which battered aliens and other qualified aliens are eligible). The inclusion of that provision prohibiting the consideration of a battered alien's receipt of public benefits presupposes that DHS will ordinarily consider the past receipt of benefits in making public-charge inadmissibility determinations. *Cf. Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018) ("There is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows.").

In addition, Congress mandated that many aliens seeking admission or adjustment of status obtain affidavits of support from sponsors to avoid a public-charge inadmissibility determination. *See* 8 U.S.C. § 1182(a)(4)(C) (requiring most family-sponsored immigrants to submit affidavits of support); *id.* § 1182(a)(4)(D) (same for certain employment-based immigrants); *id.* § 1183a (affidavit of support requirements). Aliens who fail to obtain a required affidavit of support qualify by operation of law as likely to become public charges, regardless of their individual circumstances. *Id.* § 1182(a)(4). Congress further specified that the sponsor must agree "to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line," *id.* § 1183a(a)(1)(A), and granted federal and state governments the right to seek reimbursement from the sponsor for "any means-tested public benefit" that the government provides to the alien, *id.* § 1183a(b)(1)(A); *see also*

*id.* § 1183a(a) (affidavits of support are legally binding and enforceable contracts "against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit").

The import of the affidavit-of-support provision is clear: To avoid being found inadmissible as likely to become a public charge, an alien governed by the provision must find a sponsor who is willing to reimburse the government for *any* means-tested public benefits the alien receives while the sponsorship obligation is in effect (even if the alien receives those benefits only briefly and only in minimal amounts). Congress thus provided that the mere *possibility* that an alien might obtain unreimbursed, means-tested public benefits in the future was sufficient to render that alien likely to become a public charge, regardless of the alien's other circumstances.

Moreover, Congress enacted the affidavit-of-support provision in 1996—the same year that it enacted the current version of the public-charge provision—against the backdrop of a longstanding interpretation of the term "public charge" for purposes of deportability under 8 U.S.C. § 1227(a)(5). Under that longstanding interpretation, an alien is deportable if he receives a public benefit that the alien or designated friends and relatives are legally obligated to repay, the relevant government agency demands repayment, and "[t]he alien and other persons legally responsible for the debt fail to repay after a demand has been made." 64 Fed. Reg. at 28,691 (citing *Matter of B-*, 3 I. & N. Dec. 323 (BIA and AG 1948)); *Concurrent Resolution on the Budget*

*for Fiscal Year 1997: Hearings Before the Committee on the Budget*, 104th Cong. 81 (1996) (noting that interpretation). Thus, when it made sponsors legally responsible for repayment of any means-tested public benefits received by an alien and provided government agencies with a legally enforceable right to demand repayment, Congress understood that a failure to repay the benefit by the alien or sponsor could render the alien deportable as a "public charge" under 8 U.S.C. § 1227(a)(5). In other words, Congress implemented a system in 1996 under which an alien's receipt of an unreimbursed, means-tested public benefit could render the alien a "public charge" subject to deportation (provided a demand for repayment was made).

Congress also took steps to limit aliens' ability to obtain public benefits. Congress provided that, for purposes of eligibility for means-tested public benefits, an alien's income is generally "deemed to include" the "income and resources" of the sponsor. 8 U.S.C. § 1631(a). This deeming provision reduces the likelihood that aliens subject to § 1182's public-charge provision will qualify for means-tested public benefits, providing further evidence of Congress's intent that such aliens not receive taxpayer-funded benefits once they are admitted to the United States. *See also* H.R. Rep. No. 104-828, at 242 (Sept. 24, 1996) (Conf. Rep.) (explaining that the deeming provision was designed to further "the national immigration policy that aliens be self-reliant"). Congress's apparent concern about the receipt of public benefits, including noncash benefits, by aliens is further underscored by provisions barring most aliens from obtaining many federal public benefits, either at all or until they have been in the

country for at least five years. *See* 8 U.S.C. §§ 1611-1613, 1641; 83 Fed. Reg. at 51,126-33.

As Congress explained, these and other provisions were driven by its concern about the "increasing" use by aliens of "public benefits [provided by] Federal, State, and local governments." 8 U.S.C. § 1601(3). Congress emphasized that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes," *id.* § 1601(1), and that it "continues to be the immigration policy of the United States that . . . (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and (B) the availability of public benefits not constitute an incentive for immigration to the United States," *id.* § 1601(2). Congress expressly equated a lack of "self-sufficiency" with the receipt of "public benefits" by aliens, *id.* § 1601(3), which it defined broadly to include any "welfare, health, disability, public or assisted housing . . . or any other similar benefit," *id.* § 1611(c) (defining "federal public benefit"). And it stressed the government's "compelling" interest in enacting "new rules for eligibility [for public benefits] and sponsorship agreements [for individuals likely to become public charges] in order to assure that aliens be self-reliant in accordance with national immigration policy." *Id.* § 1601(5).

Consistent with that statutory text, context, and history, the Rule defines a "public charge" as an "alien who receives one or more [enumerated] public benefits"

over a specified period of time. 84 Fed. Reg. at 41,501. That definition respects Congress's understanding that the term "public charge" would encompass individuals who rely on taxpayer-funded benefits to meet their basic needs. At a minimum, the Rule is "a permissible construction of the statute." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

**2.** The district court concluded that plaintiffs were likely to succeed in showing that the Rule's definition of "public charge" is not a permissible construction of the INA. ER 43-49. The court further concluded that plaintiffs had raised serious questions with respect to whether the statute "unambiguously forecloses" the Rule's interpretation of the term. ER 48. In arriving at these conclusions, the court appeared to accept plaintiffs' arguments that the term "public charge" has, since 1882, meant "primarily dependent on the government for subsistence," ER 14, that it cannot apply to aliens who are healthy and able to work, ER 34, 37, 46, and that Congress adopted this allegedly longstanding meaning, ER 46. The court's conclusions are flawed.

As discussed, Congress's 1996 INA amendments and its contemporaneous welfare-reform legislation demonstrate that Congress did not understand "public charge" to have the narrow meaning plaintiffs assert. For example, a large number of aliens will automatically be deemed inadmissible as likely to become "public charges" if they fail to obtain affidavits of support. *See supra* pp. 20-21. That is so even if the aliens are healthy adults who are willing and able to work, and there is no specific

evidence indicating that they are likely to become "primarily" dependent on the government for subsistence. Similarly, in requiring sponsors to repay *any* means-tested benefit an alien receives (regardless of the amount or length of time the alien receives the benefit) and granting government agencies the right to seek repayment, Congress understood that a sponsor's failure to repay upon demand would render the alien subject to deportation as a "public charge," without regard to whether the alien had been primarily dependent on the benefits. That result is likewise inconsistent with plaintiffs' assertion that Congress viewed the term "public charge" as encompassing only those aliens who are primarily reliant on taxpayer-funded resources.

Moreover, there would have been no basis for Congress to presume that "public charge" had the fixed, narrow meaning that plaintiffs and the district court assumed. To the contrary, Congress has repeatedly and intentionally left the term's definition and application to the discretion of the Executive Branch. Although provisions barring entry to those likely to become a "public charge" have appeared in immigration statutes dating back to the late 19th century, Congress has never defined the term. 84 Fed. Reg. at 41,308. That is not because Congress assumed the term had a settled meaning. Rather, in an extensive report that served as a foundation for the enactment of the INA, the Senate Judiciary Committee emphasized that because "the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law." S. Rep. No. 81-1515, at 349 (1950); *see*

*also id.* at 803 (reproducing Senate resolution directing Committee to make "full and complete investigation of our entire immigration system" and provide recommendations). The report also recognized that "[d]ecisions of the courts have given varied definitions of the phrase 'likely to become a public charge,'" *id.* at 347, and that "different consuls, even in close proximity with one another, have enforced [public-charge] standards highly inconsistent with one another," *id.* at 349. Far from mandating plaintiffs' definition of public charge, the report concluded that the public-charge inadmissibility determination properly "rests within the discretion of" Executive Branch officials. *Id.*; *cf. Barnhart v. Walton*, 535 U.S. 212, 225 (2002) (Where Congress enacts a "complex[]" statute implicating a "vast number of claims" with a "consequent need for agency expertise and administrative experience," it is appropriate to "read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration.").

Indeed, the statute itself reflects Congress's broad delegation of authority to the Executive Branch, as it expressly provides that public-charge inadmissibility determinations are made "in the opinion of the [Secretary of Homeland Security]." 8 U.S.C. § 1182(a)(4); *supra* p.4 n.2. *See Thor Power Tool Co. v. Commissioner*, 439 U.S. 522, 540 (1979) (Where a statute specifies that a determination is to be made "in the opinion of" an agency decisionmaker, the statute confers "broad discretion" on the decisionmaker to make that determination.).

By leaving the definition of "public charge" to the discretion of the Executive Branch, Congress recognized not only the need for flexibility in the Executive Branch's application of the public-charge provision to varied individual circumstances, but also the need for the term "public charge" to evolve over time to reflect changes in the scope and nature of public benefits. In enacting immigration and welfare-reform legislation in 1996, Congress expressly recognized the need for public-charge laws to evolve to reflect current conditions. As one Senate report explained:

> It is even more important in this era that there be such a [public-charge] law, since the welfare state has changed the pattern of immigration and emigration that existed earlier in our history. Before the welfare state, if an immigrant could not succeed in the U.S., he or she often returned to "the old country." This happens less often today, because of the welfare "safety net." . . . It should be made clear to immigrants that the taxpayers of this country expect them to be able to make it in this country on their own and with the help of their sponsors.

S. Rep. No. 104-249, at 5-9 (1996). The 1999 Guidance—which, for the first time, defined the term "public charge" by reference to cash assistance—represents an exercise of the Executive Branch's longstanding discretion to define the term "public charge" and provides an example of the term's flexibility to reflect the modern welfare state.

Administrative interpretations of the term likewise undermine the court's conclusion that "public charge" has been uniformly understood to apply only to aliens who are primarily dependent on public support for more than "short-term aid," ER 46. As the district court recognized (ER 47), since at least 1948, the Executive Branch

has taken the authoritative position that an alien qualifies as a "public charge" for deportability purposes if the alien or the alien's sponsor or relative fails to repay a public benefit upon a demand for repayment by a government agency entitled to repayment. *See Matter of B-*, 3 I. & N. Dec. at 326. Under that rubric, a failure to repay upon demand renders an alien a "public charge" for deportability purposes regardless of whether the alien was "primarily dependent" on the benefits at issue. *See id.* Indeed, although the Board of Immigration Appeals concluded that the alien in *Matter of B-* was not deportable as a public charge because Illinois law did not allow the State to demand repayment for the care she received during her stay in a state mental hospital, the opinion suggests that the alien would have been deportable as a public charge if her relatives had failed to pay the cost of the alien's "clothing, transportation, and other incidental expenses," because Illinois law made the alien "legally liable" for those incidental expenses. *Id.* at 327. That was so even though Illinois was not entitled to recover the sums expended for plaintiff's lodging, healthcare, and food. *See id.*

The district court acknowledged that an alien's receipt of a small amount of benefits would have qualified the alien as a public charge for deportability under *Matter of B-* if "the bill for those [benefits] was presented to the recipient and he refused to pay." ER 47. That acknowledgment cannot be reconciled with the court's conclusion that Congress unambiguously foreclosed DHS from determining that

aliens who would be likely to receive such benefits for a sustained period of time would be inadmissible on the ground that they were likely to become a public charge.

Courts have also historically held that an alien's reliance on taxpayer support for basic necessities on a temporary or intermittent basis was sufficient to render the alien a "public charge." *See, e.g.*, *Ex parte Turner*, 10 F.2d 816, 816 (S.D. Cal. 1926) (family was deportable as persons likely to become public charges where evidence indicated that the family had received "charitable relief" for two months and "public charities were still furnishing some necessaries to [the] family" one month later); *Guimond v. Howes*, 9 F.2d 412, 413-14 (D. Me. 1925) (alien was "likely to become a public charge" in light of evidence that she and her family had been supported by the town twice—once for 60 days and once for 90 days—over the previous two years).

Other historical sources likewise belie the district court's suggestion that the term "public charge" had a fixed and narrow meaning. For example, both the 1933 and 1951 editions of Black's Law Dictionary defined the term "public charge," "[a]s used in" the 1917 Immigration Act, to mean simply "one who produces a money charge upon, or an expense to, the public for support and care"—without reference to amount. *Public Charge*, Black's Law Dictionary (3d ed. 1933); Black's Law Dictionary (4th ed. 1951). And a 1929 treatise did the same. *See* Arthur Cook et al., *Immigration Laws of the United States* § 285 (1929) (noting that "public charge" meant a person who required "any maintenance, or financial assistance, rendered from public funds, or funds secured by taxation").

The district court was also incorrect that the Rule makes no "allowance for short-term" or temporary receipt of government benefits. ER 46. To the contrary, the Rule defines "public charge" to mean aliens who receive more than twelve months of benefits in the aggregate within a thirty-six month period. *See* 84 Fed. Reg. at 41,501. Thus, an alien who is likely to receive benefits only on a temporary or short-term basis—*i.e.*, for twelve months or fewer in the aggregate within any three-year period—will not be deemed likely to become a public charge.

The district court similarly erred in concluding that the Rule is invalid because it is allegedly inconsistent with the Attorney General's statement in *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421-22 (BIA 1962; AG 1964), that "[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," *id.* ER 34, 47-48. The alien in *Matter of Martinez-Lopez* was "an able-bodied man in his early twenties," had no dependents, had previously worked in the United States, and "was sponsored by a brother who had lived in the United States for several years and was earning approximately $85.00 a week in permanent employment." *Id.* at 422-23.

Nothing in the Rule suggests that DHS will ordinarily find an alien similarly situated to the alien in *Matter of Martinez-Lopez*—*i.e.*, a young, able-bodied alien with a U.S. work history and a financially secure sponsor—to be likely to receive public benefits over the specified period. To the contrary, DHS cited a hypothetical alien

who is "young, healthy, employed, attending college, and not responsible for providing financial support for any household members" as an example of an individual who "would not be found inadmissible" under the Rule. 83 Fed. Reg. at 51,216.

The district court claimed (ER 47) to find a settled meaning of the term "public charge" in *Gegiow v. Uhl*, 239 U.S. 3 (1915). But *Gegiow* did not conclusively settle the meaning of "public charge" in subsequent immigration laws, let alone adopt a fixed definition of public charge that the Executive Branch must apply. Rather, the "single question" presented in *Gegiow* was whether, under "the act of February 20, 1907," "an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked." 239 U.S. at 9-10. Thus, when the Court opined that the determination whether an alien was likely to become a public charge depended on the alien's "permanent personal" characteristics, it did so simply to make clear that the determination must be based on something particular to the alien and not on the general state of "local conditions" in his destination city. *Id.* at 10. The Rule comports with *Gegiow*'s holding, as it mandates that individual public-charge inadmissibility determinations must be "based on the totality of the alien's [particular] circumstances." 84 Fed. Reg. at 41,501.

Moreover, Congress revised the immigration laws to "overcome" the Supreme Court's decision in *Gegiow*. *See* S. Rep. No. 64-352, at 5 (1916) ("The purpose of this change is to overcome recent decisions of the courts limiting the meaning of the

description of the excluded class . . . . (See especially Gegiow v. Uhl, 239 U. S., 3.).”); *see also* H.R. Doc. No. 64-886, at 3-4 (1916). In light of that history, there is no basis for presuming that *Gegiow* sets out a definition of “public charge” that should be attributed to subsequent Congresses, much less that subsequent Congresses adopted the meaning of “public charge” that the district court attributed to *Gegiow*.

The district court’s reliance on this Court’s decision in *Ex parte Hosaye Sakaguchi*, 277 F. 913 (9th Cir. 1922), was likewise misplaced. There, this Court stated that the reasoning of *Gegiow* remained good law insofar as “it is still to be held that a person ‘likely to become a public charge’ is one who, by reason of poverty, insanity, or disease or disability, will probably become a charge on the public.” *Id.* at 916. But the Court recognized that the presence of “any fact tending to show that the burden of supporting the [alien] is likely to be cast upon the public” would give the Court “no hesitation” in upholding the conclusion that the alien was a public charge. *Id.* In the case before the Court, the Court merely concluded that there was no “evidence that [an alien] was likely to become a public charge” when she was “an able-bodied woman of the age of 25 years, with a fair education, with no mental or physical disability, with some knowledge of English, skilled as a seamstress and a manufacturer of artificial flowers, with a disposition to work and support herself, and having a well-to-do sister and brother-in-law, domiciled in this country, who stand ready to receive and assist her.” *Id.* Nothing in the opinion contradicts the Rule.

The district court also erroneously found it significant that, in 1996 and 2013, Congress declined to adopt legislation that would have expressly defined the term "public charge" to include receipt of certain noncash benefits. ER 45-46. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute," because "[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001). As a result, "several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

The district court's reliance on the failed 1996 and 2013 proposals to define the term "public charge" is particularly flawed here. There is no indication that Congress believed the proposed definitions were fundamentally inconsistent with the statutory term "public charge." Congress did not "discard[]" the proposed definitions of public charge "in favor of other language" eventually enacted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987). It did not adopt an alternate definition in the 1996 legislation, which left the term undefined, and it enacted no legislation on the subject in 2013. In addition, the legislative history of the 1996 proposal indicates that the proposal was dropped at the last minute because the President objected to the proposal's rigid definition of "public charge," as well as other provisions, and threatened to veto the bill unless changes were made. *See* H.R. Rep. No. 104-828, at 241; 142 Cong. Rec. S11872, S11881-82 (Sept. 30, 1996). Far from suggesting that Congress attributed an

unambiguous meaning to the still-undefined term "public charge," these circumstances suggest that Congress acceded to the President's demands that the Executive Branch retain the discretion to define the term.

The circumstances surrounding the 2013 proposal's failure similarly fail to support the inference that Congress would have viewed the Rule as an impermissible construction of the public-charge provision. The 2013 proposal was rejected by a Senate committee. S. Rep. No. 113-40, at 42 (2013). But Congress then failed to enact the bill the committee agreed on. ER 43. The question of what significance to assign to a rejected committee proposal that formed a part of a bill subsequently rejected by the full Congress underscores the problems inherent in relying on unenacted legislation.

In addition, both the 1996 and 2013 proposals were significantly broader than the Rule: the 1996 proposal covered a similar amount of benefits usage within a period of seven years rather than three, *see* H.R. Rep. No. 104-828, at 138, 240-41, and the 2013 proposal included receipt of *any* amount of public benefits, S. Rep. No. 113-40, at 42, 63. Even if Congress's failure to codify those stricter standards were evidence of its understanding of the term "public charge" (which they are not), they would not support the conclusion that Congress rejected the Rule's narrower definition.

The district court also noted that the Executive Branch had not previously adopted the Rule's particular definition of public charge. ER 46-47. But it is a

bedrock principle of administrative law that an agency may alter its interpretation of a statute it is charged with enforcing. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Provided that a new rule is "permissible under the statute" and the agency "display[s] awareness that it is changing position" and explains the "reasons for the new policy"—as DHS did here—there is nothing improper about an agency's adopting a new approach. *Id.* Particularly where the prior governing interpretation was adopted as field guidance, there should be no serious dispute that the agency charged with administering a statute has authority to alter its interpretation after notice-and-comment rulemaking.

The district court was also incorrect in suggesting that the Rule is impermissible because many Americans receive the benefits specified in the Rule. ER 48 (suggesting that the Rule is unreasonable because "in a single year, roughly a quarter [of] U.S.-born citizens receive one or more benefits used to define who is a public charge under the Rule"). U.S.-born citizens, of course, are not required to have sponsors who guarantee that the public will not be required to pay for their basic living expenses, are not compelled to reimburse the government for any public benefits received, and cannot be removed from the country for failing to repay public benefits. Yet, as explained above, Congress expressed its clear intent that aliens seeking admission or adjustment of status rely on private resources to meet their basic needs, and not on the public benefits that U.S. citizens are eligible to receive. *See supra* pp. 19-23. The Rule accords with that intent.

### B. The Rule Is Not Arbitrary Or Capricious

The district court likewise erred in concluding that the Rule was arbitrary and capricious. 5 U.S.C. § 706(2)(A). Review under "the arbitrary and capricious standard [is] deferential and narrow." *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016). Agency action will be upheld if the agency examined "the relevant data" and articulated "a satisfactory explanation" for its decision, "including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court may not itself weigh the evidence or "substitute its judgment for that of the agency." *Alaska Oil & Gas Ass'n*, 815 F.3d at 554. Final agency action satisfies the arbitrary-and-capricious standard provided that it "is within the bounds of reasoned decisionmaking." *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

The Rule—including its new definition of "public charge" and its framework for evaluating which aliens are, in the opinion of the Executive Branch, likely to become public charges—is well within the bounds of reasoned decisionmaking. As discussed, the Rule differs from the agency's previous interpretation of "public charge" (the validity of which neither plaintiffs nor the district court dispute) in that it requires adjudicators to consider an alien's past and expected future receipt of specified noncash benefits (not just cash benefits) in determining whether that alien is likely to become a public charge and defines the term "public charge" to include those

who receive such benefits for more than twelve months in the aggregate within any thirty-six month period.

Consistent with the dictates of reasoned decisionmaking, the agency "forthrightly acknowledged" its change in approach and provided "good reasons for the new policy." *Fox Television Stations*, 556 U.S. at 515, 517. Specifically, the agency explained that the Rule is designed "to better ensure that applicants for admission to the United States and applicants for adjustment of status to lawful permanent resident who are subject to the public charge ground of inadmissibility are self-sufficient—*i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations." 83 Fed. Reg. at 51,122; 84 Fed. Reg. at 41,317-19. Because Congress itself viewed the receipt of any public benefits, including noncash benefits, as indicative of a lack of self-sufficiency, the agency reasoned that the Rule is more consistent with congressional intent than the agency's 1999 approach. 83 Fed. Reg. at 51,123; *see also* 84 Fed. Reg. at 41,319 (explaining that the Rule is designed to address "deficiencies" in the standard adopted by the 1999 Guidance, including "that the guidance assumed an overly permissi[ve] definition of dependence on public benefits by only including consideration of certain cash benefits, rather than a broader set of benefits, whether cash or noncash, that similarly denote reliance on the government").

The agency also stressed that the 1999 Guidance had relied on an "artificial distinction between cash and noncash benefits." 83 Fed. Reg. at 51,123. As the

agency explained, "[f]ood, shelter, and necessary medical treatment are basic necessities of life." 83 Fed. Reg. at 51,159. Thus, a "person who needs the public's assistance to provide for these basic necessities is not self-sufficient," even if the person does not receive cash assistance from the government. *Id.*

The agency also emphasized that the cost to the federal government of providing noncash benefits to a recipient often exceeds the cost of cash-based assistance, demonstrating that noncash benefits are in many individual cases a more significant form of public support than is cash-based assistance. *See* 83 Fed. Reg. at 51,160. For example, the agency estimated that the average recipient of Temporary Assistance for Needy Families (TANF) receives about $1,272.56 in cash assistance per year. *Id.* By contrast, the agency estimated that the average Medicaid recipient receives $7,426.59 in annual benefits and the average household is provided $8,121.16 per year in federal rental assistance. *Id.* The agency thus reasonably concluded that the receipt of noncash benefits was relevant to whether an alien was self-supporting or instead required public support to meet basic needs.

The agency also explained, at length, its reasons for including in the Rule the various factors it identified as weighing on the question whether an alien is likely to become a public charge. *See* 83 Fed. Reg. 51,178-207. The factors implemented Congress's mandate that the agency consider, at a minimum, each alien's "age"; "health"; "family status"; "assets, resources, and financial status"; and "education and skills" in making a "public charge" determination. *See id.* at 51,178; 8 U.S.C.

§ 1182(a)(4)(B). The agency described in detail how each of the various factors bore positively or negatively on the determination whether an alien is likely to depend on public benefits in the future, while retaining the "totality of the circumstances" approach that allows each adjudicating officer to make a decision appropriate to each alien's particular circumstances.

The agency also rationally weighed the benefits and costs of the Rule. It explained that, by excluding those aliens likely to rely on public benefits from the country and encouraging those within the country to become self-sufficient, the Rule is likely to save federal and state governments billions of dollars annually in benefit payments and associated costs. *See* 83 Fed. Reg. at 51,228. At the same time, the agency recognized that the disenrollment of aliens from public-benefit programs could have certain adverse effects. The agency noted, for example, that a reduction in public benefit enrollment and payments could negatively affect third parties who receive such payments as revenue, including, for example, health-care providers who participate in Medicaid and local businesses who accept SNAP benefits. 83 Fed. Reg. at 51,118; 84 Fed. Reg. at 41,313. The agency also recognized that disenrollment in public-benefit programs by aliens subject to the Rule or those who incorrectly believe they are subject to the Rule could have adverse consequences on the health and welfare of those populations, while also potentially imposing some "costs [on] states and localities." 84 Fed. Reg. at 41,313.

Although it recognized these potential costs, the agency explained that there were reasons to believe that the costs would not be as great as some feared. 84 Fed. Reg. at 41,313. Among other things, in response to commentator concerns, the agency took steps to "mitigate . . . disenrollment impacts." *Id.* Those steps included excluding receipt of benefits under the Children's Health Insurance Program (CHIP) from the list of public benefits covered by the Rule, and exempting Medicaid benefits received by aliens under the age of twenty-one and pregnant women from the Rule's definition of public charge. *Id.* at 41,313-14. The agency also noted that the majority of aliens subject to the Rule do not currently receive public benefits, either because they reside outside the United States or because, following the 1996 welfare-reform legislation, they are generally precluded from receiving such benefits. *Id.* at 41,212-13. As a result, the agency concluded that the Rule was unlikely to substantially affect the receipt of public benefits by those subject to the Rule. *Id.* at 41,313.

The agency also explained that those classes of aliens who are eligible for the noncash benefits covered by the Rule, such as lawful permanent residents and refugees, are, except in rare circumstances, not subject to a public-charge inadmissibility determination and are thus not affected by the Rule. 84 Fed. Reg. at 41,313. An agency is not obliged to abandon an otherwise lawful policy simply because third parties not affected by the policy might wrongly assume that they are. But in any event, contrary to the district court's assertion, ER 58-59, the agency considered and made plans to address disenrollment by those not covered by the

Rule. To the extent such individuals disenroll from public benefits out of confusion over the Rule's coverage, the agency reasoned that the effect might be short-lived, as such individuals might re-enroll after realizing their error. 84 Fed. Reg. at 41,463. And, to clear up any confusion as quickly as possible—thus minimizing disenrollment among populations not subject to the Rule—the agency further stated that it planned to "issue clear guidance that identifies the groups of individuals who are not subject to this rule, including, but not limited to, U.S. citizens, [certain] lawful permanent residents, . . . and refugees." *Id.* at 41,313.

Ultimately, the agency rationally concluded that the benefits obtained from promoting self-sufficiency outweighed the Rule's potential costs. *See* 84 Fed. Reg. at 41,314. As the agency explained, the precise costs of the Rule were uncertain, given the impossibility of estimating precisely the number of individuals who would disenroll from public-benefit programs as a result of the Rule, how long they would remain disenrolled, and to what extent such disenrollment would ultimately affect state and local communities and governments. *See, e.g.*, 84 Fed. Reg. at 41,313. At the same time, the Rule provided clear but similarly difficult-to-measure benefits, such as helping to ensure that aliens entering the country or adjusting status are self-reliant and reducing the incentive to immigrate that the availability of public benefits might otherwise provide to aliens abroad. The agency's ultimate decision about whether to move forward with the Rule thus "called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty." *Department of*

*Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019). Given Congress's clear focus on ensuring that aliens admitted to the country rely on private resources and not public benefits, the agency's decision to prioritize self-reliance among aliens is plainly reasonable.

The district court mistakenly concluded that plaintiffs were likely to succeed in establishing that DHS failed to address adequately comments directed at the adverse economic and health effects that benefit disenrollment caused by the Rule could have on state and local governments and local communities. ER 53-58. But an agency's obligation to respond to comments on a proposed rulemaking is "not 'particularly demanding.'" *Association of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012). Instead, "the agency's response to public comments need only 'enable [courts] to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'" *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993); *see also Environmental Def. Fund v. EPA*, 922 F.3d 446, 458 (D.C. Cir. 2019) ("Nothing in the APA saddles agencies with the crushing task of responding to every single example cited in every single comment.").

The agency's response to commentators' concerns about the disenrollment-related costs of the Rule easily satisfies that standard. As discussed above, the agency carefully considered the arguments presented by commenters and addressed them in detail. The district court's assertions that "DHS failed to grapple with the Rule's predictable effects [on disenrollment]," ER 55, and "flatly refused to consider the

costs associated with predicted, likely disenrollment," including disenrollment by those not subject to the Rule, ER 58, are thus wrong.

The district court also asserted that DHS acted arbitrarily in failing to address comments directed at the impact of the Rule on public health, and, in particular, comments asserting that the Rule would result in fewer aliens being vaccinated. ER 62. But the agency both acknowledged the potential impact of the Rule on public health in general and vaccinations in particular, and took steps to mitigate that impact. *See supra* p. 40. Most notably, it excluded CHIP benefits and Medicaid benefits provided to women during pregnancy and for 60 days following pregnancy and aliens under twenty-one from the Rule's coverage. 84 Fed. Reg. at 41,380; *see also id.* at 41,384 (explaining that the exclusion of Medicaid benefits for women and those under twenty-one "should address a substantial portion . . . of the vaccinations issue"). The agency also explained, with respect to vaccinations, that local health centers and state health departments provide low- or no-cost vaccinations to aliens and their children through services not covered by the Rule. 84 Fed. Reg. at 41,385.

The district court similarly erred in concluding that the Rule was arbitrary and capricious because DHS failed to justify its statement that the Rule "will ultimately strengthen public safety, health, and nutrition" by "denying admission or adjustment of status to aliens who are not likely to be self-sufficient." ER 58 (citing 84 Fed. Reg. at 41,314). The agency's long-term prediction that denying admission or adjustment of status to aliens unlikely to be able to support themselves would be beneficial is

unobjectionable and consistent with Congress's own findings. *See* 8 U.S.C. § 1601. But that single sentence taken from the agency's lengthy explanation of the Rule was not, in any event, the justification for the Rule. As discussed above, the agency justified the Rule on the ground that it better accords with congressional intent and national immigration policy. *See supra* pp. 36-38; *see also, e.g.*, 84 Fed. Reg. at 41,314 (explaining that the Rule was premised on the agency's reweighing of policy priorities in light of the "longstanding self-sufficiency goals set forth by Congress").

The district court also missed the mark in suggesting that the agency failed to take account of "reliance interests" that the 1999 Guidance may have engendered. ER 60. To the contrary, the Rule expressly bars DHS from considering any benefits newly covered by the Rule that an alien received before the Rule's effective date. 84 Fed. Reg. at 41,504 (8 C.F.R. § 212.22(d)). In addition, DHS explicitly stated that the Rule applies only to applications and petitions postmarked (or if applicable, submitted electronically) on or after the effective date. *Id.* at 41,292. Thus, to the extent an alien obtained benefits in reliance on the 1999 Guidance's definition of public charge, those benefits will not be counted against the alien. *Id.* And, as noted, the agency explained its reasons for departing from the 1999 Guidance, thus satisfying its obligation to acknowledge and justify a policy change that may affect those who relied on the previous policy. *See supra* pp. 36-38.

## III. The Remaining Factors Weigh Against A Preliminary Injunction

The remaining preliminary injunction factors also weigh against an injunction. Contrary to the district court's conclusion, plaintiffs have not established that they will be irreparably harmed absent an injunction. To obtain an injunction, a "plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Id.*; *see also Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011) ("An injunction will not issue if the person or entity seeking injunctive relief shows a mere 'possibility of some remote future injury.'") (quoting *Winter*, 555 U.S. at 22).

As discussed above, plaintiffs' alleged budgetary harms are speculative, founded on an attenuated chain of inferences, and fail to account for cost savings that the Rule is likely to generate for plaintiffs. *See supra* Part I. At most, plaintiffs have established a mere possibility of a future harm to their fiscal interests. That mere possibility is not sufficient to establish their standing. But even if it were, it would not demonstrate the immediate, irreparable harm necessary for the award of preliminary injunctive relief. *See Caribbean Marine Servs. Co.*, 844 F.2d at 674.

The balance of equities and the public interest likewise do not support the entry of a preliminary injunction here. Both the federal government and the public

will be irreparably harmed if the Rule cannot go into effect. So long as the Rule is enjoined, DHS will be forced to retain an immigration policy in which it grants lawful-permanent-resident status to aliens who "in the opinion of the [Secretary]," are likely to become public charges as the Secretary would define that term. 8 U.S.C. § 1182(a)(4)(A). DHS currently has no viable means of revisiting adjustment-of-status determinations once made, *see* ER 98, so those aliens will likely receive lawful-permanent-resident status permanently (assuming they are not ineligible for other reasons), such that the harm is irreparable.

And as noted, plaintiffs' asserted injuries are at odds with the purposes underlying the public-charge inadmissibility provision. Plaintiffs do not serve the public interest by promoting increased use of public benefits by aliens, contrary to Congress's clear intent. At a minimum, the harms to the federal government and the public preclude enjoining the Rule pending the resolution of this case on the merits.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the court's preliminary injunction vacated.

Respectfully submitted,

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December 2019

## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of two related cases pending in this Court:

*State of California v. USDHS*, No. 19-17214

*State of Washington v. USDHS*, No. 19-35914

*s/ Gerard Sinzdak*
Gerard Sinzdak

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,506 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*s/ Gerard Sinzdak*
Gerard Sinzdak

# ADDENDUM

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**8 U.S.C. § 1182**

**§ 1182. Inadmissible aliens**

**(a) Classes of aliens ineligible for visas or admission**

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

**(4) Public charge**

**(A) In general**

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 application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

**(B) Factors to be taken into account**

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's--

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

**(C) Family-sponsored immigrants**

Any alien who seeks admission or adjustment of status under a visa number issued under section 1151(b)(2) or 1153(a) of this title is inadmissible under this paragraph unless--

(i) the alien has obtained--

(I) status as a spouse or a child of a United States citizen pursuant to clause (ii), (iii), or (iv) of section 1154(a)(1)(A) of this title;

(II) classification pursuant to clause (ii) or (iii) of section 1154(a)(1)(B) of this title; or

(III) classification or status as a VAWA self-petitioner; or

(ii) the person petitioning for the alien's admission (and any additional sponsor required under section 1183a(f) of this title or any alternative sponsor permitted under paragraph (5)(B) of such section) has executed an affidavit of support described in section 1183a of this title with respect to such alien.

**(D) Certain employment-based immigrants**

Any alien who seeks admission or adjustment of status under a visa number issued under section 1153(b) of this title by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest) is inadmissible under this paragraph unless such relative has executed an affidavit of support described in section 1183a of this title with respect to such alien.

**(E) Special rule for qualified alien victims**

Subparagraphs (A), (B), and (C) shall not apply to an alien who--

(i) is a VAWA self-petitioner;

(ii) is an applicant for, or is granted, nonimmigrant status under section 1101(a)(15)(U) of this title; or

(iii) is a qualified alien described in section 1641(c) of this title.

* * *

**(s) Consideration of benefits received as battered alien in determination of inadmissibility as likely to become public charge**

In determining whether an alien described in subsection (a)(4)(C)(i) is inadmissible under subsection (a)(4) or ineligible to receive an immigrant visa or otherwise to adjust to the status of permanent resident by reason of subsection (a)(4), the consular officer or the Attorney General shall not consider any benefits the alien may have received that were authorized under section 1641(c) of this title.

**8 U.S.C. § 1183a**

**§ 1183a. Requirements for sponsor's affidavit of support**

**(a) Enforceability**

(1) Terms of affidavit

No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section 1182(a)(4) of this title unless such affidavit is executed by a sponsor of the alien as a contract--

(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;

(B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit (as defined in subsection (e)1), consistent with the provisions of this section; and

(C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2).

(2) Period of enforceability

An affidavit of support shall be enforceable with respect to benefits provided for an alien before the date the alien is naturalized as a citizen of the United States, or, if earlier, the termination date provided under paragraph (3).

(3) Termination of period of enforceability upon completion of required period of employment, etc.

(A) In general

An affidavit of support is not enforceable after such time as the alien (i) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act [42 U.S.C.A § 401 et seq.] or can be credited with such qualifying quarters as provided under subparagraph (B), and (ii) in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 1613 of this title) during any such period.

(B) Qualifying quarters

For purposes of this section, in determining the number of qualifying quarters of coverage under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] an alien shall be credited with--

(i) all of the qualifying quarters of coverage as defined under title II of the Social Security Act worked by a parent of such alien while the alien was under age 18, and

(ii) all of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.

No such qualifying quarter of coverage that is creditable under title II of the Social Security Act for any period beginning after December 31, 1996, may be credited to an alien under clause (i) or (ii) if the parent or spouse (as the case may be) of such alien received any Federal means-tested public benefit (as provided under section 1613 of this title) during the period for which such qualifying quarter of coverage is so credited.

(C) Provision of information to save system

The Attorney General shall ensure that appropriate information regarding the application of this paragraph is provided to the system for alien verification of eligibility (SAVE) described in section 1137(d)(3) of the Social Security Act [42 U.S.C.A. § 1320b-7(d)(3)].

**(b) Reimbursement of government expenses**

(1) Request for reimbursement

(A) Requirement

Upon notification that a sponsored alien has received any means-tested public benefit, 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 shall request reimbursement by the sponsor in an amount which is equal to the unreimbursed costs of such benefit.

(B) Regulations

The Attorney General, in consultation with the heads of other appropriate Federal agencies, shall prescribe such regulations as may be necessary to carry out subparagraph (A).

(2) Actions to compel reimbursement

(A) In case of nonresponse

If within 45 days after a request for reimbursement under paragraph (1)(A), the appropriate entity has not received a response from the sponsor indicating a willingness to commence payment an action may be brought against the sponsor pursuant to the affidavit of support.

(B) In case of failure to pay

If the sponsor fails to abide by the repayment terms established by the appropriate entity, the entity may bring an action against the sponsor pursuant to the affidavit of support.

(C) Limitation on actions

No cause of action may be brought under this paragraph later than 10 years after the date on which the sponsored alien last received any means-tested public benefit to which the affidavit of support applies.

(3) Use of collection agencies

If the appropriate entity under paragraph (1)(A) requests reimbursement from the sponsor or brings an action against the sponsor pursuant to the affidavit of support, the appropriate entity may appoint or hire an individual or other person to act on behalf of such entity acting under the authority of law for purposes of collecting any amounts owed.

**(c) Remedies**

Remedies available to enforce an affidavit of support under this section include any or all of the remedies described in section 3201, 3203, 3204, or 3205 of Title 28, as well as an order for specific performance and payment of legal fees and other costs of collection, and include corresponding remedies available under State law. A Federal agency may seek to collect amounts owed under this section in accordance with the provisions of subchapter II of chapter 37 of Title 31.

**(d) Notification of change of address**

(1) General requirement

The sponsor shall notify the Attorney General and the State in which the sponsored alien is currently a resident within 30 days of any change of address of the sponsor during the period in which an affidavit of support is enforceable.

(2) Penalty

Any person subject to the requirement of paragraph (1) who fails to satisfy such requirement shall, after notice and opportunity to be heard, be subject to a civil penalty of--

(A) not less than $250 or more than $2,000, or

(B) if such failure occurs with knowledge that the sponsored alien has received any means-tested public benefits (other than benefits described in section 1611(b), 1613(c)(2), or 1621(b) of this title) not less than $2,000 or more than $5,000.

The Attorney General shall enforce this paragraph under appropriate regulations.

**(e) Jurisdiction**

An action to enforce an affidavit of support executed under subsection (a) may be brought against the sponsor in any appropriate court--

(1) by a sponsored alien, with respect to financial support; or

(2) by the appropriate entity of the Federal Government, a State or any political subdivision of a State, or by any other nongovernmental entity under subsection (b)(2), with respect to reimbursement.

**(f) "Sponsor" defined**

(1) In general

For purposes of this section the term "sponsor" in relation to a sponsored alien means an individual who executes an affidavit of support with respect to the sponsored alien and who--

(A) is a citizen or national of the United States or an alien who is lawfully admitted to the United States for permanent residence;

(B) is at least 18 years of age;

(C) is domiciled in any of the several States of the United States, the District of Columbia, or any territory or possession of the United States;

(D) is petitioning for the admission of the alien under section 1154 of this title; and

(E) demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line.

(2) Income requirement case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(3) Active duty armed services case

Such term also includes an individual who does not meet the requirement of paragraph (1)(E) but is on active duty (other than active duty for training) in the Armed Forces of the United States, is petitioning for the admission of the alien under section 1154 of this title as the spouse or child of the individual, and demonstrates (as provided in paragraph (6)) the means to maintain an annual income equal to at least 100 percent of the Federal poverty line.

(4) Certain employment-based immigrants case

Such term also includes an individual--

(A) who does not meet the requirement of paragraph (1)(D), but is the relative of the sponsored alien who filed a classification petition for the sponsored alien as an employment-based immigrant under section 1153(b) of this title or who has a significant ownership interest in the entity that filed such a petition; and

(B)(i) who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line, or

(ii) does not meet the requirement of paragraph (1)(E) but accepts joint and several liability together with an individual under paragraph (5)(A).

(5) Non-petitioning cases

Such term also includes an individual who does not meet the requirement of paragraph (1)(D) but who--

(A) accepts joint and several liability with a petitioning sponsor under paragraph (2) or relative of an employment-based immigrant under paragraph (4) and who demonstrates (as provided under paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line; or

(B) is a spouse, parent, mother-in-law, father-in-law, sibling, child ( if at least 18 years of age), son, daughter, son-in-law, daughter-in-law, sister-in-law, brother-in-law, grandparent, or grandchild of a sponsored alien or a legal guardian of a sponsored alien, meets the requirements of paragraph (1) (other than subparagraph (D)), and executes an affidavit of support with respect to such alien in a case in which--

(i) the individual petitioning under section 1154 of this title for the classification of such alien died after the approval of such petition, and the Secretary of Homeland Security has determined for humanitarian reasons that revocation of such petition under section 1155 of this title would be inappropriate; or

(ii) the alien's petition is being adjudicated pursuant to section 1154(l) of this title (surviving relative consideration).

(6) Demonstration of means to maintain income

(A) In general

(i) Method of demonstration

For purposes of this section, a demonstration of the means to maintain income shall include provision of a certified copy of the individual's Federal income tax return for the individual's 3 most recent taxable years and a written statement, executed under oath or as permitted under penalty of perjury under section 1746 of Title 28, that the copies are certified copies of such returns.

(ii) Flexibility

For purposes of this section, aliens may demonstrate the means to maintain income through demonstration of significant assets of the sponsored alien or of the sponsor, if such assets are available for the support of the sponsored alien.

(iii) Percent of poverty

For purposes of this section, a reference to an annual income equal to at least a particular percentage of the Federal poverty line means an annual income equal to at least such percentage of the Federal poverty line for a family unit of a size equal to the number of members of the sponsor's household (including family and non-family dependents) plus the total number of other dependents and aliens sponsored by that sponsor.

(B) Limitation

The Secretary of State, or the Attorney General in the case of adjustment of status, may provide that the demonstration under subparagraph (A) applies only to the most recent taxable year.

**(h) "Federal poverty line" defined**

For purposes of this section, the term "Federal poverty line" means the level of income equal to the official poverty line (as defined by the Director of the Office of Management and Budget, as revised annually by the Secretary of Health and Human Services, in accordance with section 9902(2) of Title 42) that is applicable to a family of the size involved.

**(i) Sponsor's social security account number required to be provided**

(1) An affidavit of support shall include the social security account number of each sponsor.

(2) The Attorney General shall develop an automated system to maintain the social security account number data provided under paragraph (1).

(3) The Attorney General shall submit an annual report to the Committees on the Judiciary of the House of Representatives and the Senate setting forth--

(A) for the most recent fiscal year for which data are available the number of sponsors under this section and the number of sponsors in compliance with the financial obligations of this section; and

(B) a comparison of such numbers with the numbers of such sponsors for the preceding fiscal year.

**8 U.S.C. § 1227**

**§ 1227. Deportable aliens**

**(a) Classes of deportable aliens.**

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

**(5) Public charge**

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

**8 U.S.C. § 1601**

**§ 1601. Statements of national policy concerning welfare and immigration**

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

(2) It continues to be the immigration policy of the United States that--

(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

(3) Despite the principle of self-sufficiency, aliens have been applying for and receiving public benefits from Federal, State, and local governments at increasing rates.

(4) Current 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.

(5) It is 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.

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

(7) With 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 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.

*respond:* The estimated total number of respondents for the information collection Form I–539 paper filers is 174,289 and the estimated hour burden per response is two hours. The estimated total number of respondents for the information collection Form I–539 e-filers is 74,696 and the estimated hour burden per response is 1.08 hours. The estimated total number of respondents for the information collection I–539A is 54,375 and the estimated hour burden per response is 0.5 hour. The estimated total number of respondents for the information collection of Biometrics is 248,985 and the estimated hour burden per response is 1.17 hours.

(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 747,974 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 $56,121,219.

USCIS Form I–912

Under the PRA DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule will require non-substantive edits to USCIS Form I–912, Request for Fee Waiver. These edits make clear to those who request fee waivers that an approved fee waiver can negatively impact eligibility for an immigration benefit that is subject to the public charge inadmissibility determination. Accordingly, USCIS has submitted a PRA Change Worksheet, Form OMB 83–C, and amended information collection instrument to OMB for review and approval in accordance with the PRA.

USCIS Form I–407

Under the PRA, DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule requires the use of USCIS Form I–407 but does not require any changes to the form or instructions and does not impact the number of respondents, time or cost burden. This form is currently approved by OMB under the PRA. The OMB control number for this information collection is 1615–0130.

USCIS Form I–693

Under the PRA, DHS is required to submit to OMB, for review and approval, covered reporting requirements inherent in a rule. This rule requires the use of USCIS Form I–693 but does not require any changes to the form or instructions and does not impact the number of respondents, time or cost burden. This form is currently approved by OMB under the PRA. The OMB control number for this information collection is 1615–0033.

## 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, Immigration, Privacy, 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 214*

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

*8 CFR Part 245*

Aliens, Immigration, Reporting and recordkeeping requirements.

*8 CFR Part 248*

Aliens, Reporting and recordkeeping requirements.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

## PART 103—IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Public Law 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.

■ 2. Section 103.6 is amended by:

a. Revising paragraphs (a)(1), (a)(2)(i), and (c)(1);

■ b. Adding paragraph (d)(3); and

■ c. Revising paragraph (e) The revisions and additions read as follows:

### § 103.6 Surety bonds.

(a) * * *

(1) *Extension agreements; consent of surety; collateral security.* All surety bonds posted in immigration cases must be executed on the forms designated by DHS, a copy of which, and any rider attached thereto, must be furnished to the obligor. DHS is authorized to approve a bond, a formal agreement for the extension of liability of surety, a request for delivery of collateral security to a duly appointed and undischarged administrator or executor of the estate of a deceased depositor, and a power of attorney executed on the form designated by DHS, if any. All other matters relating to bonds, including a power of attorney not executed on the form designated by DHS and a request for delivery of collateral security to other than the depositor or his or her approved attorney in fact, will be forwarded to the appropriate office for approval.

(2) *Bond riders*—(i) *General.* A bond rider must be prepared on the form(s) designated by DHS, and attached to the bond. If a condition to be included in a bond is not on the original bond, a rider containing the condition must be executed.

* * * * *

(c) * * *

*(1) Public charge bonds.* Special rules for the cancellation of public charge bonds are described in 8 CFR 213.1.

* * * * *

(d) * * *

(3) *Public charge bonds.* The threshold bond amount for public charge bonds is set forth in 8 CFR 213.1.

(e) *Breach of bond.* Breach of public charge bonds is governed by 8 CFR 213.1. For other immigration bonds, a bond is breached when there has been a substantial violation of the stipulated conditions. A final determination that a bond has been breached creates a claim in favor of the United States which may not be released by the officer. DHS will determine whether a bond has been breached. If DHS determines that a bond has been breached, it will notify the obligor of the decision, the reasons therefor, and inform the obligor of the right to appeal the decision in accordance with the provisions of this part.

■ 3. Section 103.7 is amended by adding paragraphs (b)(1)(i)(LLL) and (MMM) to read as follows:

### § 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(LLL) Public Charge Bond, Form I–945. $25.

(MMM) Request for Cancellation of Public Charge Bond, Form I–356. $25.

## PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 4. 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, 1185 note (section 7209 of Pub. L. 108–458), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2.

■ 5. 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 alien 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.

■ 6. 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 8 CFR 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 lawful permanent resident, if the application is postmarked (or, if applicable, submitted electronically) on or after October 15, 2019.

### § 212.21 Definitions.

For the purposes of 8 CFR 212.20 through 212.23, the following definitions apply:

(a) *Public Charge.* Public charge means an alien who receives one or more public benefits, as defined in paragraph (b) of this section, for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).

(b) *Public benefit.* Public benefit means:

(1) Any Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits), including:

(i) Supplemental Security Income (SSI), 42 U.S.C. 1381 *et seq.;*

(ii) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 *et seq.;* or

(iii) Federal, State or local cash benefit programs for income maintenance (often called ''General Assistance'' in the State context, but which also exist under other names); and

(2) Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. 2011 to 2036c;

(3) Section 8 Housing Assistance under the Housing Choice Voucher Program, as administered by HUD under 42 U.S.C. 1437f;

(4) Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. 1437f); and

(5) Medicaid under 42 U.S.C. 1396 *et seq.,* except for:

(i) Benefits received for an emergency medical condition as described in 42 U.S.C. 1396b(v)(2)–(3), 42 CFR 440.255(c);

(ii) Services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 *et seq.;*

(iii) School-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under State or local law;

(iv) Benefits received by an alien under 21 years of age, or a woman during pregnancy (and during the 60-day period beginning on the last day of the pregnancy).

(6) Public Housing under section 9 of the U.S. Housing Act of 1937.

(7) Public benefits, as defined in paragraphs (b)(1) through (b)(6) of this section, do not include any public benefits received by an alien who at the time of receipt of the public benefit, or at the time of filing or adjudication of the application for admission or adjustment of status, or application or request for extension of stay or change of status is—

(i) Enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), or

(ii) Serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or

(iii) Is the spouse or child, as defined in section 101(b) of the Act, of an alien described in paragraphs (b)(7)(i) or (ii) of this section.

(8) In a subsequent adjudication for a benefit for which the public charge ground of inadmissibility applies, public benefits, as defined in this section, do not include 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 8 CFR 212.23(a), or for which the alien received a waiver of public charge inadmissibility, as set forth in 8 CFR 212.23(b).

(9) Public benefits, as defined in this section, do not include any public benefits that were or will be received by—

(i) Children of U.S. citizens whose lawful admission for permanent residence and subsequent residence in the legal and physical custody of their U.S. citizen parent will result automatically in the child's acquisition of citizenship, upon meeting the eligibility criteria of section 320(a)–(b) of the Act, in accordance with 8 CFR part 320; or

(ii) Children of U.S. citizens whose lawful admission for permanent residence will result automatically in the child's acquisition of citizenship upon finalization of adoption (if the child satisfies the requirements applicable to adopted children under INA 101(b)(1)), in the United States by the U.S. citizen parent(s), upon meeting the eligibility criteria of section 320(a)–(b) of the Act, in accordance with 8 CFR part 320; or

(iii) Children of U.S. citizens who are entering the United States for the purpose of attending an interview under section 322 of the Act in accordance with 8 CFR part 322.

(c) *Likely at any time to become a public charge.* Likely at any time to become a public charge means more likely than not at any time in the future to become a public charge, as defined in 212.21(a), based on the totality of the alien's circumstances.

(d) *Alien's household.* For purposes of public charge inadmissibility determinations under section 212(a)(4) of the Act:

(1) If the alien is 21 years of age or older, or under the age of 21 and married, the alien's household includes:

(i) The alien;

(ii) The alien's spouse, if physically residing with the alien;

(iii) The alien's children, as defined in 101(b)(1) of the Act, physically residing with the alien;

(iv) The alien's other children, as defined in section 101(b)(1) of the Act, not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;

(v) Any other individuals (including a spouse not physically residing with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's federal income tax return; and

(vi) Any individual who provides to the alien at least 50 percent of the alien's financial support, or who lists the alien as a dependent on his or her federal income tax return.

(2) If the alien is a child as defined in section 101(b)(1) of the Act, the alien's household includes the following individuals:

(i) The alien;

(ii) The alien's children as defined in section 101(b)(1) of the Act physically residing with the alien;

(iii) The alien's other children as defined in section 101(b)(1) of the Act not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;

(iv) The alien's parents, legal guardians, or any other individual providing or required to provide at least 50 percent of the alien's financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided to the alien;

(v) The parents' or legal guardians' other children as defined in section 101(b)(1) of the Act physically residing with the alien;

(vi) The alien's parents' or legal guardians' other children as defined in section 101(b)(1) of the Act, not physically residing with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and

(vii) Any other individual(s) to whom the alien's parents or legal guardians provide, or are required to provide at least 50 percent of such individual's financial support or who is listed as a dependent on the parent's or legal guardian's federal income tax return.

(e) *Receipt of public benefits.* Receipt of public benefits occurs when a public benefit-granting agency provides a public benefit, as defined in paragraph (b) of this section, to an alien as a beneficiary, whether in the form of cash, voucher, services, or insurance coverage. Applying for a public benefit does not constitute receipt of public benefits although it may suggest a likelihood of future receipt. Certification for future receipt of a public benefit does not constitute receipt of public benefits, although it may suggest a likelihood of future receipt. An alien's receipt of, application for, or certification for public benefits solely on behalf of another individual does not constitute receipt of, application for, or certification for such alien.

(f) Primary caregiver means an alien who is 18 years of age or older and has significant responsibility for actively caring for and managing the well-being of a child or an elderly, ill, or disabled person in the alien's household.

**§ 212.22 Public charge inadmissibility determination.**

This section relates to the public charge ground of inadmissibility under section 212(a)(4) of the Act.

(a) *Prospective determination based on the totality of 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 by weighing all factors that are relevant to whether the alien is more likely than not at any time in the future to receive one or more public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period. Except as necessary to fully evaluate evidence provided in paragraph (b)(4)(ii)(E)(*3*) of this section, DHS will not specifically assess whether an alien qualifies or would qualify for any public benefit, as defined in 8 CFR 212.21(b).

(b) *Minimum factors to consider.* A public charge inadmissibility determination must at least entail consideration of the alien's age; health; family status; education and skills; and assets, resources, and financial status, as follows:

(1) *The alien's age*—(i) *Standard.* When considering an alien's age, DHS will consider whether the alien's age makes the alien more likely than not to become a public charge at any time in the future, such as by impacting the alien's ability to work, including whether the alien is between the age of 18 and the minimum ''early retirement age'' for Social Security set forth in 42 U.S.C. 416(*l*)(2).

(ii) [Reserved]

(2) *The alien's health*—(i) *Standard.* DHS will consider whether the alien's health makes the alien more likely than not to become a public charge at any time in the future, including whether the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status.

(ii) *Evidence.* USCIS' consideration includes but is not limited to the following:

(A) A report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required (to which USCIS will generally defer absent evidence that such report is incomplete); or

(B) Evidence of a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status.

(3) *The alien's family status*—(i) *Standard.* When considering an alien's family status, DHS will consider the alien's household size, as defined in 8 CFR 212.21(d), and whether the alien's household size makes the alien more likely than not to become a public charge at any time in the future.

(ii) [Reserved]

(4) *The alien's assets, resources, and financial status*—(i) *Standard.* When considering an alien's assets, resources, and financial status, DHS will consider whether such assets, resources, and financial status excluding any income from illegal activities or sources (*e.g.,* proceeds from illegal gambling or drug sales, and income from public benefits listed in 8 CFR 212.21(b)), make the alien more likely than not to become a public charge at any time in the future, including whether:

(A) The alien's household's annual gross income is at least 125 percent of the most recent Federal Poverty Guideline (100 percent for an alien on active duty, other than training, in the U.S. Armed Forces) based on the alien's household size as defined by section 212.21(d);

(B) If the alien's household's annual gross income is less than 125 percent of the most recent Federal Poverty Guideline (100 percent for an alien on active duty, other than training, in the U.S. Armed Forces), the alien may submit evidence of ownership of significant assets. For purposes of this paragraph, an alien may establish ownership of significant assets, such as savings accounts, stocks, bonds, certificates of deposit, real estate or other assets, in which the combined cash value of all the assets (the total value of the assets less any offsetting liabilities) exceeds:

(*1*) If the intending immigrant is the spouse or child of a United States citizen (and the child has reached his or her 18th birthday), three times the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size;

(*2*) If the intending immigrant is an orphan who will be adopted in the United States after the alien orphan acquires permanent residence (or in whose case the parents will need to seek a formal recognition of a foreign adoption under the law of the State of the intending immigrant's proposed residence because at least one of the parents did not see the child before or during the adoption), and who will, as a result of the adoption or formal recognition of the foreign adoption, acquire citizenship under section 320 of the Act, the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size; or

(*3*) In all other cases, five times the difference between the alien's household income and 125 percent of the FPG (100 percent for those on active duty, other than training, in the U.S. Armed Forces) for the alien's household size.

(C) The alien has sufficient household assets and resources to cover any reasonably foreseeable medical costs, including as related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work;

(D) The alien has any financial liabilities; and whether

(E) The alien has applied for, been certified to receive, or received public benefits, as defined in 8 CFR 212.21(b), on or after October 15, 2019.

(ii) *Evidence.* USCIS' consideration includes, but is not limited to the following:

(A) The alien's annual gross household income including, but not limited to:

(*1*) For each member of the household whose income will be considered, the most recent tax-year transcript from the U.S. Internal Revenue Service (IRS) of such household member's IRS Form 1040, U.S. Individual Income Tax Return; or

(*2*) If the evidence in paragraph (b)(4)(ii)(A)(*1*) of this section is unavailable for a household member, other credible and probative evidence of such household member's income, including an explanation of why such transcript is not available, such as if the household member is not subject to taxation in the United States.

(B) Any additional income from individuals not included in the alien's household provided to the alien's household on a continuing monthly or yearly basis for the most recent calendar year and on which the alien relies or will rely to meet the standard at 8 CFR 212.22(b)(4)(i);

(C) The household's cash assets and resources. Evidence of such cash assets and resources may include checking and savings account statements covering 12 months prior to filing the application;

(D) The household's non-cash assets and resources, that can be converted into cash within 12 months, such as net cash value of real estate holdings minus the sum of all loans secured by a mortgage, trust deed, or other lien on the home; annuities; securities; retirement and educational accounts; and any other assets that can easily be converted into cash;

(E) Evidence that the alien has:

(*1*) Applied for or received any public benefit, as defined in 8 CFR 212.21(b), on or after October 15, 2019 or disenrolled or requested to be disenrolled from such benefit(s); or

(*2*) Been certified or approved to receive any public benefit, as defined in 8 CFR 212.21(b), on or after October 15, 2019 or withdrew his or her application or disenrolled or requested to be to disenrolled from such benefit(s);

(*3*) Submitted evidence from a Federal, State, local, or tribal agency administering a public benefit, as defined in 212.21(b), that the alien has specifically identified as showing that the alien does not qualify or would not qualify for such public benefit by virtue of, for instance, the alien's annual gross household income or prospective immigration status or length of stay;

(F) Whether the alien has applied for or has received a USCIS fee waiver for an immigration benefit request on or after October 15, 2019, unless the fee waiver was applied for or granted as part of an application for which a public charge inadmissibility determination under section 212(a)(4) of the Act was not required.

(G) The alien's credit history and credit score in the United States, and other evidence of the alien's liabilities not reflected in the credit history and credit score (*e.g.,* any mortgages, car loans, unpaid child or spousal support, unpaid taxes, and credit card debt); and

(H) Whether the alien has sufficient household assets and resources (including, for instance, health insurance not designated as a public benefit under 8 CFR 212.21(b)) to pay for reasonably foreseeable medical costs, such as costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for himself or herself, to attend school, or to work;

(5) *The alien's education and skills.* (i) *Standard.* When considering an alien's education and skills, DHS will consider whether the alien has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being more likely than not to become a public charge.

(ii) *Evidence.* USCIS' consideration includes but is not limited to the following: (A) The alien's history of employment, excluding employment involving illegal activities, *e.g.,* illegal gambling or drug sales. The alien must provide the following:

(*1*) The last 3 years of the alien's tax transcripts from the U.S. Internal Revenue Service (IRS) of the alien's IRS Form 1040, U.S. Individual Income Tax Return; or

(*2*) If the evidence in paragraph (b)(5)(ii)(A)(*1*) of this section is unavailable, other credible and probative evidence of the alien's history of employment for the last 3 years, including an explanation of why such transcripts are not available, such as if the alien is not subject to taxation in the United States;

(B) Whether the alien has a high school diploma (or its equivalent) or has a higher education degree;

(C) Whether the alien has any occupational skills, certifications, or licenses; and

(D) Whether the alien is proficient in English or proficient in other languages in addition to English.

(E) Whether the alien is a primary caregiver as defined in 8 CFR 212.21(f), such that the alien lacks an employment history, is not currently employed, or is not employed full time. Only one alien within a household can be considered a primary caregiver of the same individual within the household. USCIS' consideration with respect this paragraph includes but is not limited to evidence that an individual the alien is caring for resides in the alien's household, evidence of the individual's age, and evidence of the individual's medical condition, including disability, if any.

(6) *The alien's prospective immigration status and expected period of admission.*

(i) *Standard.* DHS will consider the immigration status that the alien seeks and the expected period of admission as it relates to the alien's ability to financially support for himself or herself during the duration of the alien's stay, including:

(A) Whether the alien is applying for adjustment of status or admission in a nonimmigrant or immigrant classification; and

(B) If the alien is seeking admission as a nonimmigrant, the nonimmigrant classification and the anticipated period of temporary stay.

(ii) [Reserved]

(7) *An affidavit of support under section 213A of the Act, when required under section 212(a)(4) of the Act, that meets the requirements of section 213A of the Act and 8 CFR 213a*—(i) *Standard.* If the alien is required under sections 212(a)(4)(C) or (D) to submit an affidavit of support under section 213A of the Act and 8 CFR part 213a, and submits such a sufficient affidavit of support, DHS will consider the likelihood that the sponsor would actually provide the statutorily-required amount of financial support to the alien, and any other related considerations.

(A) *Evidence.* USCIS consideration includes but is not limited to the following:

(*1*) The sponsor's annual income, assets, and resources;

(*2*) The sponsor's relationship to the applicant, including but not limited to whether the sponsor lives with the alien; and

(*3*) Whether the sponsor has submitted an affidavit of support with respect to other individuals.

(c) *Heavily weighted factors.* The factors below will weigh heavily in a public charge inadmissibility determination. The mere presence of any one heavily weighted factor does not, alone, make the alien more or less likely than not to become a public charge.

(1) *Heavily weighted negative factors.* The following factors will weigh heavily in favor of a finding that an alien is likely at any time in the future to become a public charge:

(i) The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment;

(ii) The alien has received or has been certified or approved to receive one or more public benefits, as defined in § 212.21(b), for more than 12 months in the aggregate within any 36-month period, beginning no earlier than 36 months prior to the alien's application for admission or adjustment of status on or after October 15, 2019;

(iii)(A) The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for himself or herself, attend school, or work; and

(B) The alien is uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition; or

(iv) The alien was previously found inadmissible or deportable on public charge grounds by an Immigration Judge or the Board of Immigration Appeals.

(2) *Heavily weighted positive factors.* The following factors will weigh heavily in favor of a finding that an alien is not likely to become a public charge:

(i) The alien's household has income, assets, or resources, and support (excluding any income from illegal activities, *e.g.,* proceeds from illegal gambling or drug sales, and any income from public benefits as defined in § 212.21(b)) of at least 250 percent of the Federal Poverty Guidelines for the alien's household size;

(ii) The alien is authorized to work and is currently employed in a legal industry with an annual income, excluding any income from illegal activities such as proceeds from illegal gambling or drug sales, of at least 250 percent of the Federal Poverty Guidelines for the alien's household size; or

(iii) The alien has private health insurance, except that for purposes of this paragraph (c)(2)(iii), private health insurance must be appropriate for the expected period of admission, and does not include health insurance for which the alien receives subsidies in the form of premium tax credits under the Patient Protection and Affordable Care Act, as amended.

(d) *Treatment of benefits received before* October 15, 2019. For purposes of this regulation, DHS will consider, as a negative factor, but not as a heavily weighted negative factor as described in paragraph (c)(1) of this section, any amount of cash assistance for income maintenance, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), State and local cash assistance programs that provide benefits for income maintenance (often called ''General Assistance'' programs), and programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received, or certified for receipt, before October 15, 2019, as provided under the 1999 Interim Field Guidance, also known as the 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds. DHS will not consider as a negative factor any other public benefits received, or certified for receipt, before October 15, 2019.

**§ 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 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 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 sections 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 re-registering 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) A nonimmigrant described in section 101(a)(15)(A)(i) and (A)(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) A nonimmigrant classifiable as C–2 (alien in transit to U.N. Headquarters) or C–3 (foreign government official), 22 CFR 41.21(d);

(15) A nonimmigrant described in section 101(a)(15)(G)(i), (G)(ii), (G)(iii), and (G)(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) A nonimmigrant classifiable as NATO–1, NATO–2, NATO–3, NATO–4 (NATO representatives), and NATO–6 in accordance with 22 CFR 41.21(d);

(17) An applicant for nonimmigrant status under section 101(a)(15)(T) of the Act, in accordance with 8 CFR 212.16(b);

(18) Except as provided in section 212.23(b), an individual who is 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) Has 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) Has 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 § 212.23(b),

(i) A petitioner 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) An individual who is 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 is 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 individual is 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 section 212.23(b), any alien who is a VAWA self-petitioner under section 212(a)(4)(E)(i) of the Act;

(21) Except as provided in section 212.23(b), 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), 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; and

(27) 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 §§ 212.23(a)(18) through (21) must submit an affidavit of support as described in section 213A of the Act 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 waiver of the public charge ground of inadmissibility that is authorized by law or regulation.

## PART 213—PUBLIC CHARGE BONDS

■ 7. The authority citation for part 213 is revised to read as follows:

**Authority:** 8 U.S.C. 1103; 1183; 8 CFR part 2.

■ 8. Revise the part heading to read as set forth above.

■ 9. Revise § 213.1 to read as follows:

### § 213.1 Adjustment of status of aliens on submission of a public charge bond.

(a) *Inadmissible aliens.* In accordance with section 213 of the Act, after an alien seeking adjustment of status has been found inadmissible as likely at any time in the future to become a public charge under section 212(a)(4) of the Act, DHS may allow the alien to submit a public charge bond, if the alien is otherwise admissible, in accordance with the requirements of 8 CFR 103.6 and this section. The public charge

bond must meet the conditions set forth in 8 CFR 103.6 and this section.

(b) *Discretion.* The decision to allow an alien inadmissible under section 212(a)(4) of the Act to submit a public charge bond is in DHS's discretion. If an alien has one or more heavily weighted negative factors as defined in 8 CFR 212.22 in his or her case, DHS generally will not favorably exercise discretion to allow submission of a public charge bond.

(c) *Public Charge Bonds.* (1) *Types.* DHS may require an alien to submit a surety bond, as listed in 8 CFR 103.6, or cash or any cash equivalents specified by DHS. DHS will notify the alien of the type of bond that may be submitted. All surety, cash, or cash equivalent bonds must be executed on a form designated by DHS and in accordance with form instructions. When a surety bond is accepted, the bond must comply with requirements applicable to surety bonds in 8 CFR 103.6 and this section. If cash or a cash equivalent, is being provided to secure a bond, DHS must issue a receipt on a form designated by DHS.

(2) *Amount.* Any public charge bond must be in an amount decided by DHS, not less than $8,100, annually adjusted for inflation based on the Consumer Price Index for All Urban Consumers (CPI–U), and rounded up to the nearest dollar. The bond amount decided by DHS may not be appealed by the alien or the bond obligor.

(d) *Conditions of the bond.* A public charge bond must remain in effect until USCIS grants a request to cancel the bond in accordance with paragraph (g) of this section, whereby the alien naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, dies, the alien has reached his or her 5-year anniversary since becoming a lawful permanent resident, or the alien changes immigration status to one not subject to public charge ground of inadmissibility. An alien on whose behalf a public charge bond has been submitted may not receive any public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 364month period (such that, for instance, receipt of two benefits in one month counts as two months, after the alien's adjustment of status to that of a lawful permanent resident, until the bond is cancelled in accordance with paragraph (g) of this section. An alien must also comply with any other conditions imposed as part of the bond.

(e) *Submission.* A public charge bond may be submitted on the alien's behalf only after DHS notifies the alien and the alien's representative, if any, that a bond may be submitted. The bond must be submitted to DHS in accordance with the instructions of the form designated by DHS for this purpose, with the fee prescribed in 8 CFR 103.7(b), and any procedures contained in the DHS notification to the alien. DHS will specify the bond amount and any other conditions, as appropriate for the alien and the immigration benefit being sought. USCIS will notify the alien and the alien's representative, if any, that the bond has been accepted, and will provide a copy to the alien and the alien's representative, if any, of any communication between the obligor and the U.S. government. An obligor must notify DHS within 30 days of any change in the obligor's or the alien's physical and mailing address.

(f) *Substitution.* (1) *Substitution Process.* Either the obligor of the bond previously submitted to DHS or a new obligor may submit a substitute bond on the alien's behalf. The substitute bond must specify an effective date. The substitute bond must meet all of the requirements applicable to the initial bond as required by this section and 8 CFR 103.6, and if the obligor is different from the original obligor, the new obligor must assume all liabilities of the initial obligor. The substitute bond must also cover any breach of the bond conditions which occurred before DHS accepted the substitute bond, in the event DHS did not learn of the breach until after DHS accepted the substitute bond.

(2) *Acceptance.* Upon submission of the substitute bond, DHS will review the substitute bond for sufficiency as set forth in this section. If the substitute bond is sufficient DHS will cancel the bond previously submitted to DHS, and replace it with the substitute bond. If the substitute bond is insufficient, DHS will notify the obligor of the substitute bond to correct the deficiency within the timeframe specified in the notice. If the deficiency is not corrected within the timeframe specified, the previously submitted bond will remain in effect.

(g) *Cancellation of the Public Charge Bond.* (1) An alien or obligor may request that DHS cancel a public charge bond if the alien:

(i) Naturalized or otherwise obtained United States citizenship;

(ii) Permanently departed the United States;

(iii) Died;

(iv) Reached his or her 5-year anniversary since becoming a lawful permanent resident; or

(v) Obtained a different immigration status not subject to public charge inadmissibility, as listed in 8 CFR 212.23, following the grant of lawful permanent resident status associated with the public charge bond.

(2) *Permanent Departure Defined.* For purposes of this section, permanent departure means that the alien lost or abandoned his or her lawful permanent resident status, whether by operation of law or voluntarily, and physically departed the United States. An alien is only deemed to have voluntarily lost lawful permanent resident status when the alien has submitted a record of abandonment of lawful permanent resident status, on the form prescribed by DHS, from outside the United States, and in accordance with the form's instructions.

(3) *Cancellation Request.* A request to cancel a public charge bond must be made by submitting a form designated by DHS, in accordance with that form's instructions and the fee prescribed in 8 CFR 103.7(b). If a request for cancellation of a public charge bond is not filed, the bond shall remain in effect until the form is filed, reviewed, and a decision is rendered. DHS may in its discretion cancel a public charge bond if it determines that an alien otherwise meets the eligibility requirements of paragraphs (g)(1) of this section.

(4) *Adjudication and Burden of Proof.* The alien and the obligor have the burden to establish, by a preponderance of the evidence, that one of the conditions for cancellation of the public charge bond listed in paragraph (g)(1) of this section has been met. If DHS determines that the information included in the cancellation request is insufficient to determine whether cancellation is appropriate, DHS may request additional information as outlined in 8 CFR 103.2(b)(8). DHS must cancel a public charge bond if DHS determines that the conditions of the bond have been met, and that the bond was not breached, in accordance with paragraph (h) of this section. For cancellations under paragraph (g)(1)(iv) of this section, the alien or the obligor must establish that the public charge bond has not been breached during the 5-year period preceding the alien's fifth anniversary of becoming a lawful permanent resident.

(5) *Decision.* DHS will notify the obligor, the alien, and the alien's representative, if any, of its decision regarding the request to cancel the public charge bond. When the public charge bond is cancelled, the obligor is released from liability. If the public charge bond has been secured by a cash deposit or a cash equivalent, DHS will refund the cash deposit and any interest earned to the obligor consistent with 8 U.S.C. 1363 and 8 CFR 293.1. If DHS denies the request to cancel the bond,

DHS will notify the obligor and the alien, and the alien's representative, if any, of the reasons why, and of the right of the obligor to appeal in accordance with the requirements of 8 CFR part 103, subpart A. An obligor may file a motion pursuant to 8 CFR 103.5 after an unfavorable decision on appeal.

(h) *Breach.* (1) *Breach and Claim in Favor of the United States.* An administratively final determination that a bond has been breached creates a claim in favor of the United States. Such claim may not be released or discharged by an immigration officer. A breach determination is administratively final when the time to file an appeal with the Administrative Appeals Office (AAO) pursuant to 8 CFR part 103, subpart A, has expired or when the appeal is dismissed or rejected.

(2) *Breach of Bond Conditions.* (i) The conditions of the bond are breached if the alien has received public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months), after the alien's adjustment of status to that of a lawful permanent resident and before the bond is cancelled under paragraph (g) of this section. DHS will not consider any public benefits, as defined in 8 CFR 212.21(b), received by the alien during periods while an alien was present in the United States in a category that is exempt from the public charge ground of inadmissibility or for which the alien received a waiver of public charge inadmissibility, as set forth in 8 CFR 212.21(b) and 8 CFR 212.23, and public benefits received after the alien obtained U.S. citizenship, when determining whether the conditions of the bond have been breached. DHS will not consider any public benefits, as defined in 8 CFR 212.21 (b)(1) through (b)(3), received by an alien who, at the time of receipt filing, adjudication or bond breach or cancellation determination, is enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or if received by such an individual's spouse or child as defined in section 101(b) of the Act; or

(ii) The conditions of the bond otherwise imposed by DHS as part of the public charge bond are breached.

(3) *Adjudication.* DHS will determine whether the conditions of the bond have been breached. If DHS determines that it has insufficient information from the benefit-granting agency to determine whether a breach occurred, DHS may request additional information from the benefit-granting agency. If DHS determines that it has insufficient information from the alien or the obligor, it may request additional information as outlined in 8 CFR part 103 before making a breach determination. If DHS intends to declare a bond breached based on information that is not otherwise protected from disclosure to the obligor, DHS will disclose such information to the obligor to the extent permitted by law, and provide the obligor with an opportunity to respond and submit rebuttal evidence, including specifying a deadline for a response. DHS will send a copy of this notification to the alien and the alien's representative, if any. After the obligor's response, or after the specified deadline has passed, DHS will make a breach determination.

(4) *Decision.* DHS will notify the obligor and the alien, and the alien's representative, if any, of the breach determination. If DHS determines that a bond has been breached, DHS will inform the obligor of the right to appeal in accordance with the requirements of 8 CFR part 103, subpart A. With respect to a breach determination for a surety bond, the alien or the alien's representative, if any, may not appeal the breach determination or file a motion.

(5) *Demand for Payment.* Demands for amounts due under the terms of the bond will be sent to the obligor and any agent/co-obligor after a declaration of breach becomes administratively final.

(6) *Amount of Bond Breach and Effect on Bond.* The bond must be considered breached in the full amount of the bond.

(i) *Exhaustion of administrative remedies.* Unless an administrative appeal is precluded by regulation, a party has not exhausted the administrative remedies available with respect to a public charge bond under this section until the party has obtained a final decision in an administrative appeal under 8 CFR part 103, subpart A.

(ii) [Reserved]

## PART 214—NONIMMIGRANT CLASSES

■ 10. The authority citation for part 214 continues to read as follows:

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Public Law 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 11. Section 214.1 is amended by:

■ a. Adding paragraph (a)(3)(iv),

■ b. Removing the term, ''and'' in paragraph (c)(4)(iii);

The additions read as follows:

### § 214.1 Requirements for admission, extension, and maintenance of status.

(a) * * *

(3) * * *

(iv) Except where the nonimmigrant classification for which the alien seeks to extend is exempt from section 212(a)(4) of the Act or that section has been waived, as a condition for approval of extension of status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status he or she seeks to extend one or more public benefits as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). For the purposes of this determination, DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date.

* * * * *

## PART 245—ADJUSTMENT OF STATUS TO THAT OF A PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 12. 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.

■ 13. Amend § 245.4 by redesignating the undesignated text as paragraph (a) and adding paragraph (b) to read as follows:

### § 245.4 Documentary requirements.

* * * * *

(b) For purposes of public charge determinations under section 212(a)(4) of the Act and 8 CFR 212.22, an alien who is seeking adjustment of status under this part must submit a declaration of self-sufficiency on a form designated by DHS, in accordance with form instructions.

■ 14. 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 applicant's unlawful presence in the United States, section 212(a)(9)(B)(iii) of the Act is not applicable, and the applicant 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.

## PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

■ 15. The authority citation for part 248 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

■ 16. Section 248.1 is amended by:

■ a. Revising paragraph (a);

■ b. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f), respectively; and

■ c. Adding a new paragraph (b); and

■ d. Revising newly redesignated paragraph (c)(4).

The revisions and additions read as follows:

### § 248.1 Eligibility.

(a) *General.* Except for those classes enumerated in § 248.2 of this part, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status in accordance with section 247 of the Act who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification other than that of a spouse or fiance(e), or the child of such alien, under section 101(a)(15)(K) of the Act or as an alien in transit under section 101(a)(15)(C) of the Act. Except where the nonimmigrant classification to which the alien seeks to change is exempted by law or regulation from section 212(a)(4) of the Act, as a condition for approval of a change of nonimmigrant status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status from which he or she seeks to change, public benefits, as described in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date . An alien defined by section 101(a)(15)(V) or 101(a)(15)(U) of the Act may be accorded nonimmigrant status in the United States by following the procedures set forth in 8 CFR 214.15(f) and 214.14, respectively.

(b) *Decision in change of status proceedings.* Where an applicant or petitioner demonstrates eligibility for a requested change of status, it may be granted at the discretion of DHS. There is no appeal from the denial of an application for change of status.

(c) * * *

(4) As a condition for approval, an alien seeking to change nonimmigrant classification must demonstrate that he or she has not received, since obtaining the nonimmigrant status from which he or she seeks to change, one or more public benefits, as defined in 8 CFR 212.21(b), for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). For purposes of this determination, DHS will only consider public benefits received on or after October 15, 2019 for petitions or applications postmarked (or, if applicable, submitted electronically) on or after that date. This provision does not apply to classes of nonimmigrants who are explicitly exempt by law or regulation from section 212(a)(4) of the Act.

* * * * *

**Kevin K. McAleenan,**

*Acting Secretary of Homeland Security.*

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