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Submitted to: policyfeedback@uscis.dhs.gov
Cc: Amanda Baran

Re: Immigrant Legal Resource Center (ILRC) Comments on New Policy Manual Guidance on the Public Charge Ground of Inadmissibility – 8 USCIS-PM G (Dec. 19, 2022, effective Dec. 23, 2022)

Dear USCIS,

We write to comment on the updated Policy Manual sections on the Public Charge Ground of Inadmissibility at Volume 8, Part G, released December 19, 2022, and effective December 23, 2022. Overall, these changes are a welcome development for adjustment applicants and the advocates who represent them, providing greater clarity on when and how the public charge test will be applied.

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC is a leader in family-based immigration, including public charge inadmissibility and the affidavit of support, producing trusted legal resources including webinars, trainings, and manuals such as *Families & Immigration: A Practical Guide* and *Public Charge and Immigration Law*. The ILRC provides technical legal support for attorneys, DOJ-accredited representatives, and non-profit programs who represent immigrants during the process of applying for permanent residence.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local service providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. For many, one of the benefits of becoming a U.S. citizen is being able to sponsor family members such as parents, children, and siblings by filing a visa petition and affidavit of support, and ensuring their family members meet the requirements of the public charge ground of inadmissibility. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits and sponsor family members. As a member of the Protecting Immigrant Families (PIF) campaign, we have also developed our nuanced understanding of the challenges posed by the public charge ground of inadmissibility.

While we are appreciative of the many positive aspects of the new policy manual guidance, we also offer some suggested improvements that USCIS can implement. USCIS has identified specific goals for the implementation of the new public charge rule[1] and the suggested language below will further those goals. Specifically, we recommend giving more weight to a sufficient affidavit of support, narrowly interpreting state and local benefits, providing further guidance on what is considered "long-term institutionalized care paid for by the government," eliminating consideration of approval for future receipt of benefits and prior application for fee waivers, adopting as policy issuing a request for evidence or notice of intent to deny prior to a denial based on public charge, and clarifying bond policies and procedures to promote fairness and due process.

I. ILRC commends USCIS for many positive improvements to the USCIS Policy Manual.

Recognition that most applicants subject to a public charge test are ineligible for benefits that would hurt them in a public charge assessment (8 USCIS-PM G.7(A) "Most Noncitizens Are Not Eligible for Public Benefits"). The ILRC appreciates USCIS's explicit acknowledgement that most applicants subject to public charge are not eligible for the types of public benefits that can be considered as part of a public charge determination. Although impacted noncitizens are unlikely to read Policy Manual guidance, this nonetheless will help combat the chilling effect from legal representatives who erroneously advise against an adjustment applicant's use of benefits due to misunderstanding about which benefits might be considered for public charge purposes and a tendency to conservatively err on the side of assuming such benefits might count, rather than that they do not.

Clarification that disability alone does not mean a person is likely to become a public charge and recognition that many disabilities do not impact a person's health or ability to support themselves (8 USCIS-PM G.5(B)(2) "Relationship Between Health and Disability"). The ILRC applauds USCIS's clarification that simply because a person has a disability, that does not mean they are likely to become a public charge in the future. This will avoid discriminating against those with disabilities in the public charge analysis and hopefully promote a fairer and more just application of the law, for all applicants.

Inclusion of income from unauthorized employment in household income calculation (8 USCIS-PM G.5(D) "Income"). We commend USCIS's position on consideration of income, regardless of whether the applicant or other household member worked with valid employment authorization. As the guidance notes, working without authorization may raise other issues, unrelated to public charge inadmissibility, but should not affect the determination whether a person is in danger of being primarily dependent on the government for subsistence, the central inquiry in the public charge assessment. This approach avoids blurring the lines between different grounds of inadmissibility and other immigration violations and helps adjudicating officers focus on the central analysis for public charge, rather than extraneous facts that may have the tendency to bias an already highly subjective assessment but shed no light on whether the applicant will be primarily reliant on the government for support in the future.

Guidance on consideration of receipt of benefits (8 USCIS-PM G.7). The ILRC appreciates USCIS providing details about how officers should evaluate current or past receipt of benefits that count in terms of amount, duration, and recency of receipt, and for allowing an applicant to submit evidence that might counterbalance the negative impact of their receipt of benefits. Taking this approach will ensure that receipt of benefits does not unduly tip the scales in favor of a negative public charge finding and will more closely approximate whether current or past receipt has any

[1] USCIS, *Clarifying the 2022 Public Charge Rule*, https://www.uscis.gov/sites/default/files/document/flyers/PublicChargeFinalRule2022_Infographic_V4_508.pdf.

bearing on potential future receipt (i.e. the longer ago and/or less amount of benefits received, the less likely a person will rely upon similar benefits in the future).

Clarification that earned benefits and student loans, scholarships, and grants do not count as public charge (8 USCIS-PM G.7(E)). The ILRC appreciates USCIS's list of public benefits programs that do not count, especially earned benefits like Social Security retirement benefits, government pensions, veterans' benefits, and unemployment insurance which notably were missing from the final rule published in September 2022. We also appreciate inclusion of student loans, scholarships, and grants in the list of programs that do not count in a public charge inadmissibility determination, since the ILRC often fields questions from community members and practitioners about college and university-related assistance like these. The longer and more extensive a list of programs that do not count that USCIS is able to compile and post, both in the Policy Manual guidance and on the USCIS website, the more successful USCIS will be in reversing the chilling effect created by the Trump-era public charge rule since practitioners and the public are most likely to be reassured by statements from the government, rather than other sources.

Identification of extenuating circumstances that might warrant consideration in the totality of the circumstances (8 USCIS-PM G.9(A)(3) "Other Notable Circumstances Relevant in the Totality of the Circumstances"). The ILRC commends USCIS for specifically identifying certain factual situations that may be relevant in the totality of the circumstances, most significantly where noncitizens have experienced crime, domestic violence, or other adverse circumstances and consequently had to use public benefits that will be considered in a public charge determination. Providing officers guidance on these particular extenuating circumstances and allowing for a more expansive "other adverse circumstances" catch-all category better enables adjudicators to flexibly apply a holistic approach, as mandated by the statute.

Hypothetical totality of the circumstances scenarios (8 USCIS-PM G.7(B) "Totality of the Circumstances Scenarios"). The ILRC appreciates USCIS's inclusion of hypothetical examples to help illustrate how an officer might review a case in the totality of the circumstances. This will help practitioners to screen, evaluate, and advise applicants on how their own situations might be viewed in the totality of the circumstances, including helping practitioners identify weaknesses that may need to be bolstered with additional evidence, and aid practitioners in giving clients a realistic assessment of the likelihood USCIS will find them inadmissible based on public charge.

II. USCIS should give more weight to a sufficient affidavit of support and amend policy manual guidance to reflect its importance.

The ILRC agrees that a sufficient affidavit of support should be a positive consideration in making a public charge determination. However, we urge USCIS to adhere to the longstanding adjudicatory principle that a statutorily sufficient affidavit of support demonstrates that the applicant, in consideration of the totality of factors, is not likely to become a public charge. A sufficient affidavit of support indicates the person has family and community ties willing to support them, while taking into account family size and financial resources of the household. Further, the affidavit of support provides a form and evidentiary standard that is consistent across applications, providing clarity for adjudicators and applicants alike. Significant precedent exists for using a sufficient affidavit of support as the cornerstone of the public charge inquiry and creating a rebuttable presumption that the applicant has overcome the public charge ground of inadmissibility.[2]

[2] *See, e.g.,* 9 FAM § 302.8-2(B)(2)(b) ("A properly filed, non-fraudulent Form I-864, should normally be considered sufficient to satisfy the INA 212(a)(4) requirements.").

- The language of 8 USCIS-PM 6.D should be altered to recognize the longstanding precedent that a statutorily sufficient affidavit of support is strong proof that an applicant is not likely to become a public charge:

  Therefore, a sufficient Form I-864 is a positive consideration in the totality of the circumstances and creates a rebuttable presumption that the applicant is not likely to become a public charge. ~~However, a sufficient Form I-864 does not, alone, result in a finding that a noncitizen is not inadmissible under the public charge ground due to the statute's requirement to consider the statutory minimum factors~~

III. USCIS should narrowly interpret state and local benefits as cash assistance for income maintenance.

The ILRC appreciates USCIS's lengthy list of programs that do not count in 8 USCIS-PM G.7(E). However, it is impossible to create an exhaustive list, including those programs that do not count as "public cash assistance for income maintenance," and any confusion will likely perpetuate the chilling effect created by the 2019 final rule and discourage noncitizens from accessing benefits that they and their families need and for which they qualify. To ameliorate this as much as possible, the ILRC urges USCIS to adopt a narrow interpretation of such programs by instructing adjudicating officers, in line with 8 USCIS-PM G.7(A) ("Most Noncitizens Are Not Eligible for Public Benefits"), to start with the presumption that any benefits the applicant may have received do not count for public charge purposes and should not be considered as part of the public charge analysis (since this is the most likely scenario).

- 8 USCIS-PM G.7 should be revised to include additional language on narrowly interpreting state and local benefits, as follows:

  USCIS considers current and/or past receipt of public cash assistance for income maintenance and long-term institutionalization at government expense in the totality of the circumstances, taking into account the amount, duration, and recency of the receipt. Current and/or past receipt of benefits alone, however, is not a sufficient basis to determine whether an applicant is likely at any time to become a public charge. As discussed in 8 USCIS-PM G.7(A), most noncitizens are not eligible for public benefits considered as part of the public charge inadmissibility determination. Thus, adjudicators should narrowly interpret "state, tribal, territorial, or local cash benefit programs for income maintenance" since most likely any cash assistance program the noncitizen may be receiving is not a public benefit referenced in section 212.21(b). See 8 CFR 212.21(b).

- 8 USCIS-PM G.7(B) also should be revised to include additional language on narrowly interpreting state and local benefits, as follows:

  Public cash assistance for income maintenance means:

  - *Supplemental Security Income (SSI);*
  - *Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF) program; and*
  - *State, tribal, territorial, or local cash benefit programs for income maintenance.*

  As discussed in 8 USCIS-PM G.7(A), most noncitizens are not eligible for public benefits considered as part of the public charge inadmissibility determination. Thus, adjudicators should narrowly interpret "state, tribal,

territorial, or local cash benefit programs for income maintenance" since most likely any cash assistance program the noncitizen may be receiving is not a public benefit referenced in section 212.21(b). See 8 CFR 212.21(b).

IV. USCIS should provide more clarification on what is considered long-term institutionalization.

The Policy Manual guidance provides some explanation as to what is considered "long-term institutionalization at government expense," at 8 USCIS-PM G.2(C) and 8 USCIS-PM G.7(C), however further clarification is needed.

First, as currently worded in the Policy Manual guidance it is unclear whether caregiver respite care or behavioral health or substance abuse disorder treatment are not considered "long-term institutionalization" because of the nature of the care, or the duration of the care.[3]

- One way to make this clearer would be to rephrase 8 USCIS-PM G.7(C), if accurate, to separate the durational discussion from the discussion of types of institutionalized care as follows:

  Long-term institutionalization does not include ~~imprisonment for conviction of a crime~~ or institutionalization for short periods or for rehabilitation purposes.[251] *Long-term institutionalization also does not include sporadic or intermittent periods of institutionalization, even on a recurring basis.*

  Long-term institutionalization does not include imprisonment for conviction of a crime or, ~~such as~~ for caregiver respite care or behavioral health or substance abuse disorder treatment. HCBS are also not considered as long-term institutionalization at government expense.

Second, while the guidance states that individuals who have been offered Home and Community Based Services (HCBS) and declined in favor of the continuation of institutionalization would be considered long-term institutionalized, it is not clear under what circumstances applicants in nursing homes who rely on Medicaid would fall into this category. Medicaid is the primary payer of long-term care in the United States and covers 6 in 10 nursing home residents. USCIS must provide more guidance for nursing home residents and others institutionalized at government expense where HCBS is available and how they will be assessed. For example, USCIS should clarify whether nursing home residents in areas where HCBS are not as readily available will be found inadmissible even if HCBS cannot be offered.

Third, USCIS should clarify how an individual can determine that their institutionalization is paid for by Medicaid, and whether *other* government assistance, besides Medicaid, might pay for long-term institutionalization such that it would be considered as public charge. Currently, the Policy Manual guidance makes it sound as though Medicaid is not the only way in which long-term institutionalization could be at government expense: "For the purpose of a public charge inadmissibility determination, 'long-term institutionalization at government expense' means government assistance for long-term institutionalization (*in the case of Medicaid* . . ."[4] but no other examples are given, apart from Medicaid.

[3] 8 USCIS-PM G.7(C).
[4] 8 USCIS-PM G.2(C) (emphasis added).

Fourth, USCIS should clarify what duration is considered "a long period of time short of indefinite duration."[5] The rule[6] and policy manual guidance are clear that sporadic stays–those that end in discharge–in a facility at government expense will not be considered long-term institutionalization. However, a "long period" of institutionalization is not defined and raises concerns of inconsistent interpretation by USCIS adjudicators. USCIS should provide examples or parameters that better define this factor to ensure consistency and to avoid confusion.

V. USCIS should eliminate consideration of approval for future receipt of benefits.

While the new guidance states that certification or approval for future receipt of benefits will not be considered as "receipt" of benefits,[7] USCIS still proposes to consider approval for future receipt of benefits in the totality of the circumstances.[8] This is a distinction without a difference and regrettably continues the approach from the 2019 final rule, which looked at certification or approval for future receipt of benefits as part of the overall public charge assessment.[9] The ILRC urges USCIS to eliminate this guidance, especially as USCIS states it expects such approval for future receipt to be very rare, to avoid unnecessarily adding to the chilling effects related to people's fears about accessing benefits for which they qualify (which USCIS also acknowledges is unlikely to create public charge problems based on the vast majority of applicants' general ineligibility for benefits that count).

- To effectuate this change, USCIS should strike in its entirety 8 USCIS-PM G.9(A)(1) "Potential Future Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense":

  ~~*1. Potential Future Receipt of Public Cash Assistance for Income Maintenance or Long-term Institutionalization at Government Expense*~~

  ~~*Although USCIS expects this to be rare, it is possible that an applicant could, on their own behalf, be certified for, or approved to receive in the future, public cash assistance for income maintenance or long-term institutionalization at government expense.*~~

  ~~*While such certification or approval would not constitute receipt of such benefits under the regulations,[293] evidence of such certification or approval could indicate the probability of future receipt, and be considered by USCIS as probative of whether the applicant is likely to become a public charge at any time in the future.[294] As such, USCIS considers this certification or approval for future receipt, if any, in the totality of the circumstances.*~~

[5] *Id.*
[6] See 87 Fed. Reg. 55472, 55563 (Sept. 9, 2022).
[7] 8 USCIS-PM G.2(D) ("[A]pproval for future receipt of a public benefit . . . is also not considered receipt.").
[8] 8 USCIS-PM G.9(A)(1) (". . . it is possible that an applicant could, on their own behalf, be certified for, or approved to receive in the future, public cash assistance for income maintenance or long-term institutionalization at government expense. While such certification or approval would not constitute receipt of such benefits under the regulations, evidence of such certification or approval could indicate the probability of future receipt, and be considered by USCIS as probative of whether the applicant is likely to become a public charge . . . As such, USCIS considers this certification or approval for future receipt, if any, in the totality of the circumstances.").
[9] DHS, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41502 (Aug. 14, 2019) ("Certification for future receipt of a public benefit does not constitute receipt of public benefits, although it may suggest a likelihood of future receipt.").

VI. USCIS should eliminate consideration of fee waivers as part of the totality of the circumstances.

The new Policy Manual guidance inexplicably includes past receipt of a fee waiver as a consideration in the totality of the circumstances to determine the likelihood of becoming a public charge. This will create a chilling impact on immigrants generally in need of a fee waiver since the negative connotation of seeking and receiving one is made clear by the Policy Manual, even though the eligibility to receive a fee waiver rests on standards that are different from public charge.

Fee waivers have never been an explicit factor in evaluating public charge until adopted by the prior administration in its public charge rule that was enjoined and ultimately vacated.[10] In practice, there are few applications for which an adjustment applicant might have applied for a fee waiver in the past, other than possibly an application for advance parole (I-131), employment authorization (I-765), or Temporary Protected Status (I-821).

Consideration of such past fee waivers contradicts other USCIS guidance on public charge under the new rule, since a fee waiver may be based on receipt of public benefits by a family member, but the public charge guidance specifically states that receipt of any benefit by a family member may not be considered. Under both existing policy and DHS's proposed rule on the USCIS fee schedule, the agency specifically allows a fee waiver by a parent to be based on a child's receipt of a public benefit, describing, for example, that "A child's receipt of public housing assistance . . . will be acceptable as required evidence of the parent's eligibility for a fee waiver, when the parent resides in the same household." [11] However, the public charge rule specifically states that receipt of a public benefit by a family member may not be considered in the public charge determination.[12] If USCIS allows for fee waivers to be considered as part of the public charge analysis, in the totality of the circumstances, then this guidance will essentially negate the rule's prohibition against considering family member receipt of benefits.

The Policy Manual reference to fee waivers invites confusion and erroneous determinations by adjudicators because it does not describe the fact that the determination of fee waiver eligibility has different criteria than a public charge determination. It also may invite officers to consider fee exemptions that are granted by statute and regulation, where public charge is not an admissibility ground. This last part was at least specifically excluded from the 2019 final rule on public charge, cited above. As such, USCIS should not consider the receipt of a fee waiver as a factor in the public charge inquiry.

- USCIS should strike in its entirety 8 USCIS-PM G.9(A)(2) "Other Relevant Information":

  ~~*2. Other Relevant Information*~~

  ~~*The totality of the circumstances analysis includes all information or evidence in the record before the officer that is relevant to a public charge inadmissibility determination, including forms and evidence previously submitted to USCIS.*~~

[10] DHS, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. at 41503 (directing USCIS officers to consider "Whether the [noncitizen] has applied for or has received a USCIS fee waiver for an immigration benefit request . . . unless the fee waiver was applied for or granted as part of an application for which a public charge inadmissibility determination . . . was not required.").
[11] DHS, USCIS Fee Schedule and Changes to Certain other Immigration Benefit Request Requirements, 88 Fed. Reg. 402, 458 (Jan. 4, 2023).
[12] 87 Fed. Reg. at 55637; 8 CFR § 2112.21(d); *see also* 8 USCIS-PM G.2(D).

~~*For example, it is possible that some applicants for adjustment of status may have previously requested and received a fee waiver for a prior immigration benefit. In such a case, the officer considers this evidence in the totality of circumstances, such as by taking into account the recency and amount of the fee waiver, as well as the grounds for eligibility.*~~

~~*As a general matter, the most common eligibility criteria for a fee waiver are receipt of a means-tested benefit or household income below 150 percent of the Federal Poverty Guidelines (FPG), both of which would already be evident in the applicant's responses to questions on Form I-485. If the fee waiver were requested on the basis of financial hardship, then the officer could request additional evidence on the nature and recency of such hardship in the totality of the circumstances. Note that USCIS is not collecting information about previously received fee waivers on Form I-485. However, if such information is in the record, officers may consider it in the totality of the circumstances.*~~

VII. USCIS should adopt as policy the issuance of an RFE or NOID before denying an application based on the public charge ground of inadmissibility.

USCIS should issue a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) in all cases where the officer is inclined to deny based on public charge inadmissibility, since most public charge concerns can be favorably resolved with a new affidavit of support and/or additional documentation. Thus, as a matter of policy all applicants in danger of a negative public charge finding should be allowed the opportunity to provide further documentation before a denial because most of the time this will remedy the problem. This opportunity to supplement the record prior to a negative public charge finding is especially important to ensure fairness for pro se applicants, who may not have fully understood what the public charge test entails and what information and evidence they should provide.

- Specifically, USCIS should change 8 USCIS-PM G.9(D)(1) "Request for Evidence or Notice of Intent to Deny" as follows:

  If the initial evidence submitted by the applicant does not establish eligibility or ineligibility, USCIS ~~may~~ must first issue a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) to request more information or evidence from the applicant in accordance with USCIS policy, prior to issuing a final decision denying based on public charge.

VIII. USCIS should clarify that applicants are not required to give up their appeal rights or concede inadmissibility to post a public charge bond; USCIS also should provide for automatic expiration of the bond under certain circumstances.

Applicants should not be required to concede inadmissibility to post a public charge bond, if offered by the officer as a matter of discretion on a case-by-case basis. If an applicant disagrees with an officer's public charge finding but is offered the opportunity to post a bond, they should be able to appeal or otherwise challenge the public charge determination while seeking bond. USCIS should also clarify whether a person can pay a bond but later seek to have it canceled by proving they are not a public charge.

The guidance, at 8 USCIS-PM G.12(D), states that a public charge bond can be canceled by USCIS at its own discretion or upon the noncitizen or obligor filing Form I-356, Request for Cancellation of Public Charge Bond, based on the noncitizen's death, permanent departure from the United States, becoming a U.S. citizen, or after 5 years as an LPR without having breached the public charge bond. USCIS should make bond cancellation automatic, without

the burdensome requirement that the noncitizen or obligor file Form I-356, after 5 years following the grant of LPR status or at time of naturalization. These events should trigger USCIS review for public charge bond breach and, if none is found, result in automatic cancellation of the bond.

Conclusion

In short, the ILRC commends USCIS for the positive aspects of the Policy Manual guidance that will provide clarity and consistency in public charge adjudications. We provide these additional suggestions to help USCIS achieve its implementation goals and ensure that the public charge ground of inadmissibility is applied consistently and narrowly.

Please do not hesitate to reach out to us with any questions or to discuss any of these suggestions further.

Best regards,

/s/
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