April 25, 2022

Mr. Andrew Parker, Branch Chief
Residence and Admissibility Branch
Residence and Naturalization Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20588-0009

Via Electronic Submission: www.regulations.gov

RE: America First Legal Foundation's Comments on the Department of Homeland Security Notice of Proposed Rulemaking, "Public Charge Ground of Inadmissibility," 87 FR 10570, DHS Docket No. USCIS-2021-0013 (Feb. 24, 2022)

Dear Mr. Parker:

America First Legal Foundation ("AFL") is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process, and equal protection for all Americans, and encourage the diffusion of knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States.

We submit these comments regarding DHS's February 24, 2022, Notice of Proposed Rulemaking ("NPRM"), 87 Fed. Reg. 10,570 (Feb. 24, 2022) (the "NPRM" or "proposed rule").

I. Summary

In short, the proposed rule is practically ineffective and will encourage the use of myriad public benefits by aliens, while simultaneously rendering wholly useless the public charge ground of inadmissibility.

If DHS finalizes this NPRM, we will spare no expense and make every effort to ensure that it is properly enjoined, held unlawful, and set aside. AFL asks you to withdraw it.

Throughout the proposed rule, DHS appears more concerned with the chilling effect of a *functioning* public charge ground of inadmissibility on aliens' willingness to accept public benefits than on upholding the sacred values of self-sufficiency. And while limiting the public charge ground of inadmissibility's efficacy, DHS proposes placing a tremendous burden on the taxpayers and on the federal, state, tribal, and local agencies that administer these programs.

Under the guise of "long-standing precedent," the proposed rule seeks to narrowly define critical concepts, including "public charge," and the types of public benefits that could lead to such a determination. In so doing, the proposed rule ignores Congressional intent dating back to the late Nineteenth Century in favor of an interim guidance memo that was never meant to be the equivalent of a final agency rule. Additionally, in differentiating between types of public benefits, the proposed rule uses semantics as facts to argue substantive differences between cash and non-cash benefits.

While failing to justify any policy determination or provide any reasoned analysis other than to rebuke the previous Administration, the NPRM makes it impossible for an adjudicator to determine that an alien is, in fact, a public charge. The NPRM removes the concept of weighted evidence that empirically would demonstrate that someone was more or less likely to become a public charge. Additionally, the notion that the mere presence of an affidavit of support of the immigrant in the record is sufficient to overcome the burden is nonsensical. The federal government has never truly implemented processes for holding affiants accountable.

The NPRM arbitrarily limits the applicability of the proposed rule to exclude applicants for change and extension of status, even as it acknowledges that the Secretary has the discretion to set conditions, it ignores public charge bond provisions, and eliminates exclusions for military personnel included in the 2019 Final Rule.

The timing for this proposed rule could not be worse. The United States is in a crisis because the Biden Administration has opened the southern border and effectively ended immigration enforcement. The proposed rule will needlessly exacerbate an already explosive situation. Any changes viewed as further easing immigration enforcement or access to public benefits for aliens will serve as a tremendous pull factor leading toward even more illegal immigration.

II. The Proposed Definitions Are Too Narrow.

Congress has never defined the term "public charge," but its intent is clear. The term first appeared in statute in the Immigration Act of 1882, where Congress barred the admission of "any person unable to take care of himself or herself without becoming a public charge."[1] While subsequent immigration legislation addressed prohibitions for and inadmissibility of those that are found to be public charges, in 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").[2] It included a statement of national policy on 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[.]

PRWORA went on to restrict the federal benefits that aliens were able to receive and more relevant to this discussion—broadly defined federal public benefits.[3]

After PRWORA's passage, the former Immigration and Naturalization Service undertook rulemaking on the public charge issue and simultaneously issued *interim field guidance* on the same. The guidance, commonly known as the Pearson Memo,[4] forms the basis for the definitions that DHS now proposes to include in its proposed rule. The proposition that longstanding *field guidance*—especially *interim* field guidance—should serve as the precedential basis for agency action, despite clear Congressional intent to the contrary, lacks merit. The definitions are too restrictive and fly in the face of the Congressional statement of national policy outlined in PRWORA.

In keeping with the Pearson Memo, the NPRM proposes to define as a public charge an alien who is primarily dependent on the government for subsistence, and states

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[1] Immigration Act of 1882, ch. 376, sec.2, 22 Stat. 213 (1882).
[2] Public Law 104-193, 110 Stat. 2105.
[3] *Id* at Section 401(c).
[4] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 65 Fed. Reg. 28689 (Effective May 21, 1999).

that this definition is "a better interpretation of the statute and properly balances the competing policy objectives established by Congress."[5]

Upon closer examination, such a definition or interpretation does not further the policy objectives established by Congress. Congress did not want aliens drawn into this country with the promise of reliance on public benefits at taxpayer expense. Limiting the determination for public charge purposes to "primarily dependent" ignores the fact that the alien may still be dependent on costly benefits, even if not primarily relying on a benefit for income subsistence. In short, this definition will allow many aliens receiving public benefits to easily evade a finding, or even be subject to a determination that they are, in fact, a public charge.

DHS further states that it does not believe that the definition should "include a person who receives benefits from the government to help to meet some needs but is not primarily depending on the government and instead has one or more sources of independent income or resources upon which the individual primarily relies."[6] This is, at best, a semantic distinction as DHS seeks to differentiate the utilization of benefits. If the goal is to avoid reliance on the government for support, it is unclear from this proposed rule why an alien who relies on support—regardless of the type and regardless of the use—should not even be evaluated as a potential public charge simply because they fail to meet DHS'S primary reliance standard.

The NPRM also alters the benefits DHS may consider, contrary to the definition of federal benefits as enacted by Congress in PRWORA. Under the guise of being "fair and humane,"[7] the proposed rule purports to define public charge as only meaning cash benefits for income maintenance purposes or long-term institutionalization, when at government expense. Focusing on the former, this definition relegates public charge determinations to only those aliens receiving supplemental social security income, cash assistance under Temporary Assistance for Needy Families ("TANF"), or other state, local, or tribal cash programs.[8] While appearing to be broad and sufficiently encompassing in scope, the definition restricts those benefits which could be considered in an analysis.

With the focus on cash benefits, DHS notes that many public assistance programs meet particular needs and are geared to individuals who also have other means of

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[5] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10606 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).
[6] *Id*.
[7] U.S. Dep't of Homeland Security, DHS Proposes Fair and Humane Public Charge Rule (Feb. 17, 2022), https://www.dhs.gov/news/2022/02/17/dhs-proposes-fair-and-humane-public-charge-rule.
[8] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10669 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

primary support. While true, this fact does not lessen an individual's reliance on the public assistance program or suggest that an individual is not otherwise primarily reliant on it. Instead, DHS continually repeats the assertion that because it believes that most non-cash benefit programs are supplemental, the nature of those programs is sufficiently distinct from cash programs to show that individuals are not primarily relying on them.

If we limit the analysis to reliance for income, then DHS is, on its face correct. But Congress was concerned about aliens relying on government-funded welfare programs, not about aliens utilizing only income-deriving benefits. There is simply no functional difference between a cash and a non-cash benefit. Non-cash benefits drain the taxpayer fisc in the same way as cash benefits do, as noncash benefits must still be purchased, with cash, by the taxpayer. A recipient of federal or state housing assistance is significantly reliant on the government and so are recipients of Medicaid or other state low or no-cost medical benefits. Yet, under this proposed rule, neither of those public benefits, nor any other benefit not directly providing cash to a recipient, could be considered in determining whether an alien is a public charge. Either DHS is outright ignoring these and other significant benefits, or it is drawing an artificial distinction between income deriving cash benefits and other significant non-cash benefits.

DHS should only look to whether an individual is, in fact, relying on a public benefit at all. If the goal is to ensure that aliens are not reliant on the government, the focus should be on how much the government spends on the benefit, not simply whether the benefit is income-deriving.

DHS should withdraw this narrow and flawed definition of public benefit and promulgate a new NPRM that defines public benefit in a manner more consistent with Congressional intent and with the way states and the federal government distribute monies for public benefits. While a *de minimis* exception to certain benefits programs may be appropriate, it is not appropriate to exclude whole programs where any state is spending billions of dollars per year. It is unfathomable for DHS to suggest that an alien in receipt of such a benefit should not, at a minimum, be subject to a public charge determination. It is contrary to our principles of self-sufficiency to adopt a rule like this one.

III. The Proposed Rule Fails to Justify Its Policy Decisions

Throughout its discussion of the proposed regulatory changes, the NPRM references DHS's perceived disagreements with the 2019 Final Rule. The Administrative Procedure Act ("APA") prohibits agency actions that are "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with the law."[9] While the Biden Administration is within its discretion to take a different approach from previous administrations—so long as that different approach is consistent with the law—proposed rules require justification and stated reasoning when amending regulations.[10] In the instant case, many of the decisions appear to be made simply because they are in contravention of the 2019 Final Rule.

In determining whether an alien is a public charge, DHS's proposed rule focuses only on the statutorily enumerated minimum requirements and the affidavit of support. While AFL certainly agrees with DHS's proposal that adjudicators utilize a totality of the circumstances standard, as required by law, our agreement with the process ends there.

In its discussion of the proposed changes, DHS rebuked the 2019 Final Rule where officers were provided with prescribed standards for how to address the statutory factors and made clear what should be viewed positively and negatively in the adjudication.[11] DHS now finds that this was too complicated of a process and prefers a return to the "longstanding and straightforward framework."[12] This is not a reasoned analysis. DHS fails to recognize that the 2019 standards were included to better instruct officers instead of providing nothing more than a list with no other guidance. The public charge ground of inadmissibility has been under-utilized for many years largely because of lack of legal precedent and clear field guidance. With the Pearson Memo being in effect since 1999 and not producing much needed clarity in those past 23 years, it makes little sense why DHS now feels that this is the best approach to follow. Clearly officers were unable to follow this guidance, given that it was simply being ignored. DHS needs to now provide clearer standards within the regulatory text to give better instruction to its officers.

Additionally, the proposed rule notes that the 2019 Final Rule required an evaluation of the sponsor's affidavit of support.[13] DHS now believes that such an evaluation is unnecessary and that simply having an affidavit of support in the record should be

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[9] 5 U.S.C. § 706(2)(A).
[10] "The APA requires an agency to provide notice of a proposed rule, an opportunity for comment, and statement of the basis and purpose of the final rule adopted. *American Medical Ass'n v. Reno*, 57 F. 3d 1129, 1132 (DC Cir. 1995).
[11] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41502 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).
[12] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245). NPRM at 10617.
[13] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41504 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).

sufficient for the alien to meet his or her burden in the adjudication. In making this determination, DHS notes that the affidavit of support is an enforceable contract.[14] While accurate, to suggest this as a reason for not making an independent determination is insincere and not a justification for a policy decision. DHS conveniently ignores the government's longstanding history of failure to hold sponsors accountable and to, where appropriate, take legal action to enforce those contracts. If DHS is going to simply consider a properly filed affidavit of support as sufficient evidence of support, DHS must take additional steps in this regulation to reform the affidavit of support and hold accountable those that are in breach of this enforceable contract.

In the 2019 Final Rule, DHS opted to apply the rule to those aliens changing or extending their nonimmigrant status in the United States.[15] While DHS correctly notes that an applicant for extension or change of status is not an applicant for adjustment of status or admission, DHS does note that it has the discretion to set conditions on granting those applications and petitions.[16] DHS fails to provide any reasoned analysis as to why these aliens should not be subject to the proposed rule. It opines that these nonimmigrants are generally not eligible for various types of public benefits and that certain nonimmigrant classes must, as a condition of admission, provide sufficient funds.[17] AFL does not contest DHS's discretion to set conditions as noted above but if these classes of aliens are some that may ultimately be able to utilize certain public benefit programs, DHS cannot simply hide behind discretion. Interested parties and the citizens of this country, in general, have a right to understand why DHS intends, as a policy choice, to use its discretion not to include the public charge determination as a condition. To simply say that it will not is insufficient and does not provide a meaningful opportunity to comment on the proposed rule.

The 2019 Final Rule significantly amended provisions related to public charge bonds. Providing, for the first time, a workable framework to realistically implement and actually use public charge bonds as a part of U.S. immigration law.[18] DHS has now

[14] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245). NPRM at 10618.
[15] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41507 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).
[16] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10600 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).
[17] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10601 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).
[18] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41504 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).

declined to make any change to the existing framework, instead finding that the "existing regulations provide an adequate framework for DHS to exercise its discretion."[19] The existing framework is only adequate if, in DHS's discretion, the goal is to never use this authority. In fact, DHS notes that this is not a priority given that there is a small pool of instances where it would be inclined to use this authority. The public charge bond, much like the affidavit of support, is a tool to ensure compliance with the immigration law and ensure that an alien will not ultimately become a public charge in the United States. It stands to reason that DHS, the department tasked with administering our nation's immigration laws would be interested in utilizing the tools at its disposal to carry out such a task. Accordingly, it is troubling that the proposed rule so plainly states DHS's intention to ignore this authority and to underutilize the public charge bond to the extent that amending the relevant regulations are not necessary. The justification for such a policy choice is lacking in the NPRM, but it is quite apparent: DHS intends to eviscerate the public charge ground of inadmissibility. AFL ask DHS to reconsider its position on public charge bonds and make needed reforms, in much the same manner as the 2019 Final Rule to ensure that such bonds can be made operationally feasible.

Lastly, AFL notes with dismay DHS's decision to part with the 2019 Final Rule in yet another way. It no longer excludes military service members from consideration based on receipt of public benefits. In the 2019 Final Rule, DHS excluded active-duty U.S. service members and their spouses and children from consideration if they received benefits.[20] In this proposed rule, DHS no longer believes that is appropriate. Yet again, it is not something that was considered in the 1999 Interim Field Guidance and that faux-precedent weighs heavily in this proposed rule. Additionally, DHS maintains that U.S. service-members do not typically receive the income-deriving benefits that give rise to public charge determinations.[21] AFL is appalled by this analysis and assertion that these brave men and women and their families should not be provided with special dispensation based on their service to this country simply because it is unlikely that they will not need the income-deriving benefits. This NPRM has carved-out exemptions and exclusions for all manner of benefits and classes of aliens and the exception will swallow the rule. However, DHS has erred in

[19] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10626 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).
[20] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41501 (Finalized Aug. 14, 2019) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, and 248).
[21] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10623 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

excluding U.S. service members and their family members from that already expansive list.

IV. The NPRM Fails to Adequately Consider the Administrative Burdens or Costs to the States

The NPRM includes an economic analysis purporting to consider the cost of implementing this rule on the affected population as well as the government. This analysis is deficient as it fails to consider the actual administrative burdens placed on each state–affected parties by this NPRM–which undertake much of the responsibility in administering the public benefits considered in this analysis. DHS should consider additional factors.

The lengthy economic analysis focuses on the chilling effect of implementing a public charge definition more expansive than what is proposed. Beyond the typical analysis of the cost to process and adjudicate an application under this rule, DHS seems concerned only with the impact of disenrollment of public benefits because of this NPRM or aliens forgoing enrollment entirely.

In its analysis, DHS attempts to argue that disenrollment or forgoing enrollment from public benefits has downstream economic impacts that, due to lessened transfer payments, will negatively affect the economy. The problem is that DHS readily acknowledges that it is unable to "quantify the State portion of the transfer payment due to a lack of data related to State-level administration of these public benefit programs."[22] This statement belies DHS's argument that the economic analysis is complete and that the NPRM provides a fulsome picture of the state of public benefit administration and the economy should this NPRM be finalized.

Additionally, while DHS focuses on a reduction of transfer payments as a net negative, it fails to explore the savings to taxpayers on either the state or federal side. The federal government and each state spends millions of dollars per year administering its public benefits system which provides billions of dollars per year. Any reduction in payments because of this rule has an impact on federal and state benefit distributions. DHS has an obligation to broadly analyze those impacts and include its findings in the analysis. Assuming that DHS's analysis is correct, this must result in a savings to the taxpayers that is quantifiable and should be included to provide a more complete analysis.

[22] Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570, 10663 (proposed Feb. 24, 2022) (to be codified at 8 C.F.R. parts 212 and 245).

Additionally, DHS fails to analyze the effect of any larger alternative that, more consistently with the Congressional intent, ensures that aliens seeking admission or other benefits do not become a public charge. Accordingly, such an analysis should not be limited to the chilling affect for aliens already present in the United States but the benefit for the taxpayers and the lessening burdens on our already overwhelmed systems of public benefits. DHS's limited analysis belies its true intent and ignores its charge to faithfully execute the immigration laws of this nation as mandated by Congress.

V. Conclusion

For the reasons set forth above—and for other related issues not listed here– America First Legal strongly opposes this proposed rule and urges the Department of Homeland Security to withdraw it.