***The following is the text of the proposed rule that the Secretary approved on February 16, 2022. The official version of this document will publish in the* Federal Register *and be available at https://www.federalregister.gov. The comment period will open on the date of the official version's publication in the* Federal Register.**

Billing Code: 9111-97

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 212 and 245

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

RIN 1615-AC74

Public Charge Ground of Inadmissibility

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) proposes to prescribe how it determines whether a noncitizen is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act (INA) because they are likely at any time to become a public charge. Noncitizens who seek adjustment of status or a visa, or who are applicants for admission, must establish that they are not likely at any time to become a public charge, unless Congress has expressly exempted them from this ground of inadmissibility or has otherwise permitted them to seek a waiver of inadmissibility. Under this proposed rule, a noncitizen would be considered likely at any time to become a public charge if they are likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense. In August of 2019, DHS issued a different rule on this topic, which is no longer in effect. This proposed rule, if finalized, would implement a different policy than the August 2019 Final Rule.

DATES: Written comments and related material must be submitted on or before [Insert date 60

days after the date of publication in the Federal Register].

ADDRESSES: You may submit comments on this NPRM, identified by DHS Docket No. USCIS-2021-0013, through the Federal eRulemaking Portal: *https://www.regulations.gov*. Follow the website instructions for submitting comments.

Comments submitted in a manner other than the one listed above, including emails or letters sent to the Department of Homeland Security (DHS) or U.S. Citizenship and Immigration Services (USCIS) officials, will not be considered comments on the NPRM and may not be considered by DHS. Please note that DHS and USCIS cannot accept any comments that are hand-delivered or couriered. In addition, USCIS cannot accept comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is not accepting mailed comments. If you cannot submit your comment by using *https://www.regulations.gov*, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at (240) 721-3000 for alternate instructions.

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

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Table of Abbreviations

ADA – Americans with Disabilities Act

ANPRM – Advance Notice of Proposed Rulemaking

ASC – Application Support Center

BIA – Board of Immigration Appeals

BLS – Bureau of Labor Statistics

CBP – Customs and Border Protection

CDC – Centers for Disease Control and Prevention

CFR – Code of Federal Regulations

CHIP – Children's Health Insurance Program

COS – Change of Status

COVID-19 – Coronavirus Disease 2019

DACA – Deferred Action for Childhood Arrivals

DHS – U.S. Department of Homeland Security

DOS – U.S. Department of State

DOJ – Department of Justice

EOS – Extension of Stay

FAM – Department of State Foreign Affairs Manual

FBR – Federal Benefit Rate

FDA – Food and Drug Administration

HCBS – Home and Community Based Services

HCV – Housing Choice Voucher

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

HSA – Homeland Security Act

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

IIRIRA – Illegal Immigration Reform and Immigrant Responsibility Act of 1996

INA – Immigration and Nationality Act

INS – Immigration and Naturalization Service

IRCA – Immigration Reform and Control Act

LPR – Lawful Permanent Resident

LRIF – Liberian Refugee Immigration Fairness Act

NACARA – Nicaraguan Adjustment and Central American Relief Act

NATO – North Atlantic Treaty Organization

NEPA – National Environmental Policy Act

NOID – Notice of Intent to Deny

NPRM – Notice of Proposed Rulemaking

OAW – Operation Allies Welcome

OMB – Office of Management and Budget

PHA – Public Housing Agency

PHE – Public Health Emergency

PRA – Paperwork Reduction Act

PRWORA – Personal Responsibility and Work Opportunity Reconciliation Act of 1996

RFA – Regulatory Flexibility Act of 1980

RFE – Request for Additional Evidence

RIA – Regulatory Impact Analysis

SIPP – Survey of Income and Program Participation

SNAP – Supplemental Nutrition Assistance Program

SSA – Social Security Administration

SSI – Supplemental Security Income

TANF – Temporary Assistance for Needy Families

TPS – Temporary Protected Status

UMRA – Unfunded Mandates Reform Act of 1995

USCIS – U.S. Citizenship and Immigration Services

USDA – U.S. Department of Agriculture

VAWA – Violence Against Women Act

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

I. Public Participation

DHS invites all interested parties to submit written data, views, comments, and

arguments on all aspects of this NPRM. Comments must be submitted in English, or an English translation must be provided.

Instructions for comments: All submissions may be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov*, and may include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy and Security Notice available at *https://www.regulations.gov*.

Docket: For access to the docket and to read background documents or comments received, go to *https://www.regulations.gov*, referencing DHS Docket No. USCIS-2021-0013. You may also sign up for email alerts on the online docket to be notified when comments are posted, or a final rule is published.

II. Executive Summary

DHS seeks to administer section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), in a manner that will be clear and comprehensible for officers as well as for noncitizens[1] and their families and will lead to fair and consistent adjudications, thereby mitigating the risk of unequal treatment of similarly situated individuals. DHS proposes to define the term "likely at any time to become a public charge" in regulation and to identify the types of public benefits that would be

[1] For purposes of this discussion, USCIS uses the term "noncitizen" colloquially to be synonymous with the term "alien."

considered as part of the public charge inadmissibility determination. DHS also proposes to establish general principles regarding consideration of current and past receipt of public benefits in public charge inadmissibility determinations.

Additionally, DHS proposes the factors that DHS would consider in prospectively determining, under the totality of the circumstances framework, whether an applicant for admission or adjustment of status before DHS is inadmissible under the public charge ground. DHS proposes to amend existing information collections submitted with applications for adjustment of status to that of a lawful permanent resident to include questions relevant to the statutory minimum factors. DHS also proposes to require that all written denial decisions issued by USCIS to applicants reflect consideration of each of the statutory minimum factors, as well as the Affidavit of Support Under Section 213A of the INA where required, consistent with the standards set forth in the proposed rule, and specifically articulate the reasons for the officer's determination.

On August 14, 2019, DHS issued a different rule on the public charge ground of inadmissibility, which is no longer in effect.[2] The 2019 Final Rule expanded DHS's definition of "public charge," and was associated with a heavy direct paperwork burden on applicants and adjudicators. The 2019 Final Rule was also associated with widespread indirect effects, primarily with respect to those who were not even subject to the public charge ground of inadmissibility, such as U.S. citizen children in mixed-status households. Notwithstanding these widespread indirect effects, during the time that the 2019 Final Rule was in place, of the 47,555

[2] *See* 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 2, 2019).

applications for adjustment of status to which the rule was applied, DHS issued only 3 denials (which were subsequently reopened and approved) and 2 Notices of Intent to Deny (which were ultimately rescinded, and the applications were approved) based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A)-(B) of the INA, 8 U.S.C. 1182(a)(4)(A)-(B).

This proposed rule, if finalized, would implement a different policy than the 2019 Final Rule. As discussed at greater length below, DHS believes that, in contrast to the 2019 Final Rule, this proposed rule would effectuate a more faithful interpretation of the statutory concept of "likely at any time to become a public charge"; avoid unnecessary burdens on applicants, adjudicators, and benefits-granting agencies; and mitigate the possibility of widespread "chilling effects" with respect to individuals disenrolling or declining to enroll themselves or family members in public benefits programs for which they are eligible, especially by individuals who are not subject to the public charge ground of inadmissibility.

A. Major Provisions of the Regulatory Action

DHS proposes to include the following major changes:

• Amending 8 CFR 212.18, Application for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. This section clarifies that T nonimmigrants seeking adjustment of status are not subject to the public charge ground of inadmissibility.

• Adding 8 CFR 212.20, Applicability of public charge inadmissibility. This section identifies the categories of noncitizens who are subject to the public charge ground of inadmissibility.

• Adding 8 CFR 212.21, Definitions. This section establishes key regulatory definitions: likely at any time to become a public charge, public cash assistance for income maintenance, long-term institutionalization at government expense, receipt (of public benefits), and government.

• Adding 8 CFR 212.22, Public charge inadmissibility determination. This section clarifies that evaluating the likelihood at any time of becoming a public charge is a prospective determination based on the totality of the circumstances. This section provides details on how the statutory minimum factors, as well as an Affidavit of Support Under Section 213A of the INA, if required, and current or past receipt of public benefits would be considered when making a public charge inadmissibility determination. This section also states that the fact that an applicant has a disability, as defined by section 504 of the Rehabilitation Act (Section 504), will not alone be a sufficient basis to determine whether the noncitizen is likely at any time to become a public charge. This section also includes categories of noncitizens whose past or current receipt of public benefits will not be considered in a public charge inadmissibility determination.

• Adding 8 CFR 212.23, Exemptions and waivers for public charge ground of inadmissibility. This section provides a list of statutory and regulatory exemptions from and waivers of the public charge ground of inadmissibility.

• Amending 8 CFR 245.23, Adjustment of aliens in T nonimmigrant classification. This section clarifies that T nonimmigrants seeking adjustment of status are not subject to the public charge ground of inadmissibility.

B. Summary of Legal Authority

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

C. Summary of Costs and Benefits

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

Relative to the No Action Baseline, the primary source of quantified new direct costs for the proposed rule is the increase in the time required to complete Form I-485. DHS estimates

that the proposed rule would impose additional new direct costs of approximately $12,871,511 annually to applicants filing Form I-485. In addition, the proposed rule would result in an annual savings for a subpopulation of affected individuals; T nonimmigrants applying for adjustment of status would no longer need to submit Form I-601 to seek a waiver of the public charge ground of inadmissibility. DHS estimates the total annual savings for this population would be $15,359. DHS estimates that the total annual net costs would be $12,856,152.[3]

Over the first 10 years of implementation, DHS estimates the total net costs of the proposed rule would be approximately $128,561,520 (undiscounted). In addition, DHS estimates that the 10-year discounted total net costs of this proposed rule would be about $109,665,584 at a 3-percent discount rate and about $90,296,232 at a 7-percent discount rate.

DHS expects the primary benefit of this proposed rule to be the qualitative benefit of establishing clear standards governing a determination that a noncitizen is inadmissible based on the public charge ground.

Tables 1 and 2 provide a more detailed summary of the proposed provisions and their impacts relative to the No Action Baseline and Pre-Guidance Baseline, respectively.

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

[3] Calculations: Total annual net costs ($12,856,152) = Total annual costs ($12,871,511) – Total annual savings ($15,359)

Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including "likely at any time to become a public charge," "receipt (of public benefits)," "public cash assistance for income maintenance," "long-term institutionalization at government expense," and "government."	

Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual.

		Transfer Payments: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.
Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on the public charge ground.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground. Costs • None **Transfer Payments**: • The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the

		limited period that they are in such status or eligible for such benefits.
Source: USCIS analysis.		

Table 2. Summary of Major Provisions and Economic Impacts of the Proposed Rule, FY 2022 – FY 2032 (Relative to the Pre-Guidance Baseline)		
Provision	**Purpose**	**Expected Impact of Proposed Rule**
Revising 8 CFR 212.18. Application for waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on

		inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including "likely at any time to become a public charge," "receipt (of public benefits)," "public cash assistance for income maintenance," "long-term institutionalization at government expense," and "government."	
Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or

		disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. **Transfer Payments**: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.
Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on the public charge ground.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground. Costs • None **Transfer Payments**: • The primary impact of the proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer

		payments from the Federal and State governments to individuals. However, DHS is unable to quantify these effects given how much time has passed between the issuance of the 1999 Interim Field Guidance and this rulemaking. • The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.
Source: USCIS analysis.		

III. Background

A. Legal Authority

The Secretary's authority for issuing this proposed rule is found in various sections of the Immigration and Nationality Act (INA, 8 U.S.C. 1101 et seq.), and the Homeland Security Act of 2002 (HSA).[4]

Section 102 of the HSA, 6 U.S.C. 112, and section 103 of the INA, 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration laws of the United

[4] *See* Pub. L. 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq. (Nov. 25, 2002).

States. Section 101 of the HSA, 6 U.S.C. 111, establishes that part of DHS's primary mission is to ensure that efforts, activities, and programs aimed at securing the homeland do not diminish either the overall economic security of the United States or the civil rights and civil liberties of persons.

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

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

In general, under section 213 of the INA, 8 U.S.C. 1183, the Secretary has the discretion to admit into the United States a noncitizen who is determined to be inadmissible based only on the public charge ground upon the giving of a suitable and proper bond or undertaking approved by the Secretary.[5]

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

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

B. Grounds of Inadmissibility Generally

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[5] *See* INA sec. 213, 8 U.S.C. 1183.

The United States has a long history of permitting noncitizens to enter the United States, whether permanently or on a temporary basis. At the same time, Congress has sought to exclude noncitizens who pose a threat to the safety or general welfare of the country or who seek to violate immigration laws.[6]

Congress has exercised this authority in part by establishing the concepts of admission[7] and inadmissibility in the INA.[8] Noncitizens may be inadmissible due to a range of acts, conditions, and conduct.[9] If a noncitizen is inadmissible as described in section 212(a) of the INA, 8 U.S.C. 1182(a), that noncitizen is ineligible to be admitted to the United States and ineligible to receive a visa. Congress has extended the applicability of the inadmissibility grounds beyond the context of applications for admission and visas by making admissibility an eligibility requirement for certain immigration benefits.[10] If a noncitizen is inadmissible, that noncitizen is also ineligible for those benefits unless the noncitizen is eligible to apply for and is granted a discretionary waiver of inadmissibility or other form of relief to overcome the inadmissibility, where available and appropriate.[11]

C. The Public Charge Ground of Inadmissibility

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[6] *See Fiallo v. Bell*, 430 U.S. 787, 787 (1977) (The Supreme Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control").
[7] Admission is defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* INA sec. 101(a)(13)(A), 8 U.S.C. 1101(a)(13)(A).
[8] INA sec. 212(a), 8 U.S.C. 1182(a).
[9] *Ibid*.
[10] For example, adjustment of status. *See* INA sec. 245(a)(2), 8 U.S.C. 1255(a)(2).
[11] *See, e.g.*, INA sec. 212(a)(9)(B)(v), 8 U.S.C. 1182(a)(9)(B)(v), INA sec. 212(h), 8 U.S.C. 1182(h), INA sec. 212(i), 8 U.S.C. 1182(i); INA sec. 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii); *see also* USCIS Policy Manual, Volume 9 – Waivers, *https://www.uscis.gov/policy-manual/volume-9*

Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), provides that an applicant for a visa, admission, or adjustment of status is inadmissible if they are likely at any time to become a public charge. The public charge ground of inadmissibility, therefore, applies to individuals applying for a visa to come to the United States temporarily or permanently, for admission, or for adjustment of status to that of a lawful permanent resident.[12] By statute, some categories of noncitizens are exempt from the public charge inadmissibility ground, while others may apply for a waiver of the public charge inadmissibility ground.[13]

The INA does not define the term "public charge." It does, however, specify that when determining whether a noncitizen is likely at any time to become a public charge, consular officers and immigration officers must, at a minimum, consider the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.[14] Additionally, section 212(a)(4)(B)(ii) of the INA, 8 U.S.C. 1182(a)(4)(B)(ii), permits the consular officer or the immigration officer to consider any Affidavit of Support Under Section 213A of the INA, 8 U.S.C. 1183a, submitted on the applicant's behalf, when determining whether the applicant is likely at any time to become a public charge.[15] In fact, with very limited exceptions, most noncitizens seeking family-based immigrant visas and adjustment of status, and some noncitizens seeking employment-based immigrant visas or adjustment of status, must submit a

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[12] *See* INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).
[13] *See* INA sec. 245(j). *See* 8 CFR 245.11. *See* INA sec. 245(d)(2)(B). *See* INA sec. 212(d)(3)(A).
[14] *See* INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).
[15] *See* INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii). When required, the applicant must submit an Affidavit of Support Under Section 213A of the INA (Form I-864 or Form I-864EZ).

sufficient Affidavit of Support Under Section 213A of the INA in order to avoid being found inadmissible as likely at any time to become a public charge.[16]

In general, under section 213 of the INA, 8 U.S.C. 1183, the Secretary has the discretion to admit into the United States a noncitizen who is determined to be inadmissible based only on the public charge ground upon the giving of a suitable and proper bond or undertaking approved by the Secretary.[17]

1. Public Charge Statutes and Case Law, Pre-IIRIRA

Since at least 1882, the United States has denied admission to noncitizens on public charge grounds.[18] The INA of 1952 excluded noncitizens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the government at the time of application for admission, were likely at any time to become public charges.[19] The government has long interpreted the words "in the opinion of" as evincing the subjective nature of the determination.[20] The determination is also necessarily subjective to some degree due to its prospective nature.

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[16] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).
[17] *See* INA sec. 213, 8 U.S.C. 1183.
[18] *See* Immigration Act of 1882, ch. 376, secs. 1-2, 22 Stat. 214, 214. Section 11 of the Act also provided that a noncitizen who became a public charge within 1 year of arrival in the United States from causes that existed prior to their landing was deemed to be in violation of law and was to be returned at the expense of the person or persons, vessel, transportation, company, or corporation who brought the noncitizen into the United States. *See also, e.g.*, Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1084; Immigration Act of 1907, ch. 1134, 34 Stat. 898, 899; Immigration Act of 1917, ch. 29, sec. 3, 39 Stat. 874, 876; INA of 1952, ch. 477, sec. 212(a)(15), 66 Stat. 163, 183; Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, sec. 531(a), 110 Stat. 3009-546, 3009-674-75 (1996); Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54.
[19] *See* INA of 1952, ch. 477, sec. 212(a)(15), 66 Stat. 163, 183.
[20] *See Matter of Harutunian*, 14 I&N Dec. 583, 588 (Reg'l Cmm'r 1974) ("[T]he determination of whether an alien falls into that category [as likely to become a public charge] rests within the discretion of the

A series of administrative decisions after the passage of the INA of 1952 clarified that a totality of the circumstances review was the proper framework for making public charge determinations and that receipt of public benefits would not, alone, lead to a finding of likelihood of becoming a public charge. In *Matter of Martinez-Lopez*, the Attorney General opined that the statute "require[d] more than a showing of a possibility that the alien will require public support. Some *specific* circumstance, such as mental or physical disability, advanced age, or other fact showing that the burden of supporting the alien is likely to be cast on the public, must be present. 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."[21] In *Matter of Perez*, the Board of Immigration Appeals (BIA) held that

> [t]he determination of whether an alien is likely to become a public charge . . . is a prediction based upon the totality of the alien's circumstances at the time he or she applies for an immigrant visa or admission to the United States. The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge.[22]

As stated in *Matter of Harutunian*, public charge determinations should take into consideration factors such as a noncitizen's age, incapability of earning a livelihood, a lack of

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consular officers or the Commissioner . . . Congress inserted the words 'in the opinion of' (the consul or the Attorney General) with the manifest intention of putting borderline adverse determinations beyond the reach of judicial review." (citation omitted)); *see also Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421 (Att'y Gen. 1962) ("[U]nder the statutory language the question for visa purposes seems to depend entirely on the consular officer's subjective opinion.").

[21] 10 I&N Dec. 409, 421-23 (BIA 1962; Att'y Gen. 1964) (emphasis added). DHS discusses *Matter of Martinez-Lopez*, and consideration of disability, at greater length elsewhere in this preamble.

[22] 15 I&N Dec. 136, 137 (BIA 1974).

sufficient funds for self-support, and a lack of persons in this country willing and able to assure that the noncitizen will not need public support.[23]

The totality of the circumstances framework for public charge inadmissibility determinations was codified in relation to one specific class of noncitizens in the 1980s. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), providing eligibility for adjustment of status to that of a lawful permanent resident to certain noncitizens who had resided in the United States continuously prior to January 1, 1982.[24] No changes were made to the language of the public charge exclusion ground under former section 212(a)(15) of the INA, 8 U.S.C. 1182(a)(15), but IRCA contained special public charge rules for noncitizens seeking legalization under section 245A of the INA, 8 U.S.C. 1255a. Although IRCA provided otherwise eligible noncitizens an exemption or waiver for some grounds of excludability, the noncitizens generally remained subject to the public charge ground of exclusion.[25] Under IRCA, however, if an applicant demonstrated a history of self-support through employment and without receiving public cash assistance, they would not be ineligible for adjustment of status based on being inadmissible on the public charge ground.[26] In addition, IRCA contained a discretionary waiver of public charge inadmissibility for noncitizens who were "aged, blind or disabled" as defined in section 1614(a)(1) of the Social Security Act who applied for lawful permanent

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[23] 14 I&N Dec. 583, 589 (Reg'l Comm'r 1974).
[24] *See* IRCA of 1986, Pub. L. 99-603, sec. 201, 100 Stat. 3359, 3394.
[25] *See* INA sec. 245A(d)(2)(B)(ii)(IV), 8 U.S.C. 1255a(d)(2)(B)(ii)(IV).
[26] *See* INA sec. 245A(d)(2)(B)(iii), 8 U.S.C. 1255a(d)(2)(B)(iii).

resident status under IRCA and were determined to be inadmissible based on the public charge ground.[27]

The former Immigration and Naturalization Service (INS) promulgated 8 CFR 245a.3,[28] which established that immigration officers would make public charge inadmissibility determinations by examining the "totality of the alien's circumstances at the time of his or her application for legalization."[29] According to the regulation, the existence or absence of a particular factor could never be the sole criterion for determining whether a person is likely to become a public charge.[30] Further, the regulation provided that the determination is a "prospective evaluation based on the alien's age, health, income, and vocation."[31]

A special provision in the rule stated that noncitizens with incomes below the poverty level are not excludable if they are consistently employed and show the ability to support themselves.[32] Finally, a noncitizen's past receipt of public cash assistance would be a significant factor in a context that also considers the noncitizen's consistent past employment.[33] In *Matter of A-*, INS again pursued a totality of the circumstances approach in public charge determinations for applicants for legalization.[34] "Even though the test is prospective," INS "considered evidence of receipt of prior public assistance as a factor in making public charge

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[27] *See* INA sec. 245A(d)(2)(B)(ii), 8 U.S.C. 1255a(d)(2)(B)(ii); *see also* 42 U.S.C. 1382c(a)(1). This discretionary waiver applies only to IRCA legalization and not to adjustment of status under INA sec. 245(a), 8 U.S.C. 1255(a).
[28] *See Adjustment of Status for Certain Aliens*, 54 FR 29442 (Jul. 12, 1989). This regulation does not apply to adjustment of status under section 245(a) of the INA, 8 U.S.C. 1255, or to applications for admission with CBP. It is limited to adjustment from temporary to permanent resident status under the legalization provisions of IRCA. DHS does not propose amending 8 CFR 245a.3.
[29] *See* 8 CFR 245a.3(g)(4)(i).
[30] *Ibid.*
[31] *Ibid.*
[32] *See* 8 CFR 245a.3(g)(4)(iii).
[33] *Ibid.*
[34] 19 I&N Dec. 867 (Comm'r 1988).

determinations."[35] INS also considered a noncitizen's work history, age, capacity to earn a living, health, family situation, affidavits of support, and other relevant factors in their totality.[36]

The administrative practices surrounding public charge inadmissibility determinations began to crystalize into legislative changes in the 1990s. The Immigration Act of 1990 reorganized section 212(a) of the INA, 8 U.S.C. 1182(a), and redesignated the public charge provision as section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).[37] In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[38] added to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the mandatory statutory factors and the enforceable affidavit of support.[39] Also in 1996, in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which is commonly known as the 1996 welfare reform law, Congress stated that noncitizens generally should not depend on public resources and that the availability of public benefits should not constitute an incentive for immigration to the United States.[40]

2. Public Benefits Under PRWORA

PRWORA significantly restricted noncitizens' eligibility for many Federal, State, and local public benefits.[41] When Congress enacted PRWORA, it set forth a self-sufficiency policy statement that noncitizens should be able to financially support themselves with their own

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[35] *Ibid.*
[36] *See* 19 I&N Dec. 867, 869 (Comm'r 1988).
[37] *See* Immigration Act of 1990, Pub. L. 101-649, sec. 601(a), 104 Stat. 4978, 5072. In 1990, Congress reorganized INA sec. 212(a), redesignating the public charge provision as INA sec. 212(a)(4).
[38] Pub. L. 104-208, div. C, 110 Stat 3009-546.
[39] Pub. L. 104-208, div. C, 110 Stat 3009-546.
[40] *See* Pub. L. 104-193, section 400, 110 Stat. 2105, 2260 (codified at 8 U.S.C. 1601).
[41] 8 U.S.C. 1601-1646.

resources or by relying on the aid of family members, sponsors, and private organizations, without depending on government assistance.[42] Although not defined in PRWORA, in context, self-sufficiency is tied to a noncitizen's ability to meet their needs without depending on public resources.[43]

PRWORA defines the term "Federal public benefit"[44] and provides that an "alien" who is not a "qualified alien" is ineligible for any such benefits,[45] subject to certain exceptions.[46] Among the exceptions established by Congress allowing for eligibility for all noncitizens, are provision of medical assistance for the treatment of an emergency medical condition; short term, in-kind, non-cash emergency disaster relief; and public health assistance related to immunizations and treatment of the symptoms of a communicable disease.[47] The exceptions were further clarified by the Department of Justice (DOJ) and some of the agencies that administer these public benefits. On January 16, 2001, the DOJ published a notice of final order, "Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation,"[48] which indicated that PRWORA does not preclude noncitizens

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[42] 8 U.S.C. 1601(2).
[43] *Ibid*.
[44] 8 U.S.C. 1611(c).
[45] 8 U.S.C. 1611(a).
[46] 8 U.S.C. 1611(b).
[47] *See* 8 U.S.C. 1611(b)(1). *See Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 66 FR 3613 (Jan. 16, 2001); *see also Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 62 FR 61344 (Nov. 17, 1997).
[48] *See Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 66 FR 3613 (Jan. 16, 2001); *see also Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 61 FR 45985 (Aug. 30, 1996).

from receiving certain other widely available programs, services, or assistance as well as certain benefits and services for the protection of life and safety.

PRWORA further identified three types of benefits and related eligibility rules. First, there are "specified Federal programs," for which even "qualified aliens" are generally not eligible.[49] Second, there are "Federal means-tested public benefits," for which "qualified aliens" are generally eligible after a 5-year waiting period.[50] And finally, there are "designated federal programs," for which States are allowed to determine whether and when a "qualified alien" is eligible, subject to certain restrictions.[51]

Subsequent legislation has added additional categories of noncitizens, many with humanitarian statuses, to PRWORA's various exceptions and special provisions in order to meet the needs of those vulnerable populations. DHS also discusses these statuses and modifications to PRWORA in the section below.

The following is a list of immigration categories that are "qualified aliens" under PRWORA. As noted above, subject to certain exceptions, "qualified aliens" are generally eligible for Federal public benefits after 5 years. As indicated in the section of this preamble on "Exemptions and Waivers" below, most categories of "qualified aliens" are not subject to the public charge ground of inadmissibility.

- An alien who is lawfully admitted for permanent residence under the INA.[52]
- An alien who is granted asylum under section 208 of the INA.[53]

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[49] 8 U.S.C. 1612(a).
[50] 8 U.S.C. 1613(a).
[51] 8 U.S.C. 1612(b).
[52] 8 U.S.C. 1641(b)(1).
[53] 8 U.S.C. 1641(b)(2).

- A refugee who is admitted to the United States under section 207 of the INA.[54]
- An alien who is paroled into the United States under section 212(d)(5) of the INA for a period of at least 1 year.[55]
- An alien whose deportation is being withheld under section 243(h)[56] of the INA or section 241(b)(3) of the INA, as amended.[57]
- An alien who is granted conditional entry under section 203(a)(7) of the INA as in effect before April 1, 1980.[58]
- An alien who is a Cuban and Haitian entrant as defined in section 501(e) of the Refugee Education Assistance Act of 1980.[59]
- An individual who lawfully resides in the United States in accordance with the Compacts of Free Association between the Government of the United States and the Governments of the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau referred to in 8 U.S.C. 1612(b)(2)(G) (but only with respect to Medicaid).[60]
- An alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced in, such battery or cruelty but only if (in the opinion of the agency providing such benefits) there is a

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[54] 8 U.S.C. 1641(b)(3)
[55] 8 U.S.C. 1641(b)(4). Noncitizens who have been paroled have not been admitted. *See* INA sec. 101(a)(13)(B), 8 U.S.C. 1101(a)(13)(B); *see also* INA sec. 212(d)(5), 8 U.S.C. 1182(d)(5).
[56] As in effect immediately before the effective date of section 307 of division C of Pub. L. 104-208, 110 Stat. 3009-546.
[57] 8 U.S.C. 1641(b)(5).
[58] 8 U.S.C. 1641(b)(6).
[59] 8 U.S.C. 1641(b)(7).
[60] 8 U.S.C. 1641(b)(8).

substantial connection between such battery or cruelty and the need for the benefits to be provided, and the alien has been approved or has a petition pending that sets forth a prima facie case for status under section 204(a)(1)(A)(i)-(iv), or classification pursuant to section 204(a)(1)(B)(i)-(iii) of the INA, or suspension of deportation under section 244(a)(3) of the INA, or cancellation of removal pursuant to INA sec. 240A(b)(2).[61]

- An alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or a parent of the alien (without active participation by the alien in such battery or cruelty), or by a member of the spouse or parent's family residing in the same household as the alien and the spouse or parent consented to, or acquiesced to such battery or cruelty (and the alien did not actively participate in such battery or cruelty), but only if (in the opinion of the agency providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided, and the alien has been approved or has a petition pending which sets forth a prima facie case for status under section 204(a)(1)(A)(i)-(iv), or classification pursuant to section 204(a)(1)(B)(i)-(iii) of the INA, or suspension of deportation under section 244(a)(3) of the INA, or cancellation of removal pursuant to INA section 240A(b)(2).[62]
- An alien child who resides in the same household as a parent who has been battered or subjected to extreme cruelty in the United States by that parent's spouse or by a member of the spouse's family residing in the same household as the parent, and the spouse consented to, or acquiesced to such battery or cruelty, but only if (in the opinion of the agency

[61] 8 U.S.C. 1641(c)(1).
[62] 8 U.S.C. 1641(c)(2).

providing such benefits) there is a substantial connection between such battery or cruelty and the need for the benefits to be provided, and the alien has been approved or has a petition pending which sets forth a prima facie case for status under section 204(a)(1)(A)(i)-(iv), or classification pursuant to section 204(a)(1)(B)(i)-(iii) of the INA, or suspension of deportation under section 244(a)(3) of the INA, or cancellation of removal pursuant to INA section 240A(b)(2).[63]

- An alien who has been granted nonimmigrant status under section 101(a)(15)(T) of the INA or who has a pending application that sets forth a prima facie case for eligibility for such nonimmigrant status.[64]

There are additional categories of noncitizens who may be eligible for certain benefits notwithstanding limitations set under PRWORA. For instance, the following noncitizens are treated as though they are refugees for benefits eligibility purposes, under other provisions of law:

- An alien who is a victim of a severe form of trafficking in persons, or an alien classified as a nonimmigrant under 8 U.S.C. 1101(a)(15)(T)(ii).[65]
- An Iraqi or Afghan alien granted special immigrant status under section 8 U.S.C. 101(a)(27).[66]

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[63] 8 U.S.C. 1641(c)(3).
[64] 8 U.S.C. 1641(c)(4).
[65] 22 U.S.C. 7105(b)(1)(A).
[66] Pub. L. 111-118, Div. A., Tit. VIII., sec. 8120, 123 Stat. 3409, 3457 (2009).

- A citizen or national of Afghanistan (or a person with no nationality who last habitually resided in Afghanistan) paroled into the United States after July 31, 2021, who meets certain requirements, until March 31, 2023, or the term of parole granted, whichever is later.[67]

In addition, in the Medicaid context, States may also elect to provide medical assistance under Title XIX of the Social Security Act to cover all lawfully residing children under age 21 or pregnant individuals.[68]

Under PRWORA, States may enact their own legislation to provide State and local public benefits to certain noncitizens not lawfully present in the United States.[69] Some States and localities have funded public benefits for some noncitizens who may not be eligible for Federal public benefits.[70]

While PRWORA allows certain noncitizens to receive certain public benefits (e.g., Medicaid limited to treatment of an emergency medical condition (all noncitizens);[71] Supplemental Nutrition Assistance Program (SNAP) ("qualified alien" children under 18)), Congress, except in very limited circumstances,[72] did not prohibit DHS from considering the receipt of such benefits in a public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), or direct DHS to do so.

The following table presents a list of the major categories of noncitizens eligible for SSI, TANF, or Medicaid who would be subject to a public charge inadmissibility determination were

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[67] Pub. L. 117-43, sec. 2502(b) (Sept. 30, 2021).
[68] *See* sections 1903(v)(4) of the Social Security Act (42 U.S.C. 1396b(v)(4)).
[69] *See* 8 U.S.C. 1621(d).
[70] *See, e.g.*, U.S. Dep't of Health & Human Servs. (HHS), Office of the Assistant Sec'y for Planning & Evaluation, *Overview of Immigrants Eligible for SNAP, TANF, Medicaid and CHIP* (Mar. 27, 2012), available at *http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Eligibility/ib.shtml.*
[71] *See* 8 U.S.C. 1611(b)(1)(A).
[72] *See* INA sec. 212(s), 8 U.S.C. 1182(s).

they later to apply for adjustment of status or admission to the United States, unless another statutory exemption applies that is particular to their individual circumstances.[73] The table is provided for background purposes only and should not be used to determine benefits eligibility.

Table 3. Categories of noncitizens eligible for SSI, TANF, or Medicaid for long-term institutionalization whose past or current benefit use may be considered in a public charge inadmissibility determination

Population	Eligible for which benefits?	Notes
Noncitizens who were paroled into the United States for more than one year	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1] Medicaid and TANF eligibility subject to 5-year waiting period in most cases.
Noncitizens granted withholding of removal who are allowed to remain in the United States	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1]
Certain citizens of Micronesia, the Marshall Islands, or Palau, who can lawfully reside and work in the United States under the Compacts of Free Association	Medicaid for long-term institutionalization	
Cuban and Haitian Entrants under section 501(e) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note)	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1] Not subject to the public charge inadmissibility ground if also in an exempt immigration status.[2]
Lawfully present children, pregnant women, and women in the 60-day postpartum period or 12-month postpartum period (depending on the State's election), in States that have elected to cover this population in Medicaid	Medicaid for long-term institutionalization	Not subject to the public charge inadmissibility ground if also in an exempt immigration status.[2]
Noncitizen members of federally recognized Indian tribes	SSI, Medicaid for long-term	Not subject to the public charge inadmissibility ground if also in an exempt immigration status.[2]

[73] A list of statutory exemptions to the public charge ground of inadmissibility can be found in the Applicability section of this preamble and in proposed 8 CFR 212.23.

	institutionalization	
Conditional entrants under section 203(a)(7) of the INA as in effect before April 1, 1980	SSI, TANF, Medicaid for long-term institutionalization	SSI eligibility only in limited circumstances.[1]
Returning lawful permanent residents (LPRs) who are seeking admission to the United States as described in section 101(a)(13)(C) of the INA (8 U.S.C. 1101(a)(13)(C)), including those absent from the United States for more than 180 days	SSI, TANF, Medicaid for long-term institutionalization	Not all LPRs are eligible for SSI, TANF, and Medicaid, depending on factors such as whether the State requires LPRs to have 40 qualified work quarters and whether subject to the 5-year waiting period.
Notes [1] *See* Social Security Administration, Supplemental Security Income for Noncitizens, *https://www.ssa.gov/pubs/EN-05-11051.pdf* (accessed Feb. 9, 2022). [2] *See* proposed 8 CFR 212.23.		

DHS welcomes comments on the table, including proposed clarifications or corrections, and may update the table as appropriate in the preamble to a final rule.

3. Changes Under IIRIRA

Congress, in IIRIRA,[74] codified in the public charge inadmissibility statute the following minimum factors that must be considered when making public charge inadmissibility determinations:[75]

- Age;
- Health;
- Family status;
- Assets, resources, and financial status; and

[74] Pub. L. 104-208, div. C, 110 Stat 3009-546 (1996).
[75] *See* Pub. L. 104-208, div. C, sec. 531, 110 Stat. 3009-546, 3009-674 (1996) (amending INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4)).

- Education and skills.[76]

Section 531(a) of IIRIRA amended section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), to require an enforceable affidavit of support under newly added section 213A of the INA, 8 U.S.C. 1183a,[77] for certain noncitizens to avoid a finding of inadmissibility under that section.[78] The law required submission of an Affidavit of Support Under Section 213A of the INA for most family-based immigrants and certain employment-based immigrants and provided that these noncitizens are inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), unless a sufficient affidavit is filed on their behalf.[79] Congress also permitted, but did not require, consular and immigration officers to consider the Affidavit of Support Under Section 213A of the INA as a factor in the public charge inadmissibility determination.[80] In the House Conference Report on IIRIRA, the committee indicated that the amendments to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), were designed to "expand" the public charge ground of inadmissibility by requiring DHS to find inadmissible those who lack a sponsor willing to support them.[81]

DHS may appropriately consider the policy goals articulated in PRWORA and IIRIRA when administratively implementing the public charge ground of inadmissibility, and may also consider other important goals including, but not limited to, clarity, fairness, and

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[76] *See* INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).
[77] Section 551 of IIRIRA created INA sec. 213A, 8 U.S.C. 1183a, and specified the requirements for a sponsor's affidavit, including making it enforceable. *See* INA sec. 213A, 8 U.S.C. 1183a; sec. 551 of IIRIRA, Pub. L. 104-208, 110 Stat. 3009 (1996).
[78] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D). *See* INA sec. 213A, 8 U.S.C. 1183a.
[79] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).
[80] *See* INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).
[81] *See* H.R. Rep. No. 104-828, at 240-41 (1996) (Conf. Rep.); *see also* H.R. Rep. No. 104-469(I), at 143-45 (1996).

administrability. DHS acknowledges the potential tension between the availability of public benefits to some noncitizens as set forth in PRWORA and statutory provisions that deny visa issuance, admission, and adjustment of status to noncitizens who are likely to become a public charge. Congress, in enacting PRWORA and IIRIRA very close in time, made certain public benefits available to a small number of noncitizens who are also subject to the public charge ground of inadmissibility, even though receipt of some such benefits could influence a determination of whether the noncitizen is inadmissible as likely at any time to become a public charge.

Under the statute crafted by Congress, noncitizens generally would not be issued visas, admitted to the United States, or permitted to adjust status if they are likely at any time to become a public charge. Congress nonetheless recognized that certain noncitizens present in the United States who are subject to the public charge ground of inadmissibility might reasonably find themselves in need of public benefits that, if obtained, could influence a determination of whether they are inadmissible as likely at any time to become a public charge. Consequently, in PRWORA, Congress allowed certain noncitizens to be eligible for some public benefits even though they may later seek a visa, admission, or adjustment of status and thereby be subject to the public charge ground of inadmissibility. However, Congress, except in very limited circumstances,[82] did not prohibit DHS from considering the receipt of such benefits in a public charge inadmissibility determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). In other words, although a noncitizen may obtain public benefits for which they are eligible, the

[82] *See* INA sec. 212(s), 8 U.S.C. 1182(s).

receipt of those benefits may be considered for public charge inadmissibility determination purposes.

4. INS 1999 Notice of Proposed Rulemaking and Interim Field Guidance

On May 26, 1999, INS issued a proposed rule, Inadmissibility and Deportability on Public Charge Grounds[83] (1999 NPRM), and on that same day issued interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (1999 Interim Field Guidance).[84]

In the 1999 proposed rule, INS proposed to "alleviate growing public confusion over the meaning of the currently undefined term 'public charge' in immigration law and its relationship to the receipt of Federal, State, or local public benefits."[85] INS sought to reduce negative public health and nutrition consequences generated by that confusion and to provide noncitizens, their sponsors, health care and immigrant assistance organizations, and the public with better guidance as to the types of public benefits that INS considered relevant to the public charge determination.[86] INS also sought to address the public's concerns about immigrants' fears of accepting public benefits for which they remained eligible, specifically in regards to medical care, children's immunizations, basic nutrition, and treatment of medical conditions that may jeopardize public health.[87]

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[83] 64 FR 28676 (May 26, 1999).
[84] 64 FR 28689 (May 26, 1999). Due to a printing error, the *Federal Register* version of the 1999 Interim Field Guidance appears to be dated "March 26, 1999," even though the guidance was actually signed May 20, 1999; became effective May 21, 1999; and was published in the *Federal Register* on May 26, 1999, along with the NPRM.
[85] *See* 64 FR 28676, 28676 (May 26, 1999).
[86] *See* 64 FR 28676, 28676-77 (May 26, 1999).
[87] *See* 64 FR 28676, 28676 (May 26, 1999).

When developing the proposed rule, INS consulted with Federal benefit-granting agencies such as the U.S. Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA). The Deputy Secretary of HHS, whose Department administers Temporary Assistance for Needy Families (TANF), Medicaid, the Children's Health Insurance Program (CHIP), and other benefits, advised that the best evidence of whether an individual is relying primarily on the government for subsistence is either the receipt of public cash benefits for income maintenance purposes or institutionalization for long-term care at government expense.[88] The Deputy Commissioner for Disability and Income Security Programs at SSA agreed that the receipt of Supplemental Security Income (SSI) "could show primary dependence on the government for subsistence fitting the INS definition of public charge."[89] Furthermore, the USDA's Under Secretary for Food, Nutrition and Consumer Services advised that "neither the receipt of food stamps nor nutrition assistance provided under the Special Nutrition Programs administered by USDA should be considered in making a public charge determination."[90] While these letters supported the approach taken in the 1999 proposed rule and Interim Field Guidance, the letters specifically focused on the reasonableness of a given INS interpretation (i.e., primary dependence on the government for subsistence). The letters did not foreclose the agency from adopting a different definition consistent with statutory authority.

INS defined public charge in the 1999 proposed rule, as well as in the 1999 Interim Field Guidance, to mean, for purposes of admission and adjustment of status, "an alien who is likely to

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[88] *See* 64 FR 28676, 28686-87 (May 26, 1999).
[89] *See* 64 FR 28676, 28687 (May 26, 1999).
[90] *See* 64 FR 28676, 28688 (May 26, 1999).

become . . . primarily dependent[91] on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."[92] The 1999 proposed rule provided that non-cash benefits, as well as "supplemental, special-purpose cash benefits should not be considered" for public charge purposes, in light of INS's decision to define public charge by reference to primary dependence on public benefits.[93] Ultimately, however, INS did not publish a final rule conclusively addressing these issues.

The 1999 Interim Field Guidance was issued as an attachment to the 1999 proposed rule in order to "provide additional information to the public on the Service's implementation of the public charge provisions of the immigration laws . . . in light of the recent changes in law."[94] The 1999 Interim Field Guidance explained how the agency would determine if a person is likely to become a public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a), for admission and adjustment of status purposes, and whether a person is deportable as a public charge under section 237(a)(5) of the INA, 8 U.S.C. 1227(a)(5).[95] The 1999 Interim Field Guidance also was intended to stem the fears that were causing noncitizens to refuse certain supplemental public

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[91] Former INS defined "primarily dependent" as "the majority" or "more than 50 percent."
[92] *See* 64 FR 28676, 28681 (May 26, 1999); 64 FR 28689 (May 26, 1999). The proposed rule also defined public charge to mean, "for purposes of removal as a deportable alien means an alien who has become primarily dependent on the Government for subsistence as demonstrated by either: (i) The receipt of public cash assistance for income maintenance purposes, or (ii) Institutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime)." 64 FR 28676, 28684 (May 26, 1999).
[93] *See* 64 FR 28676, 28692-93 (May 26, 1999).
[94] *See* 64 FR 28689, 28689 (May 26, 1999).
[95] *See* 64 FR 28689, 28692-93 (May 26, 1999).

benefits, such as transportation vouchers and childcare assistance, that were intended to help recipients become better able to obtain and retain employment and establish self-sufficiency.[96]

The Department of State (DOS) also issued a cable to its consular officers at that time implementing similar guidance for visa adjudications, and its Foreign Affairs Manual (FAM) was similarly updated.[97] Until both agencies published new regulations and policy guidance, including changes to the FAM, in 2018 and 2019, USCIS had continued to follow the 1999 Interim Field Guidance in its adjudications, and DOS had continued following the public charge guidance set forth in the FAM in 1999.[98]

5. DHS Inadmissibility on Public Charge Grounds Notice of Proposed Rulemaking and 2019 Final Rule

In August 2019, DHS issued a final rule, Inadmissibility on Public Charge Grounds (2019 Final Rule). The 2019 Final Rule (that is no longer in effect), changed DHS's public charge standards and procedures.[99] The 2019 Final Rule redefined the term public charge to mean "an alien who receives one or more public benefits, as defined in [the 2019 Final Rule], 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)."[100] It also defined the term public benefit to include cash assistance for income maintenance (other than tax credits), SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program,

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[96] *See* 64 FR 28689 (May 26, 1999).
[97] *See* 64 FR 28676, 28680 (May 26, 1999).
[98] *See* 9 FAM 302.8, *https://fam.state.gov/fam/09fam/09fam030208.html* (accessed Dec. 12, 2021).
[99] *See* 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 2, 2019).
[100] *See* 84 FR 41292 (Aug. 14, 2019).

Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing.[101] DHS tailored the 2019 Final Rule to limit the rule's effects in certain ways, such as with respect to the consideration of public benefits received by active duty military members and their spouses and children, and consideration of public benefits received by children in certain contexts.[102]

The 2019 Final Rule also provided an evidentiary framework under which USCIS would determine public charge inadmissibility and explained how DHS would interpret the statutory minimum factors for determining whether "in the opinion of"[103] the officer, a noncitizen is likely at any time to become a public charge. Specifically, for adjustment of status applications before USCIS, DHS created a new Declaration of Self-Sufficiency, Form I-944, which collected information from applicants relevant to the 2019 Final Rule's approach to the statutory factors and other factors identified in the rule that would be considered in the totality of the circumstances.[104]

The 2019 Final Rule also contained a list of negative and positive factors that DHS would consider as part of this inadmissibility determination, and directed officers to consider these factors "in the totality of the circumstances."[105] These positive or negative factors, as well as the

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[101] *Ibid.*
[102] *See* 84 FR 41292 (Aug. 14, 2019). For example, under that rule, public benefits did not include public benefits received by those who, at the time of receipt, filing the application for admission or adjustment of status, or adjudication, is enlisted in the U.S. Armed Forces, serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or the spouse of children of such service members. Also under that rule, public benefits did not include benefits received by children of U.S. citizens whose lawful admission for permanent residence would result in automatic acquisition of U.S. citizenship.
[103] *See* INA sec. 212(a)(4)(A), 8 U.S.C. 1182(a)(4)(A).
[104] The Declaration of Self-Sufficiency requirement only applied to adjustment applicants and not applicants for admission at a port of entry.
[105] *See* 84 FR 41292 (Aug. 14, 2019).

"heavily weighted" positive and negative factors, operated as guidelines to help the officer determine whether the noncitizen was likely at any time to become a public charge.[106] In the 2019 Final Rule, DHS indicated that apart from a lack of an Affidavit of Support Under Section 213A of the INA, where required, the presence of a single positive or negative factor, or heavily weighted negative or positive factor, would never, on its own, create a presumption that an applicant was inadmissible as likely at any time to become a public charge or determine the outcome of the public charge inadmissibility determination.[107] Rather, a public charge inadmissibility determination would be based on the totality of the circumstances presented in an applicant's case.[108]

Additionally, the 2019 Final Rule added provisions that rendered certain nonimmigrants ineligible for extension of stay or change of status if they received one or more public benefits, as defined in the rule, for more than 12 months in the aggregate within any 36-month period since obtaining the nonimmigrant status they wished to extend or change.[109]

The 2019 Final Rule also revised DHS regulations governing the Secretary's discretion to accept a public charge bond under section 213 of the INA, 8 U.S.C. 1183, for those seeking adjustment of status.[110]

The 2019 Final Rule did not interpret or change DHS's implementation of the public charge ground of deportability.[111]

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[106] *Ibid*.
[107] *Ibid*.
[108] *See* 84 FR 41292 (Aug. 14, 2019).
[109] *Ibid*.
[110] *Ibid*.
[111] *See* INA sec. 237(a)(5), 8 U.S.C. 1227(a)(5). *See* 84 FR 41292, 41295 (Aug. 14, 2019).

6. Litigation History and Vacatur of DHS 2019 Final Rule

The 2019 Final Rule was set to take effect on October 15, 2019, but, before it did, numerous Plaintiffs filed suits challenging the 2019 Final Rule in five district courts, across four circuits.[112] All five district courts preliminarily enjoined the 2019 Final Rule. Although differing in some particulars, all five concluded that the 2019 Final Rule's definition was contrary to the INA because the term "public charge" had a long-settled definition with which the 2019 Final Rule conflicted. Some courts also concluded that the 2019 Final Rule was likely arbitrary and capricious, and that the 2019 Final Rule likely violated the Rehabilitation Act.[113]

The cases took differing paths through the courts of appeals. The Ninth and Fourth Circuits granted the government's requests for stays pending appeal.[114] The Second and Seventh Circuits declined to grant stays; however, the Supreme Court subsequently granted stays in those cases, pending final resolution by the Court of the government's appeals.[115] The 2019 Final Rule was ultimately implemented on February 24, 2020.

On June 10, 2020, the Seventh Circuit affirmed the lower court's preliminary injunction.[116]

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[112] *CASA de Maryland, Inc., et al., v. Trump*, 19-cv-2715 (D. Md.); *City and County of San Francisco, et al.*, v. DHS, et al., 19-cv-04717 (N.D.Ca.)**;** *City of Gaithersburg, et al. v. Trump, et al.*, 19-cv-02851 (D. Md.); *Cook County et al. v. McAleenan et al.*, 19-cv-06334 (N.D. Ill.); *La Clinica De La Raza, et al., v. Trump, et al.*,19-cv-4980 (N.D. Ca.); *Make the Road New York, et al. v. Cuccinelli, et al.*, 19-cv-07993 (S.D.N.Y.); *New York, et al. v. DHS, et al.*, 19-cv-07777 (S.D.N.Y.); *State of California, et al., v. DHS, et al.*, 19-cv-04975 (N.D. Cal.); *State of Washington, et al. v. DHS, et al.*, 19-cv-05210 (E.D. Wa.).
[113] *Cook County. v. Wolf*, 962 F.3d 208, 228 (7th Cir. 2020).
[114] *See*, *City and County of San Francisco, et al. v. DHS*, 944 F.3d 773 (9th Cir. Dec. 5, 2019), *City and County of San Francisco, et al. v. DHS*, No. 19-17213 (9th Cir. Jan. 20, 2021); *CASA de Maryland, Inc. et al. v. Trump*, No. 19-2222 (4th Cir. Dec 9, 2019).
[115] *See DHS v. New York*, 140 S. Ct. 599 (2020); *Wolf v. Cook County*, 140 S. Ct. 681 (2020).
[116] *See Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020) (then-Judge Barrett dissenting).

On July 29, 2020, the United States District Court for the Southern District of New York entered a second preliminary injunction prohibiting enforcement of the 2019 Final Rule nationwide during the pendency of the COVID-19 public-health emergency.[117] On August 12, 2020, the Second Circuit issued an order staying the second preliminary injunction outside of the States within the Second Circuit. Then, on September 11, 2020, the Second Circuit stayed the second preliminary injunction in its entirety.[118]

Meanwhile, on August 4, 2020, the Second Circuit issued a decision affirming the original Fall 2019 injunctions on appeal before that court.[119]

One day later, on August 5, 2020, the Fourth Circuit reversed the Maryland district court's injunction.[120] Plaintiffs filed a timely motion for en banc rehearing, and on December 3, 2020, the Fourth Circuit granted that motion. By ordering en banc rehearing, the Fourth Circuit vacated the prior panel decision.

On October 7, 2020, the government filed petitions for writ of certiorari in the Second and Seventh Circuit cases.[121] The government urged the Court to grant certiorari in the Second Circuit case, and to hold the Seventh Circuit case pending its resolution of the Second Circuit case.

On November 2, 2020, the United States District Court for the Northern District of Illinois entered a partial final judgment in favor of Plaintiffs in the Cook County case and

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[117] *See New York v. DHS*, 475 F. Supp. 3d 208 (S.D.N.Y. 2020).
[118] *See New York v. DHS*, 974 F.3d 210 (2d Cir. 2020).
[119] *See New York v. Department of Homeland Security*, 969 F.3d 42 (2d Cir. 2020).
[120] *See CASA de Maryland v. Trump*, 971 F.3d 220 (4th Cir. 2020).
[121] *See Department of Homeland Security v. New York*, No. 20-449 (S. Ct.); *Wolf v. Cook County*, No. 20-450 (S. Ct.).

vacated the 2019 Final Rule nationwide.[122] The Seventh Circuit stayed the judgment pending the Supreme Court's resolution of the government's certiorari petition in the preliminary injunction appeal.

On December 2, 2020, the Ninth Circuit affirmed preliminary injunctions entered by the U.S. district courts in California and Washington.[123]

On January 19, 2021, the government submitted a petition for writ of certiorari in the Ninth Circuit case, which asked the Court to hold the petition until it decided the New York case.[124]

On February 2, 2021, President Biden directed the Secretary, along with the Attorney General, the Secretary of State, and other relevant agency heads, to "review all agency actions related to implementation of the public charge ground of inadmissibility . . . and the related ground of deportability."[125] The President ordered the agencies to complete that review within 60 days.[126]

On February 22, 2021, the Supreme Court granted the government's petition for writ of certiorari in *DHS v. New York*, No. 20-449, in order to review the preliminary injunctions issued in October 2019 by the United States District Court for the Southern District of New York.

Approximately 2 weeks later, DHS announced its determination that continuing to defend the 2019 Final Rule before the Supreme Court and in the lower courts would not be in the public

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[122] *See Cook County v. Wolf*, 2020 WL 6393005 (N.D. Ill. Nov. 2, 2020).
[123] *See City & County of San Francisco v. USCIS*, 981 F.3d 742 (9th Cir. 2020).
[124] *See USCIS v. City & County of San Francisco*, No. 20-962 (S. Ct.). The petition was submitted on January 19, 2021, and docketed on January 21, 2021.
[125] *See* Exec. Order No. 14012, sec. 4, 86 FR 8277, 8278.
[126] *Ibid*.

interest or an efficient use of government resources. Consistent with that determination, the government filed stipulations with the Supreme Court dismissing *DHS v. New York*, No. 20-449; *Mayorkas v. Cook County*, No. 20-450; and *USCIS v. City & County of San Francisco*, No. 20-962.

The government likewise filed motions to dismiss public charge related appeals in the lower courts. The Seventh Circuit granted the government's motion and dismissed the appeal. As a consequence, the vacatur ordered by the United States District Court for the Northern District of Illinois became effective. The government subsequently published a notice in the *Federal Register* formally removing the 2019 Final Rule from the Code of Federal Regulations.[127]

On March 11, 2021, the United States Court of Appeals for the Fourth Circuit granted DHS's unopposed motion to dismiss the appeal and issued a mandate making the order dismissing the appeal effective. On the same day, a group of States filed motions in the Fourth and Seventh Circuits to intervene and recall the respective mandates. On March 15, 2021, the Seventh Circuit motion was denied. On March 18, 2021, the Fourth Circuit motion was denied.

On March 19, 2021, the same collection of States filed with the Supreme Court an application to intervene and to stay the vacatur judgment of the United States District Court for the Northern District of Illinois.[128] That application was denied on April 26, 2021.

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[127] *See Inadmissibility on Public Charge Grounds; Implementation of Vacatur*, 86 FR 14221, 14221 (Mar. 15, 2021).
[128] *See Texas, et al. v. Cook County, Illinois, et al.*, 20A150.

On March 10, 2021, a different collection of States filed a motion to intervene in the Ninth Circuit case.[129] On April 8, 2021, that motion was denied.

On April 30, 2021, the same collection of States filed a motion for leave to intervene in the Supreme Court in order to pursue further review of the Ninth Circuit's judgment.[130] On June 1, 2021, the Court ordered that the matter be held in abeyance to permit the prospective intervenors an opportunity to file a petition for writ of certiorari from the denial of their motion to intervene in the United States Court of Appeals for the Ninth Circuit.

On June 18, 2021, the same collection of States filed a petition for writ of certiorari with the Supreme Court, in which the States presented three questions.[131]

On October 29, 2021, the Supreme Court granted the petition limited to the question of whether the States should be permitted to intervene.

7. Consideration of Chilling Effects

In this proposed rule, DHS gives more thorough consideration to the potential chilling effects of promulgating regulations governing the public charge inadmissibility determination. In considering such effects, DHS took into account the former INS's approach to chilling effects in the 1999 Interim Field Guidance and 1999 NPRM, the 2019 Final Rule's discussion of chilling effects, judicial opinions on the role of chilling effects, evidence of chilling effects

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[129] *See City and County of San Francisco, et al., v. USCIS, et al.*, 19-17213.
[130] *See Arizona, et al. v. City and County of San Francisco, et al.*, 20M81.
[131] *See Arizona, et al. v. City and County of San Francisco, et al.*, 20-1775. The questions presented were: (1) whether States with interests should be permitted to intervene to defend a rule when the United States ceases to defend; (2) whether the rule is contrary to law or arbitrary and capricious; and (3) alternatively, whether the decision below as to the rule should be vacated as moot under *Munsingwear*.

following the 2019 Final Rule, and public comments on chilling effects following the August 2021 Advance Notice of Proposed Rulemaking (ANPRM).

a. Discussion of Chilling Effects in the 1999 NPRM and 1999 Interim Field Guidance

The 1999 NPRM and accompanying 1999 Interim Field Guidance specifically cited public confusion regarding the meaning of the statutorily undefined term "public charge," and the potential negative public health consequences, as creating a need for urgent action to provide "better guidance as to the types of public benefits that will and will not be considered in public charge determinations."[132] The 1999 NPRM explained that, following the enactment of PRWORA and its restrictions on the eligibility of certain noncitizens for many Federal, State, and local public benefits,

> numerous legal immigrants and other aliens are choosing not to apply for . . . benefits [for which Congress expressly made them eligible] because they fear the negative immigration consequences of potentially being deemed a 'public charge.' This tension between the immigration and welfare laws is exacerbated by the fact that 'public charge' has never been defined in statute or regulation. Without a clear definition of the term, noncitizens have no way of knowing which benefits they may safely access without risking deportation or inadmissibility.[133]

The INS went on to note that, according to Federal and State benefit-granting agencies,

> this growing confusion is creating significant, negative public health consequences across the country. This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits are not only causing them considerable harm, but are also jeopardizing the general public. For example, infectious diseases may spread as the numbers of immigrants who decline immunization services increase.[134]

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[132] *See* 64 FR 28676 (May 26, 1999); 64 FR 28689 (May 26, 1999).
[133] 64 FR 28676 (May 26,1999).
[134] 64 FR 28676, 28677 (May 26, 1999).

For these reasons, and following on-the-record consultation with HHS, USDA, and SSA, as well as consideration of the historical understandings of the term "public charge," the INS proposed (and in the 1999 Interim Field Guidance, implemented) a clear definition of "public charge" that excluded from consideration non-cash benefits (other than institutionalization for long-term care at government expense).[135]

b. Discussion of Chilling Effects in the 2019 *Final Rule*

In the 2019 Final Rule, DHS adopted a markedly different approach to chilling effects as compared to the former INS's approach in the 1999 NPRM and 1999 Interim Field Guidance. In the 2019 Final Rule, DHS acknowledged that the rule could result in a chilling effect with respect to the use of public benefits by noncitizens, even among individuals who were not subject to the rule, and with respect to public benefits that are not covered by the rule.[136] DHS received a significant number of detailed public comments regarding the chilling effects of that rule.[137] Commenters pointed to past studies regarding the effects of PRWORA[138] on public

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[135] *See* 64 FR 28677, 28678-28686 (May 26, 1999).
[136] *See, e.g.*, 84 FR 41292, 41310 et seq. (Aug. 14, 2019).
[137] *See, e.g.*, 84 FR 41292, 41310 (Aug. 14, 2019) ("Commenters said that the rule's disenrollment effect would have lasting impacts on the health and safety of our communities and that immigrant families are experiencing significant levels of fear and uncertainty that has a direct impact on the health and well-being of children. Citing studies and research, many commenters asserted that the chilling effect will increase hunger, food insecurity, homelessness and poverty. They added that the chilling effect will also decrease educational attainment and undermine workers' ability to acquire new skills for in-demand occupations. Many commenters stated that negative public health, social, and economic outcomes (e.g., hunger, food insecurity, decreased nutrition, unmet physical and mental health needs, unimmunized individuals, disease, decreased school attendance and performance, lack of education, poverty, homelessness) collectively damage the prosperity and health of our communities, schools, and country. Several commenters said that the rule would drive up uncompensated care costs, increase use of medical emergency departments, increase healthcare costs, endanger maternal and infant health, and heighten the risk of infectious disease epidemics. One commenter indicated that the rule would make child poverty worse and harm communities as well as infrastructure that serves all of us.").
[138] *See* Pub. L. 104-193, title IV, 110 Stat. 2260 (1996).

benefits eligibility for noncitizens.[139] Some commenters discussed chilling effects that resulted from confusion and fear regarding the 2018 NPRM that preceded that 2019 Final Rule.[140] Some commenters reported direct knowledge of such effects.[141] In response to the comments, although DHS did not dispute the studies cited by commenters, DHS made three arguments regarding its approach in the 2019 Final Rule.

First, DHS emphasized that the government's interest, as stated in 8 U.S.C. 1601, in reducing noncitizens' incentive to immigrate to or adjust status in the United States due to the availability of public benefits, and in promoting the self-sufficiency of noncitizens within the United States, was "a sufficient basis to move forward."[142] DHS also cited its "authority to take past, current, and likely future receipt of public benefits into account, even where it may ultimately result in discouraging aliens from receiving public benefits."[143] Accordingly, DHS stated that it expected noncitizens seeking lawful permanent resident status or nonimmigrant

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[139] One commenter wrote that "[a] U.S. Department of Agriculture analysis found that welfare reform's restrictions on legal immigrants' ability to receive food stamps appears to have deterred participation by their children, many of whom retained their eligibility." Another wrote that "[r]esearch shows that following PRWORA, enrollment declined both in programs whose eligibility PRWORA did not change and among individuals and families that remained eligible (that is, who were unaffected by the *eligibility* changes but were fearful of receiving benefits)." (emphasis in original.)

[140] A commenter reported that "just months after the first leaks of the executive order, a Los Angeles-based health care provider serving a largely Latino community reported a 20 percent drop in SNAP enrollment and a 54 percent drop in Medicaid enrollment among children, as well as an overall 40 percent decline in program re-enrollments." Another reported that "community providers have already reported changes in healthcare use, including decreased participation in Medicaid and WIC in the wake of the release of the draft proposal."

[141] A commenter stated that "[a]s the Intake Coordinator, I have spoken with several families whose children are in dire need of mental health services (experiencing depression, anxiety, grief, trauma, disruptive behaviors), but the caregivers are afraid to utilize their child's Medi-Cal insurance. As a result, these children are not receiving the services they need."). Another stated that "[l]ast year when there were early press accounts about a change in the public charge test, the health center's WIC program experienced a sudden drop off in attendance based on rumors in the immigrant community that it was no longer safe to participate in WIC."

[142] *See* 84 FR 41292, 41312 (Aug. 14,2019).

[143] *Ibid*.

status in the United States to "make purposeful and well-informed decisions commensurate with the immigration status they are seeking."[144] Although DHS acknowledged that individuals subject to the 2019 Final Rule may decline to enroll in, or choose to disenroll from, public benefits for which they are eligible under PRWORA to avoid the 2019 Final Rule's negative consequences, DHS stated that it would not "limit the effect of the rulemaking to avoid the possibility that individuals subject to this rule may disenroll or choose not to enroll, as self-sufficiency is the rule's ultimate aim."[145]

Second, DHS stated that it was "difficult to predict the rule's disenrollment impacts with respect to the regulated population, although DHS has attempted to do so in the . . . Final Regulatory Impact Analysis" that accompanied the 2019 Final Rule.[146] DHS stated that "data limitations [have impeded DHS from developing] a precise count [or a] reasonable estimate of the number of aliens who are both subject to the public charge ground of inadmissibility and are eligible for public benefits in the United States."[147] But DHS also acknowledged that there is little overlap between the population regulated by the 2019 Final Rule and the public benefits considered in public charge inadmissibility determinations under the 2019 Final Rule:

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[144] 84 FR 41292, 41312 (Aug. 14, 2019).
[145] *Ibid*.
[146] 84 FR 41292, 41312 (Aug. 14, 2019). The Final Regulatory Impact Analysis (RIA) did not contain any estimates that took into account the regulated population's actual eligibility for the covered benefits.
[147] DHS also wrote that the difficulty in producing an estimate "is compounded by the fact that most applicants subject to the public charge ground of inadmissibility and therefore this rule are generally unlikely to suffer negative consequences resulting from past receipt of public benefits because they will have been residing outside of the United States and therefore, ineligible to have ever received public benefits." 84 FR at 41292, 41313 (Aug. 14, 2019).

- "Aliens who are unlawfully present and nonimmigrants physically present in the United States . . . are generally barred from receiving federal public benefits other than emergency assistance";[148]
- "[A]pplicants for admission and adjustment of status . . . are generally ineligible for SNAP benefits and therefore, would not need to disenroll from SNAP to avoid negative consequences";[149] and
- "[C]ertain lawfully present children and pregnant women in certain states and the District of Columbia [are eligible for Medicaid, but] this final rule exempts receipt of Medicaid by such persons."[150]

Third, DHS wrote that it was "difficult to predict the rule's disenrollment impacts with respect to people who are not regulated by this rule, such as people who erroneously believe themselves to be affected."[151] DHS wrote that

> because DHS will not consider the receipt of public benefits by U.S. citizens and aliens not subject to public charge inadmissibility . . . it would be unwarranted for U.S. citizens and aliens exempt from public charge inadmissibility to disenroll from a public benefit program or forgo enrollment in response to this rule when such individuals are not subject to this rule. DHS will not alter this rule to account for such unwarranted choices.[152]

Instead, DHS committed itself to "issue clear guidance that identifies the groups of individuals who are not subject to this rule,"[153] and noted that DHS had excluded multiple public benefits from consideration.

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[148] 84 FR 41292, 41313 (Aug. 14, 2019).
[149] 84 FR 41292, 41313 (Aug. 14, 2019).
[150] 84 FR 41292, 41313 (Aug. 14, 2019).
[151] 84 FR 41292, 41313 (Aug. 14, 2019).
[152] 84 FR 41292, 41313 (Aug. 14, 2019).
[153] 84 FR 41292, 41313 (Aug. 14, 2019).

c. Judicial Opinions Regarding Chilling Effects

Several courts have considered the appropriate role of chilling effects in public charge inadmissibility determinations. All the cases challenging the 2019 Final Rule involved allegations that DHS failed to adequately consider the potential chilling effects of the 2019 Final Rule. In a June 2020 opinion, the Seventh Circuit reasoned that the rule's chilling effects were foreseeable and, in some respects, represented a rational response by immigrants to the 2019 Final Rule, insofar as the 2019 Final Rule did not create a predictable framework for weighing past receipt of designated public benefits, and did not foreclose DHS from designating additional public benefits for consideration in the future.[154] The court held that DHS failed to adequately grapple with "the collateral consequences of . . . disenrollments" resulting from the rule, including "reduce[d] access to vaccines and other medical care, resulting in an increased risk of an outbreak of infectious disease among the general public."[155] The court also held that DHS failed to adequately consider "the added burden on states and local governments, which must disentangle their purely state-funded programs from covered federal programs," and noted that notwithstanding the rule's potential effects on State and local governments, DHS had also concluded that the rule would not have "substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government."[156]

In a December 2019 opinion that stayed multiple preliminary injunctions against the 2019 Final Rule, a panel of the Ninth Circuit Court of Appeals reasoned that DHS's "only mandate is

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[154] *See Cook County Ill. v. Wolf*, 962 F.3d 208, 230-31 (7th Cir. 2020).
[155] *See Cook County Ill.*, 962 F.3d at 230-31.
[156] *See Cook County Ill.*, 962 F.3d at 230-31.

to regulate immigration and naturalization, not to secure transfer payments to state governments or ensure the stability of the health care industry. Any effects on those entities are indirect and well beyond DHS's charge and expertise."[157] But a later decision by the Ninth Circuit took an opposing view. The later panel emphasized the substantial evidence in the record regarding chilling effects and characterized the 2019 Final Rule's response to comments regarding chilling effects as "a generality coupled with an expression of uncertainty."[158] The court found that, although "[t]he record before DHS was replete with detailed information about, and projections of, disenrollment and associated financial costs to state and local governments . . . . DHS made no attempt to quantify the financial costs of the Rule or critique the projections offered."[159] The court concluded that DHS likely failed to satisfy its duty to "examine the relevant data."[160] Similarly, with respect to the financial impacts of the 2019 Final Rule's public health consequences, the court found that "DHS itself repeatedly acknowledged that hospitals might face financial harms as a result of the Rule, but DHS repeatedly declined to quantify, assess, or otherwise deal with the problem in any meaningful way." The court also observed that

> DHS insisted that vaccines would "still be available" to Medicaid-disenrolled individuals because "local health centers and state health departments" would pick up the slack . . . despite objections voiced by such local health centers and state health departments themselves showing that the Rule will put the populations they serve—citizens and non-citizens alike—in danger.[161]

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[157] *See City & Co. of San Francisco v. USCIS et al.*, 944 F.3d 773, 804 (9th Cir. 2019).
[158] *See City & Co. of San Francisco v. USCIS et al.*, 981 F.3d 742, 759 (9th Cir. 2020).
[159] *See City & Co. of San Francisco v. USCIS et al.*, 981 F.3d 742, 759 (9th Cir. 2020).
[160] *See City & Co. of San Francisco v. USCIS et al.*, 981 F.3d 742, 759 (9th Cir. 2020).
[161] *See City & Co. of San Francisco v. USCIS et al.*, 981 F.3d 742, 759 (9th Cir. 2020).

Finally, in the Second Circuit, a panel that upheld a preliminary injunction against the rule cited the plaintiffs' allegations of chilling effects as being sufficient to establish standing.[162] However, the panel did not cite such chilling effects in its evaluation of the merits of the policy.[163]

d. Evidence of Chilling Effects Related to the 2019 Final Rule

DHS is aware of evidence that the 2019 Final Rule, and the rulemaking process that preceded it, resulted in significant disenrollment effects among noncitizens and U.S. citizens in immigrant families. For instance, in February 2021, the Urban Institute published a report describing the following survey findings:

- "In 2020, almost one in seven adults in immigrant families (13.6 percent) reported that they or a family member avoided a noncash government benefit program, such as Medicaid, the Children's Health Insurance Program, the Supplemental Nutrition Assistance Program, or housing assistance, because of concerns about future green card applications. This 'chilling effect' was most significant in families more likely to be

[162] *See New York v. DHS*, 969 F.3d 42, 59-61 (2020).
[163] A few days prior to the panel's decision, a court in the Southern District of New York had issued a second preliminary injunction against the 2019 Final Rule, based primarily on a range of alleged harms associated with the rule's chilling effects during the COVID-19 pandemic. *See New York v. DHS*, 475 F. Supp. 3d 208, 226-30 (S.D.N.Y 2020). The Second Circuit later stayed that second preliminary injunction, "based primarily on the district court's apparent lack of jurisdiction to issue the preliminary injunction during the appeal of its prior, virtually identical injunction (coupled with DHS's showing of irreparable harm resulting from its inability to enforce its regulation)." *See New York v. DHS*, 974 F.3d 210 (2d Cir. 2020).

directly affected by the rule, those in which one or more members do not have a green card (27.7 percent)."[164]

- "In 2020, more than one in six adults in immigrant families (17.8 percent) reported avoiding a noncash government benefit program or other help with basic needs because of green card concerns or other worries about immigration status or enforcement. More than one in three adults in families in which one or more members do not have a green card (36.1 percent) reported these broader chilling effects."[165]
- "Immigrant families avoided public benefits and supports not only because of perceived risks of how the public charge rule might affect their ability to secure a green card but because of broader immigration concerns, such as the risk of information being shared with immigration enforcement authorities or the deportation of family members."[166]

These findings were generally consistent with the findings described in prior reports, which documented similar chilling effects and confusion in the aftermath of the 2018 NPRM on public charge inadmissibility and after implementation of the 2019 Final Rule.[167]

Similarly, in December 2020, the Migration Policy Institute published an analysis showing that from 2017 to 2019,

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[164] *See* Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis 1 (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).
[165] *Ibid.*
[166] *Ibid.*
[167] *See* Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019 (Urban Institute),(accessed Jan. 26, 2022); Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2019), One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018 (Urban Institute).).

> participation in [Temporary Assistance for Needy Families (TANF)], SNAP, and Medicaid declined twice as fast among noncitizens as citizens . . . . Between 2016 and 2019, the number of low-income noncitizens participating in SNAP fell by 37 percent, as did the number using TANF or similar cash assistance programs . . . . At the same time, Medicaid participation by low-income noncitizens fell by 20 percent. Across all the programs, the decline in participation for U.S.-born citizens was far smaller, decreasing only about half as much as for noncitizens and with even smaller drops for naturalized citizens.[168]

The analysis also showed notable declines "among low-income U.S.-citizen children under age 18 with noncitizens in the household, as their program participation dropped almost as rapidly as that of noncitizens themselves . . . . Participation in [SNAP, TANF, and Medicaid] fell about twice as fast over the 2016 to 2019 period for U.S.-citizen children with noncitizens in the household as for those with only citizens in the household."[169]

Similar outcomes were described in an October 2019 report regarding immigrant communities in San Diego and San Francisco issued by the Kaiser Family Foundation. That report relayed qualitative assertions from various social and legal services providers that "an increasing number of families are disenrolling themselves and their children from programs, including Medi-Cal (California's Medicaid program), and not renewing or not enrolling in programs even though they or their children are eligible and are not directly affected by the

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[168] *See* Randy Capps et al., Migration Policy Institute, Anticipated "Chilling Effects" of the Public-Charge Rule Are Real: Data Reflect Steep Decline in Benefits Use by Immigrant Families (Dec. 2020), *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 26, 2022).

[169] *See* Randy Capps et al., Migration Policy Institute, Anticipated "Chilling Effects" of the Public-Charge Rule Are Real: Data Reflect Steep Decline in Benefits Use by Immigrant Families (Dec. 2020), *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 26, 2022).

policy changes."[170] For instance, a family services provider is quoted as saying, "they're scared to apply for certain much needed funding whether it's Calfresh [food assistance] or it's Medi-Cal, to get them the health insurance."[171] A health provider is quoted as stating that "we had a patient who had a breast mass. Our physician had told her to go see a specialist. And because she had heard about public charge, she did not want to go see the specialist."[172]

An October 2019 Kaiser Family Foundation report described similar results, as follows:

- "Based on findings from the health center survey, nearly half (47%) of health centers reported that many or some immigrant patients declined to enroll themselves in Medicaid in the past year . . . . In addition, nearly one-third (32%) said that many or some immigrant patients disenrolled from or declined to renew Medicaid coverage."[173]
- "Health centers also report enrollment declines among children in immigrant families. More than a third of (38%) health centers reported that many or some immigrant patients were declining to enroll their children in Medicaid over the past year, while nearly three

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[170] *See* Samantha Artiga et al., Kaiser Family Foundation, Issue Brief: Addressing Health and Social Needs of Immigrant Families: Lessons from Local Communities at 7 (Oct. 28, 2019), *available at https://www.kff.org/report-section/addressing-health-and-social-needs-of-immigrant-families-lessons-from-local-communities-issue-brief/* (accessed Jan. 26, 2022).
[171] *See* Samantha Artiga et al., Kaiser Family Foundation, Issue Brief: Addressing Health and Social Needs of Immigrant Families: Lessons from Local Communities at 7 (Oct. 28, 2019), *available at https://www.kff.org/report-section/addressing-health-and-social-needs-of-immigrant-families-lessons-from-local-communities-issue-brief/* (accessed Jan. 26, 2022).
[172] *See* Samantha Artiga et al., Kaiser Family Foundation, Issue Brief: Addressing Health and Social Needs of Immigrant Families: Lessons from Local Communities at 8 (Oct. 28, 2019), *available at https://www.kff.org/report-section/addressing-health-and-social-needs-of-immigrant-families-lessons-from-local-communities-issue-brief/* (accessed Feb. 12, 2021).
[173] Jennifer Tolbert et al., Kaiser Family Foundation, Issue Brief: Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients at 2 (Oct. 15, 2019), *available at https://www.kff.org/medicaid/issue-brief/impact-of-shifting-immigration-policy-on-medicaid-enrollment-and-utilization-of-care-among-health-center-patients/* (accessed Feb. 14, 2021).

in ten (28%) reported many or some immigrant patients were disenrolling or deciding not to renew Medicaid coverage for their children."[174]

- "Follow-up interviews with health center staff are consistent with these survey findings of declining Medicaid enrollment among immigrant patients and their families . . . . In addition, enrollment staff who assist patients in applying for Medicaid and other coverage have access to this information as part of the application process. At some health centers interviewed, these changes were widespread with many patients dropping Medicaid while at others, the changes were occurring among only a small number of patients."[175]
- "Health center respondents reported that immigrant patients are increasingly afraid to disclose personal information. Interview respondents across all health centers reported that some immigrant patients have become reluctant to disclose any personal information out of fear that the health center would share that information with authorities."[176]
- "Health center interview respondents reported that the patients disenrolling or declining to enroll in Medicaid are a broader group of immigrants than those targeted by the public charge rule . . . . Respondents also reported that patients have expressed concerns that enrolling their children in these programs, even if their children were born in the United States, may jeopardize their status or the status of family members. In addition, although pregnant women are categorically eligible for Medicaid and would be unaffected by public charge if they enroll in Medicaid, health center respondents reported that pregnant

[174] *Id*. at 2-3.
[175] *Id*. at 3.
[176] *Ibid*.

women are declining to enroll in Medicaid or disenrolling, in some cases out of fear of risking future opportunities for residency or citizenship."[177]

- "Fear of public charge implications extends beyond Medicaid to other health and social service programs, including some that are not included in the public charge rule . . . . Several respondents noted that their WIC caseloads are down and attributed the trend to public charge fears. Respondents in California and Missouri also noted that immigrant patients are declining to enroll in or accept referrals for state and local food assistance programs, even though these programs are not subject to public charge. A health center serving New York City reported that patients with HIV or AIDS are hesitating to enroll in or are disenrolling from the city-run HIV/AIDS Services Administration (HASA) program out of fear that the program's services fall under the public charge rule."[178]

The Kaiser Family Foundation report, like the other reports described in this section, raises critical questions about the chilling effects of the 2019 Final Rule on noncitizens and citizens alike, including pregnant women and children.

e. Comments on Chilling Effects in Response to the 2021 ANPRM

On August 23, 2021, DHS issued an ANPRM on the public charge ground of inadmissibility.[179] In the ANPRM, DHS asked the public how it should address the possibility that individuals who are eligible for public benefits, including U.S. citizen relatives of noncitizens, would forgo the receipt of those benefits as a result of DHS's consideration of

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[177] *Id*. at 5.
[178] *Ibid*.
[179] Public Charge Ground of Inadmissibility; Advance Notice of Proposed Rulemaking and Notice of Virtual Public Listening Sessions, 86 FR 47025 (Aug. 23, 2021).

certain public benefits in the public charge inadmissibility determination. DHS asked for any data and information it should consider about the direct and indirect effects of past public charge policies in this regard. In addition, DHS asked about data that it could use to estimate any potential direct and indirect effects, economic or otherwise, of the public charge ground of inadmissibility related to the 2019 Final Rule. DHS also specifically sought information from State, territorial, local, and Tribal benefit granting agencies regarding impacts of the 2019 Final Rule on the application for or disenrollment from public benefit programs, including how DHS could reduce the likelihood that individuals would forgo public benefits out of concern over immigration consequences of such receipt. Commenters overwhelmingly confirmed the existence of chilling effects and cited to studies and data regarding the same.

For example, a group of 21 Attorneys General urged DHS to weigh and avoid chilling effects when crafting future public charge policies. These commenters stated that, as a consequence of the 2019 Final Rule, increasing numbers of immigrants disenrolled from or declined to enroll in public benefits programs, including programs not covered by the rule. This may have led, for instance, to a "nationwide decrease of approximately 260,000 enrollees in child Medicaid and 21,000 enrollees" in the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), neither of which would have been considered under the 2019 Final Rule in any event.[180] The commenters stated that, according to State benefit granting

[180] Alma Guerrero, M.D., M.P.H, et al., Forgoing Healthcare in a Global Pandemic: The Chilling Effects of the Public Charge Rule on Health Access Among Children in California, UCLA Latino Policy & Politics Initiative (Apr. 07, 2021), *https://latino.ucla.edu/research/public-charge-ca-children/*; Leslie Berestein Rojas, Thousands Of LA Immigrant Families Are No Longer Enrolled In Public Benefits. A Pending Trump Rule Could Be Why, LAist (Aug. 02, 2019), *https://laist.com/news/thousands-of-la-immigrant-families-are-no-longer-enrolled-in-public-benefits-a-pending-trump-rule-co*.

agencies, because the public charge inadmissibility formula in the 2019 Final Rule was so complex and layered, it was extraordinarily difficult for immigrants and service providers to understand whether or how it applied to them. Those commenters said that many immigrants avoided benefits out of fear and confusion. To underscore the severity of the impact, commenters noted that these immigrants even avoided important benefits like medical care during a pandemic.

With respect to health effects, in particular, the American Medical Association (AMA) commented that the potential wide-reaching effect of the 2019 Final Rule was anticipated and acknowledged in the 2019 Final Rule and that those predictions were proven to be true, stating that half of the immigrant families surveyed said they had avoided using Medicaid, CHIP, or SNAP.[181] But the commenter acknowledged that most of the individuals who chose not to access non-cash benefits were not subject to the 2019 Final Rule.[182] Like other commenters, the AMA highlighted the amplified chilling effects during the pandemic, stating that "the lead up to, and short-term change of, the public charge rule had a far-reaching chilling effect on the immigrant population and caused eligible individuals to not access benefits during a time when they were most needed, the COVID-19 public health emergency."[183] The AMA stated that researchers using Census Bureau data have found that, during the public health emergency, "the

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[181] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019 (Urban Institute). *https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_2.pdf* (accessed Jan 26, 2022).
[182] Shaw, April. The Public Charge Rule and Public Health (Apr. 6, 202), Network for Public Health Law, *https://www.networkforphl.org/resources/the-public-charge-rule-and-public-health/* (accessed Jan. 18, 2022).
[183] Barofsky, Jeremy et al. Spreading Fear: The Announcement of The Public Charge Rule Reduced Enrollment in Child Safety-Net Programs (Oct. 2020); Health Affairs Vol. 39, No.10: Children's Health *https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763* (accessed Jan. 18, 2022).

public charge policy likely caused 2.1 million essential workers and household members to forgo Medicaid and 1.3 million to forgo SNAP"[184] during a time when 41.4 percent of low-income immigrant families were experiencing food insecurity and 52.1 percent were worried about being able to pay for medical costs.[185]

Similarly, another commenter noted that while chilling effects would have been damaging under any circumstances, they were particularly devastating when the COVID-19 pandemic struck in the United States. The commenter cited to recent evidence that the chilling effect is still impacting many immigrant communities, even though DHS stopped applying the 2019 Final Rule in March 2021.[186]

A Latino civil rights and advocacy group cited to a Kaiser Family Foundation study, which found that 35 percent of Latino respondents, and 63 percent in the case of potentially undocumented Latino adults, cited concerns that receiving the COVID-19 vaccine would negatively affect either their own or a family member's immigration status, or both.[187] Similarly, a poll conducted by the commenter found that 14 percent of parents are concerned that getting

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[184] Touw, Sharon, McCormack, Grace, Himmelstein, David, Woolhandler, Steffie, and Zallman, Leah. "Immigrant Essential Workers Likely Avoided Medicaid And SNAP Because Of A Change To The Public Charge Rule," (Jul. 2021) Health Affairs, *https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2021.00059* (accessed Jan. 18, 2022).

[185] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2021), Adults in Low-Income Immigrant Families Were Deeply Affected by the COVID-19 Crisis yet Avoided Safety Net Programs in 2020, (The Urban Institute), available at *https://www.urban.org/research/publication/adults-low-income-immigrant-families-were-deeply-affected-covid-19-crisis-yet-avoided-safety-net-programs-2020* (accessed Jan. 26, 2022).

[186] Protecting Immigrant Families (PIF), Research Documents Harm of Public Charge Policy During the COVID-19 Pandemic, (Aug. 2021), *https://protectingimmigrantfamilies.org/wp-content/uploads/2022/01/PIF-Research-Document_Public-Charge_COVID-19_Jan2022.pdf*.

[187] Hamel, Liz et al., KFF COVID-19 Vaccine Monitor: COVID-19 Vaccine Access, Information, and Experiences Among Hispanic Adults in the U.S., Kaiser Family Foundation (May 13, 2021), *https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-access-information-experiences-hispanic-adults/*.

their child vaccinated against COVID-19 might cause immigration problems for themselves or their family.[188]

A State agency wrote that, following issuance of the 2019 Final Rule, the agency

> spoke to numerous noncitizens who were afraid to apply for public benefits for their U.S. citizen children. This was particularly apparent when [the agency] began its Pandemic-Electronic Benefit Transfer (EBT) program for children. The [agency] program automatically provided food assistance in the form of an EBT card to families in Chicago with children enrolled in the Chicago Public Schools and provided ready to go meals at schools during the height of the pandemic. Many parents did not utilize the assistance for fear of being deemed a public charge in the future.

The same agency expressed concern that "if [medical or nutrition benefits] are included in a new public charge rule or if the new final rule is as cumbersome and untenable" as was the 2019 Final Rule, the rule would "likely increase demand for other state-funded social services, such as non-Medicaid behavioral health services, emergency food assistance, and other safety net resources."

When addressing how DHS could reduce or minimize chilling effects when issuing rules addressing public charge inadmissibility, commenters had a number of suggestions, including:

- Consider only the use of cash assistance from TANF and SSI in public charge determinations, not the use of Medicaid, SNAP, or public housing benefits, including Medicaid institutional care benefits.

[188] UnidosUS, "National Survey of Latino Parents: Economic Concerns and Vaccine Access for Children," (Washington DC: UnidosUS, September 14, 2021), *https://www.unidosus.org/publications/national-survey-of-latino-parents-economic-concerns-and-vaccine-access-for-children/*

- Exclude consideration of other public benefits, such as the Children's Health Insurance Program, the health insurance marketplaces, WIC, or National School Lunch or Breakfast programs, or receipt of the Earned Income or Child Tax Credit.
- Exclude dependents' and family members' use of benefits, especially use of benefits by children, as well as by those who use benefits due to reasons such as domestic violence.
- Exclude past, current, or future receipt of public benefits from public charge inadmissibility determinations, and instead only find noncitizens inadmissible if they are determined to be likely in the future to rely on the Federal Government to such an extent that the reliance is permanent, primary, and total, meaning the use of the benefits is necessary to avoid destitution.
- Limit public charge consideration to only two Federal cash-assistance programs (TANF and SSI), and excluding all State, local, and Tribal benefits from consideration, to make the guidelines simple to communicate and understand.
- Clearly define which public benefits would not be considered in a public charge inadmissibility determination (e.g., SNAP, CHIP, Medicaid, and Affordable Care Act premium subsidies for health coverage through an exchange).

In addition, commenters emphasized the importance of simple, streamlined, and easy to communicate rules, and encouraged DHS and other Federal agencies to provide outreach to immigrant communities about the relief afforded by any revised rules.

DHS appreciates that the consideration of past and current benefit receipt has resulted and may continue to result in chilling effects, notwithstanding that few categories of noncitizens are actually subject to the public charge ground of inadmissibility, and these categories of noncitizens would likely not have received such benefits to begin with. As discussed elsewhere

in this preamble, however, DHS nonetheless believes that it is important to consider a noncitizen's past or current receipt of certain benefits, to the extent that such receipt occurs, as part of the public charge inadmissibility determination.

DHS remains interested in public comment regarding ways to shape public communications around the final rule to mitigate chilling effects among U.S. citizens and among the great majority of noncitizens who are either ineligible for the public benefits covered by this rule prior to admission or adjustment of status or are exempt from a public charge determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Although such communications materials are not part of the rulemaking, DHS is keenly aware of the established effects of its actions in this policy area and wishes to ensure that the final rule faithfully applies the public charge statute without causing undue confusion among the public.

8. Other Burdens of the 2019 Final Rule

The 2019 Final Rule imposed a range of burdens separate and apart from the chilling effects described above. Commenters responding to the ANPRM, as well as those participating in the listening sessions, expressed concerns regarding those burdens. These comments echoed concerns raised in response to the 2018 NPRM. DHS briefly describes the most recent public input here.

Some commenters focused on the information collection and evidentiary burdens associated with the rule. Many commenters objected to the burden of collecting documentation for and completing the Form I-944. The Form I-944, together with its instructions, spanned 30 pages and requested a wide range of information on the statutory minimum factors, some of which was duplicative of other filings. Information and supporting documentation included, for

instance, an accounting of all liabilities and debts; a list of all assets that can be converted into cash within 12 months; account statements, evidence of real estate value, and other evidence of the value of assets; credit report, if available (or documentation showing that no such report is available); proof of health insurance; and copies of W-2s and income tax returns.

One commenter, a professional association, noted that the scope and burden of the Form I-944

> created a variety of practical problems. The first is one of simple adjudicative inefficiency. Instead of an adjustment of status application consisting of completed forms and a reasonable number of supporting documents, filings would include hundreds or even thousands of pages of supporting financial documents. USCIS was then charged with maintaining and organizing this voluminous documentation simply to reach the obvious conclusion that an employment-based immigrant, many of whom are offered employment at high salaries well above the poverty line, [is] unlikely to become a public charge.

The commenter also noted that the form's scope and burden forced applicants to choose between seeking adjustment of status and collecting and then transmitting, first to an attorney and then to USCIS, a wide range of sensitive financial documents. The commenter encouraged USCIS to limit information collection regarding financial status from employment-based immigrants who have an approved immigrant visa petition containing a valid labor certification or (for an immigrant category for which a labor certification is not required) a valid U.S. job offer.

Other commenters focused on the 2019 Final Rule's burdens on public benefit agencies, healthcare providers, and others who interacted with the public in connection with public benefits and therefore expended resources to familiarize themselves with the 2019 Final Rule and to communicate with the public about the rule's terms. Commenters stated that this kind of research and outreach went well beyond the staff's skills and typical responsibilities.

One State agency wrote that it "incurred significant costs to support the needs of immigrant-serving community organizations and in responding to the fear and confusion caused by the 2019 public charge rule (published as an NPRM in October 2018 but broadly leaked and reported on in spring 2018)." The agency issued multiple grants to address misinformation and fear in communities and fund family counseling related to the 2018 NPRM and 2019 Final Rule. The commenter wrote that "staff dedicated hundreds of hours planning and implementing State help for immigrants completing the [Form I-944, including] dozens of meetings with both internal staff members and cross-agency staff members, as well as external partners who work with immigrant communities to understand the extensive requirements of the [Form I-944]." The commenter wrote that the resource burden centered on the Form I-944's questions related to the type, amount, and dates of all benefits ever applied for or received, which in the commenter's view were so detailed as to "[make] it highly unlikely that any noncitizen subject to the 2019 rule would have been able to complete the form without intensive consultation with IDHS caseworkers, potentially even caseworkers in multiple states, and/or administering agencies."

Following issuance of the 2019 Final Rule, the commenter observed "a significant increase in the number of customers to our offices. The amount of work needed to prepare for and meet this demand was overwhelming." The commenter wrote that "[t]he expense of training caseworkers alone cost more than 2700 person hours and $91,000. Caseworkers were needed to provide information and services to individuals seeking to disenroll from benefits. The estimated administrative cost ranges from 61,500 to 143,500 person hours and over $3 million."

Similarly, another commenter on the ANPRM stated their belief that the 2019 Final Rule "used administrative burdens as a tool to keep people from adjusting their status with the creation of the I-944" which, in their view, imposed a huge paperwork burden on applicants,

legal services providers, and attorneys. This commenter went on to state that "[a]dministrative burdens have a disproportionately harmful effect on people with fewer resources" and that such administrative burdens "like onerous paperwork, complex requirements, and opaque guidelines are barriers to equity in federal policies and programs."

9. The COVID-19 Pandemic

Although DHS believes that the approach contained in this proposed rule would be warranted, on both legal and policy grounds, regardless of the effects of the COVID-19 pandemic, DHS includes brief background on the pandemic's effects for three reasons. First, the onset of the COVID-19 pandemic coincided with the implementation of the 2019 Final Rule and had widespread effects on the same population that adjusted their behavior in response to the 2019 Final Rule. As a result, the COVID-19 pandemic's effects necessarily serve as relevant historical context when considering the effects of the 2019 Final Rule. Second, although DHS recognizes that the COVID-19 pandemic has evolved, the pandemic's effects continue, in a variety of ways, to this day. Third, the current COVID-19 pandemic provides certain evidence that another pandemic is not a hypothetical concern and illustrates the importance that this rule account for similar occurrences in the future. The following description is thus a relevant context for this proposed rule as well.

a. The COVID-19 Pandemic and Its Effects on Public Health and the Economy

Beginning as early as December 2019, just a few months after publication of the 2019 Final Rule, there was an outbreak of a novel coronavirus, now known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), and the disease it causes, now known as coronavirus

disease 2019 (COVID-19).[189] On January 30, 2020, the Director-General of the World Health Organization (WHO) declared the outbreak a "public health emergency of international concern" under the International Health Regulations (2005) and on March 11, 2020, the WHO announced that the COVID-19 outbreak can be characterized as a pandemic.[190] On January 31, 2020, the Secretary of HHS declared a public health emergency dating back to January 27, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d), in response to COVID-19.[191] On March 13, 2020, President Trump declared a National Emergency concerning the COVID-19 outbreak to control the spread of the virus in the United States.[192]

The virus that causes COVID-19 is characterized by easy airborne transmission among individuals in close physical proximity (within about 6 feet), and it can be spread by both symptomatic and certain asymptomatic carriers.[193] Among adults, the risk for severe illness

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[189] *See* Wang, Chen et al., Comment: A Novel Coronavirus Outbreak of Global Health Concern, The Lancet (Jan. 24, 2020), *available at https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30185-9/fulltext*.

[190] *See* WHO, Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) (Jan. 30, 2020), *available at https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)* and WHO, Listing of WHO's Response to COVID-19, *https://www.who.int/news/item/29-06-2020-covidtimeline*.

[191] Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020). *See also* HHS Renewal of Determination That A Public Health Emergency Exists, *https://aspr.hhs.gov/legal/PHE/Pages/COVID19-14Jan2022.aspx* (Jan. 14, 2022). The determination that a public health emergency exists due to COVID-19 has subsequently been renewed seven times: on April 21, 2020, on July 23, 2020, on October 2, 2020, on January 7, 2021, on April 15, 2021, on July 19, 2021, on October 15, 2021, and most recently on January 14, 2022, effective January 16, 2022.

[192] Proclamation 9994 of Mar. 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

[193] *See* Centers for Disease Control & Prevention (CDC), How COVID-19 Spreads (updated July 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html* (accessed Jan. 25, 2022); and Centers for Disease Control & Prevention (CDC), How COVID-19 Spreads (updated July 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html* (accessed Jan. 25, 2022).

from COVID-19 (e.g., illness requiring hospitalization, intensive care, and ventilator use)[194] increases with age, with older adults at highest risk, as well as people of any age with underlying medical conditions.[195]

The COVID-19 pandemic's effects have been vast, including within the United States, and they are ongoing. As of February 8, 2022, a total of 903,038 COVID-19 deaths have been reported in the United States.[196] As of February 8, 2022, the 7-day moving average of daily deaths in the United States was 2,303[197] and the 7-day moving average of hospitalizations was 102,695.[198] Effects on the U.S. economy as a result of the COVID-19 pandemic have been dramatic. Soon after the COVID-19 pandemic began, the United States witnessed widespread job losses and food insecurity. In March 2020, the U.S. Bureau of Labor Statistics estimated that the seasonally adjusted domestic unemployment rate was 4.4 percent.[199] That number spiked to 14.8 percent in April, and it gradually fell to 6.3 percent by January 2021.[200] The unemployment rate for January 2022 was 4.0 percent.[201] While the high unemployment rate has declined

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[194] *See* Centers for Disease Control & Prevention (CDC), People with Certain Medical Conditions (updated Dec. 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html* (accessed Jan. 27, 2022).
[195] *See* Centers for Disease Control & Prevention (CDC), How COVID-19 Spreads (updated July 14, 2021), *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html* (accessed Jan. 25, 2022).
[196] *See* CDC, United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction, *https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days* (accessed Feb. 8, 2022).
[197] *See* CDC, Daily Trends in Number of COVID-19 Deaths in The United States Reported to CDC, *available at https://covid.cdc.gov/covid-data-tracker/#trends_dailydeaths* (accessed Feb. 10, 2022).
[198] *See* CDC, Prevalent Hospitalizations of Patents with Confirmed COVID-19, United States, *available at https://covid.cdc.gov/covid-data-tracker/#hospitalizations* (accessed Feb. 10, 2022).
[199] *See* U.S. Bureau of Labor Statistics, Graphics for Economic News Releases: Civilian Unemployment Rate, *available at https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm* (accessed Feb. 9, 2022).
[200] *Id.*
[201] *Id.*

significantly, the United States is now experiencing high demand for labor as compared to the available supply of workers.[202] As of November 2021, the labor force participation rate was at 61.8 percent, having recovered about half of what was lost at height of the COVID-19 pandemic compared with the February 2020 rate of 63.3 percent.[203] In addition, the full scope of implications of the emergence of the Omicron variant, and the potential effects of future variants, for public health,[204] inflation,[205] and supply chains[206] remains uncertain.

The COVID-19 pandemic's effects on food insecurity have at times also been severe. Prior to March 13, 2020, of 250 million persons surveyed, 20 million reported that they "often"

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[202] The BLS Job Openings and Labor Turnover Survey (JOLTS) reports 11 million job openings in October 2021 (compared to 6.8 million job openings in October 2020). *See* Bureau of Labor Statistics, Job Openings and Labor Turnover Survey released on December 8, 2021, at *https://www.bls.gov/news.release/archives/jolts_12082021.htm*.

[203] *See* CNN, Three key numbers that explain America's labor shortage (Dec. 25, 2021), *https://www.cnn.com/2021/12/25/economy/labor-shortage-early-retirement-charts/index.html* (accessed Jan. 18, 2021).

[204] *See* Annika Kim Constantino, *Omicron detected in Florida and Texas as it takes root in 25 U.S. states*, CNBC, *https://www.cnbc.com/2021/12/10/omicron-detected-in-florida-texas-and-other-states-as-it-takes-root-across-the-us-.html* (accessed Dec. 10, 2021).

[205] On December 10, 2021, BLS reported that the CPI-U increased 0.8 percent in November on a seasonally adjusted basis after rising 0.9 percent in October. Over the previous 12 months, the all items index increased 6.8 percent before seasonal adjustment. *See* BLS, Economic News Release, Consumer Price Index Summary (Dec. 20, 2021), *https://www.bls.gov/news.release/cpi.nr0.htm*.

[206] *See, e.g.*, Mitchell Hartman, *Omicron's impact on inflation and supply chains is uncertain*, Marketplace, *https://www.marketplace.org/2021/12/01/omicrons-impact-on-inflation-and-supply-chains-is-uncertain/* (Dec. 1, 2021) ("People have trouble getting to work through lockdowns and what have you, and labor gets scarcer — particularly for those jobs where being present at work matters. Supply goes down and has an upward pressure on pricing . . ."); Alyssa Fowers & Rachel Siegel, *Five charts explaining why inflation is at a near 40-year high*, Wash. Post, *https://www.washingtonpost.com/business/2021/10/14/inflation-prices-supply-chain/* (Oct. 14, 2021, last updated Dec. 10, 2021) ("Prices for meat, poultry, fish and eggs have surged in particular above other grocery categories. The White House has pointed to broad consolidation in the meat industry, saying that large companies bear some of the responsibility for pushing prices higher. . . Meat industry groups disagree, arguing that the same supply-side issues rampant in the rest of the economy apply to proteins because it costs more to transport and package materials, while tight labor market has held back meat production.").

or "sometimes" did not have enough to eat.[207] By December 9, 2020, that figure had increased by 50 percent to 30 million people.[208] From March to September 2020, the number of people participating in SNAP increased from around 37.2 million to 42.9 million, and the number of participating households increased from around 19 million to 22.6 million.[209] That number has since decreased but has not returned to pre-pandemic levels. As of October 2021, the number of people participating in SNAP decreased to 41.1 million, and the number of households to 21.3 million.[210] In addition, multiple States are administering Pandemic Electronic Benefit Transfer (P-EBT) programs for school-age children. As of September 2020, over 10.9 million people and 7.3 million households were participating in this program.[211] As of October 2021, this number only marginally decreased to 10.0 million people but increased to 8.8 million households.[212]

The COVID-19 pandemic has also had major impacts on State, Tribal, territorial, and local governments, which have played a critical role in responding to the pandemic.[213] Projections indicated that use of State and local spending programs is likely to increase,

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[207] U.S. Census Bureau, Week 1 Household Pulse Survey: April 23 - May 5, Food Table 2a. Food Sufficiency for Households, Prior to COVID-19 Pandemic, by Select Characteristics: United States, *available at https://www.census.gov/data/tables/2020/demo/hhp/hhp1.html#setables* (accessed Jan. 27, 2022).
[208] U.S. Census Bureau, Week 21 Household Pulse Survey: December 9 to December 21, Food Table 2b. Food Sufficiency for Households, In the Last Seven Days, by Select Characteristics: United States, *available at https://www.census.gov/data/tables/2020/demo/hhp/hhp21.html#setables* (accessed Jan. 23, 2021).
[209] *See* Food and Nutrition Service, National and/or State Level Monthly and/or Annual Data, FY16 through FY20 National View Summary (Latest Available Month: September 2020), *available at https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap* (accessed Feb. 11, 2021).
[210] *See* Food and Nutrition Service, Supplemental Nutrition Assistance Program (Data as of Jan. 7, 2022), Monthly Data FY 2019 through FY 2022, *https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-1.pdf* (accessed Jan. 18, 2022).
[211] *See* Food and Nutrition Service, Pandemic EBT Program Participation and Benefits - FY 20, *available at https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap* (accessed Feb. 11, 2021).
[212] See Food and Nutrition Service, Pandemic EBT (P-EBT) Program (data as of Jan. 7, 2022), *https://fns-prod.azureedge.net/sites/default/files/resource-files/40PEBTPart%24-1.pdf* (accessed Jan. 18, 2022).
[213] *See* Cong. Res. Serv., General State and Local Fiscal Assistance and COVID-19: Eligible Purposes, Allocations, and Use Data, R46990 (Dec. 16, 2021).

particularly for public welfare programs and hospital and health expenses.[214] Congress has appropriated significant funding to support these governments through the Coronavirus Relief Fund.[215]

Finally, the COVID-19 pandemic has created significant pressures on health care providers. For instance, community health centers have experienced a decline in patient visits, staffing, and revenue. By one estimate, as of December 2020, the decline in patient visits may have translated into over $4 billion in revenue losses nationwide, "an amount that represents 12.7 percent of total revenue reported nationally in 2019."[216] In September 2021, prior to the emergence of the Omicron variant, one analysis projected that hospitals nationwide would lose an estimated $92 billion in net income over the course of that year, or $54 billion taking into account certain Federal funding.[217]

b. Nationwide Vaccination Effort

The COVID-19 vaccination effort in the United States began in mid-December 2021, after the U.S. Food and Drug Administration granted the first vaccine emergency use

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[214] *Ibid.*
[215] *Ibid.*
[216] *See* Sharac, Jessica et al., Geiger Gibson / RCHN Community Health Foundation Research Collaborative, Data Note: Key Updates from the Health Center COVID-19 Survey (Week #36): The Status of Community Health Centers in the Midst of the Worst Phase of the COVID-19 Pandemic, at 7-9, available at *https://www.rchnfoundation.org/?p=9394* (accessed Feb. 12, 2021).
[217] *See* Kaufman Hall, Financial Effects of COVID-19: Hospital Outlook for the Remainder of 2021 at 7 (Sept. 2021), *https://www.aha.org/guidesreports/2021-09-21-financial-effects-covid-19-hospital-outlook-remainder-2021* (accessed Jan. 26, 2022).

authorization.[218] As of February 9, 2022, 213.2 million (64.2 percent) of the U.S. population was fully vaccinated, and 251.5 million (75.7 percent) had received at least one shot.[219]

On January 4, 2022, Centers for Disease Control and Prevention (CDC) recommended the use of the Pfizer booster 5 months after becoming fully vaccinated.[220] On January 7, 2022, CDC recommended the use of the Moderna booster 5 months after becoming fully vaccinated.[221] As of February 9, 2022, 90.5 million people (42.5 percent) have received a booster dose.[222]

c. The COVID-19 Pandemic's Effects on Vulnerable Communities

From the outset, many of the COVID-19 pandemic's effects have been felt most acutely in more vulnerable communities, including localities with high poverty rates and among certain racial and ethnic populations. For instance, the cumulative COVID-19 case rate on a per capita basis has consistently been higher in counties with a higher percentage of their population in poverty. As of January 27, 2022, counties with "Low" such percentages (0 percent to 12.3 percent) had experienced a cumulative case rate of approximately 20,426 cases per 100,000 persons. By contrast, counties with Moderate (12.3 percent to 17.3 percent) and High (>17.3 percent) percentages experienced case rates of approximately 22,555 and 23,720 per 100,000

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[218] See, U.S. Department of Health and Human Services, COVID-19 Vaccines; Timeline *https://www.hhs.gov/coronavirus/covid-19-vaccines/index.html* (accessed Feb. 10, 2022).
[219] *See* CDC, COVID-19 Vaccinations in the United States, *https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total* (accessed Feb. 9, 2022).
[220] *See* CDC, CDC Recommends Pfizer Booster at 5 Months, Additional Primary Dose for Certain Immunocompromised Children | CDC Online Newsroom (Jan. 4, 2022), *https://www.cdc.gov/media/releases/2022/s0104-Pfizer-Booster.html* (accessed Jan. 18, 2022).
[221] *See* CDC, CDC Recommends Moderna Booster at 5 Months (Jan. 7, 2022), *https://www.cdc.gov/media/releases/2022/s0107-moderna-booster.html* (accessed Jan. 18, 2022).
[222] *See* CDC, COVID-19 Vaccinations in the United States (Jan. 15, 2022), *https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total* (accessed Feb. 9, 2022).

persons, respectively.[223] The relative disparities are greater with respect to COVID-19 deaths. As of January 27, 2022, cumulative COVID-19 deaths ranged from 216 per 100,000 in counties falling within the "Low" classification, to 275 and 339 for "Moderate" and "High," respectively.[224]

Similarly, the cumulative case rate on a per capita basis has consistently been higher in counties with a higher percentage of uninsured individuals. As of January 27, 2022, counties with "Low" percentages of uninsured individuals (0 percent to 7.1 percent) had experienced a cumulative case rate of approximately 20,822 cases per 100,000 persons. By contrast, counties with Moderate (7.1 percent to 11.4 percent) and High (>11.4 percent) percentages of uninsured persons experienced rates of approximately 22,719 and 23,022 per 100,000 persons, respectively.[225] The pattern is similar with respect to COVID-19 deaths. As of January 27, cumulative COVID-19 deaths ranged from 235 per 100,000 in counties falling within the "Low" classification, to 268 and 305 for "Moderate" and "High," respectively.[226] Although most of the uninsured are citizens, noncitizens are significantly more likely than citizens to be uninsured. In 2018, among the nonelderly population, 23 percent of lawfully present noncitizens and more than 4 in 10 (45 percent) undocumented noncitizens were uninsured compared to less than 1 in

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[223] *See* CDC, Trends in COVID-19 Cases and Deaths in the United States, by County-level Population Factors, *available at https://covid.cdc.gov/covid-data-tracker/#pop-factors_totalcases* (sorted by United States/Percent of Population in Poverty/Cases/Cumulative) (accessed Jan. 27, 2022).
[224] *See* CDC, Trends in COVID-19 Cases and Deaths in the United States, by County-level Population Factors, available at *https://covid.cdc.gov/covid-data-tracker/#pop-factors_totaldeaths* (sorted by United States/Percent of Population in Poverty/Deaths/Cumulative) (accessed Jan. 27, 2022).
[225] *See* CDC, Trends in COVID-19 Cases and Deaths in the United States, by County-level Population Factors, *available at https://covid.cdc.gov/covid-data-tracker/#pop-factors_totalcases* (sorted by United States/Percent of Population Uninsured/Cases/Cumulative) (accessed Jan. 27, 2022).
[226] *See* CDC, Trends in COVID-19 Cases and Deaths in the United States, by County-level Population Factors, *available at https://covid.cdc.gov/covid-data-tracker/#pop-factors_totaldeaths* (sorted by United States/Percent of Population Uninsured/Deaths/Cumulative) (accessed Jan. 27, 2022).

10 (9 percent) citizens. Moreover, among citizen children, those with at least one noncitizen parent are more likely to be uninsured compared to those with citizen parents (8 percent vs. 4 percent).[227]

Similarly, some racial and ethnic groups have experienced higher rates of COVID-19 cases and deaths as compared to the general population. Through January 31, 2022, the CDC data on race and ethnicity for 85 percent of the people who have died from COVID-19 reveal that the percent of non-Hispanic American Indian / Alaska Native, non-Hispanic Black, and non-Hispanic Native Hawaiian / Other Pacific Islander people who have died from COVID-19 is higher than the percent of these racial and ethnic groups in the total U.S. population.[228] Through January 31, 2022, the CDC data on race and ethnicity for 65 percent of the people who have been infected by COVID-19 show that the percent of Hispanic / Latino, non-Hispanic American Indian / Alaska Native, and non-Hispanic Native Hawaiian / Other Pacific Islander people who have had COVID-19 cases is higher than the percent of these racial and ethnic groups in the total U.S. population.[229]

These disparities likely trace to a range of factors, including disparities in access to telework in certain communities. Research shows that

> [r]acial minorities and low-income workers, including immigrants, have fewer opportunities to work from home because more of them tend to work in service industries. As a result, immigrants working in factories, supermarkets, delivery,

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[227] *See* Kaiser Family Foundation, Health Coverage of Immigrations (Mar. 18, 2020), available at *https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/* (accessed Jan. 27, 2022).
[228] *See* CDC, Deaths by Race/Ethnicity – All Age Groups, available at *https://covid.cdc.gov/covid-data-tracker/#demographics* (accessed Feb. 1, 2022).
[229] *Ibid.*

sanitation, and poultry and meat processing sectors are more likely to be exposed to COVID-19.[230]

Immigrants are also more likely to feel pressure to continue to go to work due to the disproportionate job losses experienced in such industries.[231] DHS is aware that a significant portion of service industry work also is essential critical infrastructure work,[232] some of which DHS has previously prioritized for additional immigration flexibilities.[233] Participation in this kind of work frequently benefits the country, but also places such workers at greater risk for infection than those who work from home or in more socially distanced settings.

Finally, although DHS is unaware of vaccination data specific to citizenship and immigration status, there were disparities across racial and ethnic lines with respect to vaccination rates during the initial rollout of the nationwide vaccination campaign. For example, the percentage of fully vaccinated non-Hispanic Asians did not reach parity with non-Hispanic

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[230] *See* Indiana University Public Policy Institute, Immigration Policy and COVID-19: Implications of the Public Charge Rule (June 2020), *available at https://policyinstitute.iu.edu/doc/covid-19-public-charge-immigration-brief.pdf* (accessed Jan. 27, 2022) (citing Elise Gould et al., Economic Policy Institute, Not Everybody Can Work from Home: Black and Hispanic Workers are Much Less Likely to be Able to Telework (Mar. 19, 2020), available at *https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/* (accessed Jan. 27, 2022)).

[231] With respect to immigrants specifically, unemployment data from August 2019 to August 2020 indicate that "the observed increase in unemployment in the United States was twice as large among immigrants with at most a high-school degree than for their peers with higher degrees. In addition, differences by education level were less pronounced for the native-born." *See* Organisation for Economic Co-operation and Development, What is the impact of the COVID-19 pandemic on immigrants and their children? (Oct. 19, 2020), available at *http://www.oecd.org/coronavirus/policy-responses/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children-e7cbb7de/* (accessed Feb. 11, 2021).

[232] *See generally* Cybersecurity and Infrastructure Security Agency, Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response (Aug. 10, 2021), available at *https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce* (accessed Jan. 27, 2022).

[233] *See, e.g.*, 85 FR 82291 (Dec. 18, 2020) (extension of temporary rule creating flexibilities with respect to certain H-2A temporary agricultural workers); 85 FR 51304 (Aug. 20, 2020) (first extension of temporary rule); 85 FR 21739 (Apr. 20, 2020) (initial temporary rule); *see also, e.g.*, 87 FR 4722 (Jan. 28, 2022) (similar flexibilities with respect to certain H-2B temporary non-agricultural workers); 86 FR 28198 (May 25, 2021) (same); 85 FR 28843 (May 14, 2020) (same).

Whites until May 2, 2021, and the percentage of fully vaccinated Hispanics/Latinos did not reach parity with non-Hispanic Whites until September 23, 2021.[234] On January 12, 2022, the Kaiser Family Foundation reported that "Over the course of the vaccination rollout, Black and Hispanic people have been less likely than their White counterparts to receive a vaccine, but these disparities have narrowed over time, particularly for Hispanic people." DHS emphasizes, however, that existing data contain limitations and may have been influenced by restrictions on vaccine eligibility related to age and other factors during the initial rollout.[235]

d. USCIS Response to COVID-19 and Public Charge

Commenters on the 2018 NPRM expressed concerns that the proposed rule would "make immigrant families afraid to seek healthcare, including vaccinations against communicable diseases, and therefore, endanger the U.S. population." A commenter specifically provided the example of "a novel influenza outbreak" for which the "critical first step" of the government's response would "be to get individuals access to healthcare" and stated that even if such services qualified for a narrow exception, "it would have a significant impact on the country's ability to protect and promote the public health."[236]

DHS responded to those concerns by noting that with the rule it did "not intend to restrict the access of vaccines … or intend to discourage individuals from obtaining the necessary

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[234] *See* CDC, Percent of People Receiving COVID-19 Vaccine by Race/Ethnicity and Date Administered, United States, *available at https://covid.cdc.gov/covid-data-tracker/#vaccination-demographics-trends* (accessed Feb. 10, 2022).
[235] *See* Kaiser Family Foundation, Latest Data on COVID-19 Vaccinations by Race/Ethnicity (Jan. 12, 2022), *https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity/#* (accessed Jan. 27, 2022). *See also* CDC, Race/Ethnicity of People Fully Vaccinated, available at *https://covid.cdc.gov/covid-data-tracker/#vaccination-demographic* (accessed Feb. 10, 2022).
[236] *See* 84 FR 41292, 41384 (Aug. 14, 2019).

vaccines."[237] DHS also stated that many sources of vaccines through public benefits programs are not considered public benefits under (the now vacated) 8 CFR 212.21(b)[238] or would otherwise not be a negative factor in the totality of the circumstances determination.[239] In the 2019 Final Rule, DHS did not directly address the commenters' concerns that a loss of trust in government healthcare services might hamper the government's ability to respond to a novel disease outbreak.

However, USCIS did address such concerns in a limited way with the publication of USCIS Policy Manual (PM) content relating to the public charge ground of inadmissibility.[240] In PM Volume 8, Part G, Chapter 10 – Public Benefits, USCIS provided a non-exhaustive list of benefits that are "not considered public benefits in the public charge inadmissibility determination."[241] This list included "public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease."[242] The PM also noted that USCIS does not consider certain Medicaid benefits for purposes of the public charge inadmissibility determination, including "benefits paid for an emergency medical condition."[243] USCIS published this guidance to its website on February 5, 2020.

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[237] *Ibid.*
[238] 84 FR 41292, 41501 (Aug. 14, 2019).
[239] *See* 84 FR 41292, 41385 (Aug. 14, 2019).
[240] *See* USCIS Policy Manual, Part G – Public Charge Ground of Inadmissibility (accessed Jan. 31, 2022). To find historical guidance, click on the "Appendices" tab.
[241] USCIS Policy Manual Volume 8, Part G – Public Charge Ground of Inadmissibility, Chapter 10 – Public Benefits, available at *https://www.uscis.gov/policy-manual/volume-8-part-g-chapter-10*.
[242] *Ibid*.
[243] *Ibid*.

On March 13, 2020, USCIS posted an alert box on its website regarding the 2019 Final Rule and COVID-19. The alert stated that

> USCIS will neither consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination, nor as related to the public benefit condition applicable to certain nonimmigrants seeking an extension of stay or change of status, even if such treatment is provided or paid for by one or more public benefits, as defined in the rule (e.g. federally funded Medicaid).[244]

The alert did not explain how a person could enroll in Medicaid for the sole purpose of COVID-19-related care,[245] or cite a provision of the 2019 Final Rule specifically authorizing the exemptions described in the alert or the PM.

With respect to receipt of other public benefits covered by the 2019 Final Rule (such as non-COVID-19-related federally funded Medicaid, SNAP, and public housing benefits), the PM and alert did not offer flexibility beyond that implicit in the "totality of the circumstances" analysis. The alert stated that

> if an alien subject to the public charge ground of inadmissibility lives and works in a jurisdiction where disease prevention methods such as social distancing or quarantine are in place, or where the alien's employer, school, or university voluntarily shuts down operations to prevent the spread of COVID-19, the alien may submit a statement with his or her application for adjustment of status to explain how such methods or policies have affected the alien as relevant to the factors USCIS must consider in a public charge inadmissibility determination. For instance, if the alien is prevented from working or attending school and must rely on public benefits for the duration of the COVID-19 outbreak and recovery phase, the alien can provide an explanation and relevant supporting documentation. To the extent relevant and credible, USCIS will take all such evidence into consideration in the totality of the alien's circumstances.

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[244] *See* USCIS, Public Charge; Alert, available at *https://www.uscis.gov/archive/public-charge* (last Reviewed/updated Sep. 22, 2020).

[245] *Cf., e.g.*, 84 FR at 41380 ("DHS recognizes that Medicaid and CHIP benefits for children also provide for other services or funding for in school health services and serve as an important way to ensure that children receive the vaccines needed to protect public health and welfare.").

The alert did not provide any further detail regarding the weight that USCIS would afford the COVID-19-related mitigating circumstances in its public charge inadmissibility determinations or explain whether the existence of a general economic downturn might warrant similar special consideration.

D. Public Charge Bonds

If a noncitizen is determined to be inadmissible under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), they may be admitted in the discretion of the Secretary, if otherwise admissible, upon the giving of a suitable and proper bond.[246] Public charge bonds are intended to ensure "that the alien will not in the future become a public charge."[247]

Historically, bond provisions started with States requiring certain amounts to assure a noncitizen would not become a public charge.[248] Bond provisions were codified in Federal immigration laws in 1903.[249] Notwithstanding codification in 1903, the acceptance of a bond posting in consideration of a noncitizen's admission and to assure that they will not become a public charge apparently had its origin in Federal administrative practice earlier than this date. Beginning in 1893, immigration inspectors served on Boards of Special Inquiry that reviewed exclusion cases of noncitizens who were likely to become public charges because the noncitizens

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[246] *See* INA sec. 213, 8 U.S.C. 1183. *See* 8 CFR 103.6; *see also* 8 CFR 213.1.
[247] *See* INA sec. 213, 8 U.S.C. 1183; *Matter of Viado*, 19 I&N Dec. 252, 253 (BIA 1985).
[248] *See, e.g.*, *Mayor, Aldermen & Commonalty of City of N.Y. v. Miln*, 36 U.S. 102 (1837) (upholding a New York statute that required vessel captains to provide certain biographical information about every passenger on the ship and further permitting the mayor to require the captain to provide a surety of not more than $300 for each noncitizen passenger to indemnify and hold harmless the government from all expenses incurred to financially support the person and the person's children); *see also* H.D. Johnson & W.C. Reddall, *History of Immigration* (Washington, 1856).
[249] *See* Immigration Act of 1903, ch. 1012, 32 Stat. 1213 (repealed by Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898, and Immigration Act of 1917, ch. 29, 39 Stat. 874).

lacked funds or relatives or friends who could provide support.[250] In these cases, the Boards of Special Inquiry usually admitted the noncitizen if someone could post bond or one of the immigrant aid societies would accept responsibility for the noncitizen.[251]

The present language of section 213 of the INA, 8 U.S.C. 1183, has been in the law without essential variation since 1907.[252] Under section 21 of the Immigration Act of 1917, an immigration officer could admit a noncitizen if a suitable bond was posted. In 1970, Congress amended section 213 of the INA, 8 U.S.C. 1183, to permit the posting of cash received by the U.S. Department of the Treasury and to eliminate specific references to communicable diseases of public health significance.[253] At that time, Congress also added, without further explanation or consideration, the phrase that any sums or other security held to secure performance of the bond shall be returned "except to the extent forfeited for violation of the terms thereof" upon termination of the bond.[254] Subsequently, IIRIRA amended the provision when adding a parenthetical that clarified that a bond is provided in addition to, and not in lieu of, the Affidavit of Support Under Section 213A of the INA and the income deeming requirements under section

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[250] *See* Immigration Act of 1891, ch. 551, 26 Stat. 1084, which created the Office of the Superintendent of Immigration within the Treasury Department. The Superintendent oversaw a new corps of U.S. Immigrant Inspectors stationed at the country's principal ports of entry. *See* USCIS History and Genealogy, Origins of Federal Immigration Service, *https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-immigration-service* (accessed June 4, 2021).
[251] *See* USCIS History and Genealogy, *Origins of Federal Immigration Service*, available at *https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-immigration-service* (accessed June 4, 2021).
[252] *See* Act of February 20, 1907, ch. 1134, sec. 26, 34 Stat. 898, 907.
[253] *See* Pub. L. 91-313, 84 Stat. 413, 413 (1970); *see also* 116 Cong. Rec. S9957 (daily ed. June 26, 1970).
[254] *See* Pub. L. 91-313, 84 Stat. 413, 413 (1970).

213A of the INA, 8 U.S.C. 1183a.[255] Regulations implementing the public charge bond were promulgated in 1964 and 1966,[256] and are currently found at 8 CFR 103.6 and 8 CFR 213.1.

The 1999 Interim Field Guidance explained the IIRIRA changes to the public charge bond statute and noted that officers can offer public charge bonds as they had done in the past, but did not detail procedures for public charge bonds.[257] In the 2019 Final Rule, DHS promulgated a detailed public charge bond framework that included provisions that USCIS, consistent with sections 103 and 213 of the INA, 8 U.S.C. 1103 and 1183, would offer a public charge bond to certain applicants for adjustment of status who are inadmissible only due to the likelihood of becoming a public charge and when a favorable exercise of discretion is warranted, based upon the totality of the applicant's facts and circumstances.[258] The 2019 Final Rule also included provisions regarding the minimum public charge bond amount, the circumstances under which a public charge bond would be cancelled, as well as established specific conditions under which a public charge bond would be breached.[259]

IV. DHS 2021 Inadmissibility on Public Charge ANPRM and Listening Sessions

On August 23, 2021, DHS published an ANPRM to seek broad public feedback on the public charge ground of inadmissibility to inform its development of a future regulatory

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[255] *See* Pub. L. 104-208, div. C, sec. 564(f), 110 Stat. 3009-546, 3009-684. Under 8 U.S.C. 1631, the sponsor's income and resources, as well as the income and resources of the sponsor's spouse, is counted as the sponsored alien's income for the purposes of determining eligibility for any Federal means-tested public benefits.
[256] *See Miscellaneous Amendments to Chapter*, 29 FR 10579 (July 30, 1964); *see also Miscellaneous Edits to Chapter*, 31 FR 11713 (Sept. 7, 1966).
[257] *See* 64 FR 28689 (May 26, 1999).
[258] *See* 84 FR 41292, 41595 (Aug. 14, 2019).
[259] *See* 84 FR 41292, 41299 (Aug. 14, 2019).

proposal. The goal of the ANPRM was to help ensure that a future regulatory proposal would be fair, consistent with law, and informed by relevant data and evidence. The ANPRM identified key considerations associated with the public charge ground of inadmissibility. These considerations include how DHS should define the term "public charge," which public benefits DHS should consider relevant to the public charge inadmissibility determination, and how DHS should assess the statutory minimum factors when determining whether a noncitizen is likely to become a public charge.

DHS welcomed input from individuals, organizations, government entities and agencies, and all other interested members of the public. DHS also provided notice of public virtual listening sessions on the public charge ground of inadmissibility and the ANPRM. USCIS held two public listening sessions, one specifically for the general public on September 14, 2021, and one for State, territorial, local, and Tribal benefits-granting agencies and nonprofit organization on October 5, 2021. DHS accepted written comments and related material through October 22, 2021.

DHS received a total of 195 public comments in response to the ANPRM. Of these, 181 were unique and applicable to the ANPRM. DHS received comments from advocacy groups, individuals, State and local governments, legal services providers, professional associations, and a variety of other groups. The slight majority of all unique submissions were provided by organizations. Commenter types included:

Table 4: Tallies by Commenter Type	
Commenter Type	Count of Unique Submissions
Advocacy Group	37
Individual	36
Anonymous	27

State or Local Government	18
Legal Services Provider	12
Professional Association	10
Healthcare Provider	8
Joint Submission	8
Religious/Community/Social Organization	6
Research Institute/Organization	5
Trade or Business Association	4
State or Local Elected Official (State Representative/Senator)	3
Academic/Researcher	2
Law firm (when representing itself)	2
School/University	2
Employer/Company	1
Total	**181**

While commenters provided thoughtful responses relating to most topics raised by DHS in the ANPRM, the 10 topics with the most comments were:

Table 5: ANPRM Topics with the Most Comments	
Topic	Count of Unique Submissions
Which public benefits should or should not be considered as a part of a public charge inadmissibility determination?	83
How should DHS address the possibility that individuals may choose to forgo the receipt of public benefits as a result of the public charge inadmissibility determination?	67
How should DHS define "public charge"?	63
The impacts or costs of previous rulemaking and policy in this area unrelated to a specific type of public benefit	59
Elements of the vacated 2019 Final Rule that commenters thought should be included or excluded in a future public charge rule	47
The Affidavit of Support, generally	40
Which factors are most predictive of whether a noncitizen is likely (or is not likely) to become a public charge?	37
How DHS could address potential unfairness or discrimination in public charge inadmissibility determinations	32
If and how DHS should consider disabilities or chronic health conditions in its evaluation of the health factor	28
Elements of the 1999 Interim Field Guidance that commenters thought should be included or excluded in a future public charge rule	25

Approximately 250 individuals or groups participated in the September 14, 2021,[260] listening session and approximately 210 participated in the October 5, 2021, session.[261] Among the topics raised by participants were the following:

- Disenrollment effects associated with the 2019 Final Rule and how to reduce potential disenrollment effects in future rulemaking through policy choices and communication strategy;
- The definition of public charge and which public benefits, if any, are relevant to that definition;
- How DHS should apply the health factor, particularly for noncitizens who may have disabilities;
- Better communication concerning which populations of noncitizens are subject to the public charge ground of inadmissibility;
- Consistency between DOS and DHS approaches to public charge inadmissibility;
- The totality of the circumstances approach to public charge inadmissibility determinations;
- Concerns relating to the heavy burden of information collection and required evidence associated with the 2019 Final Rule; and
- Consideration of a sufficient Affidavit of Support Under Section 213A of the INA in a public charge inadmissibility determination.

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[260] *See* Listening Session I Transcript.
[261] *See* Listening Session II Transcript.

Many individuals and organizations who provided feedback during the listening sessions stated that they also provided written comments with more detailed and comprehensive suggestions for DHS's consideration.

DHS thanks all of those individuals and organizations who participated in the listening sessions or provided public comments. DHS has reviewed all of the comments and considered them in developing this proposed rule. Where relevant, DHS has referenced comments received in response to the ANPRM in the preamble to this proposed rule.

V. Discussion of Proposed Rule

A. Introduction

In drafting this proposed rule, DHS seeks to articulate a policy that would be fully consistent with law; that would reflect empirical evidence to the extent relevant and available, and allow flexibility for adjudicators to benefit from the emergence of new evidence as time passes; that would carefully consider public comments; that would be clear, fair, and comprehensible for officers as well as for noncitizens and their families; that would lead to fair and consistent adjudications and, thus, avoid unequal treatment of similarly situated individuals; and would not otherwise unduly impose barriers for noncitizens seeking admission or adjustment of status in the United States.[262] DHS also seeks to ensure that its regulatory proposal would not unduly interfere with the receipt of public benefits, in particular by those who are not subject to the public charge ground of inadmissibility.

B. Applicability

[262] *See* Executive Order 14012 (Restoring Faith in Our Legal Immigration System and Strengthening Integration and Inclusion Efforts for New Americans), 86 FR 8277 (published Feb. 5, 2021).

This proposed rule interprets the public charge inadmissibility ground under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and only with respect to public charge inadmissibility determinations made by DHS. This proposed rule would apply to any noncitizen subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), who is applying for adjustment of status to that of a lawful permanent resident before USCIS or is applying for admission before U.S. Customs and Border Protection (CBP) at a port of entry as part of the inspection process.[263]

However, this proposed rule does not propose to address public charge inadmissibility determinations under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), or public charge deportability determinations under section 237(a)(5) of the INA, 8 U.S.C. 1227(a)(5), made by DOJ in the course of removal proceedings under section 240 of the INA, 8 U.S.C. 1229a.

Furthermore, this proposed rule does not address public charge inadmissibility determinations made by DOS when noncitizens apply for visas with DOS.[264]

1. Applicants for Admission

Applicants for admission are inspected at, or when encountered between, ports of entry. They are inspected by immigration officers to assess, among other things, whether they are inadmissible under section 212(a) of the INA, 8 U.S.C. 1182(a), including section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).

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[263] *See* proposed 8 CFR 212.20 through 212.23.

[264] DOS reopened the comment period for 60 days on their preliminarily enjoined interim final rule addressing ineligibility on public charge grounds. The comment period closed on January 18, 2022. See, *Visas: Ineligibility Based on Public Charge Grounds*, interim final rule; reopening of public comment period, 86 FR 64070 (Nov. 17, 2021).

a. Nonimmigrants

Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), any noncitizen who is applying for a visa or for admission to the United States as a nonimmigrant is inadmissible if they are likely at any time to become a public charge. A noncitizen applies directly to a U.S. consulate or embassy abroad for a nonimmigrant visa to travel to the United States temporarily for a limited purpose, such as to visit for business or tourism.[265] As noted above, this proposed rule does not address public charge ineligibility determinations made by DOS. Instead, DOS consular officers assess whether the noncitizen is ineligible for a visa, including under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), as applicable.

Once DOS issues the nonimmigrant visa, the noncitizen generally may travel to the United States using that visa and apply for admission at a port of entry. CBP determines whether the applicant for admission is inadmissible under any ground, including section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). This proposed rule applies to CBP's public charge inadmissibility determinations.[266]

b. Immigrants

A noncitizen who is the beneficiary of an immigrant visa petition approved by USCIS may apply to a DOS consulate or embassy abroad for an immigrant visa to allow them to seek admission to the United States as an immigrant.[267] As part of the immigrant visa process, DOS

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[265] Certain nonimmigrant classifications are subject to petition requirements, and in such cases a petition generally must be approved on a noncitizen's behalf by USCIS prior to application for a visa. *See, e.g.*, INA sec. 214(c), 8 U.S.C. 1184(c). In addition, certain noncitizens are not subject to a visa requirement in order to seek admission as a nonimmigrant. *See, e.g.*, INA sec. 217, 8 U.S.C. 1187; *see also* 8 CFR 212.1.
[266] *See* INA secs. 221 and 222, 8 U.S.C. 1201 and 1202; 8 CFR 204.
[267] *See* INA secs. 221 and 222, 8 U.S.C. 1201 and 1202; 8 CFR 204; 22 CFR Part 42.

determines whether the applicant is eligible for the visa, which includes a determination of whether the noncitizen has demonstrated that they are admissible to the United States and that no inadmissibility grounds in section 212(a) of the INA, 8 U.S.C. 1182(a), apply. In determining whether the applicant has demonstrated that they are not inadmissible on the public charge ground, DOS reviews all of the mandatory factors, including any required Affidavit of Support Under Section 213A of the INA as set forth in their regulations and guidance.[268] This proposed rule will not address public charge inadmissibility determinations made by DOS.[269]

Once DOS issues the immigrant visa, the noncitizen typically can travel to the United States and apply for admission as an immigrant at a port of entry. CBP determines whether the applicant for admission as an immigrant is inadmissible under any ground, including section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). This proposed rule applies to these public charge inadmissibility determinations made by CBP.

c. Certain Lawful Permanent Residents Returning to the United States

Lawful permanent residents generally are not considered to be applicants for admission, and therefore are not subject to inadmissibility determinations upon their return from a trip abroad. However, in certain limited circumstances, a lawful permanent resident will be considered an applicant for admission and, therefore, subject to an inadmissibility determination

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[268] 22 CFR 40.41; 9 FAM 302.8.

[269] On October 11, 2019, DOS published an interim final rule ("IFR") regarding visa ineligibility on public charge grounds and accepted public comments on the rule through November 19, 2019. Given the changed circumstances since publication of that IFR, on November 17, 2021, DOS reopened the public comment period for an additional 60 days to seek additional comments regarding whether the IFR should be rescinded or revised, and what final rule should ultimately be adopted, if any, regarding the public charge ground of inadmissibility. Therefore, it is possible that DOS will amend its regulations and guidance.

upon the lawful permanent resident's return to the United States.[270] This inadmissibility determination includes whether the noncitizen is inadmissible as likely at any time to become a public charge.

2. Adjustment of Status Applicants

In general, a noncitizen who is physically present in the United States may be eligible to apply for adjustment of status before USCIS to that of a lawful permanent resident if the applicant was inspected and admitted or paroled, is eligible to receive an immigrant visa, is admissible to the United States, and has an immigrant visa immediately available at the time of filing the adjustment of status application.[271] As part of the adjustment of status process, USCIS is responsible for determining whether the applicant has met their burden of proof to establish eligibility for the benefit,[272] which includes a determination of whether the applicant has demonstrated that no inadmissibility grounds in section 212(a) of the INA, 8 U.S.C. 1182(a), apply (or, if they do apply, that the noncitizen is eligible for a waiver of the inadmissibility ground or other form of relief). In determining whether the adjustment of status applicant has demonstrated that they are not inadmissible on the public charge ground, DHS proposes to

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[270] Individuals who have been lawfully admitted for permanent residence are regarded as applicants for admission in the following circumstances: (1) the individual has abandoned or relinquished that status; (2) the individual has been outside the United States for a continuous period in excess of 180 days; (3) the individual has engaged in illegal activity after departing the United States; (4) the individual has departed the United States while under legal process seeking removal of the noncitizen from the United States, including removal proceedings and extradition proceedings; (5) the individual has committed an offense identified in section 212(a)(2) of the INA, 8 U.S.C. 1182(a)(2), unless granted a waiver of inadmissibility for such offense or cancellation of removal; and (6) the individual has attempted to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer. *See* INA sec. 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C).

[271] *See* INA sec. 245, 8 U.S.C. 1255. Noncitizens in removal proceedings before an immigration judge may also apply for adjustment of status pursuant to 8 CFR 1245.

[272] *See* INA sec. 291, 8 U.S.C. 1361.

review the mandatory statutory factors together with any required Affidavit of Support Under Section 213A of the INA and other relevant information, in the totality of the circumstances.

3. Rule Does Not Address Extension of Stay/Change of Status

DHS permits certain nonimmigrants to remain in the United States beyond their authorized period of stay to continue engaging in activities permitted under their current nonimmigrant status.

The extension of stay (EOS) regulations require that the individual filing the application or petition for EOS demonstrate that the nonimmigrant is admissible to the United States (i.e., generally, is not inadmissible under any ground under section 212(a) of the INA, 8 U.S.C. 1182(a)), or that any applicable inadmissibility ground has been waived.[273] Although many of the inadmissibility grounds in section 212(a) of the INA, 8 U.S.C. 1182(a), apply to applications and petitions for EOS, section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), does not apply because it only applies to applicants for visas, admission, and adjustment of status. An applicant for or beneficiary of an application or petition for EOS is neither an applicant for a visa, admission, or adjustment of status. The decision to grant an EOS application, with certain limited exceptions, is discretionary,[274] however, and DHS has the authority to set conditions in determining whether to grant the EOS application or petition.[275]

Additionally, under section 248 of the INA, 8 U.S.C. 1258, DHS may permit change of status (COS) from one nonimmigrant classification to another classification, with certain

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[273] *See* 8 CFR 214.1(a)(3)(i).
[274] *See* 8 CFR 214.1(c)(5).
[275] *See generally* INA sec. 214(a)(1), 8 U.S.C. 1184(a)(1); 8 CFR 214.1(a)(3)(i).

exceptions, as long as the nonimmigrant is continuing to maintain their current nonimmigrant status and is not inadmissible under section 212(a)(9)(B)(i) of the INA, 8 U.S.C. 1182(a)(9)(B)(i).[276] Like EOS, COS applications and petitions are not subject to the public charge ground of inadmissibility and therefore, public charge inadmissibility will not render an individual ineligible for COS under the statute. Additionally, as with EOS, COS is a discretionary determination, and DHS has the authority to set conditions that apply for a nonimmigrant to change their status.[277]

Neither the 1999 Interim Field Guidance nor the 1999 NPRM addressed EOS or COS. However, in the 2019 Final Rule (that is no longer in effect), DHS required individuals who sought EOS and COS to establish that they had not received one or more public benefits for more than 12 months in the aggregate within any 36-month period since obtaining the nonimmigrant status they sought to extend or from which they sought to change and through adjudication.[278] In that rule, DHS wrote that its policy of imposing public benefit conditions on EOS and COS applications and petitions was within DHS's authority pursuant to sections 214 and 248 of the INA, 8 U.S.C. 1184 and 1258, to regulate conditions and periods of admission of nonimmigrants and conditions for COS, respectively, and consistent with the PRWORA policy statement described above.[279] In setting the public charge condition in the 2019 Final Rule, DHS noted that it was reasonable to require, as a condition of obtaining EOS or COS, evidence that nonimmigrants inside the United States have not received public benefits during their

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[276] *See* INA sec. 248(a), 8 U.S.C. 1258(a); 8 CFR 248.1(a).
[277] *See* INA sec. 248(a), 8 U.S.C. 1258(a).
[278] *See* 84 FR 41292 (Aug. 14, 2019).
[279] *See* 84 FR 41292, 41330 (Aug. 14, 2019); 83 FR 51114, 51135-36 (Oct. 10, 2018).

nonimmigrant stay "given DHS's authority to set conditions [on EOS and COS]"[280] and the government's "interest in ensuring that aliens present in the United States do not depend on public benefits to meet their needs."[281]

Although DHS indeed has the authority to set conditions on both EOS and COS applications and petitions, for the purposes of this NPRM, DHS does not propose any conditions on such applications and petitions based on receipt of public benefits. DHS no longer believes that it needs an additional condition to ensure that nonimmigrants present in the United States do not depend on public benefits, in part because nonimmigrants are generally barred from receiving many of the public benefits considered in this proposed rule, e.g., SSI and TANF, and Medicaid for long-term institutionalization. In addition, a number of nonimmigrant classifications are employment-based and entail nonimmigrants being paid to perform services or labor in the United States.[282] Others nonimmigrants, such as F nonimmigrant students, must have sufficient funds available for self-support during the entire proposed course of study.[283] Additionally, DHS agrees with commenters during the 2018-2019 public charge rulemaking that the public charge inadmissibility determination that nonimmigrants undergo at the time of visa issuance and when applying for admission as nonimmigrants at the port of entry,[284] as mandated by Congress, sufficiently addresses the assessment of whether such nonimmigrants are likely to receive public benefits. DHS also believes that imposing the public benefit condition on EOS

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[280] *See* 84 FR 41292, 41329 (Aug. 14, 2019).
[281] *See* 83 FR 51114, 51135 (Oct. 10, 2018).
[282] *See, e.g.*, H, L, O, P nonimmigrant classifications, *Special requirements for admission, extension, and maintenance of status*, 8 CFR 214.2(h), (l), (o), (p).
[283] *See* 8 CFR 214.2(f)(1)(B), 22 CFR 41.61(b)(1)(ii). *See also* USCIS; Students and Employment, *https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/students-and-employment* (accessed Feb. 10, 2022).
[284] *See* 84 FR 41292 (Aug. 14, 2019).

and COS would impose unnecessary burdens on applicants, petitioners, and adjudicators. Finally, consistent with statements made by commenters in response to the 2018 NPRM, DHS believes it appropriate to refrain from adding a public benefit condition to applications and petitions for EOS and COS, as this will avoid discouraging international students and scholars from applying for post-secondary education in the United States.[285] Accordingly, DHS is not proposing to consider receipt of any public benefits in adjudicating applications and petitions for EOS and COS.

4. Summary Tables

Tables 6 through 10 below provide a summary of immigrant categories for adjustment of status and the applicability of the public charge inadmissibility determination to such categories.

Table 6. Applicability of INA Sec. 212(a)(4) to Family-Based Adjustment of Status Applications[286]		
Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A and Affidavit of Support Under Section 213A of the INA (Form I-864) – Required or Exempt?[287]

[285] *See* 84 FR 41292, 41330-41331 (Aug. 14, 2019).

[286] Applicants who filed a Form I-485 before December 19, 1997, are exempt from the Affidavit of Support requirement. *See* Section 531(b) of Div. C of Pub. L. 104-208, 110 Stat. 3009-546, 3009-675 (September 30, 1996). *See* 8 CFR 213a.2(a)(2)(i) (adjustment applicants) and 8 CFR 213a.2(a)(2)(ii)(B) (applicants for admission). Noncitizens who acquired citizenship under section 320 of the INA, 8 U.S.C. 1431, upon admission to the United States are exempt from submitting an affidavit of support, and files Form I-864W, Request for Exemption for Intending Immigrant's Affidavit of Support. *See* 8 CFR 213a.2(a)(2)(ii)(E). *See* Section 101 of the Child Citizenship Act, Pub. L. 106-395, 114 Stat. 1631, 1631 (October 30, 2000) (amending section 320 of the INA, 8 U.S.C. 1431). In addition, the surviving spouses, children, and parents of a deceased member of the military who obtain citizenship posthumously are exempt from a public charge determination. *See* Section 1703(e) of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1392, 1695 (November 24, 2003).

[287] Some categories of adjustment of status applicants are exempt from the Affidavit of Support requirement, but submit Form I-864W, Request for Exemption for Intending Immigrant's Affidavit of Support, with their adjustment of status application to establish that a Form I-864 is not required in their case. These categories include children of U.S. citizens who will automatically become U.S. citizens under the Child Citizenship Act of 2000 upon their admission to the United States, self-petitioning widows and widowers of U.S. citizens, and self-petitioning battered spouses and children. Applicants who have earned (or can be credited with) 40 quarters (credits) of coverage under the Social Security Act (SSA) may also file Form I-864W to establish that a Form I-864 is not required in their case.

Immediate Relatives of U.S. citizens, including spouses, children, and parents[288]	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C)
Unmarried sons and daughters of U.S. citizens and their children (family-sponsored 1st preference)[289]	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C)
Spouses, children, and unmarried sons and daughters of noncitizen residents (family-sponsored 2nd preference)[290]	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C)
Married sons and daughters of U.S. citizens and their spouses and children (family-sponsored 3rd preference)[291]	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C)
Brothers and sisters of U.S. citizens (at least 21 years of age) and their spouses and children (family-sponsored 4th preference)[292]	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C)

[288] Includes the following categories: IR-6 Spouses; IR-7 Children; CR-7 Children, conditional; IH-8 Children adopted abroad under the Hague Adoption Convention; IH-9 Children coming to the United States to be adopted under the Hague Adoption Convention; IR-8 Orphans adopted abroad; IR-9 Orphans coming to the United States to be adopted; IR-0 Parents of adult U.S. citizens. Children adopted abroad generally do not apply for adjustment of status.

[289] Includes the following categories: A-16 Unmarried Amerasian sons/daughters of U.S. citizens; F-16 Unmarried sons/daughters of U.S. citizens; A-17 Children of A-11 or A-16; F-17 Children of F-11 or F-16; B-17 Children of B-11 or B-16.

[290] Includes the following categories: F-26 Spouses of noncitizen residents, subject to country limits; C-26 Spouses of noncitizen residents, subject to country limits, conditional; FX-6 Spouses of noncitizen residents, exempt from country limits; CX-6 Spouses of noncitizen residents, exempt from country limits, conditional; F-27 Children of noncitizen residents, subject to country limits; C-28 Children of -C-26, or C-27, subject to country limits, conditional; B-28 Children of, B-26, or B-27, subject to country limits; F-28 Children of F-26, or F-27, subject to country limits; C-20 Children of C-29, subject to country limits, conditional; B-20 Children of B-29, subject to country limits; F-20 Children of F-29, subject to country limits; C-27 Children of noncitizen residents, subject to country limits, conditional; FX-7 Children of noncitizen residents, exempt from country limits; CX-8 Children of CX7, exempt from country limits, conditional; FX-8 Children of FX-7, or FX-8, exempt from country limits; CX-7 Children of noncitizen residents, exempt from country limits, conditional; F-29 Unmarried sons/daughters of noncitizen residents, subject to country limits; C-29 Unmarried children of noncitizen residents, subject to country limits, conditional.

[291] Includes the following categories: A-36 Married Amerasian sons/daughters of U.S. citizens; F-36 Married sons/daughters of U.S. citizens; C-36 Married sons/daughters of U.S. citizens, conditional; A-37 Spouses of A-31 or A-36; F-37 Spouses of married sons/daughters of U.S. citizens; C-37 Spouses of married sons/daughters of U.S. citizens, conditional; B-37 Spouses of B-31 or B-36; A-38 Children of A-31 or A-36, subject to country limits; F-38 Children of married sons/daughters of U.S. citizens; C-38 Children of C-31 or C-36, subject to country limits, conditional; B-38 Children of B-31 or B-36, subject to country limits.

[292] Includes the following categories: F-46 Brothers/sisters of U.S. citizens, adjustments; F-47 Spouses of brothers/sisters of U.S. citizens, adjustments; F-48 Children of brothers/sisters of U.S. citizens.

Fiancés of U.S. citizens (admitted as a K-1 or K-2 nonimmigrant)[293]	Yes, per INA sec. 212(a)(4)(A)	Required, per INA sec. 212(a)(4)(C)
Amerasians based on preference category, born between December 31, 1950, and October 22, 1982[294]	Yes, per INA sec. 212(a)(4)(A)	Exempt, per Amerasian Act, Pub. L. 97-359 (Oct. 22, 1982)
Amerasians, born in Vietnam between January 1, 1962, and January 1, 1976 Immediate Relative: AM-6, AR-6 Children Amerasians under Amerasian Homecoming Act, Pub. L. 100-202 (Dec. 22, 1987)[295] born between January 1, 1962, and January 1, 1976	No. (Form I-360 and adjustment of status) Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202	Exempt, per section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202
Spouses, widows, or widowers of U.S. citizens (IW-6)	Yes, per INA sec. 212(a)(4)	Exempt, per 8 CFR 204.2 and 71 FR 35732 (June 21, 2006)
Immediate relative VAWA applicants, including spouses and children[296]	No, per INA sec. 212(a)(4)(E) and INA sec. 212(a)(4)(C)(i)	Exempt, per INA sec. 212(a)(4)(E)
1st preference VAWA applicants, including B-16 Unmarried sons/daughters of U.S. citizens, self-petitioning B-17 Children of B-16	No, per INA sec. 212(a)(4)(C)(i)	Exempt, per INA sec. 212(a)(4)(C)(i)
2nd preference VAWA applicants, including spouses and children[297]	No, per INA sec. 212(a)(4)(C)(i)	Exempt, per INA sec. 212(a)(4)(C)(i)

[293] Includes the following categories: CF-1 Spouses, entered as fiancé(e), adjustments conditional; IF-1 Spouses, entered as fiancé(e).
[294] Includes the following categories: Immediate Relative AR-6 Children, Amerasian, First Preference: A-16 Unmarried Amerasian sons/daughters of U.S. citizens; Third Preference A-36 Married Amerasian sons/daughters of U.S. citizens. *See* section 204(f) of the INA, 8 U.S.C. 1154(f). Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.
[295] Includes the following categories: AM-1 principal (born between 1/1/1962-1/1/1976); AM-2 Spouse, AM-3 child; AR-1 child of U.S. citizen born Cambodia, Korea, Laos, Thailand, Vietnam. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.
[296] Includes the following categories: IB-6 Spouses, self-petitioning; IB-7 Children, self-petitioning; IB-8 Children of IB-1 or IB-6; IB-0 Parents battered or abused, of U.S. citizens, self-petitioning.
[297] Includes the following categories: B-26 Spouses of noncitizen residents, subject to country limits, self-petitioning; BX-6 Spouses of noncitizen residents, exempt from country limits, self-petitioning; B-27 Children of noncitizen residents, subject to country limits, self-petitioning; BX-7 Children of noncitizen residents, exempt from country limits, self-petitioning; BX-8 Children of BX-6, or BX-7, exempt from country limits; B-29 Unmarried sons/daughters of noncitizen residents, subject to country limits, self-petitioning.

3rd Preference VAWA Married son/daughters of U.S. citizen, including spouses and children[298]	No, per INA sec. 212(a)(4)(C)(i)	Exempt, per INA sec. 212(a)(4)(C)(i)

Table 7. Applicability of INA Sec. 212(a)(4) to Employment-Based Adjustment of Status Applications		
Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?
First Preference: Priority workers[299]	Yes, in general,[300] per INA sec. 212(a)(4)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5 percent or more)[301] in filed Form I-140, per INA sec. 212(a)(4)(D) and 8 CFR 213a
Second Preference: Professionals with advanced degrees or noncitizens of exceptional ability	Yes, in general,[302] per INA sec. 212(a)(4)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5 percent or more) in filed Form I-140, per INA sec. 212(a)(4)(D) and 8 CFR 213a

[298] Includes the following categories: Third Preference VAWA; B-36 Married sons/daughters of U.S. citizens, self-petitioning; B-37 Spouses of B-36, adjustments; B-38 Children of B-36, subject to country limits.

[299] Includes the following categories: E-16 Immigrants with extraordinary ability; E-17 Outstanding professors or researchers; E-18 Certain Multinational executives or managers; E-19 Spouses of E-11, E-12, E-13, E-16, E-17, or E18; E-10 Children of E-11, E-12, E-13, E-16, E-17, or E-18.

[300] If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Form I-485, also falls under a category exempted under section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E) (for example, T nonimmigrants, U nonimmigrants, and VAWA self-petitioners), the applicant is not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4) (but is still required to file Form I-864). *See* 8 CFR 213a.2(b)(2).

[301] Relative means a husband, wife, father, mother, child, adult son, adult daughter, brother, or sister. Significant ownership interest means an ownership interest of five percent or more in a for-profit entity that filed an immigrant visa petition to accord a prospective employee an immigrant status under section 203(b) of the INA, 8 U.S.C. 1153(b). *See* 8 CFR 213a.1.

[302] If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (five percent or more), and the applicant, at both the time of filing and adjudication of the Form I-485, also falls under a category exempted under section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E) (for example, T nonimmigrants, U nonimmigrants, and VAWA self-petitioners), the applicant is not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4) (but is still required to file Form I-864). *See* 8 CFR 213a.2(b)(2).

Third preference: Skilled workers, professionals, and other workers[303]	Yes, in general,[304] per INA sec. 212(a)(4)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5 percent or more) in filed Form I-140, per INA sec. 212(a)(4)(D) and 8 CFR 213a
Fifth preference: Investors[305]	Yes, per INA sec. 212(a)(4)	Not applicable[306]

Table 8. Applicability of INA Sec. 212(a)(4) to Special Immigrant Adjustment of Status Applications		
Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?
Religious Workers[307]	Yes, per INA sec. 212(a)(4)	Not applicable[308]

[303] Includes the following categories: EX-6 Schedule A worker; EX-7 Spouses of EX-6; EX-8 Children of EX-6; E-36 Skilled workers; E-37 Professionals with baccalaureate degrees; E-39 Spouses of E-36, or E-37; E-30 Children of E36, or E-37; EW-8 Other workers; EW-0 Children of EW-8; EW-9 Spouses of EW-8; EC-6 Chinese Student Protection Act (CSPA) principals; EC-7 Spouses of EC-6; EC-8 Children of EC-6.

[304] If the applicant is adjusting based on an employment-based petition where the petition is filed by either a qualifying relative, or an entity in which such relative has a significant ownership interest (5 percent or more), and the applicant, at both the time of filing and adjudication of the Form I-485, also falls under a category exempted under section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E) (for example, T nonimmigrants, U nonimmigrants, and VAWA self-petitioners) the applicant is not subject to section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4) (but is still required to file Form I-864). *See* 8 CFR 213a.2(b)(2).

[305] Includes the following categories: C-56 Employment creation, not in targeted area, adjustments, conditional E-56 Employment creation; I-56 Employment creation, targeted area, pilot program, adjustments, conditional; T-56 Employment creation, targeted area, conditional; R-56 Investor pilot program, not targeted, conditional; C-57 Spouses of C-51 or C-56, conditional; E-57 Spouses of E-51 or E-56; I-57 Spouses of I-51 or I-56, conditional; T-57 Spouses of T-51 or T-56, conditional; R-57 Spouses of R-51 or R-56, conditional; C-58 Children of C-51 or C-56, conditional; E-58 Children of E-51 or E-56; I-58 Children of I-51 or I-56, conditional; T-58 Children of T-51 or T-56, conditional; R-58 Children of R-51 or R-56, conditional.

[306] Fifth preference employment-based applicants are Immigrant Petition by Alien Entrepreneur (Form I-526) self-petitioners. The regulation at 8 CFR 213a.1 relates to a person having ownership interest in an entity filing for a prospective employee and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D) is inapplicable.

[307] Includes the following categories: SD-6 Ministers; SD-7 Spouses of SD-6; SD-8 Children of SD-6; SR-6 Religious workers; SR-7 Spouses of SR-6; SR-8 Children of SR-6.

[308] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers (for example, a religious institution), would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirement for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D) generally is inapplicable.

International employees of U.S. government abroad[309]	Yes, per INA sec. 212(a)(4)	Not applicable[310]
Employees of Panama Canal[311]	Yes, per INA sec. 212(a)(4)	Not applicable[312]
Foreign Medical School Graduates[313]	Yes, per INA sec. 212(a)(4)	Not applicable[314]
Retired employees of International Organizations, including G-4 International Organization Officer[315] International Organizations (G-4s international organization officer/ Retired G-4 Employee)[316]	Yes, per INA sec. 212(a)(4)	Not applicable[317]
SL-6 Juvenile court dependents	No, per INA sec. 245(h)	Not applicable, per INA sec. 245(h)

[309] Includes the following categories: SE-6 Employees of U.S. government abroad, adjustments; SE-7 Spouses of SE-6; SE-8 Children of SE-6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.
[310] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers (for example, the U.S. Armed Forces), would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirement for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.
[311] Includes the following categories: SF-6 Former employees of the Panama Canal Company or Canal Zone Government; SF-7 Spouses or children of SF-6; SG-6 Former U.S. government employees in the Panama Canal Zone; SG-7 Spouses or children of SG-6; SH-6 Former employees of the Panama Canal Company or Canal Zone government, employed on April 1, 1979; SH-7 Spouses or children of SH-6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.
[312] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers generally would not be a relative of the noncitizen or a for-profit entity and therefore the requirement for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.
[313] Includes the following categories: SJ-6 Foreign medical school graduate who was licensed to practice in the United States on Jan. 9, 1978; SJ-7 Spouses or children of SJ-6. Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.
[314] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.
[315] Includes the following categories: SK-6 Retired employees of international organizations; SK-7 Spouses of SK-1 or SK-6; SK-8; Certain unmarried children of SK-6; SK-9 Certain surviving spouses of deceased international organization employees.
[316] Includes the following categories: SN-6 Retired NATO-6 civilian employees; SN-7 Spouses of SN-6; SN-9; Certain surviving spouses of deceased NATO-6 civilian employees; SN-8 Certain unmarried sons/daughters of SN-6.
[317] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D), 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.

U.S. Armed Forces Personnel[318]	Yes, per INA sec. 212(a)(4)	Not Applicable[319]
International Broadcasters[320]	Yes, per INA sec. 212(a)(4)	Not Applicable[321]
Special immigrant interpreters who are nationals of Iraq or Afghanistan[322]	No, per section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006, as amended, Pub. L. 109-162 (Jan. 6, 2005), section 1244(a)(3) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Pub. L. 110-181 (Jan. 28, 2008), section 602(b) of the Afghan Allies Protection Act of 2009, as amended, Pub. L. 111-8 (Mar. 11, 2009)	Exempt, per section 602(b)(9) of the Afghan Allies Protection Act of 2009, title VI of Pub. L. 111-8, 123 Stat. 807, 809 (Mar. 11, 2009)[323]

Table 9. Applicability of INA Sec. 212(a)(4) to Refugee, Asylee, and Parolee Adjustment of Status Applications		
Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?
Asylees[324]	No, per INA sec. 209(c)	Exempt, per INA sec. 209(c)
Indochinese Parolees from Vietnam, Cambodia, and Laos	No, per section 586 of Pub. L. 106-429 (Nov. 6, 2000)	Exempt, per section 586 of Pub. L. 106- 429 (Nov. 6, 2000)

[318] Includes the following categories: SM-6 U.S. armed forces personnel, service (12 years) after October 1, 1991, SM-9 U.S. armed forces personnel, service (12 years) by October 1991; SM-7 Spouses of SM-1 or SM-6; SM-0 Spouses or children of SM-4 or SM-9; SM-8 Children of SM-1 or SM-6.
[319] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.
[320] Includes the following categories: BC-6 Broadcast (IBCG of BBG) employees; BC-7 Spouses of BC-1 or BC-6; BC-8 Children of BC-6.
[321] For this category, although the applicants are subject to public charge under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), the employers would generally not be a relative of the noncitizen or a for-profit entity and therefore the requirements for an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), generally is inapplicable.
[322] Includes the following categories: SI-6 Special immigrant interpreters who are nationals of Iraq or Afghanistan; SI-6, SI-7, SI-8 - spouse and child of SI-6; SQ-6 Certain Iraqis and Afghans employed by U.S. Government SQ-6, SQ7, SQ-8 Spouses and children of SQ-6; SI-6 Special immigrant interpreters who are nationals of Iraq or Afghanistan; SI-7 Spouses of SI-1 or SI-6; SI-8 Children of SI-1 or SI-6.
[323] Sections 245(c)(2), (7), and (8) of the INA, 8 U.S.C. 1255(c)(2), (7), and (8), do not apply to special immigrant Iraq and Afghan nationals who were employed by or on behalf of the U.S. government (for Section 602(b) and 1244 adjustment applicants who were either paroled into the United States or admitted as nonimmigrants). *See* Section 1(c) of Pub. L. 110-36, 121 Stat. 227, 227 (June 15, 2007), which amended Section 1059(d) of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, 119 Stat. 3136, 3444 (Jan. 6, 2006) to state that sections 245(c)(2), (7), and (8) of the INA, 8 U.S.C. 1255(c)(2), (7), and (8), do not apply to Iraq or Afghan translator adjustment of status applicants.
[324] Includes the following categories: AS-6 Asylees; AS-7 Spouses of AS-6; AS-8 Children of AS-6; SY-8 Children of SY6; GA-6 Iraqi asylees; GA-7 Spouses of GA-6; GA-8 Children of GA-6.

IC-6 Indochinese refugees (Pub. L. 95-145 of 1977) IC-7 Spouses or children of Indochinese refugees not qualified as refugees on their own		
Polish and Hungarian Parolees (Nationals of Poland or Hungary who were paroled into the United States from November 1, 1989, to December 31, 1991)[325]	No, per title VI, subtitle D, section 646(b), Pub. L. 104- 208 (Sept. 30, 1996); 8 CFR 245.12	Exempt, per title VI, subtitle D, section 646(b), Pub. L. 104- 208 (Sept. 30, 1996); 8 CFR 245.12
Refugees[326]	No, per INA sec. 207(c)(3) and INA sec. 209(c)	Exempt, per INA sec. 207 and INA sec. 209(c)
Cuban-Haitian Entrant under IRCA[327]	No, per section 202 of Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986) (as amended), 8 U.S.C. 1255a	Exempt, per section 202 of Pub. L. 99- 603, 100 Stat. 3359 (Nov. 6, 1986) (as amended), 8 U.S.C. 1255a
HRIFA: Principal HRIFA Applicant who applied for asylum before December 31, 1995[328]	No, per section 902 of Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.	Exempt, per section 902 of Pub. L. 105- 277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.

Table 10. Applicability of INA Sec. 212(a)(4) to Other Applicants		
Category	Subject to INA sec. 212(a)(4)?	INA sec. 213A, and Form I-864, Affidavit of Support Under Section 213A of the INA, Required or Exempt?
Diplomats Section 13	Yes, per Section 13 of Pub. L. 85-316 (Sept. 11, 1957), as	Exempt, by statute, as they are not listed in INA sec. 212(a)(4)

[325] Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.
[326] Includes the following categories: RE-6 Other refugees (Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (Mar. 17, 1980)); RE-7 Spouses of RE-6; RE-8 Children of RE-6; RE-9 Other relatives.
[327] Note that this program has a sunset date of 2 years after enactment, however, some cases may still be pending.
[328] Includes the following categories: HA-6 Principal HRIFA Applicant; Spouse of HA-6, HA-7; Child of HA-6, HA-8; Unmarried Son or Daughter 21 Years of Age or Older of HA-6, HA-9; Principal HRIFA Applicant paroled into the United States before December 31, 1995 HB-6; Spouse of HB-6, HB-7; Child of HB-6, HB-8; Unmarried Son or Daughter 21 Years of Age or Older of HB-6 HB-9; Principal HRIFA Applicant who arrived as a child without parents in the United States HC-6; Spouse of HC-6, HC-7; Child of HC-6, HC-8; Unmarried Son or Daughter 21 Years of Age or Older of HC-6, HC-9; Principal HRIFA Applicant child who was orphaned subsequent to arrival in the United States HD-6, Spouse of HD-6, HD-7; Child of HD-6, HD-8; Unmarried Son or Daughter 21 Years of Age or Older of HD-6, HD-9; Principal HRIFA Applicant child who was abandoned subsequent to arrival and prior to April 1, 1998 HE-6; Spouse of HE-6, HE-7; Child of HE-6, HE-8; Unmarried Son or Daughter 21 Years of Age or Older of HE-6, HE9. Note that this program has a sunset date of March 31, 2000; however, dependents may still file for adjustment of status.

	amended by Pub. L. 97-116 (Dec. 29, 1981); 8 CFR 245.3	as a category that requires Form I-864.
Persons Born in the United States under Diplomatic Status (NA-3), as described in 8 CFR 101.3	Yes, per INA sec. 212(a)(4)	Exempt, per 8 CFR 101.3
Diversity immigrant, spouse, and child[329]	Yes, per INA sec. 212(a)(4)	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I-864.[330]
Certain entrants before January 1, 1982[331]	Yes, per INA sec. 212(a)(4), INA sec. 245A(b)(1)(C)(i), and INA sec. 245A(a)(4)(A)[332]	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I-864.
T-nonimmigrants	No, per INA sec. 212(a)(4)(E)	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I-864.[333]
Certain American Indians born in Canada	No, per INA sec. 289	Exempt, per INA sec. 289
Certain Syrian asylees adjusting under Pub. L. 106-378	No, per former 8 CFR 245.20(c) (2011)[334]	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I-864.
Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 97-429 (Jan. 8, 1983)	No, per Pub. L.97-429 (Jan. 8, 1983)	Exempt, per Pub. L. 97-429 (Jan. 8, 1983)
S (noncitizen witness or informant)	Yes, per INA sec. 212(a)(4)[335]	Exempt, per INA sec. 245(j); INA sec. 101(a)(15)(S); 8 CFR 214.2(t)(2); 8 CFR 1245.11

[329] Includes the following categories: DV-6 Diversity immigrant; DV-7 Spouse of diversity immigrant; DV-8 Child of diversity immigrant.
[330] Diversity visas are issued under section 203(c) of the INA, 8 U.S.C. 1153, which do not fall under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).
[331] Includes the following categories: W-16 Entered without inspection before January 1, 1982; W-26 Entered as nonimmigrant and overstayed visa before January 1, 1982.
[332] Certain aged, blind, or disabled persons as defined in Section 1614(a)(1) of the Social Security Act, 42 U.S.C. 1382c(a)(1), may apply for a waiver of the public charge inadmissibility ground. *See* section 245A(d)(2)(B)(ii) and (iii) of the INA, 8 U.S.C. 1255A(d)(2)(B)(ii) and (iii).
[333] Adjustment of status based on T-nonimmigrant status is under section 245(l) of the INA, 8 U.S.C. 1255(l), which does not fall under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).
[334] DHS removed the regulations relating to Syrian asylees adjusting under Pub. L. 106-378 in 76 FR 53793, 53774 (Aug. 29, 2011) because the provision was obsolete given that there were no longer eligible applicants for the adjustment provisions. DOJ has a regulation for this program that remains in effect at 8 CFR 1245.20.
[335] S-nonimmigrants can apply for a waiver using the Inter-Agency Alien Witness and Informant Record (Form I-854). *See* section 245(j) of the INA, 8 U.S.C. 1255(j) and section 101(a)(15)(S) of the INA, 8 U.S.C. 1101(a)(15)(S). *See also* 8 CFR 214.2(t)(2) and 8 CFR 1245.11.

Private Immigration Bill providing for noncitizen's adjustment of status	Dependent on the text of the Private Bill	Dependent on the text of the Private Bill
Nicaraguan Adjustment and Central American Relief Act (NACARA) sec. 202[336]	No, per section 202(a) of Pub. L. 105-100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255	Exempt, per section 202(a) of Pub. L. 105-100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255
NACARA sec. 203[337]	No, per section 203 of Pub. L. 105-11, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255	Exempt, per section 203 of Pub. L. 105-11, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255
Lautenberg, LA-6[338]	No, per section 599E of Pub. L. 101- 167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255	Exempt, per section 599E of Pub. L. 101-167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255
Registry, Z-66: Noncitizens who entered the United States prior to January 1, 1972, and who meet the other conditions	No, per INA sec. 249 and 8 CFR part 249	Exempt, per INA sec. 249 and 8 CFR part 249
U-1 Crime Victim, spouse, children and parents, and siblings under INA sec. 245(m)	No, per INA sec. 212(a)(4)(E)	Exempt, per INA sec. 212(a)(4)(E)
Temporary Protected Status (TPS)	No, per 8 CFR 244.3(a)[339]	Exempt, per 8 CFR 244.3(a)[340]
Liberian Refugee Immigration Fairness (LRIF)[341]	No, per section 7611(b)(2) of the National Defense Authorization Act (NDAA) 2020, Pub. L. 116-92, 113 Stat. 1198, 2310 (Dec. 20, 2019).	Exempt, by statute, as they are not listed in INA sec. 212(a)(4) as a category that requires Form I-864[342]

[336] Includes the following categories: NC-6 Nicaraguan or Cuban national; NC-7 Spouse of NC-6; NC-8 Child of NC-6; NC-9 Unmarried son or daughter 21 years of age or older of NC-6. Note that this program has a sunset date of April 1, 2000; however, some cases may still be pending.
[337] Includes the following categories: Z-13 Cancellation of removal; Z-14 Cancellation of removal of battered spouses or children pursuant to the Violence Against Women Act.
[338] Note that this program sunset date of September 30, 2014, only applies to parole. Eligible applicants may still apply for adjustment of status.
[339] In adjudicating TPS eligibility, USCIS is authorized to waive any ground of inadmissibility under section 212(a) of the INA, 8 U.S.C. 1182(a), for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, except for those that Congress specifically noted could not be waived or from which they are exempted by statute. *See* section 244(c)(2)(A) of the INA, 8 U.S.C. 1254a(c)(2)(A).
[340] *See* section 244(c)(2)(A) of the INA, 8 U.S.C. 1254a(c)(2)(A).
[341] Includes the following categories: LR-6 Liberian national as described in Section 7611(c)(1)(A) of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020) who has adjusted status under LRIF; LR-7 Spouse of LR-6; LR-8 Child of LR-6; LR-9 Unmarried son or daughter of LR-6.
[342] Adjustment of status based on LRIF is under Section 7611(c)(1)(A) of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), which does not fall under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D).

C. Definitions

1. Likely at Any Time to Become a Public Charge

Both the 1999 Interim Field Guidance and the 1999 NPRM defined public charge to mean, for admission and adjustment purposes, "an alien . . . who is likely to become . . . primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."[343] This definition is based on DHS's conclusion that not all receipt of public benefits paid for in whole or in part by the government indicates that an individual is a public charge or is likely at any time to become a public charge.[344] Rather, the type of benefit received matters, and DHS's focus should be on the types of benefits that reflect primary dependence on the government.[345] Neither the 1999 Interim Field Guidance nor the 1999 NPRM defined "likely" or "likely at any time to become a public charge"[346] for purposes of making public charge inadmissibility determinations.

In the 2019 Final Rule, "public charge" was defined as a noncitizen who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two public benefits in 1 month counts as 2 months).[347] DHS also separately defined public benefits to include any Federal, State, local, or Tribal cash assistance for income maintenance (other than tax credits), including SSI, TANF, Federal, State, or local cash benefit programs for income maintenance (often called "General Assistance" in the State

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[343] *See* 64 FR 28676, 28681 (May 26, 1999); 64 FR 28689 (May 26, 1999).
[344] 64 FR 28689, 28692 (May 26, 1999).
[345] *Ibid*.
[346] 64 FR 28689 (May 26, 1999); 64 FR 28676 (May 26, 1999).
[347] 84 FR 41292, 41501 (Aug. 14, 2019).

context, but which also exist under other names), as well as a list of specified non-cash benefits that included SNAP, Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, most forms of Medicaid, and Public Housing.[348] DHS stated that the expanded definition was consistent with Congress' intent, and reflected the self-sufficiency goals set forth in PRWORA.[349] DHS wrote that this approach "balance[d] an alien's lack of self-sufficiency against temporary welfare assistance that does not amount to a lack of self-sufficiency."[350]

The major change between the 1999 Interim Field Guidance and NPRM, on the one hand, and the 2019 Final Rule, on the other, was the degree of dependence on the government necessary to render an individual inadmissible as likely to become a public charge. Under the 2019 Final Rule, reliance on government support to assist with certain specified needs—food, housing, and health care—could be deemed sufficient to render an individual inadmissible as likely to become a public charge if the receipt of such benefits surpassed prescribed thresholds for duration of receipt. As set forth above, under the 1999 Interim Field Guidance and NPRM, by contrast, the former INS set a threshold of primary dependence on the government, as evidenced by the use of cash assistance or long-term institutionalization for care at government expense. Under the 1999 Interim Field Guidance approach, the use of supplemental government support to assist with discrete needs was deemed inadequate to render an individual inadmissible as likely to become a public charge.

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[348] 84 FR 41292, 41501 (Aug. 14, 2019).
[349] 84 FR 41292, 41348-49 (Aug. 14, 2019).
[350] 84 FR 41292, 41351 (Aug. 14, 2019).

DHS asked for public comment on how to define the term "public charge" in the ANPRM.[351] Some commenters noted that, before DHS enacted the 2019 Final Rule, there was a well settled understanding for more than 100 years that the term public charge meant an individual who is, or is likely to, become primarily and permanently dependent on the government for subsistence. Commenters characterized the approach taken in the 2019 Final Rule as an unprecedented departure from that longstanding meaning and requested that DHS continue to define public charge as a person who is primarily or entirely dependent on the government for subsistence.

DHS now proposes to adopt a standard more like the one used in the 1999 Interim Field Guidance and NPRM, which required primary dependence on the government for subsistence as demonstrated by the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

DHS now believes the "primarily dependent" standard is a better interpretation of the statute and properly balances the competing policy objectives established by Congress.[352]

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[351] *See* 86 FR 47025, 47028 (Aug. 23, 2021).

[352] In the 2019 Final Rule, DHS canvassed a range of sources to support the proposition that the statute was ambiguous, and that the new definition represented a reasonable interpretation of such ambiguity in light of the policy goals articulated in PRWORA. For example, DHS wrote that the rule "is not inconsistent with Congress' intent in enacting the public charge ground of inadmissibility in [the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA)], or in enacting PRWORA." *See* 84 FR 41292, 41317 (Aug. 14, 2019). DHS noted that Congress enacted those two laws in the same year, that IIRIRA amended the public charge inadmissibility statute, and that PRWORA contained the statements of national policy. DHS continued by stating that the rule, "in accordance with PRWORA, disincentivizes immigrants from coming to the United States in reliance on public benefits." *Id.* Similarly, in support of a similar definition of "public charge" in the 2018 NPRM, DHS wrote that "the term public charge is ambiguous as to how much government assistance an individual must receive or the type of assistance an individual must receive to be considered a public charge. The statute and case law do not prescribe the degree to which an alien must be receiving public benefits to be considered a public charge. Given that neither the statute nor

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

The forward-looking nature of the inquiry also suggests that it more naturally examines whether a noncitizen is likely to lack a primary means of support other than government assistance, rather than requiring predictions about the precise mix of means-tested benefits and other resources that an applicant is likely to use for a given period of time. The statutory factors that DHS is required to consider (age; health; family status; assets, resources, and financial status; and education and skills) could be relevant to either inquiry. But Congress might readily have presumed that DHS would be able to predict based on those factors (and any others that might be relevant) whether the noncitizen will have a primary means of support in the future

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the case law prescribes the degree to which an alien must be dependent on public benefits to be considered a public charge, DHS has determined that it is permissible and reasonable to propose a different approach." *See* 83 FR 51114, 51164 (Oct. 10, 2018).

apart from government benefits. By contrast, nothing in the statute instructs or equips DHS to make the type of complex prediction it aimed to do under the 2019 Final Rule as to whether the noncitizen would surpass a specific threshold of benefits receipt for designated benefits that contain particular thresholds for eligibility, some of which vary by State or locality or are available on a more generous basis to children or those with disabilities.

DHS's proposed definition of public charge is also consistent with how Congress legislated eligibility for means-tested benefits programs. As noted above, in 1996, Congress separately addressed the concern that noncitizens would seek admission or adjustment of status in order to take advantage of means-tested benefits programs by generally excluding them from participation for the first 5 years after admission or adjustment of status. One consequence of this change is that, in most cases, in administering the public charge ground of inadmissibility, DHS is unlikely to gain much insight by considering whether a given applicant has in the past received, or is currently receiving, specified public benefits (because most applicants are likely ineligible for those benefits). By contrast, DHS's past experience, as discussed in relation to chilling effects above, demonstrates the significant potential downsides of considering noncitizens' past or current receipt of benefits.

In this proposed rule, DHS opts for a compromise approach, in which DHS considers past or current receipt of the benefits most indicative of whether a person is likely to become primarily dependent on the government for subsistence. But DHS excludes from consideration a range of benefits that are less indicative of primary dependence, and for which applicants for admission and adjustment of status are likely ineligible in any event.

For the above reasons, DHS believes its proposed definition of public charge reflects a better interpretation of the statute and congressional purpose. In weighing alternatives to the

definition of public charge proposed in this rule, DHS considered that neither DHS nor any reviewing court suggested that the 2019 Final Rule's definition of public charge was compelled by statute.

DHS's experience while the 2019 Final Rule was in effect largely supports DHS's proposed definition. In the Regulatory Impact Analysis (RIA) accompanying the 2019 Final Rule, DHS wrote that "[t]he primary benefit of the final rule would be to better ensure that aliens who are admitted to the United States, seek extension of stay or change of status, or apply for adjustment of status will be self-sufficient, i.e., will rely on their own financial resources, as well as the financial resources of the family, sponsors, and private organizations."[353] DHS interprets this statement to refer to: (1) potential benefits associated with denials of admission and adjustment of status to those who are likely to become a public charge as defined in the rule (i.e., potentially reduced transfer payments, which are not formally a benefit); and (2) benefits associated with the incentives created by the rule (i.e., again reduced transfer payments due to the rule's potential deterrent effect on migration to the United States by those who might otherwise have hoped to rely on certain public benefits).[354] But notwithstanding DHS's decision at that time to expand the public charge definition to consider non-cash benefits, USCIS data show that during the year the 2019 Final Rule was in effect, out of the 47,555 applications to which the rule was applied, DHS issued only 3 denials (which were subsequently reopened and

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[353] *See* 84 FR 41292, 41490 (Aug. 14, 2019) (citing 8 U.S.C. 1601(2)).

[354] At various points in the 2019 Final Rule's preamble, DHS identified each as a benefit. *See, e.g.*, 84 FR 41292, 41493 (Aug. 14, 2019) ("Additionally, because the final rule considers public benefits for purposes of the inadmissibility determination that were not considered under the 1999 Interim Field Guidance, DHS determined that the aliens found inadmissible under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), will likely increase. However, given the compelling need for this rulemaking, including but not limited to ensuring self-sufficiency and minimizing the incentive to immigrate based on the U.S. social safety net, DHS determined that this rulemaking's impact is justified, and no further actions are required.").

approved) and 2 Notices of Intent to Deny (which were ultimately rescinded, and the applications were approved) based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A)-(B) of the Act, 8 U.S.C. 1182(a)(4)(A)-(B).[355]

Experience with the 2019 Final Rule also suggests that the proposed definition would better achieve Congress's policy objectives in other arenas. As noted above, the 2019 Final Rule had a modest effect on denials under the public charge ground of inadmissibility. But the Rule had the significant and unintended effect of discouraging noncitizens from using benefits for fear that such benefits usage would be used against them in immigration proceedings, even though most categories of noncitizens who are eligible for benefits are not subject to the public charge ground of inadmissibility. That the 2019 Final Rule's predominant effect was unintended and had the result of discouraging people from accessing the benefits for which Congress determined they are eligible, counsels in favor of the approach within this proposed rule, which generally aligns with the standard that existed before the 2019 Final Rule. For instance, this approach mitigates the possibility that intending immigrants and their families (or others who are not subject to the public charge ground of inadmissibility), despite being eligible for benefits under PRWORA, would choose to disenroll from special purpose and supplemental benefits, which serve to reduce the likelihood that the beneficiary will become primarily dependent on the government for subsistence. Important public health objectives are also advanced by mitigating the risk that noncitizens are discouraged due to potential adverse immigration consequences from

[355] USCIS Field Operations Directorate (June 2021); USCIS Office of Performance and Quality (June 2021).

obtaining healthcare coverage, where eligible. This is a particularly important goal in light of the ongoing COVID-19 pandemic and potential similar public health crises in the future.

DHS believes that defining "likely at any time to become a public charge" as "likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense," provides a closer connection between the exact language used in the statutory standard and the regulatory definition than an approach that simply defines the term "public charge" independent of the forward-looking aspect of the statutory standard.

In response to comments received after publishing the 2018 NPRM, DHS stated that it was necessary, in addition to defining public charge and public benefits, to also clarify the degree of likelihood that would be high enough to justify a denial based on the public charge ground of inadmissibility.[356] As a result, in the 2019 Final Rule, DHS defined "likely at any time to become a public charge" to mean more likely than not at any time in the future to become a public charge based on the totality of the person's circumstances.[357] DHS explained that "likely" and "more likely than not" have been used interchangeably in other DHS regulations interpreting the same term in other parts of the statute and also are supported by case law.[358]

DHS therefore proposes that an individual is likely at any time to become a public charge if the individual is likely to become primarily dependent on the government for subsistence, as demonstrated by either receipt of public cash assistance for income maintenance or long-term

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[356] 84 FR 41292, 41392-93 (Aug. 14, 2019).
[357] 84 FR 41292, 41501 (Aug. 14. 2019).
[358] 84 FR 41292, 41392-93 (Aug. 14, 2019).

institutionalization at government expense. DHS welcomes comment on whether it should use "primarily" dependent on the government for subsistence, as opposed to a greater or lesser level of dependence. DHS also believes that it is appropriate, and consistent with DHS's broad discretion and historical practice in administering the public charge ground of inadmissibility, to not specify a specific numerical formula or threshold associated with this standard. DHS welcomes comment on alternative approaches, however.

2. Public Benefits

DHS proposes to consider the same list of public benefits that are considered under the 1999 Interim Field Guidance with a few clarifications. These benefits are public cash assistance for income maintenance and long-term institutionalization at government expense (including when funded by Medicaid). DHS believes that this approach is consistent with a more natural interpretation of the term "public charge" and has the additional benefit of being more administrable and consistent with long-standing practice than the 2019 Final Rule, and less likely to result in the significant chilling effects and burdens on State and local governments that were observed following promulgation of the 2019 Final Rule.

In proposing to consider these benefits, DHS reviewed the discussion of these issues in the 1999 Interim Field Guidance and NPRM, as well as the 2019 Final Rule. The public benefits covered in the 1999 Interim Field Guidance and again in this NPRM are consistent with the case law;[359] past practices of the former INS, DHS, and DOS; limited eligibility for public benefits

[359] Although no cases have specifically identified which types of public benefits can give rise to a public charge finding, a definition that is based on primary dependence on the government remains consistent with the facts found in the case law relied on in the 1999 Interim Field Guidance and the 1999 NPRM. *See* 64 FR 28689, 28690 (May 26, 1999) and 64 FR 28676, 28677 (May 26, 1999).

among the categories of noncitizens subject to the public charge ground of inadmissibility; and the public policy considerations that have consistently informed administrative policymaking in this area.[360] It has never been DHS (or the former INS) policy that receipt of any public services or benefits paid for wholly or in part by government funds renders a noncitizen inadmissible as likely to become a public charge.[361] The nature of the program must be considered in light of public health and other national public policy decisions.[362] For example, DHS, and the INS before it, have never considered free or subsidized school lunches, home energy assistance, childcare assistance, or special nutritional benefits for children and pregnant women to be the types of public benefits that should be considered in a public charge determination, notwithstanding that each could conceivably have some nexus to future primary dependence on the government (or, in the case of the 2019 Final Rule, some nexus to future receipt of designated benefits above that rule's durational threshold).[363]

DHS notes that the structure of means-tested benefits programs—many of which were changed in 1996, roughly contemporaneously with the last amendment to the public charge provision—supports the view that predicted participation in non-cash programs should not lead to a conclusion that a noncitizen is likely to become a public charge. Many modern public assistance programs take the form of payments or in-kind benefits to help individuals meet particular needs and are not limited to individuals without a separate primary means of support. The Medicaid program, subsidized housing, and SNAP provide benefits to millions of

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[360] *See* 64 FR 28689, 28690 (May 26, 1999) and 64 FR 28676, 28677 (May 26, 1999).
[361] *See* 64 FR 28689, 28692 (May 26, 1999).
[362] *See* 64 FR 28689, 28692 (May 26, 1999).
[363] *See* 64 FR 28689, 28692-28693 (May 26, 1999).

individuals and families across the nation, many of whom also work.[364] One analysis of the 2019 Final Rule found that "[i]n a single year, 24 percent — nearly 1 in 4 — of U.S.-born citizens receive one of the main benefits in the [rule's] definition . . . . Looking at benefit receipt at any point over a 20-year period, approximately 41 to 48 percent of U.S.-born citizens received at least one of the main benefits in the public charge definition."[365] Although the public charge ground of inadmissibility does not apply to most participants in these programs, it would seem not to comport with common usage to describe so many Americans as being public charges.[366] Relatedly, all program participants will need a separate source of income to meet a number of basic needs.

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[364] For instance, in July 2021, over 76 million individuals were enrolled in Medicaid, of whom between 42-44 million were adults. *See* Medicaid.gov, July 2021 Medicaid & CHIP Enrollment Data Highlights, *https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html* (accessed Feb. 10, 2022).

[365] Center on Budget and Policy Priorities, Administration's Public Charge Rules Would Close the Door to U.S. to Immigrants Without Substantial Means (Nov. 11, 2019), *https://www.cbpp.org/research/immigration/administrations-public-charge-rules-would-close-the-door-to-us-to-immigrants* (accessed Jan. 27, 2022). The analysis also observed that "[i]n contrast, only about 5 percent of U.S.-born citizens meet the [1999 Interim Field Guidance] benefit-related criteria in the public charge determination." *Id.*

[366] In the 2018 NPRM, DHS stated that "[c]ash aid and non-cash benefits directed toward food, housing, and healthcare account for significant federal expenditure on low-income individuals and bear directly on self-sufficiency," and emphasized the significant impact, in terms of overall expenditures, of non-cash benefit programs such as Medicaid and SNAP. *See* 83 FR at 51160. At the same time, DHS acknowledged that "receipt of non-cash public benefits is more prevalent than receipt of cash benefits" (83 FR at 51160.), and DHS cited data indicating that over 20 percent of the U.S. population receives Medicaid, SNAP, or Federal housing assistance, whereas 3.5 percent of the U.S. population receives cash benefits (83 FR at 51162). DHS acknowledges that non-cash benefits programs involve significant expenditures of government funds, but the Department believes that the term "public charge" is best interpreted by reference to the degree of an individual's dependence on the government for support, rather than the scale of overall government expenditures for particular programs.

Cash assistance programs, on the other hand, are often reserved for individuals with few if any other sources of income.[367] In addition, because cash assistance is not restricted to particular uses, receipt of cash assistance—which often coincides with receipt of other means-tested benefits[368]—allows an individual to become dependent on the government in a way that participation in one or more non-cash benefits programs cannot. For example, an individual who receives only non-cash assistance would need another source of income to acquire various basic necessities like clothing or household items, while an individual who receives cash assistance could potentially rely on that assistance, combined with non-cash government benefits, to the exclusion of any other independent source of income or support.

In addition, as discussed above, when deciding to limit consideration to public cash assistance for income maintenance and "institutionalization for long-term care" at government expense,[369] the former INS consulted with benefit-granting agencies. The former INS concluded that cash assistance for income maintenance and long-term institutionalization at government

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[367] *See, e.g.*, HHS Office of Family Assistance, Characteristics and Financial Circumstances of TANF Recipients, FY 2010 (Aug. 8, 2012), *https://www.acf.hhs.gov/ofa/data/characteristics-and-financial-circumstances-tanf-recipients-fiscal-year-2010* (accessed Jan. 25, 2022) ("In FY 2010, about 17 percent of TANF families had non-TANF income."); SSA, Fast Facts & Figures About Social Security, 2021, *https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2021/fast_facts21.html* (among SSI recipients, "[e]arned income was most prevalent (4.1%) among those aged 18–64"); GAO, GAO-17-558, Federal Low-Income Programs: Eligibility and Benefits Differ for Selected Programs Due to Complex and Varied Rules at 23-24 (June 2017) (illustrating income eligibility thresholds for a hypothetical family of three, and showing lower income eligibility thresholds for SSI ($1,551) and TANF ($0 to $1,660, depending on the State) as compared to SNAP ($2,184), Housing Choice Vouchers ($1,613 to $4,925 depending on the program and State), and Medicaid ($218 to $5,359 depending on the beneficiary's age and the State)).

[368] *See, e.g.*, Center on Budget and Policy Priorities, Policy Basics: Supplemental Security Income (Feb. 8, 2021), *https://www.cbpp.org/research/social-security/supplemental-security-income* ("Over 60 percent of SSI recipients also get SNAP (food stamps) and about one-quarter receive housing assistance.") (accessed Jan. 26, 2022).

[369] As explained more fully below, for the purposes of this proposed rule, DHS is replacing the term "institutionalization for long-term care at government expense" that was used in the 1999 NPRM and 1999 Interim Field Guidance with the term "long-term institutionalization."

expense constituted the best evidence of whether a noncitizen is primarily dependent on the government for subsistence.[370]

In reaching this conclusion, the INS observed that non-cash benefits (with the exception of "institutionalization for long-term care at government expense") are, by their nature, supplemental and do not, alone or in combination, provide sufficient resources to support an individual or a family.[371] In addition to receiving non-cash benefits, a noncitizen would have to have either additional income (such as wages, savings, or earned retirement benefits) or public cash assistance to support themselves or their family.[372] Thus, by focusing on public cash assistance for income maintenance and "institutionalization for long-term care" at government expense, the INS believed that it could more readily identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests.[373] Additionally, the INS observed that certain Federal, State, and local benefits were increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient.[374] Thus, the INS concluded that participation in such non-cash programs is not evidence of primary dependence.[375]

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[370] *See* 64 FR 28676, 28677 (May 26, 1999). The former INS consulted primarily with HHS, SSA, and USDA in formulating the list of public benefits that would be considered. See 64 FR 28676, 28677 (May 26, 1999).
[371] *See* 64 FR 28689, 28692 (May 26, 1999).
[372] *Ibid.*
[373] *See* 64 FR 28689, 28692 (May 26, 1999).
[374] *Ibid.*
[375] *See* 64 FR 28676, 28677-28678 (May 26, 1999) and 64 FR 28689, 28692 (May 26, 1999).

In formulating such a conclusion, the former INS relied heavily on the expertise of HHS and other benefit-granting agencies in the form of consultation letters. HHS, in its consultation letter, stated that non-cash benefits (with the exception of institutionalization for long-term care at government expense) provide supplementary support to low-income families in the form of vouchers or direct services to support nutrition, health, and living condition needs.[376] The primary objectives of these non-cash benefits are to supplement and support the overall health and nutrition of the community by making services generally available to all.[377] When comparing cash benefits to non-cash benefits and support programs, the non-cash programs generally have more generous eligibility rules in order to also make them available to individuals and families with incomes well above the poverty line so that more people within the community have access to these programs that support individuals to be self-sufficient.[378] HHS further stated that it is extremely unlikely that an individual or family other than someone who permanently resides in a long-term care institution could subsist solely on a combination of non-cash support benefits or services, so as to be primarily dependent on the government for subsistence. HHS provided a few examples of non-cash benefits that do not directly provide subsistence: food stamps (now SNAP), Medicaid (with the exception of long-term institutionalization at government expense, as noted in this proposed rule), CHIP and their related State programs, WIC, housing benefits, and transportation vouchers. The one and only

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[376] *See* HHS letter in 64 FR 28676, 28686-28687 (May 26, 1999).
[377] *See* HHS letter in 64 FR 28676, 28686 (May 26, 1999).
[378] *See* HHS letter in 64 FR 28676, 28686 (May 26, 1999). While the SSA letter did not address non-cash benefits, the USDA letter concurred with the HHS letter and provided that neither the receipt of food stamps nor nutritional assistance as provided for under the Special Nutritional Programs should be considered in making a public charge determination. See 64 FR 28676, 28687-28688 (May 26, 1999).

exception identified by HHS to the principle that non-cash benefits do not demonstrate primary dependence on the government for subsistence is the instance where Medicaid or other government programs pay for the costs of a person's long-term institutionalization for care.[379] HHS concluded that the receipt of these non-cash benefits (except institutionalization for long-term care at government expense) should not be relevant in public charge determinations.

In the 2019 Final Rule, DHS expanded the list of public benefits that would be considered by DHS to include certain non-cash benefits beyond institutionalization for long-term care at government expense, including SNAP, most non-emergency forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and public housing under the Housing Act of 1937.[380] As noted above, however, even in 2019, DHS did not express a view that it was under a statutory obligation to expand its inquiry in this way; instead, DHS justified the expansion by reference to other policy goals, such as the significant national expenditures for each designated benefit, and DHS's desire to more closely align public charge policy with its interpretation of the statement of national policy contained in PRWORA. DHS also concluded that it –

> does not believe that Congress intended for DHS to administer section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), in a manner that fails to account for aliens' receipt of food, medical, and housing benefits so as to help aliens *become* self-sufficient. DHS believes that it will ultimately strengthen public safety, health, and nutrition through this rule by denying admission or adjustment of status to aliens who are not likely to be self-sufficient.[381]

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[379] *See* HHS letter in 64 FR 28676, 28686 (May 26, 1999).
[380] *See* 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 2, 2019).
[381] *See* 84 FR 41292, 41314 (Aug. 14, 2019).

When developing this proposed rule, as in 1999, DHS consulted with benefits-granting agencies, including USDA, which administers SNAP. As part of that consultation, USDA provided an on-the-record letter to DHS, similar to the letters included in an appendix to the 1999 NPRM, affirming that receipt of SNAP benefits does not indicate that an individual is likely to become primarily dependent on the government for subsistence. The letter explains that SNAP is supplementary in nature as the benefits are calculated to cover only a portion of a household's food costs with the expectation that the household will use its own resources to provide the rest. The letter also states that SNAP benefits are modest and tailored based on the Thrifty Food Plan (TFP), USDA's lowest cost food plan, and that an individual or family could not subsist on SNAP alone. Historically, most households receive less than the maximum allotment. According to USDA, the average per-person benefit in February 2020, prior to the pandemic, was about $121. While this amount has since increased—the 2021 reevaluation of the TFP and cost-of-living adjustments brings the average regular SNAP benefit to $169 per person today—the TFP estimates that the actual cost to feed an individual is $209.

USDA emphasized that SNAP benefits can only be used for the purchase of food, such as fruits and vegetables, dairy products, breads and cereals, or seeds and plants that produce food for the household to eat. SNAP benefits may not be converted to cash or used to purchase hot foods or any nonfood items. Receiving SNAP benefits only pertains to a need for supplemental food assistance and does not address all food needs or other general needs such as cooking equipment, hygiene items, or clothing, for example.

USDA also stated that there is no research demonstrating that receipt of SNAP benefits is a predictor of future dependency. USDA identified a study that showed that SNAP receipt in early motherhood does not lead to more or less participation in public assistance programs in the

long run compared to other young mothers who have low income but do not receive SNAP.[382] USDA recommended that DHS continue the long-standing practice prior to the 2019 Final Rule, as set forth in the 1999 Interim Field Guidance, that receipt of benefits from nutrition assistance programs administered by USDA should not be taken into account in public charge inadmissibility determinations in this proposed rule.[383]

During development of this proposed rule, DHS also consulted with HHS, which administers TANF and Medicaid. As part of that consultation, HHS provided an on-the-record letter to DHS, similar to the USDA letter and the letters included in an appendix to the 1999 NPRM. In that letter HHS expressed their general support for the approach to public charge inadmissibility taken by INS in the 1999 Interim Field Guidance and 1999 NPRM, and specifically supported an understanding of public charge linked to being primarily dependent on the government for subsistence as demonstrated by the receipt of cash assistance for income maintenance or long-term institutionalization at government expense.

In its letter, HHS evaluated the Medicaid program within the context of a public charge definition based on primary dependence on the government for subsistence. HHS stated that "with the exception of long-term institutionalization at government expense, receipt of Medicaid benefits is … not indicative of a person being or likely to become primarily dependent on the

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[382] Vartanian, Thomas P.; Houser, Linda; and Harkness, Joseph. "Food Stamps and Dependency: Disentangling the Short-term and Long-term Economic Effects of Food Stamp Receipt and Low Income for Young Mothers," *The Journal of Sociology & Social Welfare*, 2011. Available at: *https://scholarworks.wmich.edu/jssw/vol38/iss4/6*.

[383] In the 2022 letter, USDA also mentioned the Nutrition Assistance Program (NAP) block grants that operate in American Samoa, CNMI, and Puerto Rico. These block grants provide nutritional assistance to low-income households in the U.S. territories. USDA proposed that NAP benefits also not be considered in a public charge inadmissibility determination and indicated that the NAP benefits are even more modest than SNAP benefits.

government for subsistence." This conclusion was based on HHS' assessment that Medicaid, except for long-term institutionalization, does not provide assistance to meet basic subsistence needs such as for food or housing.

In addition, HHS highlighted developments since 1999 that "reaffirm Medicaid's status as a supplemental benefit." These developments include Congressional action that has expanded Medicaid coverage, such that in many states individuals and families are eligible for Medicaid despite having income substantially above the HHS poverty guidelines. HHS also noted that among working age adults without disabilities who participate in the Medicaid program, most are employed.[384] HHS discussed the significant negative public health impacts that could potentially be associated with considering Medicaid generally as indicative of primary dependence in a public charge inadmissibility determination, as highlighted by the COVID-19 pandemic "and the important role that HHS health care programs like Medicaid have played in vaccination and treatment of COVID-19."

HHS also agreed with DHS that "receipt of cash assistance for income maintenance, in the totality of the circumstances, is evidence that an individual may be primarily dependent on the government for subsistence." HHS addressed the TANF program, which it administers, and stated that unlike Medicaid, cash assistance programs under TANF have remained limited to families with few sources of other income and are much more frequently used as a primary source of subsistence.

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[384] *See* Kaiser Family Foundation, *Work Among Medicaid Adults: Implications of Economic Downturn and Work Requirements* (Feb. 11, 2021), available at *https://www.kff.org/report-section/work-among-medicaid-adults-implications-of-economic-downturn-and-work-requirements-appendix-2/* (accessed Feb. 15, 2022).

In addition to reflecting a better interpretation of the term "public charge," as discussed above, DHS's general approach to public benefits in this proposed rule also better balances the competing policy objectives established by Congress, including ensuring that individuals eligible for certain public benefits are not unduly dissuaded from applying for them. This proposed rule is not an example of DHS administering the public charge ground of inadmissibility "so as to help aliens *become* self-sufficient," as DHS argued in 2019. Rather, this rule is an effort to faithfully implement the public charge statute without unnecessarily and at this point, predictably, harming separate efforts related to health and well-being of people whom Congress made eligible for supplemental supports. This approach is also supported by the feedback DHS received on the ANPRM. Many commenters to the ANPRM recommended that DHS exclude non-cash benefits in any new proposed regulation due to the negative consequences of including consideration of non-cash benefits, which were highlighted by the COVID-19 pandemic. As far as the economic impact, an association for hospitals and health systems stated that

> [t]he negative effects of COVID-19 go beyond health care . . . Further inclusion of housing and nutritional benefits [in a public charge definition] counteracts the progress that policymakers, health care providers, and other community partners have made in addressing factors beyond clinical care that influence a person's health, including their social, economic, and environmental circumstances. Disenrollment from or delayed enrollment in these programs will inevitably drive up poverty rates, homelessness, and malnutrition, all of which lead to adverse health outcomes and undermine public health.

Another commenter stated that "[t]he inclusion of any non-cash benefit in the public charge assessment creates confusion that causes people to avoid essential services."

While, as discussed above, DHS had anticipated some of the consequences of the 2019 Final Rule as it relates to chilling effects before promulgating that rule, it underestimated the scope of the chilling effects, which was highlighted by the COVID-19 pandemic. The inclusion

of non-cash benefits in the 2019 Final Rule had a chilling effect on enrollment in Federal and State public benefits, including Medicaid, resulting in fear and confusion in the immigrant community. Concerns over actual and perceived adverse legal consequences tied to seeking public benefits have affected whether or not immigrants seek to enroll in public programs, particularly Medicaid and CHIP, and have resulted in a decrease in health insurance rates of eligible immigrants, particularly Latinos.[385]

Moreover, as discussed above, many of the pandemic's effects have been felt most acutely in more vulnerable communities, including localities with high poverty rates and among certain racial and ethnic populations.[386] Medicaid provides critical health care services including vaccination, testing and treatment of COVID-19.[387] Commenters on the 2018 NPRM expressed concerns that it would make immigrant families afraid to seek the healthcare they need, including vaccinations, endangering their health and their communities. DHS acknowledges the extensive evidence that the 2019 Final Rule had the effect of discouraging people, including

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[385] *Health Insurance Coverage and Access to Care for Immigrants: Key Challenges and Policy Options*, HHS, Assistant Secretary for Planning and Evaluation (ASPE), Office of Health Policy (Dec. 2021), available at *https://aspe.hhs.gov/sites/default/files/documents/96cf770b168dfd45784cdcefd533d53e/immigrant-health-equity-brief.pdf* (accessed Feb. 2, 2022).

[386] *See* CDC, Demographic Trends of COVID-19 cases and deaths in the U.S. reported to CDC, available at *https://covid.cdc.gov/covid-data-tracker/#demographics* (accessed Feb. 1, 2022). *See also* CDC, COVID-19 7-Day Case Rate per 100,000 Population in United States, by Percentage of County Population in Poverty, available at *https://covid.cdc.gov/covid-data-tracker/#pop-factors_7daynewcases* (accessed Feb 1, 2022).

[387] *See* Centers for Medicare & Medicaid Services (CMS) Vaccine Toolkit: Coverage and Reimbursement of COVID-19 Vaccines, Vaccine Administration, and Cost Sharing under Medicaid, the Children's Health Insurance Program, and Basic Health Program (updated May 2021), available at: *https://www.medicaid.gov/state-resource-center/downloads/covid-19-vaccine-toolkit.pdf*; CMS State Health Official letter #12-006, "Mandatory Medicaid and CHIP Coverage of COVID-19- Related Treatment under the American Rescue Plan Act of 2021," (issued October 22, 2021), available at: *https://www.medicaid.gov/federal-policy-guidance/downloads/sho102221.pdf*; CMS State Health Official letter #21-003, "Medicaid and CHIP Coverage and Reimbursement of COVID-19 Testing under the American Rescue Plan Act of 2021 and Medicaid Coverage of Habilitation Services" (issued August 30, 2021), available at *https://www.medicaid.gov/federal-policy-guidance/downloads/sho-21-003.pdf*.

children, from accessing important nutrition and health benefits, both before and during the pandemic, even among individuals who were not subject to the public charge inadmissibility ground.

This proposed rule reflects, in part, an effort by DHS to avoid exacerbating such ongoing challenges in vulnerable communities. The effects of the 2019 Final Rule, both direct and indirect, were felt strongly by vulnerable populations, including populations that have seen disproportionate impacts from the COVID-19 pandemic. At the same time as the government was relying extensively on public benefits as a part of its strategy to address the public health and economic effects of the pandemic, immigrant families withdrew from or avoided participation in important programs such as Medicaid, SNAP, and housing assistance, as noted above.[388] The decline in benefit use is particularly notable among vulnerable U.S. citizen children with noncitizen family members even though those children are not subject to the public charge ground of inadmissibility.[389] By focusing on those public benefits that are indicative of primary dependence on the government for subsistence, DHS can faithfully administer the public charge ground of inadmissibility without exacerbating challenges confronting individuals who work, go to school, and contribute meaningfully to our nation's social, cultural, and economic

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[388] *See* Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis at 1 (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).

[389] *See* Randy Capps et al., Migration Policy Institute, Anticipated "Chilling Effects" of the Public-Charge Rule Are Real: Data Reflect Steep Decline in Benefits Use by Immigrant Families (Dec. 2020), *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 26, 2022). *See also* Barofsky, Jeremy, et al. Spreading Fear: The Announcement of The Public Charge Rule Reduced Enrollment in Child Safety-Net Programs (Oct. 2020); Health Affairs Vol. 39, No.10: Children's Health, *https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00763* (accessed Jan. 18, 2022).

fabric. This approach is consistent with the INA, PRWORA, and this country's long history of welcoming immigrants seeking to build a better life.

In short, to best respond to commenters' concerns, and to achieve closer alignment to the statute and ease of administrability, DHS now proposes a policy more closely resembling the 1999 Interim Field Guidance framework (with some clarifications) in which non-cash benefits, except for long-term institutionalization at government expense, would be excluded from consideration in a public charge inadmissibility determination. By focusing on cash assistance for income maintenance and long-term institutionalization at government expense, DHS can identify those individuals who are likely at any time to become primarily dependent on the government for subsistence, without interfering with the administrability and effectiveness of other benefit programs that serve important public interests. DHS welcomes comment on the proposal to consider cash assistance for income maintenance, but not non-cash benefits (apart from long-term institutionalization), in determining whether a noncitizen is likely at any time to become primarily dependent on the government for subsistence. DHS also notes that it remains particularly concerned about the potential effects of public charge policy on children, including children in mixed-status households. DHS welcomes public comments on ways to mitigate unintended adverse impacts on children, while remaining faithful to the public charge statute, which does not contain an exemption for children and requires consideration of age.

3. Public Cash Assistance for Income Maintenance

DHS proposes that public cash assistance for income maintenance would mean: (1) Supplemental Security Income (SSI), 42 U.S.C. 1381 et seq.;

(2) Cash assistance for income maintenance under Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 et seq.; or

(3) State, Tribal, territorial, or local cash benefit programs for income maintenance (often called "General Assistance" in the State context, but which also exist under other names).

Supplemental Security Income (SSI) provides monthly income payments intended to help ensure that aged, blind or disabled persons with limited income and resources have a minimum level of income.[390] SSI is administered by the U.S. Social Security Administration.[391] The SSI program operates in the 50 States, the District of Columbia, and the Northern Mariana Islands.[392] The program also covers blind or disabled children of military parents stationed abroad and certain students studying outside the United States for a period of less than one year.[393] The eligibility requirements and the Federal income floor are identical everywhere the program operates; this provides assurance of a minimum income that States and the District of Columbia may choose to supplement.[394] In order to receive SSI benefits, an individual cannot have monthly countable income more than the current Federal benefit rate (FBR). The FBR for an eligible couple is approximately one and a half as much as that for an individual. These amounts are set by law and are subject to annual increases based on cost-of-living adjustments.[395] The

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[390] *See* U.S. Soc. Sec. Admin., Social Security Handbook, Ch. 21 ("SSA Handbook"), section 2102.1, available at *https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-toc21.html* (accessed Jan. 31, 2022).
[391] *See* SSA Handbook section 2101 (accessed Jan. 31, 2022)
[392] *See* SSA Handbook section 2103 (accessed Jan. 31, 2022)
[393] *See* SSA Handbook section 2103 (accessed Jan. 31, 2022)
[394] *See* SSA Handbook section 2102 (accessed Jan. 31, 2022). Only four States and one territory choose not to supplement Federal SSI: Arizona, Commonwealth of Northern Mariana Islands, Mississippi, North Dakota, West Virginia. See: *Understanding Supplemental Security Income SSI Benefits -- 2021 Edition, https://www.ssa.gov/ssi/text-benefits-ussi.htm* (accessed Jan. 31, 2022).
[395] *See* SSA Handbook section 2113.1

monthly maximum Federal amounts for 2022 are $841/month for an eligible individual, $1,261/month for an eligible individual with an eligible spouse, and $421 for an essential person.[396] The amount of an individual's income determines eligibility for SSI and the amount of the SSI benefit - generally, the more income a person receives, the lower the SSI benefit.[397]

Temporary Assistance for Needy Families (TANF) is a Federal block grant that can be used to provide cash assistance for income maintenance to needy families with children,[398] along with a broad range of other benefits and services that meet one or more of the four purposes of TANF.[399] The TANF program provides approximately $16.5 billion to States, the District of Columbia, and U.S. territories (Guam, the U.S. Virgin Islands, and Puerto Rico). Federally recognized American Indian tribes and Alaska Native organizations may offer TANF through the tribal TANF program.[400] The Federal Government does not provide TANF cash assistance or other TANF benefits and services directly to the public. Instead, States, territories, and Tribes determine the uses of their TANF grants and then provide cash assistance and other benefits and services to eligible beneficiaries.[401] "TANF assistance benefit amounts are set by states. In July 2019, the maximum monthly benefit for a family of three ranged from $1,066 in New Hampshire

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[396] *See* SSI Federal Payment Amounts for 2022, *https://www.ssa.gov/oact/cola/SSI.html* (accessed Jan. 31, 2022)
[397] *See* SSA Handbook, Ch. 21, section 2128, *https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-toc21.html* (accessed Jan. 31, 2022);
[398] See HHS, Admin. for Children & Families, Office of Family Assistance, About TANF, available at *https://www.acf.hhs.gov/ofa/programs/tanf/about* (accessed Feb. 1, 2022)
[399] *See* 42 U.S.C. 601 (The purpose of this part is to increase the flexibility of States in operating a program designed to: (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families.).
[400] *See* 42 U.S.C. 612.
[401] See Office of Family Assistance, Help for Families, available at *https://www.acf.hhs.gov/ofa/map/about/help-families* (accessed Jan. 31, 2022).

to $170 in Mississippi. Only New Hampshire (at 60% of the Federal poverty guidelines) had a maximum TANF assistance amount for this sized family in excess of 50% of poverty-level income."[402] Like the 1999 NPRM and the 1999 Interim Field Guidance, in this rule DHS is only proposing to take into consideration in public charge inadmissibility determinations cash assistance payments for income maintenance, but not other benefits or services funded by TANF block grants.

Programs of cash assistance for income maintenance provided at various levels of government are sometimes called "General Assistance," but sometimes given other names. "General assistance is often the only resource for individuals who cannot qualify for unemployment insurance, or whose benefits are inadequate or exhausted. Help may either be in cash or in kind, including such assistance as groceries and rent."[403] "The eligibility requirements and payment levels for general assistance vary from State to State, and often within a State. Payments are usually at lower levels and of shorter duration than those provided by federally financed programs."[404] General assistance is administered and financed by State and local governments under their own guidelines. For example, in Minnesota, the "General Assistance program helps people without children pay for basic needs. It provides money to people who can[no]t work enough to support themselves, and whose income and resources are very low."[405] To the extent that aid provided through a general assistance program is in the form of cash,

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[402] *See*, Congressional Research Services, *The Temporary Assistance for Needy Families (TANF) Block Grant: Responses to Frequently Asked Questions, https://sgp.fas.org/crs/misc/RL32760.pdf* (Updated Dec. 14, 2021).
[403] *See* U.S. Soc. Sec. Admin., Social Security Programs in the United States—General Assistance, available at *https://www.ssa.gov/policy/docs/progdesc/sspus/genasist.pdf* (accessed Jan. 31, 2022)
[404] *Id*.
[405] *See* Minn. Dep't of Human Servs., General Assistance (GA), available at *https://mn.gov/dhs/people-we-serve/adults/economic-assistance/income/programs-and-services/ga.jsp* (accessed Jan. 31, 2022)

check, or money instrument (as compared to in-kind goods or services through vouchers and similar means) and intended for income maintenance, DHS would consider it as cash assistance for income maintenance under this proposed rule.

Similar to the approach taken in the 1999 NPRM and 1999 Interim Field Guidance, not all cash assistance would be relevant for public charge inadmissibility purposes. For example, cash payments that are provided for child-care assistance or other supplemental, special purpose cash assistance would not be considered in a public charge inadmissibility determination because they do not constitute primary dependence on the government for subsistence.[406] Similarly, DHS would not consider special purpose benefits like energy assistance provided through the Low Income Home Energy Assistance Program (LIHEAP)[407] because such assistance is not intended for income maintenance. Nor would DHS consider Stafford Act disaster assistance, including financial assistance provided to individuals and households under Individual Assistance under the Federal Emergency Management Agency's (FEMA) Individuals and Households Program[408] as cash assistance for income maintenance. The same would be true for comparable disaster assistance provided by State, Tribal, territorial, or local, governments.

Federal, State, Tribal, territorial, and local governments provided pandemic-related cash assistance in response to COVID-19. This took a variety of forms, including Economic Impact Payments and the California Pandemic Emergency Assistance Fund. Under this proposed rule, DHS would not consider these types of supplemental, special purpose cash assistance programs

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[406] *See* 64 FR 28689, 28692-28693 (May 26, 1999).
[407] *See* 42 U.S.C. 8621, et seq.
[408] *See* 42 U.S.C. 5174.

or similar ones established in response to future public health emergencies in public charge inadmissibility determinations.

Other categories of cash assistance that are not intended to maintain a person at a minimum level of income, such as assistance specifically targeted to aid survivors of trafficking or crime, would similarly not fall within the definition. Moreover, earned cash benefits would continue to be excluded from consideration in public charge inadmissibility determinations. A few examples of such earned benefits that would not be considered include Title II Social Security benefits, government pension benefits, unemployment insurance payments, and veterans' benefits, as well as any benefits received via a tax credit or deduction.[409]

DHS has clarified above that special-purpose and earned-benefit cash assistance programs would not be considered in public charge inadmissibility determinations. The proposed regulatory text does not explicitly address the exclusion of these programs but does limit the consideration of cash assistance to programs providing cash assistance intended for income maintenance. DHS welcomes comment on how, if at all, to clarify these exclusions within the final rule or related guidance.

In response to the 2021 ANPRM, some commenters encouraged DHS to exclude all exclusively non-Federal benefits, including cash benefits, from public charge inadmissibility determinations. A coalition of more than 630 national, State, and local organizations and agencies wrote that programs funded solely by a State "are exercises of the powers traditionally reserved to the states and should not be counted as factors in a new public charge test." The commenter explained that the State provided State-funded benefits, including cash benefits, to

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[409] *See* 64 FR 28676, 28678-28679 (May 26, 1999).

foreign-born victims of trafficking, torture, or other serious crimes, and their derivative family members. The coalition emphasized that States and localities "have a compelling interest in promoting health and safety that includes providing benefits at their own expense without barriers caused by federal policies," and suggested that because "these benefits vary significantly by state, excluding all state and local programs will make the public charge rule easier for immigrants and federal DHS adjudicators to understand."

Although this proposed rule covers Federal, State, Tribal, territorial, or local cash benefit programs for income maintenance (consistent with past policy and the original function of the public charge ground of inadmissibility), DHS welcomes comment on this proposal, particularly as it relates to non-Federal programs targeted at individual populations.

4. Long-Term Institutionalization at Government Expense

Consistent with the 1999 Interim Field Guidance and 1999 NPRM, DHS proposes that long-term institutionalization at government expense (in the case of Medicaid, limited to institutional services under section 1905(a) of the Social Security Act), including in a nursing home or mental health institution, be included in public charge inadmissibility determinations.[410] Similarly, long-term institutionalization at government expense would be the only category of Medicaid-funded services to be considered in public charge inadmissibility determinations.

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[410] Section 1905(a) of the Social Security Act specifies that medical assistance in the Medicaid program does not include "care or services for any individual who has not attained 65 years of age and who is a patient in an institution for mental diseases." Institutions for mental diseases are defined at section 1905(i) of the Social Security Act as "a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases." While the Federal Government is not incurring a financial obligation for Medicaid beneficiaries in institutions for mental diseases, with specified exceptions, State governments are responsible for the cost of services provided to beneficiaries in these settings.

As suggested by HHS in its on-the-record consultation letter, DHS proposes to replace the term "institutionalization for long-term care at government expense," used in the 1999 Interim Field Guidance and 1999 NPRM, with "long-term institutionalization at government expense," in order to better describe the specific types of services covered and the duration for receiving them. Consistent with the 1999 Interim Field Guidance and 1999 NPRM, long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods or for rehabilitation purposes, as discussed further below.

Institutions assume total care of the basic living requirements of individuals who are admitted, including room and board.[411] Such long-term institutionalization at government expense (at any level of government) is the only non-cash benefit that would be considered under this rule. As discussed above, when developing the 1999 Interim Field Guidance and NPRM, the former INS consulted with Federal benefit-granting agencies such as HHS. In its consultation letter, HHS stated that non-cash benefits should generally be excluded from consideration. However, it noted that the one exception in which receipt of non-cash benefits would indicate that an individual is primarily dependent on government assistance for subsistence, and therefore would potentially be a public charge, is the case of an individual permanently residing in a long-term institution and who is relying on government assistance for those long-term care services. In such a case, all of that individual's basic subsistence needs are assumed by the institution.[412]

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[411] *See* Ctrs. For Medicare & Medicaid Servs., *Institutional Long Term Care*, available at *https://www.medicaid.gov/medicaid/ltss/institutional/index.html* (accessed Dec. 13, 2021). *See also* 42 CFR 435.700 et seq.
[412] *See* HHS letter in 64 FR 28676, 28687 (May 26, 1999).

"Long-term institutionalization" would be the only category of Medicaid-funded services to be considered in public charge inadmissibility determinations.[413] The 1999 Interim Field Guidance indicates that "short term rehabilitation services" are not to be considered for public charge purposes, but it does not otherwise describe the length of stay that is relevant for a public charge determination. Generally, DHS considers "long-term institutionalization" to be characterized by uninterrupted, extended periods of stay in an institution, such as a nursing home or a mental health institution. Under this approach, DHS, for example, would not consider a person to be institutionalized long term if that person had sporadic stays in a mental health institution, where the person was discharged after each stay. On the other hand, DHS would consider a person to be institutionalized long term if the person remained in the institution over a long period of time, even if that period included off-site trips or visits without discharge. Therefore, for purposes of this rulemaking, DHS is considering whether to codify this approach in a final rule, and whether to reference a specific length of time in the final rule or associated guidance. In considering such an approach, DHS welcomes the submission of data on lengths of stay for long-term care in a range of institutional settings.[414]

Although the 2019 Final Rule required all Medicaid benefits (with specified exceptions) to be taken into account in public charge determinations, as indicated above, that is not the approach DHS is proposing here. Rather, DHS proposes an approach that is consistent with the 1999 Interim Field Guidance and 1999 NPRM on the scope of impact of Medicaid benefits.

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[413] Defined as institutional services under sec. 1905(a) of the Social Security Act.
[414] However, as DHS notes later, given advances in alternatives to receiving care in institutional settings, prior receipt of long-term institutional services, even for extended periods of time, is not necessarily determinative of requiring institutional care in the future. DHS would always consider past or current receipt of long-term institutional services in the totality of the circumstances.

Also consistent with the 1999 Interim Field Guidance and the 1999 NPRM, the consideration of long-term institutionalization would not include the prior or current receipt of, or eligibility for, home and community-based services (HCBS),[415] even if those are offered at public expense, including through Medicaid.

In contrast to institutional services, Medicaid-funded HCBS help older adults and people with disabilities live, work, and fully participate in their communities.[416] These services and supports can promote employment[417] and decrease reliance on costly government-funded institutional care. For instance, HCBS meets the needs of beneficiaries at a fraction of the cost of long-term institutional care.[418] Unlike Medicaid-funded institutional services, Medicaid-funded HCBS do not include payments for room and board, and therefore do not provide the total care for basic needs provided by institutions. Medicaid is by far the largest provider of HCBS; Medicare and private health insurance coverage generally do not cover these services.[419]

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[415] HCBS provide opportunities for individuals with disabilities, such as intellectual or developmental disabilities, physical disabilities, and/or mental illnesses to receive services in their own home or community rather than in institutions. *See https://www.medicaid.gov/medicaid/home-community-based-services/index.html* (accessed Dec. 28, 2021).

[416] See Kaiser Family Foundation, Medicaid Beneficiaries Who Need Home and Community-Based Services (Mar. 2014), *available at https://www.kff.org/wp-content/uploads/2014/03/8568-medicaid-beneficiaries-who-need-home-and-community-based-servcies.pdf* (accessed Feb. 1, 2022).

[417] *See https://www.medicaid.gov/medicaid/long-term-services-supports/employment-initiatives/employment-hcbs/index.html* (describing Medicaid HCBS supports for employment) (accessed Jan. 26, 2021); *See also https://www.macpac.gov/wp-content/uploads/2018/07/The-Role-of-Medicaid-in-Supporting-Employment.pdf* (accessed Jan. 26, 2021).

[418] *See, e.g.*, HHS, Report to the President and Congress: The Money Follows the Person Rebalancing Demonstration (2017), *https://www.medicaid.gov/sites/default/files/2019-12/mfp-rtc.pdf* (accessed Jan. 27, 2022) ("On average, per-beneficiary per-month expenditures . . . declined by $1,840 (23 percent) among older adults transitioning from nursing homes . . . which translates to average cost savings for Medicaid and Medicare programs of $22,080 during the first year after the transition to home and community-based LTSS").

[419] Kaiser Family Foundation, Medicaid Home and Community-Based Services Enrollment and Spending (Feb. 4, 2020), available at *https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending/*.

The vast majority of public comments received in response to the 2021 ANPRM supported excluding past or current use, or eligibility for, HCBS from the public charge determination.

This approach is also supported by HHS. In its on-the-record consultation letter, HHS encouraged DHS to "consider clarifications to its public-charge framework that would account for advancements over the last two decades in the way that care is provided to people with disabilities and in the laws that protect such individuals." Specifically, HHS suggested that HCBS should not be considered in public charge inadmissibility determinations. HHS affirmed, as discussed above, that "HCBS help older adults and persons with disabilities live, work, and fully participate in their communities, promoting employment and decreasing reliance on costly government-funded institutional care." The HHS letter also distinguished HCBS from long-term institutionalization at government expense by stating that HCBS do not provide "total care for basic needs" because they do not pay for room and board.

In its letter, HHS also encouraged DHS to take into account "legal developments in the application of Section 504 since 1999," including looking at whether a person might have been institutionalized at government expense in violation of their rights.

As a departure from the 1999 Interim Field Guidance and the 1999 NPRM, in this proposed rule, DHS also recognizes that there are some circumstances where an individual may be institutionalized long-term in violation of Federal anti-discrimination laws, including the Americans with Disabilities Act (ADA) and Section 504. The ADA requires public entities, and Section 504 requires recipients of Federal financial assistance, to provide services to individuals

in the most integrated setting appropriate to their needs.[420] In 1999, the Supreme Court in *Olmstead v. L.C.*,[421] held that unjustified institutionalization of individuals with disabilities by a public entity is a form of discrimination under the ADA and Section 504. Given the significant advancements in the availability of Medicaid-funded HCBS since the 1999 Interim Field Guidance was issued,[422] individuals who previously experienced long-term institutionalization may not need long-term institutionalization in the future. The public charge ground of inadmissibility is designed to render inadmissible those persons who, based on their own circumstances, would need to rely on the government for subsistence, and not those persons who might be confined in an institution without justification. The possibility that an individual will be confined without justification thus should not contribute to the likelihood that the person will be a public charge, and to this end, DHS proposes to direct adjudicators who are assessing the probative value of past or current institutionalization to take into account, when applicable and in the totality of the circumstances, any evidence that past or current institutionalization is in violation of Federal law, including the Americans with Disabilities Act or the Rehabilitation

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[420] *See* Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* (DOJ Olmstead Statement), available at *https://www.ada.gov/olmstead/q&a_olmstead.htm*.

[421] 527 U.S. 581 (1999).

[422] For example, Congress has expanded access to HCBS as an alternative to long-term institutionalization since 1999 by establishing a number of new programs, including the Money Follows the Person program and the Balancing Incentive Program, and new Medicaid State plan authorities, including Community First Choice (42 U.S.C. 1396n(k)) and the HCBS State Plan Option under 42 U.S.C. 1396n(i). Most recently, Congress provided increased funding to expand HCBS in the American Rescue Plan. These programs are in addition to the HCBS waiver program under 42 U.S.C. 1396n(c), first authorized in the Social Security Act in the early 1980s. As a result of a combination of these new HCBS programs and authorities and the Supreme Court's *Olmstead* decision in 1999, States have expanded HCBS. *See, e.g.*, CMS Long Term Services and Supports Rebalancing Toolkit, available at *https://www.medicaid.gov/medicaid/long-term-services-supports/downloads/ltss-rebalancing-toolkit.pdf*.

Act.[423] DHS seeks comment about what specific types of evidence it should consider for this purpose.

As discussed in more detail in Section D (detailing factors DHS would take into account when making a public charge determination), DHS also clarifies that the presence of a disability, as defined by Section 504, or any other medical condition is not alone a sufficient basis to determine that a noncitizen is likely at any time to become a public charge, including that the individual is likely to require long-term institutionalization at government expense. Instead, under this proposed rule, DHS would, in the totality of the circumstances, take into account all of the statutory minimum factors, including the applicant's health, as well as the sufficient Affidavit of Support Under Section 213A of the INA, if required, in determining the noncitizen's likelihood at any time of becoming a public charge.

5. Receipt (of Public Benefits)

DHS is proposing to define "receipt (of public benefits)" separately from its definition of "likely at any time to become a public charge" and in addition to defining the universe of public benefits that would be considered in public charge inadmissibility determinations.[424] In this definition, DHS makes clear that the receipt of public benefits occurs when a public benefit-granting agency provides public benefits to a noncitizen, but only where the noncitizen is listed as a beneficiary. In addition, and similarly to the 2019 Final Rule,[425] applying for a public benefit on one's own behalf or on behalf of another would not constitute receipt of public benefits by the

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[423] *See* proposed 8 CFR 212.22(a)(3).
[424] *See* proposed 8 CFR 212.21(d), (a), (b) and (c), respectively.
[425] *See* 84 FR 41292, 41502 (Aug. 14, 2019).

noncitizen applicant, nor would approval for future receipt of a public benefit on the noncitizen's own behalf or on behalf of another. Finally, this definition would make clear that the noncitizen's receipt of public benefits solely on behalf of another, or the receipt of public benefits by another individual (even if the noncitizen assists in the application process), would also not constitute receipt of public benefits by the noncitizen. This approach differs slightly from the approach proposed in the 1999 NPRM and taken in the 1999 Interim Field Guidance under which DHS considers the receipt of (covered) public benefits received by relatives but only where such benefits constitute the sole source of support for the noncitizen, and only along with other factors in the totality of the circumstances.[426] DHS believes that this departure is necessary to mitigate significant chilling effects observed by DHS following the 2019 Final Rule.

With the inclusion of definitions of "public cash assistance for income maintenance" and "long-term institutionalization at government expense" DHS is proposing to specifically address the public benefits that would be considered in public charge inadmissibility determinations, i.e., cash assistance for income maintenance and long-term institutionalization at government expense. Other public assistance programs, including SNAP and Medicaid (other than Medicaid payment for long-term institutionalization at government expense), would not be included.

This proposal was informed by public comments received on the ANPRM. Generally, commenters strongly supported excluding from consideration public benefits received by family members from consideration in public charge inadmissibility determinations. These commenters

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[426] *See* 64 FR 28676, 28683 (May 26, 1999). *See* 64 FR 28689, 28691-28692 (May 26,1999).

strongly supported clarifying the definition of receipt in rulemaking to limit confusion and potential disenrollment effects.

Due to the wide variety of programs that provide or fund public cash assistance for income maintenance and long-term institutionalization at government expense, and the varying requirements and procedures for such programs, individuals may be confused about whether their or their family members' participation in or contact with such programs in the past, currently, or in the future would be considered "receipt" of such benefits under this proposed rule. DHS believes that this definition, if finalized, would help alleviate such confusion and unintended chilling effects that resulted from the 2019 Final Rule by clarifying that only the receipt of specific benefits covered by the rule, only by the noncitizen applying for the immigration benefit, and only where such noncitizen is a named beneficiary would be taken into consideration. By extension, DHS would not consider public benefits received by the noncitizen's relatives (including U.S. citizen children or relatives).

DHS welcomes public comments on the most effective ways for DHS to communicate to the public that, with respect to Federal public benefits covered by this rule, DHS's consideration of past or current receipt of SSI, TANF, or Medicaid (only for long-term institutionalization at government expense) would be in the totality of the noncitizen's circumstances, and that such receipt may result in a determination that an applicant is likely at any time to become a public charge, but would not necessarily result in such a determination in all cases.

In addition, as discussed elsewhere in this preamble, DHS welcomes public comments regarding the most effective ways to communicate to the public that, with respect to Federal public benefits covered by this rule, DHS would only consider past or current receipt of SSI, TANF for cash assistance for income maintenance, or Medicaid (only for long-term

institutionalization at government expense) by those categories of noncitizens identified in Table 3, above. For instance, DHS welcomes comments on how to communicate to parents of U.S. citizen children that the receipt of benefits by such children would not be considered as part of a public charge inadmissibility determination for the parents.

6. Government

DHS's proposed definition of "likely at any time to become a public charge"[427] identifies the term "government" as the entity on which the noncitizen may become primarily dependent, as evidenced by the receipt of public cash assistance for income maintenance or long-term institutionalization. Therefore, DHS proposes to define this term as any Federal, State, Tribal, territorial, or local government entity or entities of the United States.[428] This definition would help to identify the universe of public cash assistance and long-term institutionalization programs DHS would consider in public charge inadmissibility determinations.

The 1999 NPRM defined government as any Federal, State, or local government entity or entities of the United States.[429] The 1999 NPRM does not explain the basis for the definition, but both the 1999 Interim Field Guidance and the 1999 NPRM suggest that the definition for public charge is tied to the fact that the types of benefits that are indicative of primary dependence on the government for subsistence are public cash assistance for income maintenance provided by Federal, State, and local benefits-granting agencies as well as

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[427] *See* proposed 8 CFR 212.21(a) "Likely at any time to become a public charge means likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense."
[428] *See* proposed 8 CFR 212.21(e).
[429] 64 FR 28676, 28681 (May 26, 1999).

institutionalization at Federal, State, and local entities' expense.[430] As a result, then-INS provided a definition for government to explain the types of benefits that would render an "alien" "likely to become (for admission/adjustment purposes) primarily dependent on the government for subsistence."[431]

The 2019 Final Rule, however, did not define "government." In that rule, DHS replaced the 1999 definition of public charge with a definition that did not use the term government and did not tie the definition to primary dependence on the government for subsistence.[432] As such, there was no need to provide a definition for government in that rule.

As noted above, DHS now proposes to codify the primary dependence framework reflected in the 1999 Interim Field Guidance and the 1999 NPRM and proposes to tie the definition of "likely at any time to become a public charge" to the likelihood of receiving certain government assistance. As was the case in 1999, the proper focus of the inquiry is on the public benefits programs that are evidence of dependence. DHS believes that, in addition to Federal cash assistance programs—SSI and TANF—the State, Tribal, territorial, and local programs that provide comparable cash assistance for income maintenance constitute such evidence of dependence. Cash assistance for income maintenance and long-term institutionalization provided by Federal, State, Tribal, territorial, and local entities remain the "best evidence of whether an alien is primarily dependent on the government for subsistence."[433]

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[430] 64 FR 28689, 28692 (May 26, 1999); 64 FR 28676, 28676 (May 26, 1999).
[431] 64 FR 28689, 28689 (May 26, 1999).
[432] *See* 84 FR 41292 (Aug. 14, 2019).
[433] *See* 64 FR 28689, 28692 (May 26, 1999).

As noted above, some commenters to the ANPRM suggested limiting the definition of government to only the Federal Government for purposes of the public charge ground of inadmissibility.[434] However, DHS currently believes that it is appropriate to use a definition of government that includes all U.S. government entities. For much of the time that the concept of public charge has been part of our immigration statutes, States, Tribes, territories, and localities provided much of the public support available to noncitizens. The Federal Government's role in providing such benefits expanded in response to the Great Depression in the 1930s and in the Great Society programs of the 1960s.[435] Even with this now more significant Federal role, the social safety net in the United States continues to consist of a variety of Federal, State, Tribal, territorial, and local programs that operate collaboratively to provide support for individuals. These non-Federal programs play an important role and are interwoven with Federal programs (some programs are funded by the Federal Government as well as States, Tribes, territories, and localities).

Moreover, there are provisions of law that demonstrate Congressional concern not only with noncitizens' receipt of Federal public benefits, but also noncitizens' receipt of State, Tribal, territorial, and local public benefits. For example, in addition to codifying Federal deeming provisions in 8 U.S.C. 1631, Congress included State "deeming" provisions in 8 U.S.C. 1632, which allow States to consider the income and resources of a noncitizen's sponsor and spouse in "determining the eligibility and the amount of benefits" of a noncitizen.

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[434] *See, e.g.*, USCIS-2021-0013-0182, USCIS-2021-0013-0148, and USCIS-2021-0013-0080.
[435] *See* the Social Security Amendments of 1972, Pub. L. 92-603, 86 Stat. 1329 (Oct. 30, 1972), PRWORA, Pub. L. 104-193, 110 Stat. 2105 (Aug. 22, 1996), and the Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 286 (July 30, 1965).

Additionally, the INA includes a number of provisions that focus on reimbursing or otherwise holding harmless Federal, State, Tribal, territorial, and local entities. For example, the public charge bond provisions of section 213 of the INA, 8 U.S.C. 1183, are intended to hold "States, territories, counties, towns, municipalities, and districts" of the United States "harmless against such alien becoming a public charge" and allow any "State, territory, district, county, town, or municipality" to recover the costs of public benefits that they have provided from the bond by bringing suit. Under section 213A(b)(1) of the INA, 8 U.S.C. 1183a(b)(1), if a sponsored "alien" receives any means-tested public benefit while the sponsor obligations of the Affidavit of Support Under Section 213A of the INA are in effect, "the appropriate entity of the Federal Government, a State, or any political subdivision of a State shall request reimbursement by the sponsor."

Consistent with Congress' focus on benefits provided by Federal, State, Tribal, territorial, and local entities, and its focus on reimbursing and holding harmless those entities, DHS believes that it is appropriate and consistent with Congressional purpose to define government to "mean[] any Federal, State, Tribal, territorial, or local government entity or entities of the United States."[436] Furthermore, insofar as the focus of the public charge ground of inadmissibility and related statutory provisions appears to be minimizing the burden on the United States public,[437] DHS believes it reasonable to consider only expenditures by U.S. government entities, rather than foreign government entities, under the public charge ground of inadmissibility.

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[436] *See* proposed 8 CFR 212.21(e).
[437] *See* 8 U.S.C. 1601(4).

DHS welcomes public comments on whether DHS should define government in this rule and, if so, whether it should be limited to Federal, State, Tribal, territorial, and local entities, and why or why not. DHS also welcomes public comments on whether there is an alternative definition for government that better captures the benefits indicative of primary dependence for subsistence.

7. Additional Definitions

As explained more fully above, this rule proposes to define many of the terms defined in prior guidance or regulations, including "likely at any time to become a public charge,"[438] "public cash assistance for income maintenance,"[439] "receipt (of public benefits),"[440] and "government,"[441] while this rule does not propose to define other terms defined in previous rulemaking and policy efforts, such as "public charge,"[442] "cash,"[443] "public benefit,"[444] "alien's household,"[445] and "primary caregiver"[446] for purposes of this rule.[447] DHS welcomes comments on how, if at all, DHS should define "alien's household" for use in applying the statutory minimum factors, as it did in the 2019 Final Rule. Additionally, although this proposed rule would define "public cash assistance for income maintenance," and explains in this preamble in the context of general assistance that it would consider benefits provided in the form of cash,

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[438] *See* proposed 8 CFR 212.21(a); 84 FR 41292, 41501 (Aug. 14, 2019).
[439] *See* proposed 8 CFR 212.21(b); 64 FR 28689, 28692 (May 26, 1999); 64 FR 28676, 28682 (May 26, 1999).
[440] *See* proposed 8 CFR 212.21(d); 84 FR 41292, 41502 (Aug. 14, 2019).
[441] *See* proposed 8 CFR 212.21(e); 64 FR 28676, 28681 (May 26, 1999).
[442] 84 FR 41292, 41501 (Aug. 14, 2019); 64 FR 28689, 28689 (May 26, 1999); 64 FR 28676, 28681 (May 26, 1999).
[443] *See* 64 FR 28676, 28681 (May 26, 1999).
[444] *See* 84 FR 41292, 41501 (Aug. 14, 2019).
[445] *See* 84 FR 41292, 41501-02 (Aug. 14, 2019).
[446] *See* 84 FR 41292, 41502 (Aug. 14, 2019).
[447] *See* proposed 8 CFR 212.21.

check, or other money instrument but not in-kind benefits, it does not provide a definition for what is meant by the term "cash" as the 1999 NPRM included.[448] As a result, DHS welcomes comments on whether a separate definition for the term "cash" is needed to explain what type of payments constitute public cash assistance for income maintenance. DHS also welcomes comments on any other definitions needed to explain or clarify the public charge inadmissibility determination.

D. Public Charge Inadmissibility Determination

1. Factors

a. Statutory Minimum Factors

Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), officers are required to consider specific minimum factors in determining whether an applicant seeking admission to the United States or seeking to adjust status to that of lawful permanent resident is likely at any time to become a public charge. These factors include the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills.[449] The statute does not indicate the circumstances under which any of these factors are to be treated positively or negatively, how much weight the factors should be given, or what evidence or information is relevant to the each of the statutory minimum factors.

In the 1999 Interim Field Guidance, the former INS noted that officers must consider the mandatory statutory factors, and that "[t]he existence or absence of a particular factor should

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[448] *See* 64 FR 28676, 28681 (May 26, 1999).
[449] *See* INA sec. 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i). The statute also permits, but does not require, the consideration of a sufficient Affidavit of Support Under Section 213A of the INA, if required. *See* INA sec. 212(a)(40(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

never be the sole criterion for determining if an alien is likely to become a public charge."[450] The guidance suggested that the factors would be either positive or negative,[451] but did not explain what evidence or information officers should consider in evaluating these factors listed in section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), or the weight to be given to a particular factor, in the totality of the circumstances.[452]

In the 2019 Final Rule (that is no longer in effect), DHS also required officers to consider the mandatory statutory factors in the totality of the circumstances when assessing an applicant's likelihood of becoming a public charge at any time in the future.[453] That rule provided certain standards for officers to use in assessing each factor and also identified detailed evidence that USCIS deemed relevant for the consideration of these factors.[454] The 2019 Final Rule also required that applicants for adjustment of status submit Form I-944, Declaration of Self Sufficiency,[455] which imposed substantial burdens on the public and on DHS due to the nature and volume of the information collected as part of the required initial evidence, while ultimately resulting in few adverse public charge inadmissibility determinations during the time the rule was in effect.[456]

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[450] *See* 64 FR 28689, 28690 (May 26, 1999).
[451] *See* 64 FR 28689, 28689–90 (May 26, 1999).
[452] *See* 64 FR 28689, 28689-90 (May 26, 1999). The 1999 Interim Field Guidance included consideration of the past and present receipt of cash assistance for income maintenance and noted that less weight would be assigned the longer ago the benefits were received. 64 FR at 28690. The 1999 Interim Field Guidance also noted that applicants who received cash assistance for income maintenance could overcome such receipt by being employed full-time or having a sufficient Affidavit of Support Under Section 213A of the INA. 64 FR at 28690.
[453] *See* 84 FR 41292, 41307 (Aug. 14, 2019).
[454] *See* 84 FR 41292 (Aug. 14, 2019).
[455] *See* 84 FR 41292, 41507 (Aug. 14, 2019).
[456] As noted above, during the year during which DHS implemented the 2019 Final Rule that has been vacated, DHS only issued three denials, which were reopened and granted, and two Notices of Intent to Deny, which were rescinded. USCIS Field Operations Directorate (June 2021).

A number of the comments provided in response to the 2018 NPRM stated that the proposal would result in a high paperwork burden on applicants that could discourage eligible individuals from applying for adjustment of status.[457] Moreover, commenters responding to the ANPRM strongly opposed the reintroduction of Form I-944 due to its substantial evidentiary burdens, which resulted in high administrative costs for organizations assisting applicants to be able to understand, explain, and collect the required information. The commenters on the ANPRM also noted that the evidentiary requirements in the 2019 Final Rule, which required applicants to obtain and submit a great deal of documentation, were burdensome and in some cases duplicative.

DHS therefore proposes to maintain the longstanding and straightforward framework set forth in the 1999 Interim Field Guidance, in which officers consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, where required, in the totality of the circumstances, without separately codifying the standard and evidence required for each factor as was done in the 2019 Final Rule. This will reduce burdensome and unnecessary evidentiary and information collection requirements pertaining to the statutory minimum factors, which in turn will decrease the burdens on DHS when reviewing and evaluating information and evidence. Rather than creating a new form to collect information pertaining to the statutory minimum factors when an applicant applies for adjustment of status with USCIS, DHS will collect information relevant to the statutory minimum factors from existing information collections, e.g., information pertaining to the health factor will be obtained from Form I-693, Report of Medical Examination and Vaccination Record, and DHS proposes adding new

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[457] *See, e.g.*, 84 FR 41292, 41315 (Aug. 14, 2019).

questions to the existing Form I-485 regarding the other statutory minimum factors. As with any benefit request, officers may request additional information or evidence relating to any of the statutory minimum factors as needed, on a case-by-case basis, when indicated by evidence in the record, including responses to questions on Form I-485 or other forms.[458]

DHS requests public comments on how each of the statutory minimum factors should be considered in the totality of the circumstances in a public charge inadmissibility determination. DHS is particularly interested in evidence and data that would inform to what extent each factor would impact whether a noncitizen is likely at any time to become a public charge, and how these factors can be considered without placing an unreasonable evidentiary burden on applicants for adjustment of status. In particular, DHS invites public comment on how it should define and apply family status; assets, resources, and financial status; and education and skills. DHS requested comments on this topic in the ANPRM. While many commenters on the ANPRM provided their thoughts on the statutory minimum factors, the commenters generally did not provide recommendations about the best way for DHS to define or apply the factors.[459] DHS therefore requests additional public input, noting, respectfully, that DHS cannot entertain requests to exclude from consideration any of the congressionally established statutory minimum factors.

DHS also requests public comments on the initial evidence applicants should provide regarding each of the statutory minimum factors. DHS is particularly interested in what specific

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[458] *See* 8 CFR 103.2(b)(8).

[459] DHS received comments relating to specific factors and their possible negative effect on the public charge inadmissibility determination for certain populations, as well as comments requesting a lighter evidentiary burden. However, few commenters provided ideas for consideration of the statutory minimum factors or how information about the factors should be collected so as to minimize public burden.

questions should be included on the Form I-485, Application to Register Permanent Residence or Adjust Status, to document information and evidence relevant to the statutory minimum factors without placing an unreasonable evidentiary burden on the public or significantly delaying adjustment of status adjudications by USCIS.

b. Affidavit of Support Under Section 213A of the INA

IIRIRA amended the INA by setting forth requirements for submitting what would be an enforceable affidavit of support (i.e., the current Affidavit of Support Under Section 213A of the INA). An Affidavit of Support Under Section 213A of the INA is a contract between the sponsor and the U.S. Government that imposes on the sponsor a legally enforceable obligation "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."[460]

Under section 212(a)(4)(C) and (D) of the INA, 8 U.S.C. 1182(a)(4)(C) and (D), most family-based immigrants and some employment-based immigrants are required to submit an Affidavit of Support Under Section 213A of the INA executed by a sponsor to avoid being found inadmissible based on the public charge ground.[461] This requirement applies even if the officer would ordinarily find, after reviewing the statutory minimum factors, that the intending immigrant is not likely at any time to become a public charge.[462] Where such an Affidavit of Support Under Section 213A of the INA has been executed on an applicant's behalf, the statute

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[460] INA sec. 213A(a)(1)(A), 8 U.S.C. 1183a(a)(1)(A). However, a sponsor who is on active duty (other than active duty for training) in the Armed Forces of the United States and filed a petition on behalf of a spouse or child only needs to demonstrate support equal to at least 100 percent of the Federal poverty line. *See* INA sec. 213A(f)(3), 8 U.S.C. 1183a(f)(3).
[461] INA sec. 213A, 8 U.S.C. 1183a(a)(1).
[462] *Ibid*.

permits DHS to consider it along with the statutory minimum factors in the public charge inadmissibility determination.[463]

A sufficient Affidavit of Support Under Section 213A of the INA does not, alone, result in a finding that a noncitizen is not likely at any time to become a public charge due to the statute's requirement to consider the statutory minimum factors.[464] Additionally, an Affidavit of Support Under Section 213A is not intended to guarantee that an intending immigrant will not become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense, but rather, to ensure that public benefit granting agencies could be reimbursed for certain aid provided to the sponsored noncitizen.[465]

Under the 1999 Interim Field Guidance, a sufficient Affidavit of Support Under Section 213A of the INA should be considered in the totality of the circumstances along with the statutory minimum factors in the public charge inadmissibility determination.[466] The 1999 Interim Field Guidance does not explain whether a required Affidavit of Support Under Section 213A of the INA is a positive factor or otherwise explain how an officer should consider the affidavit in the totality of the circumstances, but does imply that having a sufficient affidavit is a

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[463] INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).
[464] INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).
[465] *See* H.R. Rep. No. 104–651, at 1449 (1996) (in explaining the provision, emphasizing that the Affidavit of Support Under Section 213A of the INA would permit benefit-providing agencies to seek reimbursement).
[466] 64 FR 28689, 28690 (May 26, 1999).

positive consideration in the totality of the circumstances.[467] The 1999 NPRM proposed that the officer "may also consider any Affidavit of Support filed by your sponsor(s) on your behalf under section 213A of the Act and 8 CFR part 213a."[468] Under the 1999 NPRM, "[n]o single factor, other than the lack of a sufficient Affidavit of Support as required by section 212(a)(4)(C) and (D) of the Act, will control this decision, including past or current receipt of public cash benefits, as described in paragraph (b) of this section."[469]

In the 2019 Final Rule, when a required sufficient Affidavit of Support Under Section 213A of the INA was submitted, DHS would consider the likelihood that the sponsor who executed the affidavit "would actually provide the statutorily required amount of financial support to the alien, and any other related considerations."[470] The preamble to that rule noted that DHS generally considered a sufficient Affidavit of Support Under Section 213A of the INA to be a positive factor in the totality of the circumstances,[471] and when determining how much positive weight to give a sufficient affidavit in the totality of the circumstances, USCIS assessed the likelihood that the sponsor who executed the affidavit would actually provide financial support to the applicant by looking at the relationship between the sponsor and the applicant, whether they lived together, and whether the sponsor had submitted any Affidavit of Support

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[467] 64 FR 28689, 28690 (May 26, 1999) ("For instance, a work authorized alien who has current full-time employment or an [Affidavit of Support] should be found admissible despite past receipt of cash public benefits, unless there are other adverse factors in the case.") The 1999 Interim Field Guidance also states that "[u]nder the new [affidavit of support] rules, all family-based immigrants (and some employment-based immigrants) will have a sponsor who has indicated an ability and willingness to come to [the immigrant's] assistance." 64 FR 28689, 28690 (May 26, 1999)
[468] 64 FR 28676, 28682 (May 26, 1999).
[469] *Ibid*.
[470] 84 FR 41292, 41440 (Aug. 14, 2019).
[471] 84 FR 41292, 41197 (Aug. 14, 2019).

Under Section 213A of the INA on behalf of other individuals.[472] However, under the 2019 Final Rule, a sufficient Affidavit of Support Under Section 213A of the INA would be a negative factor in the totality of the circumstances if the evidence reflected the sponsor's inability or unwillingness of the sponsor to financially support the noncitizen.[473] Nonetheless, under the 2019 Final Rule, DHS noted that a sufficient Affidavit of Support Under Section 213A of the INA would not alone be a sufficient basis to determine whether an applicant is likely at any time to become a public charge, as the presence of a sufficient affidavit does not eliminate the need to consider all of the statutory minimum factors in the totality of the circumstances.[474]

Under the statute, a sufficient Affidavit of Support Under Section 213A of the INA, alone, is not a sufficient basis to determine the likelihood at any time of becoming a public charge given that the statute requires DHS to consider the statutory minimum factors, and does not require the same for the affidavit.[475] An Affidavit of Support Under Section 213A of the INA is an enforceable contract and DHS believes that it is unnecessary to evaluate a sponsor's subjective intent to support the applicant and abide by the terms of the contract when making a public charge inadmissibility determination in the totality of the circumstances.[476] A sponsor has the burden under section 213A of the INA, 8 U.S.C. 1183a, to demonstrate that their Affidavit of Support Under Section 213A of the INA is sufficient. Congress established the requirements for a sponsor in INA 213A(f), 8 U.S.C. 1183a(f), and these requirements do not include a

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[472] 84 FR 41292, 41198 (Aug. 14, 2019).
[473] 84 FR 41292, 41440 (Aug. 14, 2019).
[474] 84 FR 41292, 41198 (Aug. 14, 2019). However, the statute requires a finding of inadmissibility on public charge grounds if the noncitizen is required to submit an affidavit of support and fails to do so. INA sec. 212(a)(4)(D), 8 U.S.C. 1182(a)(4)(D).
[475] 84 FR 41114, 41198 (Aug. 14, 2019).
[476] *See* INA sec. 213A, 8 U.S.C. 1183a. *See Erler v. Erler*, 824 F.3d 1173 (9th Cir. 2016); *Belevich v. Thomas*, 17 F.4th 1048 (11th Cir. 2021); *Wenfang Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012).

demonstration of the sponsor's subjective intent. Once DHS determines that an Affidavit of Support Under Section 213A of the INA is sufficient, it would be duplicative to reevaluate whether or not the sponsor's binding Affidavit of Support Under Section 213A of the INA is sufficient when conducting a public charge inadmissibility determination. DHS believes that such a reevaluation would create an unnecessary burden for DHS adjudicators and the public.

DHS believes that, in the context of public charge inadmissibility determinations, the approach taken in 1999 to consider only the existence of a sufficient Affidavit of Support Under Section 213A of the INA, when required, and not assess whether the sponsor who executed the affidavit would actually provide financial support to the noncitizen, gives proper consideration to such an affidavit, consistent with the statutory provision.

While the 1999 Interim Field Guidance did not expressly direct officers to favorably consider an Affidavit of Support Under Section 213A of the INA, DHS believes that treating a sufficient affidavit favorably was implied and is wholly consistent with the statute. DHS believes that treating an Affidavit of Support Under Section 213A of the INA favorably is supported by the fact that sponsored noncitizens are less likely to turn to the government first for financial support because they can and have been known to successfully enforce the statutory requirement that sponsors provide financial support to the sponsored noncitizen at the level required by statute for the period the obligation is in effect.[477] Additionally, DHS believes that treating a sufficient Affidavit of Support Under Section 213A of INA favorably is supported by the Federal and State deeming provisions of 8 U.S.C. 1631 and 1632, which may reduce the

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[477] *See* INA sec. 213A(a)(1)(A), 8 U.S.C. 1183a(a)(1)(A). *See e.g.*, *Erler v. Erler*, 824 F.3d 1173 (9th Cir. 2016), *Belevich v. Thomas*, 17 F.4th 1048 (11th Cir. 2021), *Wenfang Liu v. Mund*, 686 F.3d 418 (7th Cir. 2012).

likelihood that a sponsored noncitizen would be eligible for a means-tested benefit, and therefore, less likely to become a public charge at any time in the future.

Accordingly, DHS proposes to favorably consider an Affidavit of Support Under Section 213A of the INA in the totality of the circumstances analysis, when required to be submitted under section 212(a)(4)(C) or (D) of the INA, 8 U.S.C. 1182(a)(4)(C) or (D), as long as it meets the requirements of section 213A of the INA, 8 U.S.C. 1183a, and 8 CFR 213a.[478] DHS believes that, while a sufficient Affidavit of Support Under Section 213A does not, in and of itself, mean an intending immigrant is not likely at any time to become a public charge, the existence of such an affidavit is indeed relevant to making that determination and should be considered favorably (i.e., a positive factor that makes an applicant less likely at any time to become a public charge in the totality of the circumstances).

c. DHS welcomes public comments or data regarding the connection between being a sponsored noncitizen who has submitted a sufficient Affidavit of Support Under Section 213A of the INA and the likelihood of being primarily dependent on the government for subsistence. Current/Past Receipt of Public Benefits

The 1999 Interim Field Guidance, 1999 NPRM, and 2019 Final Rule all considered an applicant's past and current receipt of public benefits as part of the public charge inadmissibility determination, although the framework for considering past and current receipt of benefits differed.

[478] *See* proposed 8 CFR 212.22(a)(2).

Under the 1999 Interim Field Guidance[479] and 1999 NPRM,[480] current or past receipt of public cash assistance for income maintenance did not automatically make a noncitizen inadmissible as likely at any time to become a public charge, nor did past institutionalization for long-term care at government expense. Rather, an applicant's history of benefit receipt was one of the factors to be considered in the totality of the circumstances in a public charge inadmissibility determination. The longer ago an applicant received cash benefits or was institutionalized at government expense, the less weight the applicant's receipt of such benefits would be given as a predictor that the applicant would receive these benefits in the future.[481] Additionally, the length of time an applicant received benefits and the amount of benefits received are considered under the 1999 Interim Field Guidance.[482]

In the 2019 Final Rule, past and current receipt of public benefits were considered a negative factor in the totality of the circumstances.[483] Under the 2019 Final Rule, DHS considered whether the applicant had applied for, received, or been certified or approved to receive any of the defined public benefits.[484] Past or current receipt, as well as certification or approval to receive one or more of the defined public benefits, for more than 12 months in the aggregate within any 36-month period, beginning no earlier than 36 months before the application for admission or adjustment of status, was treated as a heavily weighted negative factor in the totality of the circumstances.[485]

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[479] 64 FR 28689, 28691 (May 26, 1999).
[480] 64 FR 28676, 28683 (May 26, 1999).
[481] 64 FR 28689, 28690 (May 26, 1999). 64 FR 28676, 28683 (May 26, 1999).
[482] *Ibid*.
[483] *See* 84 FR 41292, 41503-14504 (Aug. 14, 2019).
[484] *See* 84 FR 41292, 41503 (Aug. 14, 2019).
[485] *See* 84 FR 41292, 41504 (Aug. 14, 2019).

DHS proposes to consider a noncitizen's current and past receipt of public cash assistance for income maintenance and long-term institutionalization at government expense in making a public charge inadmissibility determination in the totality of the circumstances. As stated earlier in this proposed rule, DHS believes that, by focusing on cash assistance for income maintenance or long-term institutionalization at government expense, DHS can identify those individuals who are likely to become primarily dependent on the government for subsistence, without interfering with other benefit programs that serve important public interests. When making a public charge inadmissibility determination, DHS will consider the amount, duration, and recency of receipt of such benefits.[486] For example, the longer ago a noncitizen received such benefits, the less likely such receipt helps predict future receipt of public benefits. By contrast, the longer a noncitizen has received such benefits in the past and the greater the amount of benefits, the stronger the implication that the noncitizen is likely to become a public charge. As DHS acknowledged above, given the significant advancements in the availability of Medicaid-funded HCBS since the 1999 Interim Field Guidance was issued,[487] individuals who previously experienced long-term institutionalization may not need long-term institutionalization in the future, and may instead be able to rely on their own resources for housing and other

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[486] *See* proposed 8 CFR 212.22(a)(3).

[487] For example, Congress has greatly expanded access to HCBS since 1999 by establishing a number of new programs, including the Money Follows the Person program and the Balancing Incentive Program, and new Medicaid State plan authorities, including Community First Choice (42 U.S.C. 1396n(k)) and the HCBS State Plan Option under 42 U.S.C. 1396n(i). Most recently, Congress provided increased funding to expand HCBS in the American Rescue Plan. These programs are in addition to the HCBS waiver program under 42 U.S.C. 1396n(c), first authorized in the Social Security Act in the early 1980s. As a result of a combination of these new HCBS programs and authorities and the Supreme Court's *Olmstead* decision in 1999, States have significantly expanded HCBS. *See, e.g.*, CMS Long Term Services and Supports Rebalancing Toolkit, available at *https://www.medicaid.gov/medicaid/long-term-services-supports/downloads/ltss-rebalancing-toolkit.pdf*.

expenses while using Medicaid-funded HCBS only as a supplement. DHS also intends to analyze the available empirical data relating to public benefits use to determine the predictive value of past and current receipt of benefits in making public charge inadmissibility determinations.

Under this proposed rule, current and/or past receipt of these benefits, alone, would not be a sufficient basis to determine whether an applicant is likely at any time to become a public charge.[488] DHS will consider the current and/or past receipt of these benefits in the totality of the noncitizen's circumstances, along with the other factors. DHS will consider the amount and duration of receipt, as well as how recently the noncitizen received the benefits, and for long-term institutionalization, evidence submitted by the applicant that the applicant's institutionalization violates Federal law, including the Americans with Disabilities Act or the Rehabilitation Act. However, current and/or past receipt of these benefits will not alone be a sufficient basis to determine whether the noncitizen is likely at any time to become a public charge.

This proposed approach is consistent with the 1999 Interim Field Guidance[489] and aspects of the 2019 Final Rule. INS and DHS have consistently considered the past and current receipt of benefits in making public charge inadmissibility determinations and have consistently considered such receipt in the totality of the circumstances, taking into account the amount, duration, and recency of the receipt. INS and DHS have also consistently stated that the past or current receipt of benefits alone is not a sufficient basis to determine whether an applicant is

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[488] *See* proposed 8 CFR 212.22(a)(3).
[489] *See* 64 FR 28689 (May 26, 1999).

likely at any time to become a public charge.[490] However, unlike in the 2019 Final Rule, DHS is not proposing to add any heavily weighted negative factors because DHS has determined that each public charge inadmissibility determination is heavily fact-dependent and factors that may weigh heavily in one case may not have equal weight in another depending on the totality of the applicant's circumstances. Because DHS has proposed to consider the statutory minimum factors in their totality, without separately defining each factor and its weight, DHS proposes to similarly consider current and past benefit use as one element within the totality of the circumstances.

d. Disability Alone Is Not a Sufficient Basis to Determine Whether an Applicant Is Likely at Any Time to Become a Public Charge

DHS proposes to clarify that the presence of a disability alone is not a sufficient basis to determine whether a noncitizen is likely at any time to become a public charge.[491] DHS will not presume that an individual having a disability in and of itself means that the individual is in poor health or is likely to receive cash assistance for income maintenance or require long-term institutionalization at government expense, or otherwise presume that their disability in and of itself negatively impacts any of the other statutory minimum factors. For example, many disabilities do not impact an individual's health or require extensive medical care, and the vast majority of people with disabilities do not use institutional care.[492]

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[490] *See* 64 FR 28689, 28690 (May 26, 1999); 64 FR 28676, 28683 (May 26, 1999); 83 FR 51114, 51178 (Oct. 10, 2018); 84 FR 41292, 41363 (Aug. 14, 2019).
[491] *See* proposed 8 CFR 212.22(a)(4).
[492] One analysis of American Community Survey data found that average State percentages from 2012 to 2016 of people with disabilities living in institutions were very low, ranging from 3.2 percent for Nevada to a high of 8.6 percent in North Dakota. ADA Participatory Action Research Consortium (ADA-PARC), Percentage of People with Disabilities Living in an Institution, 2012 to 16, available at *https://www.centerondisability.org/ada_parc/utils/indicators.php?id=1* (accessed Jan. 27, 2022).

Section 504 of the Rehabilitation Act prohibits discrimination against a qualified individual with a disability solely on the basis of that disability under any program or activity receiving Federal financial assistance or under any federally conducted program or activity.[493] Under Section 504, an individual with a disability is defined as a person with: (i) a physical or mental impairment that substantially limits one or more major life activities; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment.[494] An individual with a disability is a "qualified" individual with a disability if they meet the essential eligibility requirements for the receipt of the services they are seeking.[495] A fundamental purpose of Section 504 is to prohibit decisions on the basis of "prejudice, stereotypes, or unfounded fear" about people with disabilities.[496] Unfounded assumptions about people with disabilities, including that they are in poor health or are unable to work, are both pervasive and inaccurate.[497]

The 1999 NPRM did not directly address how the presence of disability should be considered in a public charge determination and the 1999 Interim Field Guidance only references disability in the context of citing a 1964 Attorney General decision in *Matter of Martinez-Lopez* relating to the totality of circumstances test.[498] Under the 2019 Final Rule, discussed in detail in

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[493] 29 U.S.C. 794(a).
[494] 29 U.S.C. 705(20)(B).
[495] 45 CFR 84.4(l)(4) (using the older term "qualified handicapped person"); 6 CFI5.3(e)(2).
[496] *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 (1987).
[497] "27 years after [the ADA's] passage, people with disabilities still face many outdated attitudes and stereotypes. For example, some believe that people with disabilities cannot live independently or contribute meaningfully to the workforce or their communities." National Council on Disability, *National Disability Policy: A Progress Report* (Oct. 2017), at 52, available at *https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf* (accessed Feb. 4, 2022).
[498] In *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421–422 (BIA 1962; Att'y Gen. 1964), the Attorney General opined that the statute requires a specific circumstance suggesting the individual may become a public charge to be present, not merely "a showing of a possibility that an alien will require public

the background section, while disability was not explicitly mentioned in the regulatory text, a number of negatively weighted factors impacted people with disabilities. For example, as part of the health factor, DHS treated an applicant's diagnosis with a medical condition that was likely to require extensive medical treatment or institutionalization or that would interfere with the applicant's ability to care for themself, to attend school, or to work upon admission or adjustment of status as a heavily weighted negative factor in the totality of the circumstances.[499] All of these conditions constitute disabilities under Section 504.[500] Additionally, under the 2019 Final Rule, an applicant with a disability could have other heavily weighted negative factors present in their case, including if they received disability services through Medicaid.[501]

As discussed previously, several lawsuits challenged the 2019 Final Rule as violating Section 504 of the Rehabilitation Act. The U.S. Court of Appeals for the Seventh Circuit found that "the [r]ule disproportionately burdens disabled people and in many instances [the rule] makes it all but inevitable that a person's disability will be the but-for cause of her being deemed likely to become a public charge."[502] For example, the court noted that many people with

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support." *Id.* at 421. Although the individual at issue in the decision did not have a disability, the decision contains a reference to disability, among other factors, that may be such a circumstance. *Id.* ("[s]ome specific circumstances, such as mental or physical disability . . . or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present."). The Attorney General did not indicate that *any* disability reasonably tends to show that an individual is likely to become a public charge, irrespective of the particular disability or the totality of the individual's circumstances. Instead, the Attorney General called for a case-by-case assessment of the individual's particular circumstances, including whether a specific disability might have a bearing on the public charge inadmissibility determination. This interpretation is consistent with the approach taken in this proposed rule. DHS notes that this decision predates Section 504 by nearly a decade and the ADA by over 25 years.

[499] *See* 84 FR 41292, 41502 (Aug. 14, 2019).

[500] Section 504 defines "disability" as impairments that substantially limit one or more major life activities, including caring for oneself, working, or learning. 42 U.S.C. 12102(2)(A).

[501] *See* 84 FR 41292, 41504 (Aug. 14, 2019).

[502] *Cook County*, 962 F.3d at 227-228 (7th Cir. 2020).

disabilities would be subject to a heavily weighted negative factor.[503] The court also pointed out that people with disabilities would be likely to be subject to a number of other heavily weighted negative factors because only Medicaid, and not private health insurance, covers the benefits and services that help people with disabilities work and thus avoid becoming public charges.[504] Under the 2019 Final Rule, using Medicaid for more than 12 months in the aggregate within any 36-month period was a heavily weighted negative factor. Yet, if a noncitizen with a disability had forgone the receipt of Medicaid to avoid the 2019 Final Rule's negative immigration consequences, and therefore could not obtain the services that are only available with Medicaid coverage to allow that individual to work or attend school, the noncitizen could potentially be subject to the heavily weighted negative factor addressing current employment, lack of employment history or prospect of future employment.[505] In addition, causing noncitizens to avoid the very supplemental benefits that will contribute to their health and self-sufficiency is inconsistent with Congress' purpose.

Taking into consideration these issues identified in litigation, in the ANPRM DHS requested comment on the treatment of disability in DHS's analysis of the health factor in light of Section 504's prohibition against discrimination on the basis of disability.[506] DHS received extensive comment on this topic. For example, in a joint comment letter, 17 organizations representing people with disabilities wrote "disability equates neither to poor health nor long-

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[503] *Cook County*, 962 F.3d at 227-228 (7th Cir. 2020).
[504] *Cook County*, 962 F.3d at 227-228 (7th Cir. 2020).
[505] *Cook County*, 962 F.3d at 227-228 (7th Cir. 2020) ("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.").
[506] 86 FR 47025, 47029 (Aug. 23, 2021).

term primary dependence on the government for subsistence" and "many people with disabilities live healthy lives and support themselves." Another commentor stressed that disability is a "life condition," not necessarily a health condition, and that the presence of a disability does not equate to having a chronic medical condition or the need for ongoing medical treatment, including institutionalization.

In light of these comments and the relevant authorities and case law, DHS believes that clarifying that disability alone is not a sufficient basis to determine whether an applicant is likely at any time to become a public charge is necessary and appropriate. This clarification reflects DHS's consideration of the extensive input of commentors to the ANPRM and is consistent with the proposed totality of the circumstances framework set forth in this proposed rule.

2. Totality of the Circumstances

DHS proposes that the "[t]he 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."[507] The proposed regulation further states that none of the statutory minimum factors other than the lack of a sufficient Affidavit of Support Under Section 213A of the INA, if required, "should be the sole criterion for determining if an alien is likely to become a public charge"[508] and that "DHS may periodically issue guidance to adjudicators to inform the totality of the circumstances assessment. Such guidance will consider how these factors affect the likelihood that the alien

[507] Proposed 8 CFR 212.22(b).
[508] *Ibid.*

will become a public charge at any time based on an empirical analysis of the best-available data as appropriate."[509]

Under section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), officers are required, at a minimum, to consider the noncitizen's age; health; family status; assets, resources, and financial status; and education and skills, and may consider a sufficient Affidavit of Support Under Section 213A of the INA, where required.[510] Although the statute does not expressly include a totality of the circumstances test, as noted in the 1999 Interim Field Guidance, this test "has been developed in several Service, BIA, and Attorney General decisions and has been codified in the Service regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986."[511] Federal courts have also endorsed this "totality of the circumstances" test.[512] As a result, the 1999 Interim Field Guidance required officers to make public charge inadmissibility determinations in the totality of the circumstances and indicated that no single factor, other than the lack of a sufficient Affidavit of Support, when required, would control the decision.[513]

Consistent with this historical approach to public charge inadmissibility determinations, the 2019 Final Rule also adopted a totality of the circumstances approach.[514] However, in addition to the prospective determination based on the totality of the circumstances framework, in which the officer was required to weigh "all factors that are relevant to whether the alien is

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[509] *Ibid*.
[510] Section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B.
[511] *See* 64 FR 28689, 28690 (May 26, 1999) citing *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds*, 509 U.S. 918) (1993).
[512] *See, e.g.*, *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds*, 509 U.S. 918 (1993).
[513] 64 FR 28689, 28690 (May 26, 1999).
[514] 84 FR 41292, 41502 (Aug. 14, 2019).

more likely than not at any time in the future" to become a public charge, the totality test in that rule detailed standards and new evidentiary requirements related to the factors that went into the analysis, designating some factors as heavily weighted positive or heavily weighted negative factors.[515]

In addition to the evidentiary and paperwork burdens established by the 2019 Final Rule and discussed above, DHS has determined that the totality of the circumstances framework established by the 2019 Final Rule was overly prescriptive. As reflected in Congress's instruction that several factors specific to the applicant must be considered, each public charge inadmissibility determination must be individualized and based on the evidence presented in the specific case, and the relative weight of each factor and associated evidence is necessarily determined by the presence or absence of specific facts. Consequently, the designation of some factors as *always* "heavily weighted" suggested a level of mathematical precision that would be unfounded and inconsistent with the long-standing standard of considering the totality of the individual's circumstances. DHS may periodically issue guidance that will consider how the factors affect the likelihood that a noncitizen will become a public charge at any time based on an empirical analysis of the best available data as appropriate. In light of this intention to issue guidance to generally inform the predictive nature of the factors as an objective aspect of the analysis, as discussed below, declining to take this categorical approach of weighting the relevant factors would best enable adjudicators to fully consider the applicant's individual circumstances and evidence presented, thereby better achieving the goals of the public charge inadmissibility determination. DHS's proposal therefore includes elements consistent with the

[515] 84 FR 41292, 41295 (Aug. 14, 2019).

standard previously in place for over 20 years, under which officers will consider the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA (when required) in the totality of the circumstances, while also introducing an empirical element as appropriate.

In connection with the 2019 Final Rule, DHS received a public comment requesting that DHS establish a base rate of likelihood that a noncitizen would become a public charge based on empirical evidence.[516] In response to the comment, DHS explained the data and practical limitations it encountered in declining to base the totality of the circumstances on an empirical data model.[517] As mentioned above, DHS is now proposing that USCIS would conduct empirical analyses of the best available data as appropriate to inform the agency on how the factors included in the totality of circumstances would affect an applicant's likelihood of becoming a public charge. This analysis may include Survey of Income and Program Participation (SIPP) panel data and other appropriate data sources USCIS identifies for this purpose.[518]

USCIS is not proposing to designate a specific empirical model for use in the adjudication process in order to predict precise probabilities of becoming a public charge for individual applicants. In addition, DHS is not proposing a fixed data source or methodology because the availability of data, as well as the efficacy of empirical models, are continuously evolving. DHS intends for any empirical analysis it conducts to inform the predictive nature of the various factors to be taken into consideration in conjunction with the assessment of the applicant's

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[516] 84 FR 41292, 41400 (Aug. 14, 2019).
[517] *Ibid*.
[518] For more information about SIPP, *see https://www.census.gov/programs-surveys/sipp/about.html* (accessed Jan. 18, 2022).

individual circumstances when making a public charge inadmissibility determination. In that vein, DHS welcomes public comments on the data sources that may be best suited to this type of analysis or studies that may inform USCIS' development of the methodology, as well as any feedback regarding how empirical data should be used in making the predictive determination of whether a noncitizen is likely to become a public charge at any time in the totality of the circumstances.

3. Denial Decision

In making a public charge inadmissibility determination, officers are required to consider the statutory minimum factors and may consider the Affidavit of Support Under Section 213A of the INA, if required.[519]

The 1999 Interim Field Guidance required that every denial decision based on the public charge ground of inadmissibility "reflect consideration of each of these factors and specifically articulate the reasons for the officer's determination."[520] While the 2019 Final Rule continued to follow a totality of the circumstances approach to public charge inadmissibility determinations in which officers were required to assess "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" become a public charge,[521] it did not state that denials based on the public charge ground of inadmissibility must include a detailed discussion of all of the factors. There is a general regulatory requirement, however, that USCIS officers "explain in writing the specific reasons for

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[519] INA sec. 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).
[520] *See* 64 FR 28689 (May 26, 1999).
[521] *See* 84 FR 41292, 41502 (Aug. 14, 2009).

a denial."[522] This requirement applies to all applications and petitions adjudicated by USCIS, including denials based on a public charge inadmissibility determination.[523]

DHS is now proposing to codify the language set forth in the 1999 Interim Field Guidance that reiterated more specifically the general requirement that every written denial decision issued by USCIS based on the public charge ground of inadmissibility include a discussion of each of the factors. DHS proposes that "[e]very written denial decision issued by USCIS based on the totality of the circumstances set forth in paragraph (b) of this section will reflect consideration of each of the factors outlined in paragraph (a) of this section and specifically articulate the reasons for the officer's determination."[524] Although existing DHS regulations and policy already require USCIS officers to specify in written denials the basis for the denial,[525] DHS believes that a provision explicitly requiring a discussion of the factors considered in the denial is consistent with the statute and is necessary to ensure that any denial based on this ground of inadmissibility is made on a case-by-case basis in light of the totality of the circumstances.

In response to the 2021 ANPRM, some commenters requested that applicants have a reasonable opportunity to present additional evidence related to their applications. DHS notes that DHS regulations and USCIS policy provide guidance to officers on situations when it is appropriate to issue a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID) before denying an application, petition, or request. An officer should issue an RFE or NOID when the

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[522] 8 CFR 103.3(a)(1)(i).
[523] 8 CFR 103.3(a)(1)(i).
[524] *See* proposed 8 CI212.22(c).
[525] *See* 8 CFR 103.3(a)(1)(i). *See* also USCIS Policy Manual Vol. 7 Part A Ch. 11, *https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-11*.

facts and the law warrant. However, an officer should issue a denial without first issuing an RFE or NOID if there would be no legal basis for approval or there is no possibility that additional information or explanation would establish a legal basis for approval.[526]

4. Exclusion from Consideration of Receipt of Certain Public Benefits

In the 2019 Final Rule, DHS excluded from consideration benefits provided under Medicaid for the treatment of an emergency medical condition, certain educational and school-based services, as well as Medicaid received by noncitizens under the age of 21, and pregnant persons.[527] DHS also excluded from consideration public benefits received by certain active-duty military personnel and their spouses and children, benefits received by noncitizens while in a status not subject to the public charge ground of inadmissibility, as well as public benefits received by certain children of U.S. citizens who are expected to obtain U.S. citizenship automatically or shortly after arriving in the United States.[528]

While DHS included the above exclusions from consideration in the 2019 Final Rule, INS did not exclude from consideration the receipt of public benefits by certain populations in the 1999 Interim Field Guidance. Similar to the 1999 Interim Field Guidance, DHS proposes to consider current and/or past receipt of public cash assistance for income maintenance and long-term institutionalization at government expense. DHS makes clear in the proposed regulatory text that DHS would consider the amount, duration, and recency of receipt, and that the current and/or past receipt of these public benefits is not alone sufficient for determining whether an

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[526] *See* USCIS Policy Manual, Volume 1 – General Policies and Procedures, Part E- Adjudications, Chapter 6, Evidence and Chapter 9, Rendering a Decision. *See also* 8 CFR 103.2(b)(8) and (16)(iv).
[527] *See* 84 FR 41292, 41501 (Aug. 14, 2019).
[528] *Ibid*.

individual is inadmissible because DHS would also consider the minimum statutory factors in each case before making a determination under the totality of the circumstances.[529] DHS is proposing to exclude from consideration public benefits received in two circumstances, as discussed below, and believes that it is unnecessary to further expand the list of exclusions.

Exclusions previously adopted by DHS are not necessary in this proposed rule because this proposed rule's provisions do not unduly interfere with the receipt of public benefits by the populations that were covered by exclusions under the 2019 Final Rule. DHS therefore believes it need not exclude from consideration, for example, the receipt of public benefits for active-duty U.S. service members and their spouses and children, as it did in the 2019 Final Rule, because that exclusion resulted in significant part from the inclusion of SNAP[530] in the definition of public benefits. DHS is proposing to exclude SNAP receipt from consideration altogether in this proposed rule. Similarly, the exclusions from consideration in the 2019 Final Rule applicable to children and pregnant women resulted from that rule's inclusion of most forms of Medicaid,[531] which DHS is proposing in this rule to consider only in the context of long-term institutionalization at government expense. DHS also does not believe that it is necessary to

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[529] *See* proposed 8 CFR 212.21(a), 212.21(a)(3).

[530] *See* U.S. Gov't Accountability Office, GAO– 16–561, Military Personnel: DOD Needs More Complete Data on Active-Duty Servicemembers' Use of Food Assistance Programs (July 2016), *available at https://www.gao.gov/assets/680/678474.pdf* (reporting estimates ranging from 2,000 active duty servicemembers receiving SNAP to 22,000 such servicemembers receiving SNAP). Effective FY16, Congress implemented a recommendation by the Military Compensation and Retirement Modernization Commission to sunset DOD's Family Subsistence Supplemental Allowance Program within the United States, Puerto Rico, the U.S. Virgin Islands, and Guam; SNAP reliance may have increased somewhat following termination of the program. *See* Pub. L. 114–92, div. A, sec. 602, 129 Stat. 726, 836 (2015); Military Comp. & Ret. Modernization Comm'n, Final Report 187 (Jan. 2015) ("The [Family Subsistence Supplemental Allowance Program] should be sunset in the United States, Puerto Rico, Guam, and other U.S. territories where SNAP or similar programs exist, thereby reducing the administrative costs of a duplicative program.").

[531] *See, e.g.*, 84 FR 41379-80 (Aug. 14, 2019) (discussing the exclusion of individuals under 21 and pregnant women).

exclude from consideration the receipt of public benefits by certain children of U.S. citizens expected to naturalize automatically or shortly after coming to the United States. In DHS's view, the scope of this rule and the fact that DHS would consider in the totality of the circumstances the amount, length of time, and recency of a noncitizen's receipt of these benefits, makes it unlikely that the receipt of such benefits by such children would carry much weight in public charge inadmissibility determinations.

a. Receipt of Public Benefits While a Noncitizen Is in a Category Exempt from Public Charge

Under PRWORA, many noncitizens, whether present in the United States in a lawful immigration status or not, are not eligible to receive many types of public benefits.[532] Those that are eligible for Federal, State, Tribal, territorial or local benefits include lawful permanent residents, refugees, and asylees who are not subject to a public charge inadmissibility determination.[533] Although many noncitizens who are eligible for Federal, State, Tribal, territorial, or local benefits receive those benefits while present in an immigration classification or category that is exempt from the public charge ground of inadmissibility or after the noncitizen obtained a waiver of the public charge ground of inadmissibility, such noncitizens may later apply for an immigration benefit that subjects them to the public charge ground of inadmissibility. For example, a noncitizen admitted as a refugee may have received benefits on that basis but may later apply for adjustment of status based on marriage to a U.S. citizen and will be subject to the public charge ground of inadmissibility.

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[532] *See* 8 U.S.C. 1611, 1621, and 1641.
[533] *See* 8 U.S.C. 1641.

The 1999 Interim Field Guidance did not expressly address how to treat an applicant's receipt of public benefits while present in an immigration category that is exempt from the public charge ground of inadmissibility or for which the noncitizen received a waiver of the public charge ground of inadmissibility. The 2019 Final Rule, however, excluded from consideration the receipt of those public benefits from consideration in public charge inadmissibility determinations.[534]

Congress, not DHS, has specified which categories of noncitizens are subject to or are exempt from the public charge ground of inadmissibility. Congress did not exempt from the public charge ground of inadmissibility noncitizens who are applying for admission or adjustment in a category subject to the public charge ground but who, in the past, were in a category of noncitizen exempt from the ground. However, DHS has the authority, in promulgating the public charge inadmissibility framework, to determine which public benefits should be considered as part of a public charge inadmissibility determination.[535]

A review of the categories of noncitizens that are exempt from the public charge ground of inadmissibility or eligible for waivers provides an indication of the concerns that Congress had when establishing these exemptions and waivers. The categories comprise a long list of vulnerable populations or groups of noncitizens of particular policy significance for the United States.[536] Congress expressed a policy preference that individuals in these categories should be able to receive public benefits without risking adverse immigration consequences. DHS believes

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[534] *See* 84 FR 41292, 41501 (Aug. 14, 2019).
[535] *See* INA sec. 103, 8 U.S.C. 1103.
[536] For example, refugees, asylees, Afghans and Iraqis employed by the U.S. government, special immigrant juveniles, Temporary Protected Status recipients, and trafficking and crime victims.

that Congress did not intend to later penalize such noncitizens for using benefits while in these categories because doing so would undermine the intent of their exemption. Given the nature of these populations and the fact that if they were applying for admission or, as permitted, adjustment of status under those categories they would be exempt from the public charge ground of inadmissibility, it is reasonable for DHS to exclude from consideration those benefits that an applicant received while in a status that is exempt from the public charge ground of inadmissibility.

Therefore, DHS proposes that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in proposed 8 CFR 212.23(a), or for which the noncitizen received a waiver of public charge inadmissibility, as set forth in proposed 8 CFR 212.23(c).[537] However, under this proposed rule, any benefits received prior to or subsequent to the noncitizen being in an exempt status would be considered in a public charge inadmissibility determination.

b. Receipt of Public Benefits by Those Granted Refugee Benefits

As explained below, under the INA, refugees at the time of admission[538] and adjustment of status[539] and asylees at the time of being granted asylum[540] and adjustment of status[541] are exempt from the public charge ground of inadmissibility. Consistent with the statute, the 1999

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[537] *See* proposed 8 CFR 212.22(a) and (c).
[538] INA sec. 207, 8 U.S.C. 1157.
[539] INA sec. 209, 8 U.S.C. 1159.
[540] INA sec. 208, 8 U.S.C. 1158.
[541] INA sec. 209, 8 U.S.C. 1159.

Interim Field Guidance,[542] 1999 NPRM,[543] and 2019 Final Rule[544] all included express provisions explaining that these categories are exempt from the public charge ground of inadmissibility, and DHS is proposing to include similar provisions in this rule.[545] As explained above, DHS will not consider any public benefits received by noncitizens while they are in a category exempt from the public charge ground of inadmissibility, including refugees and asylees, when making public charge inadmissibility determinations.

Afghans that have been recently resettled in the United States pursuant to Operation Allies Welcome (OAW)[546] are not refugees admitted under section 207 of the INA, 8 U.S.C. 1157. However, such Afghans are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an "unaccompanied alien child" as defined under 6 U.S.C. 279(g)(2).[547] Similarly, noncitizens who are the victims of a severe form of trafficking in persons as defined in 22 U.S.C. 7105(b)(1)(C) and noncitizens classified as nonimmigrants under section 101(a)(15)(T)(ii) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii), are eligible for benefits and services under any Federal or State program or activity funded or

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[542] 64 FR 28689, 28691 (May 26, 1999).
[543] 64 FR 28676, 28683 (May 26, 1999).
[544] 84 FR 41292, 41504 (Aug. 14, 2019).
[545] *See* proposed 8 CFR 212.23(a)(1) and (2).
[546] On August 29, 2021, President Biden directed DHS to lead implementation of ongoing efforts across the Federal Government to support vulnerable Afghans, including those that worked alongside the U.S. Government in Afghanistan for the past two decades, as they safely resettled in the United States. These coordinated efforts were initially referred to as Operation Allies Refuge, and the operation has since been renamed Operation Allies Welcome. *See* DHS, Operation Allies Welcome, *https://www.dhs.gov/allieswelcome* (accessed Dec. 14, 2021).
[547] *See* section 2502(b) of the Extending Government Funding and Delivering Emergency Assistance Act, Pub. L. 117-43 (Sept. 30, 2021).

administered by certain officials or agencies[548] to the same extent as noncitizens admitted to the United States as refugees under section 207 of the INA, 8 U.S.C. 1157.[549]

Under this proposed rule, when making public charge inadmissibility determinations DHS will not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an "unaccompanied alien child" as defined under 6 U.S.C. 279(g)(2).[550] This provision would only apply to those categories of noncitizens who are eligible for all three of the types of support listed (resettlement assistance, entitlement programs, and other benefits) typically reserved for refugees.

DHS does not want to discourage any such noncitizens eligible for resettlement assistance and other benefits available to refugees from accessing services for which they are eligible. The U.S. government has resettled and continues to resettle our Afghan allies. This is a population invited by the government to come to the United States at the government's expense in recognition of their assistance over the past two decades or their unique vulnerability were they to remain in Afghanistan.[551] In recognition of the unique needs of this population and the manner of their arrival in the United States, Congress explicitly extended benefits normally reserved for refugees to our Afghan allies. DHS serves as the lead for coordinating the ongoing

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[548] These are the Secretary of Health and Human Services, the Secretary of Labor, the Board of Directors of the Legal Services Corporation, and the heads of other Federal agencies. *See* 22 U.S.C. 7105(b)(1)(B).
[549] *See* 22 U.S.C. 7105(b)(1)(A).
[550] *See* proposed 8 CFR 212.22(e).
[551] DHS, *Operation Allies Welcome* (2021) *https://www.dhs.gov/sites/default/files/publications/21_1110-opa-dhs-resettlement-of-at-risk-afghans.pdf* (accessed Jan. 12, 2022).

efforts, across the Federal Government, to support vulnerable Afghans under OAW. As such, DHS has been actively communicating and promoting the various benefits that this vulnerable population may be eligible for depending on their admission, status in the United States, or both, including SSI, TANF, and various other public benefits.

Similarly, the U.S. government has expressed its strong concern for the victims of severe forms of trafficking in persons and a dedication to stabilizing them. The Trafficking Victims Protection Act of 2000 (TVPA), part of the Victims of Trafficking and Violence Protection Act of 2000, was enacted to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute trafficking in persons, while offering protections to victims of such trafficking, including temporary protections from removal, access to certain federal and state public benefits and services, and the ability to apply for T nonimmigrant status. With the passage of the TVPA, Congress intended to protect victims of trafficking and to take steps to try to meet victim's needs regarding health care, housing, education, and legal assistance.[552]

DHS strongly encourages these populations to access any and all services and benefits available to them without fear of a future negative impact. Thus, DHS now proposes to exempt from consideration receipt of public benefits by those granted refugee benefits by Congress, even when those individuals are not refugees admitted under section 207 of the INA, 8 U.S.C. 1157, such as the Afghans that have been recently resettled in the United States pursuant to OAW and noncitizen victims of a severe form of trafficking in persons.

E. Exemptions and Waivers

[552] *See* Sec. 102(b), Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386.

The public charge inadmissibility ground does not apply to certain exempted applicants for admission and adjustment of status.[553] Congress has specifically exempted certain groups from the public charge inadmissibility ground, and DHS regulations permit waivers of the inadmissibility ground for certain other groups.

In the 1999 NPRM, INS provided a list of categories of noncitizens exempt from the public charge of inadmissibility.[554] The 1999 NPRM also included a section discussing the available waivers.[555] Similarly, in the 2019 Final Rule, DHS provided a list of the categories of noncitizens to whom the public charge ground of inadmissibility does not apply.[556] Likewise, the 2019 Final Rule also contained provisions relating to the available waivers.[557]

Although these exemptions and waivers are addressed in the statute and in some existing regulations, DHS believes it appropriate to include a list of exemptions and waivers to better ensure that the regulated public understands which applicants for admission and adjustment of status are either exempt from the public charge ground of inadmissibility or may be eligible for a waiver of the inadmissibility ground. DHS proposes to include a list of the exemptions from and waivers of the public charge ground of inadmissibility.[558]

1. Exemptions

DHS proposes to include the following list of exemptions from the public charge ground

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[553] *See* proposed 8 CFR 212.23(a).
[554] *See* 64 FR 28676, 28683 (May 26, 1999).
[555] *See* 64 FR 28676, 28684 (May 26, 1999).
[556] See 84 FR 41292, 41504-41505 (Aug. 14, 2019).
[557] *See* 84 FR 41292, 41505 (Aug. 14, 2019).
[558] *See* proposed 8 CFR 212.23. This section includes two provisions that also account for any additional exemptions established by law or waivers established by law or regulation. *See* proposed 8 CFR 212.23(a)(29) and (c)(3).

of inadmissibility in this rule, as it did in the 2019 Final Rule (that is no longer in effect), with two additional exemptions pertaining to certain Syrian nationals adjusting status under Public Law 106-378[559] as well as applicants for adjustment of status under Liberian Refugee Immigration Fairness (LRIF).[560]

- Refugees at the time of admission pursuant to section 207 of the INA, 8 U.S.C. 1157, and asylees at the time of a grant of asylum under section 208 of the INA, 8 U.S.C. 1158, as well as refugees and asylees at the time of adjustment of status to lawful permanent resident;
- Amerasian immigrants at admission, pursuant to in section 584(a)(2) of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202, 101 Stat. 1329-183 (Dec. 22, 1987) (as amended), 8 U.S.C. 1101 note 5;
- Afghan and Iraqi Interpreters, or Afghan or Iraqi nationals employed by or on behalf of the U.S. Government, pursuant to section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Pub. L. 109–163 (Jan. 6, 2006), section 602(b) of the Afghan Allies Protection Act of 2009, as amended, Pub. L. 111–8 (Mar. 11, 2009), and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Pub. L. 110-181 (Jan. 28, 2008);
- Cuban and Haitian entrants at adjustment of status, pursuant to section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359 (Jan. 3, 1986) (as amended), 8 U.S.C. 1255a, note;[561]
- Aliens applying for adjustment of status, pursuant to the Cuban Adjustment Act, Pub. L. 89-

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[559] Adjustment of Status of Certain Syrian Nationals, Pub. L. 106-378, 114 Stat. 1442 (Oct. 27, 2000).
[560] DHS is adding LRIF to the list of exemptions as Congress established LRIF after the publication of the 2019 Final Rule. In the 2019 Final Rule, DHS inadvertently omitted the former exemption for certain Syrian nationals adjusting status.
[561] *See Matter of Mesa*, 12 I&N Dec. 432, 437 (Dep. Act. Comm'r. 1967).

732 (Nov. 2, 1966) as amended; 8 U.S.C. 1255, note;

- Nicaraguans and other Central Americans who are adjusting status to lawful permanent resident, pursuant to section 202(a) and section 203 of NACARA, Pub. L. 105-100, 111 Stat. 2193 (Nov. 19, 1997) (as amended), 8 U.S.C. 1255 note;
- Haitians who are adjusting status to lawful permanent resident, pursuant to section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255 note;
- Lautenberg parolees, pursuant to section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255 note;
- Special immigrant juveniles, pursuant to section 245(h) of the INA, 8 U.S.C. 1255(h);
- Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the INA, 8 U.S.C. 1259, and 8 CFR part 249;
- Aliens applying for Temporary Protected Status, pursuant to section 244(c)(2)(ii) of the INA, 8 U.S.C. 1254a(c)(2)(ii) and 8 CFR 244.3(a);[562]
- Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the INA, 8 U.S.C. 1101(a)(15)(A)(i) and (ii) (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), pursuant to section 102 of the INA, 8 U.S.C. 1102, 22 CFR 41.21(d);

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[562] INA sec. 244(c)(2)(ii), 8 U.S.C. 1254a(c)(2)(ii), authorizes DHS to waive any INA sec. 212(a), 8 U.S.C. 1182(a) ground, except for those that Congress specifically noted could not be waived.

- Nonimmigrants classifiable as C-2 (alien in transit to U.N. Headquarters) or C-3 (foreign government official), pursuant to 22 CFR 41.21(d);
- Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the INA (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories),[563] 8 U.S.C. 1101(a)(15)(G)(i), (ii), (iii), and (iv), pursuant to section 102 of the INA, 8 U.S.C. 1102, 22 CFR 41.21(d);
- Nonimmigrants classifiable as a NATO (North Atlantic Treaty Organization) representative and related categories,[564] pursuant to 22 CFR 41.21(d);
- Individuals who have a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the INA (Victim of Severe Form of Trafficking), 8 U.S.C. 1101(a)(15)(T), pursuant to section 212(d)(13)(A) of the INA, 8 U.S.C.

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[563] Includes the following categories: G-1 - Principal Resident Representative of Recognized Foreign Government to International Organization, Staff, or Immediate Family; G-2 - Other Representative of Recognized Foreign Member Government to International Organization, or Immediate Family; G-3 - Representative of Non-recognized or Nonmember Foreign Government to International Organization, or Immediate Family; G-4 - International Organization Officer or Employee, or Immediate Family; G-5 - Attendant, Servant, or Personal Employee of G-1 through G-4, or Immediate Family.

[564] Includes the following categories: NATO 1 - Principal Permanent Representative of Member State to NATO (including any of its Subsidiary Bodies) Resident in the U.S. and Resident Members of Official Staff; Secretary General, Assistant Secretaries General, and Executive Secretary of NATO; Other Permanent NATO Officials of Similar Rank, or Immediate Family; NATO 2 - Other Representative of Member State to NATO (including any of its Subsidiary Bodies) including Representatives, Advisers, and Technical Experts of Delegations, or Immediate Family; Dependents of Member of a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement or in Accordance with the provisions of the "Protocol on the Status of International Military Headquarters"; Members of Such a Force if Issued Visas; NATO 3 - Official Clerical Staff Accompanying Representative of Member State to NATO (including any of its Subsidiary Bodies), or Immediate Family; NATO-4 - Official of NATO (Other Than Those Classifiable as NATO-1), or Immediate Family; NATO-5 - Experts, Other Than NATO Officials Classifiable Under NATO-4, Employed in Missions on Behalf of NATO, and their Dependents; NATO 6 - Member of a Civilian Component Accompanying a Force Entering in Accordance with the Provisions of the NATO Status-of-Forces Agreement; Member of a Civilian Component Attached to or Employed by an Allied Headquarters Under the "Protocol on the Status of International Military Headquarters" Set Up Pursuant to the North Atlantic Treaty; and their Dependents; NATO-7 - Attendant, Servant, or Personal Employee of NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, and NATO-6 Classes, or Immediate Family.

1182(d)(13)(A), or who are in valid T nonimmigrant status and are seeking an immigration benefit for which admissibility is required;

- Petitioners for, or individuals who are granted, nonimmigrant status under section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U) (Victim of Criminal Activity), pursuant to section 212(a)(4)(E)(ii) of the INA, 8 U.S.C. 1182(a)(4)(E)(ii);
- Nonimmigrants who were admitted under section 101(a)(15)(U) (Victim of Criminal Activity) of the INA, 8 U.S.C. 1101(a)(15)(U), at the time of their adjustment of status under section 245(m) of the INA, 8 U.S.C. 1155(m), and 8 CFR 245.24;
- Aliens who are VAWA self-petitioners as defined in section 101(a)(51) of the INA, 8 U.S.C. 1101, pursuant to section 212(a)(4)(E)(i) of the INA, 8 U.S.C. 1182(a)(4)(E)(i);
- "Qualified aliens" described in section 431(c) of PRWORA (8 U.S.C. 1641(c)) (certain battered aliens as "qualified aliens"), pursuant to section 212(a)(4)(E)(iii) of the INA, 8 U.S.C. 1182(a)(4)(E)(iii);
- Applicants adjusting status under section National Defense Authorization Act For Fiscal Year 2004 (NDAA 2004), Pub. L. 108-136, 117 Stat. 1392 (Nov. 24, 2003) (posthumous benefits to surviving spouses, children, and parents);
- Noncitizen American Indians Born in Canada, pursuant to section 289 of the INA, 8 U.S.C. 1359
- Noncitizen members of the Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma pursuant to Pub. L. 97-429 (Jan. 8, 1983);
- Nationals of Vietnam, Cambodia, and Laos adjusting status, pursuant to section 586 of Pub. L. 106-429 (Nov. 1, 2000);

- 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;
- Certain Syrian nationals adjusting status under Public Law 106-378;
- Applicants adjusting under the Liberian Refugee Immigration Fairness (LRIF) law, pursuant to section 7611 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. 116-92, 113 Stat. 1198, 2309 (Dec. 20, 2019); and
- 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.

In general, the aforementioned classes of noncitizens are vulnerable populations of immigrants and nonimmigrants. Some have been persecuted or victimized and others have little to no private support network in the United States. These individuals tend to require government protection and support for a period of time. Admission of these noncitizens also serves distinct public policy goals separate from the general immigration system. The source of each exemption mentioned in proposed 8 CFR 212.23(a) can be found elsewhere in U.S. law.

2. Limited Exemption

Noncitizens described in proposed 8 CFR 212.23(a)(18) through (21)[565] are exempt from the public charge ground of inadmissibility.[566] Congress, however, did not include paragraph (D)

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[565] This includes individuals seeking adjustment of status who are in T nonimmigrant status, U nonimmigrant status, VAWA self-petitioners, and "qualified aliens" described in section 431(c) of PRWORA, 8 U.S.C. 1641(c).

[566] Section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E), specifically excludes these categories of noncitizens from sections 212(a)(4)(A), (B), and (C) of the INA, 8 U.S.C. 1882(a)(4)(A), (B), and (C).

of section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4)(D), among the exemptions in paragraph (E) for these categories. Paragraph (E) requires that an applicant for admission or adjustment of status in the employment-based preference categories of section 203(b) of the INA, 8 U.S.C. 1153(b), based on a petition filed by a relative of such an applicant (or by an entity in which the relative has a significant ownership interest) submit an Affidavit of Support Under Section 213A of the INA. DHS lacks the authority to expand the exemptions listed in section 212(a)(4)(E) of the INA, 8 U.S.C. 1182(a)(4)(E), to include paragraph (D).[567] Therefore, in certain circumstances these categories of individuals must submit an Affidavit of Support Under Section 213A of the INA if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support under section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D).

DHS proposes to codify this limited exemption in proposed 8 CFR 212.23(b).

3. Waivers

The proposed regulation at 8 CFR 212.23(c) lists the categories of applicants Congress has authorized to apply for waivers of the public charge inadmissibility ground, as follows:

- S (alien witness or informant) nonimmigrants described in section 101(a)(15)(S) of the INA, 8 U.S.C. 1101(a)(15)(S);
- Applicants for admission and adjustment of status under section 245(j) of the INA, 8 U.S.C. 1255(j) (alien witness or informant); and
- Other waivers of the public charge inadmissibility provisions in section 212(a)(4) of the INA,

[567] *See, e.g.*, *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004) and *Yith v. Nielsen*, 881 F.3d 1155, 1164 (9th Cir. 2018).

8 U.S.C. 1182(a)(4), permissible under the law.[568]

F. Public Charge Bonds

As detailed in the background section, DHS has existing regulations implementing its discretionary authority to accept public charge bonds under section 213 of the INA, 8 U.S.C. 1183. These bond provisions, found at 8 CFR 213.1 and 8 CFR 103.6, regulate the admission, upon giving a bond, of individuals found inadmissible to the United States under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), including how such bonds are posted and cancelled.

After the 2019 Final Rule, which included more detailed public charge bond provisions,[569] was vacated, DHS sought public comments in the ANPRM addressing public charge bonds and received a number of thoughtful suggestions. After careful consideration of those comments, DHS is not proposing changes to the existing regulatory provisions at this time. This approach is consistent with the approach DHS has taken historically when implementing the public charge ground of inadmissibility under the 1999 Interim Field Guidance that is currently in place.[570] Notwithstanding the approach taken in the 2019 Final Rule, at this time, the existing regulations provide an adequate framework for DHS to exercise its discretion with respect to public charge bonds, particularly given the relatively small number of cases where USCIS may be inclined to offer a public charge bond in its discretion.

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[568] *See, e.g.*, INA 212(d)(3), 8 U.S.C. 1182(d)(3) (broadly authorizing waivers of various grounds of inadmissibility for noncitizens applying for a nonimmigrant visa or admission as a nonimmigrant).
[569] *See* 84 FR 41292, 41505-41507 (Aug. 14, 2019).
[570] *See* 64 FR 28689, 28693 (May 26, 1999). *See* 64 FR 28676, 28684 (May 26, 1999).

VI. Statutory and Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order (E.O.) 12866 and E.O. 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, to the extent permitted by law, to proceed only if the benefits justify the costs. They also direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In particular, E.O. 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also considering equity, fairness, distributive impacts, and human dignity.

The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has determined that this proposed rule is an economically "significant regulatory action" under section 3(f)(1) of Executive Order 12866. Accordingly, OMB has reviewed this regulation.

1. Summary of the Proposed Rule

The proposed rule describes how DHS will determine whether a noncitizen is inadmissible because they are likely at any time to become a public charge, i.e., likely to become primarily dependent on the government for subsistence. The proposed rule also clarifies the types of public benefits that are considered in public charge inadmissibility determinations. DHS proposes to limit such consideration to public cash assistance for income maintenance and long-

term institutionalization at government expense.[571, 572] Public cash assistance for income maintenance would include cash assistance provided under TANF, SSI, and general assistance. This is the same list of public benefits that are considered under the 1999 Interim Field Guidance that was the operative standard for nearly 20 years until the 2019 Final Rule (that is no longer in effect) was promulgated. DHS also proposes to define key terms and to codify a list of categories of noncitizens who are statutorily exempt from the public charge ground of inadmissibility, or eligible for a waiver.

The proposed rule uses a framework similar to the one set forth in the 1999 Interim Field Guidance, under which officers consider past or current receipt of certain public benefits, as well as the statutory minimum factors (the noncitizen's age, health, family status, assets, resources, and financial status, and education and skills) and the Affidavit of Support Under Section 213A of the INA, where required, as part of a totality of the circumstances framework. The proposed rule maintains the language set forth in the 1999 Interim Field Guidance that reiterated more specifically the general requirement that every written denial decision issued by USCIS based on the public charge ground of inadmissibility include a discussion of each of the statutory factors.

The proposed rule establishes two exclusions from consideration of public benefits received by certain noncitizens. First, the proposed rule clarifies that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies,

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[571] See proposed 8 CFR 212.21(a).

[572] As noted in the public benefits section above, DHS proposes to replace the term "institutionalization for long-term care at government expense" with "long-term institutionalization," which better describes the specific types of services covered and the duration for receiving them. The terms are not meant to be substantively different.

DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility. Second, under the proposed rule, when making a public charge inadmissibility determination, DHS will also not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an "unaccompanied alien child" as defined under 6 U.S.C. 279(g)(2). This provision would only apply to those categories of noncitizens who are eligible for all three of the types of support listed (resettlement assistance, entitlement programs, and other benefits) typically reserved for refugees.

2. Summary of the Costs and Benefits of the Proposed Rule

The proposed rule would result in new costs, benefits, and transfers. To provide a full understanding of the impacts of the proposed rule, DHS considers the potential impacts of this proposed rule relative to two baselines, as well the potential impact of a regulatory alternative. The No Action Baseline represents a state of the world under the 1999 Interim Field Guidance, which is the policy currently in effect. The second baseline is the Pre-Guidance Baseline, which represents a trajectory established before the issuance of the 1999 Interim Field Guidance (i.e., a state of the world in which the 1999 Interim Field Guidance did not exist). The alternative analysis presented below relates to an alternative consistent with the 2019 Final Rule.

Relative to the No Action Baseline, the primary source of quantified new direct costs for the proposed rule is the increase in the time required to complete Form I-485. DHS estimates that the proposed rule would impose additional new direct costs of approximately $12,871,511

annually to applicants filing Form I-485. In addition, the proposed rule results in an annual savings for a subpopulation of affected individuals; T nonimmigrants applying for adjustment of status will no longer need to submit Form I-601 to seek a waiver of the public charge ground of inadmissibility. DHS estimates the total annual savings for this population will be $15,359. DHS estimates that the total annual net costs will be $12,856,152.[573]

Over the first 10 years of implementation, DHS estimates the total net costs of the proposed rule would be approximately $128,561,520 (undiscounted). In addition, DHS estimates that the 10-year discounted total net costs of this proposed rule would be about $109,665,584 at a 3-percent discount rate and about $90,296,232 at a 7-percent discount rate.

DHS expects the primary benefit of this proposed rule to be the non-quantified benefit of establishing clear standards governing a determination that a noncitizen is inadmissible based on the public charge ground.

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

Table 11. Summary of Major Provisions and Economic Impacts of the Proposed Rule, FY 2022 – FY 2032 (Relative to the No Action Baseline)		
Provision	**Purpose**	**Expected Impact of Proposed Rule**

[573] Calculations: Total annual net costs ($12,856,152) =Total annual costs ($12,871,511) – Total annual savings ($15,359)

Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among affected population by providing clarity on inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including "likely at any time to become a public charge," "receipt (of public benefits)," "public cash assistance for income maintenance," "long-term institutionalization at government expense," and "government."	

Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual.

		Transfer Payments: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.
Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on the public charge ground.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground. Costs • None **Transfer Payments**: • The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the

		limited period that they are in such status or eligible for such benefits.
Source: USCIS analysis.		

Table 12. Summary of Major Provisions and Economic Impacts of the Proposed Rule, FY 2022 – FY 2032 (Relative to the Pre-Guidance Baseline)

Provision	**Purpose**	**Expected Impact of Proposed Rule**
Revising 8 CFR 212.18. Application for Waivers of Inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders. Revising 8 CFR 245.23. Adjustment of aliens in T nonimmigrant classification.	To clarify that T nonimmigrants seeking adjustment of status are not subject to public charge ground of inadmissibility.	**Quantitative:** Cost Savings: • Total savings of $15,359 in costs to the government (reimbursed by fees paid by applicants) and reduced time burden annually to T nonimmigrants applying for adjustment of status who will no longer need to submit Form I-601 seeking a waiver of public charge ground of inadmissibility. Costs • None
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of noncitizens that are subject to the public charge determination.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on

		inadmissibility on the public charge ground. Costs • None
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including "likely at any time to become a public charge," "receipt (of public benefits)," "public cash assistance for income maintenance," "long-term institutionalization at government expense," and "government."	
Adding 8 CFR 212.22. Public charge determination.	To clarify the prospective totality of the circumstances analysis, the analysis of the statutory minimum factors and the Affidavit of Support Under Section 213A of the INA, consideration of an applicant's current and/or past receipt of public benefits.	**Quantitative**: Benefits • None Costs • Total annual direct costs of the proposed rule would be $12,871,511 to applicants applying to adjust status using Form I-485 with an increased time burden. **Qualitative**: Benefits • By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or

		disenrolling in public benefit programs. Costs • Costs to various entities and individuals associated with regulatory familiarization with the proposed rule. Costs would include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. **Transfer Payments**: • The proposed rule could lead to an increase in transfer payments with public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.
Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on the public charge ground.	**Qualitative**: Benefits • The proposed rule would reduce uncertainty and confusion among the affected population by providing outlines of exemptions and waivers for inadmissibility on the public charge ground. Costs • None **Transfer Payments**: • The primary impact of the proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer

		payments from the Federal and State governments to individuals. However, DHS is unable to quantify these effects given how much time has passed between the issuance of the 1999 Interim Field Guidance and this rulemaking. • The proposed rule could lead to an increase in public benefit participation and an increase in transfer payments. Some noncitizens that are in a status that is exempt from the public charge ground of inadmissibility or are eligible for certain benefits made available to refugees may be more likely to participate in public benefit programs for the limited period that they are in such status or eligible for such benefits.
Source: USCIS analysis.		

In addition to the impacts summarized above, and as required by OMB Circular A-4, the following two tables present the prepared accounting statement showing the costs associated with this proposed rule.[574]

Table 13. OMB A-4 Accounting Statement ($ in millions, 2021; No Action Baseline, FY 2022 – FY 2032)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				
Monetized Benefits	N/A			RIA

[574] *See* OMB. "Circular A-4." September 17, 2003. Available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*.

Annualized quantified, but un-monetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	• By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.			RIA
COSTS				
Annualized monetized net costs (discount rate in parenthesis)	(3%) $12.9	N/A	N/A	RIA
	(7%) $12.9	N/A	N/A	
Annualized quantified, but un-monetized, costs	N/A			
Qualitative (unquantified) costs	Costs to various entities and individuals associated with regulatory familiarization with the provisions of the proposed rule. Costs will include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. DHS estimates that the opportunity cost of time will range from about $118.65 to $158.20 per individual who will read and review the proposed rule. However, DHS cannot determine the number of individuals who will read the proposed rule.			RIA
TRANSFERS Relative to the No Action Baseline, the proposed rule could lead to an increase in public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event.				
Annualized monetized transfers: "on budget"	N/A	N/A	N/A	RIA
From whom to whom?				RIA

Annualized monetized transfers: "off-budget"	N/A	N/A	N/A	
From whom to whom?				
Miscellaneous Analyses/Category	***Effects***			***Source Citation***
Effects on State, local, and/or Tribal governments	None			None
Effects on small businesses	None			RIA
Effects on wages	None			None
Effects on growth	None			None

Table 14. OMB A-4 Accounting Statement ($ in millions, 2021; Pre-Guidance Baseline, FY2022-FY2032)				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				
Monetized Benefits	N/A			RIA
Annualized quantified, but un-monetized, benefits	N/A	N/A	N/A	RIA
Unquantified Benefits	• By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions on applying for adjustment of status or enrolling or disenrolling in public benefit programs. • The proposed rule would reduce uncertainty and confusion among the affected population by providing clarity on inadmissibility on the public charge ground.			RIA
COSTS				
Annualized monetized costs (discount rate in parenthesis)	(3%) $ 12.9	N/A	N/A	RIA

	(7%) $ 12.9	N/A	N/A	
Annualized quantified, but un-monetized, costs	N/A			
Qualitative (unquantified) costs	Costs to various entities and individuals associated with regulatory familiarization with the provisions of the proposed rule. Costs will include the opportunity cost of time to read the proposed rule and subsequently determine applicability of the proposed rule's provisions. DHS estimates that the time to read this proposed rule in its entirety would be 3 to 4 hours per individual. DHS estimates that the opportunity cost of time will range from about $118.65 to $158.20 per individual who will read and review the proposed rule. However, DHS cannot determine the number of individuals who will read the proposed rule.			RIA
TRANSFERS The proposed rule could lead to an increase in public benefit participation by individuals who would not be subject to the public charge ground of inadmissibility in any event. The primary impact of the proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer payments from the Federal and State governments to individuals. DHS also believes that the rule may have indirect effects on businesses in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs. However, DHS is unable to quantify these effects.				
Annualized monetized transfers: "on budget"	N/A	N/A	N/A	RIA
From whom to whom?				RIA
Annualized monetized transfers: "off-budget"	N/A	N/A	N/A	
From whom to whom?				
Miscellaneous Analyses/Category	***Effects***			***Source Citation***
Effects on State, local, and/or Tribal governments	DHS believes that the rule may have indirect effects on State, local, and/or Tribal government, but DHS does not know the full extent of the effect on State, local, and/or Tribal governments as compared to the Pre-Guidance Baseline. There may be costs to various entities associated with familiarization of and compliance with the provisions of the rule, including salaries and opportunity			RIA

	costs of time to monitor and understand regulation requirements, disseminate information, and develop or modify information technology (IT) systems as needed. It may be necessary for many government agencies to update guidance documents, forms, and web pages. It may be necessary to prepare training materials and retrain staff at each level of government, which will require additional staff time and will generate associated costs. However, DHS is unable to quantify these effects.	
Effects on small businesses	DHS believes that the rule may have indirect effects on small businesses and nonprofits in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits. However, DHS is unable to quantify these effects.	RIA
Effects on wages	None	None
Effects on growth	None	None

3. Background and Purpose of the Rule

As discussed in the preamble, DHS seeks to administer the public charge ground of inadmissibility in a manner that will be clear and comprehensible and will lead to fair and consistent adjudications. Under the INA, a noncitizen who, at the time of application for a visa, admission, or adjustment of status, is deemed likely at any time to become a public charge is ineligible for a visa, inadmissible, or ineligible for adjustment of status.[575]

While the INA does not define public charge, Congress has specified that, when determining if a noncitizen is likely at any time to become a public charge, immigration officers must, at a minimum, consider certain factors, including the noncitizen's age; health; and family status; assets, resources, and financial status; and education and skills.[576] Additionally, DHS may consider any affidavit of support submitted under section 213A of the Act, 8 U.S.C. 1183a,

[575] *See* INA sec. 212(a)(4); 8 U.S.C. 1182(a)(4).
[576] *See* INA sec. 212(a)(4)(B)(i); 8 U.S.C. 1182(a)(4)(B)(i).

on behalf of the applicant when determining whether the applicant may become a public charge.[577] For most family-based and some employment-based immigrant visas or adjustment of status applications, applicants must have a sufficient affidavit of support or they will be found inadmissible as likely to become a public charge.[578]

The estimation of costs and benefits for this proposed rule focuses on individuals applying for adjustment of status with USCIS using Form I-485. Such individuals would be applying from within the United States, rather than applying for a visa from outside the United States at a DOS consulate abroad. Moreover, DHS notes that CBP may incur costs pursuant to this proposed rule, but we are unable to determine this potential cost at this time due to data limitations. For example, CBP employees would have to spend time examining noncitizens arriving at a port of entry seeking admission, either pursuant to a previously issued visa or as a traveler for whom visa requirements have been waived and determining if they are likely to become a public charge if they are admitted. However, DHS is not able to quantify the number of noncitizens who would possibly be deemed inadmissible at a port of entry based on a public charge determination pursuant to this proposed rule. DHS is qualitatively acknowledging this potential impact.

4. Population

This proposed rule would affect individuals who are present in the United States who are seeking adjustment of status to that of a lawful permanent resident. By statute, an individual

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[577] *See* INA sec. 212(a)(4)(B)(ii). When required, the applicant must submit Form I-864, Affidavit of Support Under Section 213A of the INA.
[578] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

who is seeking adjustment of status and is at any time likely to become a public charge is ineligible for such adjustment, unless the individual is exempt from or has received a waiver of the public charge ground of inadmissibility.[579] The grounds of inadmissibility set forth in section 212 of the INA, 8 U.S.C. 1182, also apply when certain noncitizens seek admission to the United States, whether for a temporary purpose or permanently. However, the public charge inadmissibility ground (including ineligibility for adjustment of status) does not apply to all applicants since there are various categories of applicants that Congress expressly exempted from the public charge inadmissibility ground. Within USCIS, this proposed rule would affect individuals who apply for adjustment of status because these individuals would be required to be reviewed for a determination of inadmissibility based on public charge grounds as long as the individual is not in a category of applicant that is exempt from the public charge ground of inadmissibility. DHS notes that the population estimates are based on noncitizens present in the United States who are applying for adjustment of status and does not include individuals seeking admission at a port of entry due to the data limitations. These limitations could result in underestimation of the cost, benefit, or transfer payments of the proposed rule. However, DHS is unable to quantify the magnitude.

a. Population Seeking Adjustment of Status

The population affected by this rule consists of individuals who are applying for adjustment of status using Form I-485. Under the proposed rule, a subset of these individuals (i.e., those who are not exempt from the public charge ground of inadmissibility) would undergo

[579] *See* INA sec. 212(a)(4), 8 U.S.C. 1182(a)(4).

review for determination of inadmissibility based on public charge grounds, unless an individual is in a category of applicant that is exempt from the public charge ground of inadmissibility. The following table shows the total number of Form I-485 applications received for FY 2014 to FY 2021. DHS selects the period FY 2014 - FY 2018 to project the number of applications to be filed for the next 10 years for the reasons discussed below. Between FY 2014 and FY 2018, the population of individuals applying for adjustment of status ranged from a low of 637,138 in FY 2014 to a high of 763,192 in FY 2017. In addition, the average population of individuals who applied for adjustment of status over this period was 690,837.

Table 15. Total Population that Applied for Adjustment of Status, FY 2014 to FY 2021.

Fiscal Year	Total Population Applying for Adjustment of Status
2014	637,138
2015	638,018
2016	711,431
2017	763,192
2018	704,407
2019	600,079
2020	577,920
2021	726,566
Total (FY 2014 – FY 2018)	**3,454,186**
5-year average (FY 2014 – FY 2018)	**690,837**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)

For this analysis, DHS projects the affected population for the 10-year period from the beginning of FY 2022. DHS bases its population projection on the historical number of Form I-485 applications received over the period FY 2014–FY 2018.[580]

i. Exemptions from Determination of Inadmissibility Based on Public Charge Ground

There are exemptions and waivers for certain categories of noncitizens that are not subject to a determination of inadmissibility based on the public charge ground. The following table shows the classes of applicants for admission, adjustment of status, or registry according to statute or regulation that are exempt from inadmissibility based on the public charge ground.

Table 16. Categories of Applicants for Admission, Adjustment of Status, or Registry Exempt from Inadmissibility Based on Public Charge According to Statute or Regulation.	
• Refugees and asylees as follows: at the time admission under section 207 of the Act (refugees) or grant under section 208 of the Act (asylees); for both refugees and asylees, at the time of adjustment of status to lawful permanent resident under sections 207(c)(3) and 209(c) of the Act;	• Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202, 101 Stat. 1329-183, sec. 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note 5;
• 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 Pub. L. 109–163 (Jan. 6, 2006), as amended, section 602(b) of the Afghan Allies Protection Act of 2009, Pub. L. 111–8, title VI (Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the	• Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

[580] USCIS excluded data from FY 2019-FY 2021 due to data anomalies. As shown in the table, the population of adjustment of status applicants in FY 2019 and FY 2020 decreased significantly, followed by an increase beginning at the end of FY 2020 and beginning of FY 2021. By far the most significant increase in FY 2021 occurred in October 2020, during which receipts reached 184,779, as compared to 86,911 in October 2019, and 55,483 in October 2018. The level of receipts in October 2020 was substantially higher than the level of receipts for any other month since FY 2014. Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).

National Defense Authorization Act for Fiscal Year 2008, as amended, Pub. L. 110-181 (Jan. 28, 2008);	
• Aliens applying for adjustment of status under the Cuban Adjustment Act, Pub. L. 89-732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;	• Nicaraguans and other Central Americans applying for adjustment of status under section 202(a) and section 203 of NACARA, Pub. L. 105-100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;
• Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;	• Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. 101-167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;
• Special immigrant juveniles as described in section 245(h) of the Act;	• Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the INA, 8 U.S.C. 1259, and 8 CFR part 249 (Registry);
• Aliens applying for or reregistering for Temporary Protected Status, pursuant to section 244(c)(2)(ii) of the INA, 8 U.S.C. 1254a(c)(2)(ii) and 8 CFR 244.3(a)	• Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 97-429 (Jan. 8, 1983)
• Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the INA, 8 U.S.C. 1101(a)(15)(A)(i) and (ii) (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), pursuant to section 102 of the INA, 8 U.S.C. 1102, and 22 CFR 41.21(d)	• Nonimmigrants classifiable as C-2 (alien in transit to U.N. Headquarters) or C-3 (foreign government official), pursuant to 22 CFR 41.21(d)
• Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the INA (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), 8	• Nonimmigrants classifiable as a NATO representatives and related categories, pursuant to 22 CFR 41.21(d)

U.S.C. 1101(a)(15)(G)(i), (ii), (iii), and (iv), pursuant to section 102 of the INA, 8 U.S.C. 1102, and 22 CFR 41.21(d)	
• Individuals with a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the INA (Victim of Severe Form of Trafficking), 8 U.S.C. 1101(a)(15)(T), pursuant to section 212(d)(13)(A) of the INA, 8 U.S.C. 1182(d)(13)(A), as well as individuals in T nonimmigrant status who are seeking an immigration benefit for which inadmissibility is required	• Petitioners for, or individuals who are granted, nonimmigrant status under section 101(a)(15)(U) of the INA, 8 U.S.C. 1101(a)(15)(U) (Victim of Criminal Activity), pursuant to section 212(a)(4)(E)(ii) of the INA, 8 U.S.C. 1182(a)(4)(E)(ii), who are seeking an immigration benefit for which inadmissibility is required
• Certain Syrian nationals adjusting status under Public Law 106-378	• Applicants adjusting status who qualify for a benefit under Liberian Refugee Immigration Fairness, pursuant to Section 7611 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. 116-92, 113 Stat. 1198, 2309 (Dec. 20, 2019), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116-260 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension)
• Noncitizens who are VAWA self-petitioners as defined in section 101(a)(51) of the INA, 8 U.S.C. 1101, pursuant to section 212(a)(4)(E)(i) of the INA, 8 U.S.C. 1182(a)(4)(E)(i)	• A "qualified alien" described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), in accordance with section 212(a)(4)(E)(iii) of the Act;
• Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Pub. L. 108-136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents)	• American Indians Born in Canada as described in section 289 of the INA, 8 U.S.C. 1359;

• Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Pub. L. 106-429 under 8 CFR 245.21	• Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989, to December 31, 1991, under section 646(b) of IIRIRA, Pub. L. 104-208, div. C, title VI, subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note
• Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4).	
Source: USCIS.	

To estimate the annual total population of individuals seeking to adjust status who would be subject to review for inadmissibility based on the public charge ground, DHS examined the annual total population of individuals who applied for adjustment of status for FY 2014 - FY 2018. As noted above, the most recent fiscal years, FY 2019 - FY 2021, are not considered for this analysis because they may be outlier years.

For each fiscal year, DHS removed individuals from the population whose category of applicants is exempt from review for inadmissibility on the public charge ground, as shown in Table 17 below, leaving the total population that would be subject to such review. Further discussion of these exempt categories can be found in the preamble.

Table 17 shows the total estimated population of individuals seeking to adjust status under a category of applicant that is exempt from review for inadmissibility on the public charge ground for FY 2014 – FY 2018 as well as the total estimated population that would be subject to

public charge review.[581] In FY 2018, for example, the total number of persons who applied for adjustment of status across various classes of admission was 704,407. After removing individuals from this population whose category of applicant is exempt from review for inadmissibility on the public charge ground, DHS estimates the total population of adjustment of status applicants in FY 2018 who would be subject to review for inadmissibility on the public charge ground is 524,228.[582]

Table 17. Total Estimated Population of Individuals Seeking Adjustment of Status Who Were Exempt from or Subject to Public Charge Inadmissibility.

Fiscal Year	Total Population Applying for Adjustment of Status	Total Population Seeking Adjustment of Status that is Exempt from Review for Inadmissibility on the Public Charge Ground	Total Population Subject to Review for Inadmissibility on the Public Charge Ground
2014	637,138	178,007	459,131
2015	638,018	170,681	467,337
2016	711,431	196,090	515,341
2017	763,192	221,629	541,563
2018	704,407	180,179	524,228
Total	**3,454,186**	**946,586**	**2,507,600**
5-year average	**690,837**	**189,317**	**501,520**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).

DHS estimates the projected annual average total population of adjustment of status applicants that would be subject to review for inadmissibility on the public charge ground is 501,520. This estimate is based on the 5-year average of the annual estimated total population subject to review

[581] Calculation of total estimated population that would be subject to public charge review: (Total Population Applying for Adjustment of Status) – (Total Population Seeking Adjustment of Status that is Exempt from Public Charge Review for Inadmissibility) = Total Population Subject to Public Charge Review for Inadmissibility.

[582] Calculation of total population subject to public charge review for inadmissibility for fiscal year 2018: 704,407 – 180,179 = 524,228.

for inadmissibility on the public charge ground from FY 2014 – FY 2018. Over this 5-year period, the estimated population of individuals who applied for adjustment of status subject to review for inadmissibility on the public charge ground ranged from a low of 459,131 in FY 2014 to a high of 541,563 in FY 2017. DHS notes that the population estimates are based on noncitizens present in the United States who are applying for adjustment of status, rather than noncitizens who apply for an immigrant visa through consular processing at a DOS consulate or embassy abroad.

ii. Requirement to Submit an Affidavit of Support Under Section 213A of the INA

Certain noncitizens seeking immigrant visas or adjustment of status are required to submit an Affidavit of Support Under Section 213A of the INA executed by a sponsor on their behalf. This requirement applies to most family-sponsored immigrants and some employment-based immigrants.[583] Even within the family-sponsored and employment-based classes of admission, some noncitizens are not required to submit an Affidavit of Support Under Section 213A executed by a sponsor on their behalf. A failure to meet the requirement for a sufficient Affidavit of Support Under Section 213A of the INA will result in the noncitizen being found inadmissible under the public charge ground of inadmissibility without review of the statutory minimum factors discussed above.[584] When a sponsor executes an Affidavit of Support Under Section 213A of the INA on behalf of an applicant, they establish a legally enforceable contract between the sponsor and the U.S. Government with an obligation to financially support the

[583] *See* INA sec. 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).
[584] *See* INA sec. 212(a)(4)(C) and (D), 213A(a), 8 U.S.C. 1182(a)(4)(C) and (D), 1183a(a).

applicant and reimburse benefit granting agencies if the sponsored immigrant receives certain benefits during the period of enforceability.[585]

Table 18 shows the estimated total population of individuals seeking adjustment of status who were required or not required to have a sponsor execute an Affidavit of Support Under Section 213A of the INA on their behalf over the period FY 2014 – FY 2018. The estimated annual average population of individuals seeking to adjust status who were required to have a sponsor submit an affidavit of support on their behalf over the 5-year period was 297,998. Over this 5-year period, the estimated total population of individuals required to submit an affidavit of support from a sponsor ranged from a low of 268,091 in FY 2014 to a high of 329,011 in FY 2017.

Table 18. Total Estimated Population of Individuals Seeking Adjustment of Status Who Are Required or Not Required to Submit an Affidavit of Support.

Fiscal Year	Total Population Not Required to Submit Affidavit of Support	Total Population Required to Submit Affidavit of Support
2014	369,047	268,091
2015	365,066	272,952
2016	391,035	320,396
2017	434,181	329,011
2018	404,865	299,542
Total	**1,964,194**	**1,489,992**
5-year average	**392,839**	**297,998**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)

5. Cost-Benefit Analysis

[585] *See* INA sec. 213A(a) and (b), 8 U.S.C. 1183a(a) and (b).

DHS expects this proposed rule to produce costs and benefits associated with the procedures for administering the public charge ground of inadmissibility.

For this proposed rule, DHS generally uses the effective minimum wage plus weighted average benefits of $17.11 per hour ($11.80 effective minimum wage base plus $5.31 weighted average benefits) as a reasonable proxy of the opportunity cost of time for individuals who are applying for adjustment of status.[586] DHS also uses $17.11 per hour to estimate the opportunity cost of time for individuals who cannot or choose not to participate in the labor market as these individuals incur opportunity costs, assign valuation in deciding how to allocate their time, or both. This analysis uses the effective minimum wage rate since approximately 80 percent of the total number of individuals who applied for lawful permanent resident status were in a category of applicant under the family-sponsored categories (including immediate relatives of U.S. citizens) and other non-employment-based classifications such as diversity, refugees and asylees, and parolees.[587] Even when an individual is not working for wages, their time has value. For example, if someone performs childcare, housework, or other activities without paid compensation, that time still has value. Due to the wide variety of non-paid activities an individual could pursue, it is difficult to estimate the value of that time. DHS requests public comment on ways to best estimate the value of this non-paid time. DHS assumes the effective minimum wage for this non-paid time. DHS requests comments on using effective minimum wage.

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[586] *See* "Americans Are Seeing Highest Minimum Wage in History (Without Federal Help)" Emie Tedschi, The New York Times, April 24, 2019. Accessed at *https://www.nytimes.com/2019/04/24/upshot/why-america-may-already-have-its-highest-minimum-wage.html* (accessed Jan. 10, 2022).
[587] USCIS analysis of data provided by USCIS, Policy and Research Division (Dec. 2021).

The effective minimum wage of $11.80 is an unweighted hourly wage that does not account for worker benefits. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using the most recent Department of Labor, Bureau of Labor Statistics (BLS) report detailing the average employer costs for employee compensation for all civilian workers in major occupational groups and industries. DHS estimates that the benefits-to-wage multiplier is 1.45, which incorporates employee wages and salaries and the full cost of benefits, such as paid leave, insurance, and retirement.[588] DHS notes that there is no requirement that an individual be employed in order to file Form I-485 and many applicants may not be employed. Therefore, in this proposed rule, DHS calculates the total rate of compensation for individuals applying for adjustment of status as $17.11 per hour in this proposed rule using the benefits-to-wage multiplier, where the mean hourly wage is $11.80 per hour worked and average benefits are $5.31 per hour.[589]

a. Establishing the Baselines

DHS discusses the potential impacts of this proposed rule relative to two baselines. The first baseline is a No Action Baseline that represents a state of the world in which DHS is implementing the public charge ground of inadmissibility consistent with the 1999 Interim Field Guidance.

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[588] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour) = $39.55 / $27.35 = 1.446 = 1.45(rounded). *See* Economic News Release, *Employer Cost for Employee Compensation (September 2021)*, U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. *available at https://www.bls.gov/news.release/pdf/ecec.pdf* (viewed Jan. 6, 2022).

[589] The calculation of the weighted Federal minimum hourly wage for applicants: $11.80 per hour * 1.45 benefits-to-wage multiplier = $17.11(rounded) per hour.

The second baseline is a Pre-Guidance Baseline, which represents a state of the world in which the 1999 NPRM,[590] 1999 Interim Field Guidance,[591] and the 2019 Final Rule were not enacted.

DHS requests comment on whether the No Action and 1999 Interim Field Guidance baselines capture the range of reasonably likely futures in the absence of this proposed rule (including directions and magnitudes of impacts associated with changes in sub-regulatory guidance) or if the range should be broadened or narrowed. Relatedly, feedback is welcome regarding the extent to which the 2019 Final Rule (presented below as a regulatory alternative) affected the baseline and thus should be incorporated into this portion of the analysis, rather than in the assessment of alternative options.

b. No Action Baseline

The No Action Baseline represents the current state of the world in which DHS applies the public charge ground of inadmissibility consistent with the 1999 Interim Field Guidance. For this proposed rule, DHS estimates the No Action Baseline according to current operations and requirements and compares the estimated costs and benefits of the provisions set forth in this proposed rule to this baseline. DHS notes that costs detailed as part of the No Action Baseline include all current costs associated with completing and filing Form I-485, including required

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[590] *See* "Inadmissibility and Deportability on Public Charge Grounds," Proposed Rule," 64 FR 28676 (May 26, 1999).

[591] *See* "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689 (May 26, 1999). Due to a printing error, the *Federal Register* version of the Field Guidance is dated "March 26, 1999," even though the guidance was signed May 20, 1999, became effective May 21, 1999, and was published in the *Federal Register* on May 26, 1999.

biometrics collection and medical examination (Form I-693), as well as any affidavits of support (Forms I-864, I-864A, I-864EZ, and I-864W) or requested fee waivers (Form I-912).

As noted previously in this analysis, DHS estimates the projected average annual total population of adjustment of status applicants that would be subject to review for inadmissibility on the public charge ground is 501,520. This estimate is based on the 5-year average of the annual estimated total population subject to review for inadmissibility on the public charge ground from FY 2014–FY 2018. Table 19 shows the estimated population and annual costs of filing for adjustment of status for the proposed rule. These costs primarily result from the process of applying for adjustment of status, including filing Form I-485 and Form I-693 as well as filing an affidavit of support or Form I-912 or both, if necessary.

Table 19. Total Average Annual No Action Baseline (Current) Costs.

Form	Estimated Average Annual Population	Total Annual Cost
I-485, Application to Register Permanent Residence or Adjust Status	**501,520**	**$715,613,873**
Filing Fee		$571,732,800
Opportunity Cost of Time (OCT)		$55,091,972
Biometrics Services Fee		$42,629,200
Biometrics Services OCT		$31,490,441
Biometrics Services Travel Costs		$14,669,460
I-693, Report of Medical Examination and Vaccination Record	**501,520**	**$269,080,526**
Medical Exam Cost		$247,625,500
Opportunity Cost of Time (OCT)		$21,455,026
I-912, Request for Fee Waiver	**69,194**	**$1,385,264**
Opportunity Cost of Time (OCT)		$1,385,264
Affidavit of Support Forms (I-864, I-864A, I-864EZ, I-864W)	**297,998**	**$70,714,925**
Opportunity Cost of Time (OCT)		$70,714,925
Total Annual No Action Baseline Costs		**$1,056,794,588**

Source: USCIS analysis.

i. Forms Relevant to This Proposed Rule

Form I-485, Application to Register Permanent Residence or Adjust Status

The basis of the quantitative costs estimated for this proposed rule is the cost of filing for adjustment of status using Form I-485, the opportunity cost of time for completing this form, any other required forms, and the cost for any other incidental costs (e.g., travel costs) an individual must bear that are required in the filing process. DHS reiterates that costs examined in this section are not additional costs that the proposed rule would impose; rather, they are costs that applicants incur as part of the current application process to adjust status. The current filing fee for Form I-485 is $1,140. The fee is set at a level to recover the processing costs to DHS. As previously discussed in the population section, the estimated average annual population of individuals who apply for adjustment of status using Form I-485 is 501,520. Therefore, DHS estimates that the annual filing fee costs associated for Form I-485 is approximately $571,732,800.[592]

DHS estimates the time burden of completing Form I-485 is 6.42 hours per response, including the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.[593] Using the total rate of compensation for minimum wage of $17.11 per hour, DHS estimates the opportunity cost of time for completing

[592] Calculation: Form I-485 filing fee ($1,140) * Estimated annual population filing Form I-485 (501,520) = $571,732,800 annual cost for filing Form I-485.
[593] USCIS. "Instructions for Application to Register Permanent Residence or Adjust Status (Form I-485)." OMB No. 1615-0023. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf* (Accessed 1/12/2022).

and submitting Form I-485 would be $109.85 per applicant.[594] Therefore, using the total population estimate of 501,520 annual filings for Form I-485, DHS estimates the total opportunity cost of time associated with completing Form I-485 is approximately $55,091,972 annually.[595]

USCIS requires applicants who file Form I-485 to submit biometric information (fingerprints and signature) by attending a biometrics services appointment at a designated USCIS Application Support Center (ASC). The biometrics services processing fee is $85.00 per applicant. Therefore, DHS estimates that the annual cost associated with biometrics services processing for the estimated average annual population of 501,520 individuals applying for adjustment of status is approximately $42,629,200.[596]

In addition to the biometrics services fee, the applicant would incur the costs to comply with the biometrics submission requirement as well as the opportunity cost of time for traveling to an ASC, the mileage cost of traveling to an ASC, and the opportunity cost of time for submitting their biometrics. While travel times and distances vary, DHS estimates that an applicant's average roundtrip distance to an ASC is 50 miles and takes 2.5 hours on average to complete the trip.[597] Furthermore, DHS estimates that an applicant waits an average of 1.17

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[594] Calculation for opportunity cost of time for filing Form I-485: ($17.11 per hour * 6.42 hours) = $109.85 (rounded) per applicant.
[595] Calculation: Form I-485 estimated opportunity cost of time ($109.85) * Estimated annual population filing Form I-485 (501,520) = $55,091,972 (rounded) annual opportunity cost of time for filing Form I-485.
[596] Calculation: Biometrics services processing fee ($85) * Estimated annual population filing Form I-485 (501,520) = $42,629,200 annual cost for associated with Form I-485 biometrics services processing.
[597] *See* Employment Authorization for Certain H-4 Dependent Spouses, Final Rule, 80 FR 10284 (Feb. 25, 2015); and Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule, 78 FR 536, 572 (Jan. 3, 2013).

hours for service and to have their biometrics collected at an ASC,[598] adding up to a total biometrics-related time burden of 3.67 hours. Using the total rate of compensation of the effective minimum wage of $17.11 per hour, DHS estimates the opportunity cost of time for completing the biometrics collection requirements for Form I-485 is $62.79 per applicant.[599] Therefore, using the total population estimate of 501,520 annual filings for Form I-485, DHS estimates the total opportunity cost of time associated with completing the biometrics collection requirements for Form I-485 is approximately $31,490,441 annually.[600]

In addition to the opportunity cost of providing biometrics, applicants would incur travel costs related to biometrics collection. The cost of travel related to biometrics collection would equal $29.25 per trip, based on the estimated average 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of $0.585 per mile.[601] DHS assumes that each applicant would travel independently to an ASC to submit their biometrics, meaning that this rule would impose a travel cost on each of these applicants. Therefore, DHS estimates that the total annual cost associated with travel related to biometrics collection for the estimated average annual population of 501,520 individuals applying for adjustment of status is approximately $14,669,460.[602]

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[598] Source for biometric time burden estimate: USCIS. "Instructions for Application to Register Permanent Residence or Adjust Status (Form I-485)." OMB No. 1615-0023. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf* (accessed Jan. 12, 2022).
[599] Calculation for opportunity cost of time to comply with biometrics submission for Form I-485: ($17.11 per hour * 3.67 hours) = $62.79 (rounded) per applicant.
[600] Calculation: Estimated opportunity cost of time to comply with biometrics submission for Form I-485 ($62.79) * Estimated annual population filing Form I-485 (501,520) = $31,490,441 (rounded) annual opportunity cost of time for filing Form I-485.
[601] *See* U.S. General Services Administration website for Privately Owned Vehicle (POV) Mileage Reimbursement Rates, *https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates-etc/privately-owned-vehicle-pov-mileage-reimbursement-rates* (accessed Jan. 7, 2022).
[602] Calculation: (Biometrics collection travel costs) * (Estimated annual population filing Form I-485) = $29.25 * 501,520= $14,669,460 annual travel costs related to biometrics collection for Form I-485.

In sum, DHS estimates the total current annual cost for filing Form I-485 is $715,613,873, which includes Form I-485 filing fees, biometrics services fees, opportunity cost of time for completing Form I-485 and submitting biometrics information, and travel cost associated with biometrics collection.[603] DHS notes that a medical examination is generally required as part of the application process to adjust status. Costs associated with the medical examination are detailed in the next section. Moreover, costs associated with submitting an affidavit of support and requesting a fee waiver are also detailed in subsequent sections since such costs are not required for every individual applying for an adjustment of status.

Form I-693, Report of Medical Examination and Vaccination Record

USCIS requires most applicants who file Form I-485 seeking adjustment of status to submit Form I-693 as completed by a USCIS-designated civil surgeon. Form I-693 is used to report results of an immigration medical examination to USCIS. For this analysis, DHS assumes that all individuals who apply for adjustment of status using Form I-485 will also submit Form I-693. DHS reiterates that costs examined in this section are not additional costs that the proposed rule would impose, but costs that applicants currently incur as part of the application process to adjust status. Form I-693 is required for adjustment of status applicants to establish that they are not inadmissible to the United States on health-related grounds. While there is no filing fee associated with Form I-693, the applicant is responsible for paying all costs of the immigration medical examination, including the cost of any follow-up tests or treatment that is required, and

[603] Calculation: $571,732,800 (Annual filing fees for Form I-485) + $55,091,972 (Opportunity cost of time for filing Form I-485) + $42,629,200 (Biometrics services fees) + $31,490,441 (Opportunity cost of time for biometrics collection requirements) + $14,669,460 (Travel costs for biometrics collection) = $715,613,873 total current annual cost for filing Form I-485.

must make payments directly to the civil surgeon or other health care provider. In addition, applicants bear the opportunity cost of time for completing the applicant portions of Form I-693, as well as sitting for the immigration medical exam and the time waiting to be examined.

USCIS does not regulate the fees charged by civil surgeons for the completion of an immigration medical examination. In addition, immigration medical examination fees vary widely by civil surgeon, from as little as $20 to as much as $1,000 per applicant (including vaccinations, additional medical evaluations, and testing that may be required based on the medical conditions of the applicant).[604] DHS estimates that the average cost for these activities is $493.75 and that all applicants would incur this cost.[605] Since DHS assumes that all applicants who apply for adjustment of status using Form I-485 must also submit Form I-693, DHS estimates that based on the estimated average annual population of 501,520 the annual cost associated with filing Form I-693 is $247,625,500.[606]

DHS estimates the time burden associated with filing Form I-693 is 2.5 hours per applicant, which includes understanding and completing the form, setting an appointment with a civil surgeon for a medical exam, sitting for the medical exam, learning about and understanding the results of medical tests, allowing the civil surgeon to report the results of the medical exam

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[604] Source for immigration medical examination cost range: Paperwork Reduction Act (PRA) Report of Medical Examination and Vaccination Record (Form I-693) (OMB control number 1615-0033). The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004*.

[605] Source for immigration medical examination cost estimate: Paperwork Reduction Act (PRA) Report of Medical Examination and Vaccination Record (Form I-693) (OMB control number 1615-0033). The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202108-1615-004*.

[606] Calculation: (Estimated immigration medical examination cost for Form I-693) * (Estimated annual population filing Form I-485) = $493.75 * 501,520 = $247,625,500 annual estimated medical exam costs for Form I-693.

on the form, and submitting the medical exam report to USCIS.[607] DHS estimates the opportunity cost of time for completing and submitting Form I-693 is $42.78 per applicant based on the total rate of compensation of minimum wage of $17.11 per hour.[608] Therefore, using the total population estimate of 501,520 annual filings for Form I-485, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-693 is approximately $21,455,026 annually.[609]

In sum, DHS estimates the total current annual cost for filing Form I-693 is $260,805,446, including medical exam costs, the opportunity cost of time for completing Form I-693, and cost of postage to mail the Form I-693 package to USCIS.[610]

Form I-912, Request for Fee Waiver

Some applicants seeking an adjustment of status may be eligible for a fee waiver when filing Form I-485. An applicant who is unable to pay the filing fees or biometric services fees for an application or petition may be eligible for a fee waiver by filing Form I-912. If an applicant's Form I-912 is approved, USCIS, as a component of DHS, will waive both the filing fee and biometric services fee. Therefore, DHS assumes for the purposes of this economic

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[607] Source for immigration medical examination time burden estimate: USCIS. "Instructions for Report of Medical Examination and Vaccination Record (Form I-693)." OMB No. 1615-0033. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-693instr.pdf* (accessed Jan. 13, 2022).

[608] Calculation for immigration medical examination opportunity cost of time: ($17.11 per hour * 2.5 hours) = $42.78 per applicant.

[609] Calculation: (Estimated immigration medical examination opportunity cost of time for Form I-693) * (Estimated annual population filing Form I-485) = $42.78 * 501,520 = $21,455,026 (rounded) annual opportunity cost of time for filing Form I-485.

[610] Calculation: $247,625,500 (Medical exam costs) + $21,455,026 (Opportunity cost of time for Form I-693) = $269,080,526 total current annual cost for filing Form I-693.

analysis that the filing fees and biometric services fees required for Form I-485 are waived if an approved Form I-912 accompanies the application. Filing Form I-912 is not required for applications and petitions that do not have a filing fee. DHS also notes that costs examined in this section are not additional costs that would be imposed by the proposed rule but costs that applicants currently could incur as part of the application process to adjust status.

Table 20 shows the estimated population of individuals that requested a fee waiver (Form I-912), based on receipts, when applying for adjustment of status in FY 2014–FY 2018, as well as the number of requests that were approved or denied each fiscal year. During this period, the number of individuals who requested a fee waiver when applying for adjustment of status ranged from a low of 49,292 in FY 2014 to a high of 95,476 in FY 2017. In addition, the estimated average population of individuals applying to adjust status who requested a fee waiver for Form I-485 over the 5-year period FY 2014–FY 2018 was 69,194. DHS estimates that 69,194 is the average annual projected population of individuals who would request a fee waiver using Form I-912 when filing Form I-485 to apply for an adjustment of status.[611]

Table 20. Total Population Requesting A Fee Waiver (Form I-912) when Filing Form I-485, Adjustment of Status.

Fiscal Year	Receipts	Approvals	Denials
2014	49,292	47,535	1,546
2015	52,815	50,927	1,556
2016	87,377	81,946	4,156
2017	95,476	88,486	4,704
2018	61,010	54,496	3,425

[611] DHS notes that the estimated population of individuals who would request a fee waiver for filing Form I-485 includes all visa classifications for those applying for adjustment of status. We are unable to determine the number of fee waiver requests for filing Form I-485 that are associated with specific visa classifications that are subject to public charge review.

Total	**345,970**	**323,390**	**15,387**
5-yr average	**69,194**	**64,678**	**3,077**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022).

Note: The number of requests adjudicated in a fiscal year will not be equal to the number of received requests. A request received in one fiscal year may not be adjudicated until a subsequent fiscal year.

To provide a reasonable proxy of time valuation for applicants, as described previously, DHS assumes that applicants requesting a fee waiver for Form I-485 earn the total rate of compensation for individuals applying for adjustment of status as $17.11 per hour, where the value of $10.51 per hour represents the effective minimum wage with an upward adjustment for benefits.

DHS estimates the time burden associated with filing Form I-912 is 1 hour and 10 minutes per applicant (1.17 hours), including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.[612] Therefore, using $17.11 per hour as the total rate of compensation, DHS estimates the opportunity cost of time for completing and submitting Form I-912 is $20.02 per applicant.[613] Using the total population estimate of 69,194 requests for a fee waiver for Form I-485, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-912 is approximately $1,385,264 annually.[614]

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[612] Source for fee waiver time burden estimate: USCIS. "Instructions for Fee Waiver Request (Form I-912)." OMB No. 1615-0116. Expires Sept. 30, 2024. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf* (accessed Jan. 13, 2022).
[613] Calculation for fee waiver opportunity cost of time: ($17.11 per hour * 1.17 hours) = $20.02 (rounded).
[614] Calculation: (Estimated opportunity cost of time for Form I-912) * (Estimated annual population of approved Form I-912) = $20.02 * 69,194= $1,385,264 (rounded) annual opportunity cost of time for filing Form I-912 that are approved.

Form I-864, Affidavit of Support Under Section 213A of the INA, and Related Forms

As previously discussed, submitting a Form I-864 is required for most family-based immigrants and some employment-based immigrants to show that they have adequate means of financial support and are not likely to become a public charge. Additionally, Form I-864 can include Form I-864A, which may be filed when a sponsor's income and assets do not meet the income requirements of Form I-864 and the qualifying household member chooses to combine their resources with the sponsor's income, assets, or both to meet those requirements. Some sponsors for applicants filing applications for adjustment of status may be able to execute Form I-864EZ rather than Form I-864, provided certain criteria are met. Moreover, certain classes of immigrants currently are exempt from the requirement to file Form I-864 or Form I-864EZ and therefore must file Form I-864W, Request for Exemption for Intending Immigrant's Affidavit of Support.

There is no filing fee associated with filing Form I-864 with USCIS. However, DHS estimates the time burden associated with a sponsor executing Form I-864 is 6 hours per adjustment applicant, including the time for reviewing instructions, gathering the required documentation and information, completing the affidavit, preparing statements, attaching necessary documentation, and submitting the Form I-864.[615]

To estimate the opportunity cost of time associated with filings of I-864, this analysis uses $39.55 per hour, the total compensation amount including costs for wages and salaries and benefits from the BLS report on Employer Costs for Employee Compensation detailing the

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[615] Source for Form I-864 time burden estimate: USCIS. "Instructions for Affidavit of Support Under Section 213A of the INA (Form I-864)." OMB No. 1615-0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864instr.pdf* (accessed Jan. 13, 2022).

average employer costs for employee compensation for all civilian workers in major occupational groups and industries.[616] DHS uses this wage rate because DHS expects that sponsors who file affidavits of support have adequate means of financial support and are likely to be employed.

Using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864 would be $237.30 per petitioner.[617] DHS assumes that the average rate of total compensation used to calculate the opportunity cost of time for Form I-864 is appropriate since the sponsor of an immigrant, who is agreeing to provide financial and material support, is instructed to complete and submit the form. Using the estimated annual total population of 297,998 individuals seeking to adjust status who are required to submit an affidavit of support using Form I-864, DHS estimates the opportunity cost of time associated with completing and submitting Form I-864 $70,714,925 annually.[618] DHS estimates this amount as the total current annual cost for filing Form I-864, as required when applying to adjust status.

There is also no filing fee associated with filing Form I-864A with USCIS. However, DHS estimates the time burden associated with filing Form I-864A is 1 hour and 45 minutes (1.75 hours) per petitioner, including the time for reviewing instructions, gathering the required

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[616] *See* Economic News Release, *Employer Cost for Employee Compensation (September 2021)*, U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. *Available at https://www.bls.gov/news.release/archives/ecec_12162021.pdf* (last modified Dec. 17, 2021).
[617] Calculation opportunity cost of time for completing and submitting Form I-864, Affidavit of Support Under Section 213A of the INA: ($39.55 per hour * 6.0 hours) = $237.30 per applicant.
[618] Calculation: (Form I-864 estimated opportunity cost of time) * (Estimated annual population filing Form I-864) = $237.30 * 297,998 = $70,714,925 (rounded) total annual opportunity cost of time for filing Form I-864.

documentation and information, completing the contract, preparing statements, attaching necessary documentation, and submitting the contract.[619] Therefore, using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864A will be $69.21 per petitioner.[620] DHS assumes the average total rate of compensation used for calculating the opportunity cost of time for Form I-864 since both the sponsor and another household member agree to provide financial support to an immigrant seeking to adjust status. However, the household member also may be the intending immigrant. While Form I-864A must be filed with Form I-864, DHS notes that we are unable to determine the number of filings of Form I-864A since not all individuals filing I-864 need to file Form I-864A with a household member.

As with Form I-864, there is no filing fee associated with filing Form I-864EZ with USCIS. However, DHS estimates the time burden associated with filing Form I-864EZ is 2 hours and 30 minutes (2.5 hours) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the affidavit, preparing statements, attaching necessary documentation, and submitting the affidavit.[621] Therefore, using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864EZ will be $98.88 per petitioner.[622] However,

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[619] Source for I-864A time burden estimate: USCIS. "Instructions for Contract Between Sponsor and Household Member (Form I-864A)." OMB No. 1615-0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864ainstr.pdf* (accessed Jan. 13, 2022).
[620] Calculation opportunity cost of time for completing and submitting Form I-864A, Contract Between Sponsor and Household Member: ($39.55 per hour * 1.75 hours) = $69.21 (rounded) per petitioner.
[621] Source for I-864EZ time burden estimate: USCIS. "Instructions for Affidavit of Support Under Section 213A of the INA (Form I-864EZ)." OMB No. 1615-0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864ezinstr.pdf* (accessed Jan. 13, 2022).
[622] Calculation opportunity cost of time for completing and submitting Form I-864EZ, Affidavit of Support Under Section 213A of the INA: ($39.55 per hour * 2.5 hours) = $98.88 (rounded).

DHS notes that we are unable to determine the number of filings of Form I-864EZ and, therefore, rely on the annual cost estimate developed for Form I-864.

There is also no filing fee associated with filing Form I-864W with USCIS. However, DHS estimates the time burden associated with filing this form is 60 minutes (1 hour) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.[623] Therefore, using the average total rate of compensation of $39.55 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864EZ will be $39.55 per petitioner.[624] However, DHS notes that we are unable to determine the number of filings of Form I-864W and, therefore, rely on the annual cost estimate developed for Form I-864.

ii. Costs of Proposed Regulatory Changes

In this section, DHS estimates costs of the proposed rule relative to No Action Baseline. The primary source of quantified new costs for the proposed rule would be from an additional 1.5 hours increase in the time burden estimate to complete Form I-485 for applicants who are subject to the public charge ground of inadmissibility.[625] The additional time burden is required to collect information based on factors such as age; health; family status; assets, resources, and

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[623] Source for I-864W time burden estimate: USCIS. "Instructions for Request for Exemption for Intending Immigrant's Affidavit of Support (Form I-864W)." OMB No. 1615-0075. Expires Sept. 30, 2021. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-864winstr.pdf* (accessed Jan. 13, 2022).

[624] Calculation opportunity cost of time for completing and submitting Form I-864W: ($39.55 per hour * 1.0 hours) = $39.55.

[625] To be clear, these form changes will not affect applicants who are exempt from the public charge ground of inadmissibility listed in proposed 8 CFR 212.23.

financial status; and education and skills, so that USCIS could determine whether an applicant would be inadmissible to the United States based on the public charge ground.

The proposed rule would include additional instructions as well as additional questions for filing Form I-485 for applicants who are subject to the public charge ground of inadmissibility and, as a result, those applicants would spend additional time reading the instructions increasing the estimated time to complete the form. The current estimated time to complete Form I-485 is 6 hours and 25 minutes (6.42 hours). For the proposed rule, DHS estimates that the time burden for completing Form I-485 would increase by 1.5 hours. Therefore, in the proposed rule, the time burden to complete Form I-485 would be 7 hours and 55 minutes (7.92 hours).

The following cost is a new cost that would be imposed on the population applying to adjust status using Form I-485 for applicants who are subject to the public charge ground of inadmissibility. Table 21 shows the estimated new annual costs that the proposed rule would impose on individuals seeking to adjust status using Form I-485 for applicants who are subject to the public charge ground of inadmissibility with a 1.5-hour increase in the time burden estimate for completing Form I-485.

Table 21. Total New Quantified Direct Costs of the Proposed Rule.

Form	Estimated Annual Population	Total Annual Cost
Form I-485, Application to Register Permanent Residence or Adjust Status	**501,520**	
Opportunity Cost of Time – Additional to No Action Baseline (Current) Costs		$12,871,511
Total New Quantified Costs of the Proposed Rule		**$12,871,511**

Source: USCIS analysis.

The time burden includes the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.[626] Using the total rate of compensation for minimum wage of $17.11 per hour, DHS currently estimates the opportunity cost of time for completing and filing Form I-485 would be $25.67 per applicant.[627] Therefore, using the total population estimate of 501,520 annual filings for Form I-485 for applicants who are subject to the public charge ground of inadmissibility, DHS estimates the current total opportunity cost of time associated with completing Form I-485 is approximately $12,871,511 annually.[628]

iii. Cost Savings of the Proposed Regulatory Changes

DHS anticipates that the proposed rule would produce some quantitative cost savings relative to both baselines. DHS proposes that T nonimmigrants applying for adjustment of status will no longer need to submit Form I-601 seeking a waiver on public charge grounds of inadmissibility. The existing regulations at 8 CFR 212.18 and 8 CFR 245.23 stating that T nonimmigrants are required to obtain waivers are not in line with the Violence Against Women Act Reauthorization Act of 2013 (VAWA 2013).[629] T nonimmigrants are exempt from public charge inadmissibility under the statute, and therefore never should have required a waiver in

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[626] Source: USCIS. "Instructions for Application to Register Permanent Residence or Adjust Status (Form I-485)." OMB No. 1615-0023. Expires Mar. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf* (accessed Jan. 12, 2022).
[627] Calculation for opportunity cost of time for filing Form I-485: ($17.11 per hour * 1.5 hours) = $25.67 (rounded) per applicant.
[628] Calculation: Form I-485 estimated opportunity cost of time ($17.11 per hour * 1.5 hours) * Estimated annual population filing Form I-485 (501,520) = $17.11 *1.5*501,520=$12,871,511(rounded) annual opportunity cost of time for filing Form I-485.
[629] *See* Pub. L. 113–4, 127 Stat. 54 (Mar. 7, 2013).

order to adjust status. The proposed rule would align the regulation with the statute. DHS estimates the cost savings for this population will be $15,359 annually.

Table 22 shows the total population between FY 2014 and FY 2018 that filed form I-601. Over the 5-year period the population of individuals who have applied for adjustment of status ranged from a low of 6 in FY 2018 to a high of 35 in FY 2014. On average, the annual population of individuals over five fiscal years who filed Form I-601 and applied for adjustment of status with a T nonimmigrant status is 16.

Table 22. Total Population who filed Form I-601, Application for Waiver of Grounds of Inadmissibility and Applied for Adjustment of Status with a T Nonimmigrant status, Fiscal Year 2014 to 2018.

Fiscal Year	Total Receipts
2014	35
2015	11
2016	9
2017	19
2018	6
Total	**80**
5-year average	**16**

Source: USCIS analysis of data provided by USCIS, Policy and Research Division (Jan. 10, 2022)

DHS considers the historical data from FY 2014 to FY 2018 as the basis to form an estimated population projection of receipts for Form I-601 for T nonimmigrants who are adjusting status for the 10-year period beginning in FY 2022. Based on the average annual population of I-601 filers between FY 2014 and FY 2018, DHS projects that 16 T nonimmigrants who are applying for adjustment of status will no longer need to file Form I-601. DHS uses the effective minimum wage base plus weighted average benefit of $17.11 per hour to estimate the opportunity cost of time for these individuals since they are not likely to be participating in the

labor market. DHS previously estimated the time burden to complete the Form I-601 as 1.75 hours, including the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.[630] Thus, DHS estimates the opportunity cost of time for completing Form I-601 to be $479.08.[631] Based on the population estimate and the filing fee of $930 for Form I-601, the total estimated cost for filing fees for the all 16 estimated filers would be approximately $14,880.[632] The sum of the filing fee results in an estimated total annual savings of $15,359 resulting from the proposed rule, including the opportunity cost of time and filing fees.[633]

iv. Familiarization Costs

A likely impact of the proposed rule relative to both baselines is that various individuals and other entities will incur costs associated with familiarization with the provisions of the rule. Familiarization costs involve the time spent reviewing a rule. A noncitizen might review the rule to determine whether they are subject to the proposed rule. To the extent an individual who is directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule.

In addition to those being directly regulated by the rule, a wide variety of other entities would likely choose to read the rule and incur familiarization costs. For example, immigration

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[630] Source: USCIS. "Instructions for Application for Waiver of Grounds of Inadmissibility (Form I-601)." OMB No. 1615-0029. Expires July. 31, 2023. Available at: *https://www.uscis.gov/sites/default/files/document/forms/i-601instr.pdf* (accessed Jan. 20, 2022).
[631] Calculation: (Form I-601, time burden) * (Estimated annual applicants for Form I-601) * (Hourly wage) = 1.75 * 16 *$17.11= $479.08 (rounded) per applicant.
[632] Calculation: Filing fee* Estimated annual applicants for Form I-601 = $930*16=$14,880.
[633] Calculation: Total savings ($15,359) =$479.08+$14,880=$15,359 (rounded).

lawyers, immigration advocacy groups, health care providers of all types, benefits-administering agencies, nonprofit organizations, nongovernmental organizations, and religious organizations, among others, may want to become familiar with the provisions of this proposed rule. DHS believes such nonprofit organizations and other advocacy groups might choose to read the rule to provide information to noncitizens and associated households who may be subject to the rule. Familiarization costs incurred by those not directly regulated are indirect costs. Indirect impacts are borne by entities that are not specifically regulated by this rule but may incur costs due to changes in behavior related to this rule.

DHS estimates the time that would be necessary to read the rule would be approximately 3 to 4 hours per person, resulting in opportunity costs of time. DHS assumes the average professional reads technical documents at a rate of about 250 to 300 words per minute. An entity, such as a nonprofit or advocacy group, may have more than one person who reads the proposed rule. Using the average total rate of compensation as $39.55 per hour for all occupations, DHS estimates that the opportunity cost of time will range from about $118.65 to $158.20 per individual who must read and review the final rule.[634] However, DHS is unable to estimate the number of people that would familiarize themselves with this rule. As such, DHS is

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[634] Calculation: (Average total compensation for all occupations) * (Time to read proposed rule – lower bound) = (Opportunity cost of time [OCT] to read proposed rule) = $39.55 * 3 hours = $118.65 OCT per individual to read proposed rule, 3 hours (rounded) = (approximately 60,000 words/300)/60
Calculation: (Average total compensation for all occupations) * (Time to read proposed rule – upper bound) = (Opportunity cost of time [OCT] to read proposed rule) = $39.55 * 4 hours = $158.20 OCT per individual to read proposed rule, 4 hours= (approximately 60,000 words/250)/60
Average total compensation for all occupation ($39.55): *See* Economic News Release, *Employer Cost for Employee Compensation (September 2021)*, U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group. *Available at https://www.bls.gov/news.release/archives/ecec_12162021.pdf* (last modified December 17, 2021).

unable to quantify this cost. DHS requests comments on other possible indirect impacts of the rule and appropriate methodologies for quantifying these non-monetized potential impacts.

v. Transfer Payments of Proposed Regulatory Changes

DHS also considers transfer payments from the Federal and State governments to certain individuals who receive public benefits that would be more likely to occur under the proposed regulatory changes as compared to the No Action Baseline. While the proposed rule follows closely the approach taken in the 1999 Interim Field Guidance, it contains two changes that may have an effect on transfer payments. First, the proposed rule provides that, in any application for admission or adjustment of status in which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by a noncitizen during periods in which the noncitizen was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility. Second, under the proposed rule, when making a public charge inadmissibility determination, DHS will also not consider any public benefits that were received by noncitizens who are eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the INA, 8 U.S.C. 1157, including services described under 8 U.S.C. 1522(d)(2) provided to an "unaccompanied alien child" as defined under 6 U.S.C. 279(g)(2). Individuals covered by these exclusions may be more likely to participate in public benefit programs for the limited period of time that they are in such status or eligible for such benefits. This clarification could lead to an increase in public benefit participation by certain persons (most of whom would likely not to be subject to the public charge ground of inadmissibility in any event). This change could increase transfer payments from the Federal, Tribal, State, territorial, and local governments to certain individuals.

DHS is unable to quantify the effects of these changes but welcomes public comments on the matter.

vi. Benefits of Proposed Regulatory Changes

The primary benefit of the proposed rule would be time savings of individuals directly and indirectly affected by the proposed rule. By clarifying standards governing a determination that a noncitizen is inadmissible or ineligible to adjust status on the public charge ground, the proposed rule would reduce time spent by the affected population who are making decisions to apply for adjustment of status or enrolling or disenrolling in public benefit programs. For example, when noncitizens make decisions on whether to adjust status or to enroll or disenroll in public benefit programs, they may spend time gathering information or consulting attorneys. The proposed rule would reduce the time spent making these decisions. Specifically, the proposed rule provides clarity on inadmissibility on the public charge ground by codifying certain definitions, standards, and procedures. Listing the categories of noncitizens exempt from the public charge inadmissibility ground adds clarity as to which noncitizens are subject to the public charge determination and will help to reduce uncertainty and confusion. However, DHS is unable to quantify the reduction in time spent gathering information or consulting attorneys. DHS does not have data on how much time individuals would spend in making a decision on whether to adjust status or to enroll or disenroll in public benefit programs. DHS welcomes public comment on this benefit.

vii. Total Estimated and Discounted Costs

To compare costs over time, DHS applied a 3 percent and a 7 percent discount rate to the total estimated costs and savings associated with the proposed rule.[635] Table 23 presents a summary of the total direct costs, savings, and net costs in the proposed rule.

Table 23. Summary of Estimated Total Direct Costs and Cost Savings of the Proposed Rule

	Total Annual Costs/Savings	Costs/Savings over 10-year Period
Annual Costs	$12,871,511	$128,715,110
Annual Cost Savings	$15,359	$153,590
Annual Net Costs[1]	$12,856,152	$128,561,520

Source: USCIS Analysis
[1] Annual Net Costs= Annual Costs – Annual Savings

Over the first 10 years of implementation, DHS estimates the undiscounted direct costs of the proposed rule would be approximately $128,715,110, the cost savings $153,590, and the net costs $128,561,520. In addition, as seen in Table 24, DHS estimates that the 10-year discounted net cost of this proposed rule to individuals applying to adjust status who would be required to undergo review for determination of inadmissibility based on public charge would be approximately $109,665,584 at a 3-percent discount rate and approximately $90,296,232 at a 7-percent discount rate.

Table 24. Discounted Costs

	Costs over 10-year Period	**Savings over 10-year Period**	**Net Costs over 10-year Period**
Total Undiscounted Costs/Savings	$128,715,110	$153,590	$128,561,520
Total Costs/Savings at 3% Discount Rate	$109,796,599	$131,015	$109,665,584

[635] *See* OMB. *Circular A-4*. September 17, 2003. Available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*.

Total Costs/Savings at 7% Discount Rate	$90,404,107	$107,875	$90,296,232
Source: USCIS Analysis.			

viii. Costs to the Federal Government

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs and services provided without charge to certain applicants and petitioners. *See* section 286(m) of the INA, 8 U.S.C. 1356(m). DHS notes that USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs, such as salaries and benefits for clerical positions, officers, and managerial positions, plus an amount to recover unassigned overhead (e.g., facility rent, IT equipment and systems) and immigration benefits provided without a fee charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the service in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. Therefore, DHS has established the fee for the adjudication of Form I-485, Application to Register Permanent Residence or Adjust Status.

DHS notes the time required for USCIS to review the additional information collected in Form I-485 when the proposed rule is finalized includes the additional time to adjudicate the underlying benefit request. DHS notes that the proposed rule may increase USCIS' costs associated with adjudicating immigration benefit requests. DHS estimates that the increased time to adjudicate the benefit request will result in an increased employee cost of approximately $14

million per year.[636] USCIS currently does not charge a filing fee for other forms affected by this proposed rule do not currently charge a filing fee, including Form I-693, Medical Examination and Vaccination Record; Affidavit of Support forms (Form I-864, Form I-864A, Form I-864EZ, and I-864W); Form I-912, Request for Fee Waiver, and Form I-407, Record of Abandonment of Lawful Permanent Resident Status. While filing fees are not charged for these forms, the cost to USCIS is captured in the fee for I-485. Future adjustments to the fee schedule may be necessary to recover the additional operating costs and will be determined at USCIS' next comprehensive biennial fee review.

c. Pre-Guidance Baseline

As noted above, the Pre-Guidance Baseline represents a state of the world in which the 1999 NPRM, 1999 Interim Field Guidance, and the 2019 Final Rule were not enacted. The Pre-Guidance Baseline is included in this analysis in accordance with OMB Circular A-4, which directs agencies to include a pre-statutory baseline in an analysis if substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action.[637] DHS previously has not performed a regulatory analysis on the regulatory costs and benefits of the 1999 Interim Field Guidance and, therefore, includes a Pre-Guidance Baseline in this analysis for clarity and completeness. We present the Pre-Guidance Baseline to provide a more informed picture on the overall impacts of the 1999 Interim Field

[636] Office of Performance and Quality data received on December 30, 2021. The increase in employee cost is based on estimates of additional adjudication time due to the proposed rule, at compensation rates approximated by General Schedule wage data for USCIS employees.
[637] *See* OMB. *Circular A-4, pp. 15-16*. September 17, 2003. Available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf*.

Guidance since its inception, while recognizing that many of these impacts have been realized already.

The 2022 proposed rule would affect individuals who apply for adjustment of status because these individuals would be subject to inadmissibility determinations based on the public charge ground as long as the individual is not in a category of applicant that is exempt from the public charge ground of inadmissibility. In order to estimate the effect of the proposed rule relative to Pre-Guidance baseline, DHS revisits the state of the world for both the Pre-Guidance baseline and the No Action baseline. The state of the world in the Pre-Guidance baseline is one in which the 1999 Interim Field Guidance was never enacted. The state of the world in the No Action baseline is one in which the 1999 Interim Field Guidance was enacted and has been in practice. In order to estimate the effect of the 2022 proposed rule relative to the Pre-Guidance baseline, DHS considers the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline as well as the changes in this proposed rule relative to the No Action Baseline. Since the latter has already been discussed in the No Action Baseline Section, the rest of this section focuses on estimating the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline.

PRWORA and IIRIRA generated considerable public confusion about noncitizen eligibility for public benefits and the related question of whether the receipt of Federal, State, or local public benefits for which a noncitizen may be eligible renders them likely to become a public charge. According to the literature, these laws led to sharp reductions in the use of public benefit programs by immigrants between 1994 to 1997. This phenomenon is referred to as a chilling effect, which describes immigrants disenrolling from or forgoing enrollment in public benefit programs due to fear or confusion regarding: (1) the immigration consequences of public

benefit receipt; or (2) the rules regarding noncitizen eligibility for public benefits.[638, 639, 640] The state of the world before the 1999 NPRM and 1999 Field Guidance reflected growing public confusion over the meaning of the term "public charge" in immigration law, which was undefined, and its relationship to the receipt of Federal, State, or local public benefits.

The U.S. Department of Agriculture (USDA) published a study shortly after PRWORA took effect. The study found that the number of people receiving food stamps fell by over 5.9 million between summer 1994 and summer 1997.[641] The study notes that enrollment in the food stamps program was falling during this period, possibly due to strong economic growth, but the decline in enrollment was steepest among legal immigrants. Under PRWORA, legal immigrants were facing significantly stronger restrictions under which most of them would become ineligible to receive food stamps in September 1997. The study found that enrollment of legal immigrants in the food stamps program fell by 54 percent, accounting for 14 percent of the total decline. USDA also observed that

> Restrictions on participation by legal immigrants "appear to have deterred participation by their children, many of whom retained their eligibility for food stamps. Participation among U.S. born children living with their legal immigrant parents fell faster than participation among children living with native-born parents. The number of participating children living with legal immigrants fell by 37 percent, versus 15 percent for children living with native-born parents."[642]

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[638] Fix, M. E., & Passel, J. S. (1999). *Trends in noncitizens' and citizens' use of public benefits following welfare reform*. The Urban Institute. *http://webarchive.urban.org/publications/408086.html*.
[639] Bell, S. H. (2001). *Why are welfare caseloads falling?* The Urban Institute. *https://www.urban.org/sites/default/files/publications/61341/310302-Why-Are-Welfare-Caseloads-Falling-.pdf*.
[640] Lofstrom, M., & Bean, F. D. (2002). Assessing immigrant policy options: Labor market conditions and post-reform declines in immigrants' receipt of welfare. *Demography* 39(4), 617–63.
[641] *See* Genser, J. (1999). *Who is leaving the Food Stamps Program: An analysis of Caseload Changes from 1994 to 1997*. Washington, D.C.: U.S. Department of Agriculture, Food and Nutrition Service, Office of Analysis, Nutrition, and Evaluation. Available at *https://www.fns.usda.gov/snap/who-leaving-food-stamp-program-analysis-caseload-changes-1994-1997* (accessed Jan. 27, 2022).
[642] *Id.* at 2-3.

Another study found evidence of a "chilling effect" following enactment of PRWORA and IIRIRA where noncitizen enrollment in public benefits programs declined more steeply than U.S. citizen enrollment over the period 1994 through 1997.[643] The study found that "[w]hen viewed against the backdrop of overall declines in welfare receipt for all households, use of public benefits among noncitizen households fell more sharply (35 percent) between 1994 and 1997 than among citizen households (14 percent). These patterns hold for welfare (defined here as TANF, SSI, and General Assistance), food stamps, and Medicaid."[644] The study authors concluded that rising incomes did not explain the relatively high disenrollment rate and suggested that the steeper declines in noncitizens' use of benefits was attributable more to the chilling effects of PRWORA and public charge, among other factors. The study authors expected that, over time, eligibility changes would become more important because, under PRWORA, most immigrants admitted after August 22, 1996, would be ineligible for most means-tested public benefits for at least 5 years after their entry to the country.[645]

As described in the 1999 NPRM, the 1999 NPRM sought to reduce the negative public health and nutrition consequences generated by the existing confusion and to provide noncitizens with better guidance as to the types of public benefits that would be considered or not considered in reviews for inadmissibility on the public charge ground.

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[643] *See* Fix, M.E., and Passel, J.S. (1999). *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994 – 1997*. Washington, D.C.: The Urban Institute. Available at *https://www.urban.org/research/publication/trends-noncitizens-and-citizens-use-public-benefits-following-welfare-reform* (accessed Jan. 27, 2022).
[644] *Id.* at 1-2.
[645] *Id.*

By providing a clear definition of "likely at any time to become a public charge" and identifying the types of public benefits that would be considered in public charge inadmissibility determinations, the proposed rule could alleviate confusion and uncertainty with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits not only causes considerable harm, but also can have a range of downstream consequences for the general public. By describing the kinds of public benefits, if received, that could result in a determination that a person is likely at any time to become a public charge, immigrants would be able to maintain available supplemental benefits that are designed to aid individuals in gaining and maintaining employment. The proposed rule also lists the factors that must be considered in making public charge determinations. The proposed rule makes clear that the past or current receipt of public assistance, by itself, would not lead to a determination of being a public charge without also considering the minimum statutory factors.

The primary impact of the proposed rule relative to the Pre-Guidance Baseline would be an increase in transfer payments from the Federal and State governments to individuals. As discussed above, the chilling effect due to PRWORA and IIRIRA resulted in a decline in participation in public benefit programs among noncitizens and foreign-born individuals and their families. The proposed rule would alleviate confusion and uncertainty, as compared to the Pre-Guidance Baseline, by clarifying the ground of public charge inadmissibility. This clarification would lead to an increase in public benefit participation by certain persons (most of

whom would likely not be subject to the public charge ground of inadmissibility in any event).[646] Due to the increase in transfer payments, DHS believes that the rule may also have indirect effects on businesses in the form of increased revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, and agricultural producers who grow foods that are eligible for purchase using SNAP benefits. However, DHS is unable to quantify this indirect effect due to the significant passage of time between the 1999 Interim Field Guidance and this proposed rule. DHS invites comment on the indirect effects of the proposed rule on businesses and nonprofits.

DHS believes that the rule may have indirect effects on State, local, and/or Tribal government as compared to the Pre-Guidance baseline. There may be costs to various entities associated with familiarization of and compliance with the provisions of the rule, including salaries and opportunity costs of time to monitor and understand regulation requirements, disseminate information, and develop or modify information technology (IT) systems as needed. It may be necessary for many government agencies to update guidance documents, forms, and web pages. It may be necessary to prepare training materials and retrain staff at each level of government, which will require additional staff time and will generate associated costs. However, DHS is unable to quantify these effects. DHS invites comment on the indirect effect of the proposed rule on State, local, and/or Tribal governments.

Due to the passage of a significant amount of time between the 1999 Interim Field Guidance and this proposed rule, DHS cannot quantify the effects that this proposed rule would

[646] Relatively few noncitizens in the United States are both subject to INA 212(a)(4) and eligible for public benefits prior to adjustment of status (see Table 3 above).

have as compared to the Pre-Guidance baseline. For instance, although DHS could estimate the chilling effects of PRWORA and IIRIRA and the countervailing effects of the 1999 Interim Field Guidance, it would be challenging to apply such estimates to the 20-plus years since that time. A wide number of changes in the economy and Federal laws occurred during that time period that might have affected public benefits usage among the population most likely to be affected by the proposed rule. Thus, DHS is unable to quantify these effects.

d. Regulatory Alternative

Consistent with E.O. 12866, DHS considered the costs and benefits of available regulatory alternatives. One alternative that DHS considered was a rulemaking similar to the rulemaking that comprised the 2018 NPRM and the 2019 Final Rule (the Alternative). DHS considered both the effects of the 2018 NPRM and the 2019 Final Rule because the indirect disenrollment effects associated with the rulemaking began prior to the publication of the Final Rule. DHS sought to avoid underestimating the full impact the rulemaking had on the public.

As compared to the 1999 Interim Field Guidance, the 2019 Final Rule expanded the criteria used in public charge inadmissibility determinations. The 2019 Final Rule broadened the definition of "public charge," both by adding new public benefits for consideration and by implementing a test under which receipt of the designated benefits for more than 12 months in the aggregate within a 36-month period would render a person a public charge.

The additional public benefits in the 2019 Final Rule were non-emergency Medicaid for non-pregnant adults, federally funded nutritional assistance (SNAP), and certain housing assistance, subject to certain exclusions for certain populations. In addition, the 2019 Final Rule required noncitizens to submit a declaration of self-sufficiency on a new form designated by

DHS and required the submission of extensive initial evidence relating to the public charge ground of inadmissibility.

The 2019 Final Rule also provided, with limited exceptions, that certain applicants for extension of stay or change of nonimmigrant status would be required to demonstrate that they have not received, since obtaining the nonimmigrant status they seek to extend or change and through the time of filing and adjudication, one or more public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in 1 month counts as 2 months).

In order to estimate the effect of the Alternative relative to the Pre-Guidance baseline, DHS sums the effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline with the effect of the Alternative relative to the No Action Baseline. Detailed discussion of the costs, benefits, and transfer payments of the Alternative relative to the No Action baseline is discussed below. The effect of the 1999 Interim Field Guidance relative to the Pre-Guidance baseline under the Alternative is the same as discussed in the assessment of the proposed rule. This effect is discussed in the Pre-Guidance Baseline Section.

i. Direct Costs

Total direct costs resulting from the 2019 Final Rule were estimated to be approximately $35.4 million per year.[647] Total annual transfer payment decreases related to the 2019 Final Rule were estimated to be about $2.47 billion resulting from individuals (most of whom would likely not have been subject to the 2019 Final Rule) disenrolling from or forgoing enrollment in

[647] *See* "Inadmissibility on Public Charge Grounds," Final Rule, 84 FR 41292 (Aug. 14, 2019), as amended by *Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 2, 2019).

public benefit programs.[648] For purposes of estimating the costs and benefits of the Alternative, DHS updated its estimates of the total annual direct cost of and change in the total annual transfer payment increases related to the 2019 Final Rule.

After updating the costs from the 2019 Final Rule, DHS estimates the total annual direct costs of the Alternative would be approximately $86 million, as detailed below. These costs would include about $48,639,917 to the public to fill out and submit a new form I-944,[649] Declaration of Self-Sufficiency, which would require noncitizens to declare self-sufficiency and provide a range of evidence that DHS required for making public charge inadmissibility determinations under the 2019 Final Rule. There is also an estimated additional time burden cost of $25,743,022 to applicants who would be required to fill out and submit Form I-485;[650] $40,426 to public charge bond obligors for filing Form I–945,[651] Public Charge Bond; $946 to filers for submitting Form I–356,[652] Request for Cancellation of Public Charge Bond; and

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[648] *Ibid.*

[649] Cost to file form I-944: Form I-944 Time burden estimated in the 2019 Final Rule (4.5 hour) *Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) * Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 17 (501,520) = $38,614,532 (rounded), Cost of obtaining credit report and score cost from Experian ($19.99) * Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 17 (501,520) = $10,025,385(rounded). Total cost to file form I-944 = $38,614,532+$10,025,385= $48,639,917. DHS uses this burden hour estimate for consistency with the analysis in the 2019 Final Rule.

[650] Cost to file form I-485: Form I-485 Time burden increase estimated in the 2019 Final Rule (3 hour) * Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) * Total Population Subject to Review for Inadmissibility on the Public Charge Ground from Table 17 (501,520) = $25,743,022 (rounded).

[651] Cost to file form I-945: Form I-945 Time burden estimated in the 2019 Final Rule (1 hour) *Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) * Estimated annual population in the 2019 Final Rule who would file Form I-945 (960) = $16,426 (rounded).

[652] Cost to file form I-356: (Form I-356 Time burden estimated in the 2019 Final Rule (0.75 hour) *Average total rate of compensation discussed in Section VI.A.5 using the effective minimum wage ($17.11) + Filing fee estimated in the 2019 Final Rule ($25)) * Estimated annual population in the 2019 Final Rule who would file Form I-356 (25) = ($12.83+$25) *25 = $946 (rounded).

$7,201,007 to applicants for completing and filing forms I-129,[653] Petition for a Nonimmigrant Worker, $151,338 for I-129CW,[654] Petition for a CNMI-Only Nonimmigrant Transitional Worker, and $4,045,372 for I-539,[655] Application to Extend/Change Nonimmigrant Status to demonstrate that the applicant has not received public benefits since obtaining the nonimmigrant status that they are seeking to extend or change.[656]

ii. Transfer Payments

As noted above, the August 2019 Final Rule was also associated with widespread indirect effects, primarily with respect to those who were not subject to the August 2019 Final Rule in the first place, such as U.S.-citizen children in mixed-status households, longtime lawful permanent residents who are only subject to the public charge ground of inadmissibility in limited circumstances, and noncitizens in a humanitarian status who would be exempt from the public charge ground of inadmissibility in the context of adjustment of status.[657] DHS expects that similar effects would occur under the Alternative. DHS estimates that the total annual transfer

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[653] Cost to file form I-129: Form I-129 Time burden increase estimated in the 2019 Final Rule (0.5 hour) * the total compensation from BLS discussed in Section VI.A.5 ($39.55) * Estimated annual population who would file Form I-129 using FY2014-FY2018 data from USCIS (364,147) = $7,201,007 (rounded).
[654] Cost to file form I-129CW: Form I-129 CW Time burden increase estimated in the 2019 Final Rule (0.5 hour) * the total compensation from BLS discussed in Section VI.A.5 ($39.55) * Estimated annual population who would file Form I-129CW using FY2014-FY2018 data from USCIS (7,653) = $151,338 (rounded).
[655] Cost to file form I-539: Form I-539 Time burden increase estimated in the 2019 Final Rule (0.5 hour) * the total compensation from BLS discussed in Section VI.A.5 ($39.55) * Estimated annual population who would file Form I-539 using FY2014-FY2018 data from USCIS (204,570) = $4,045,372 (rounded).

[657] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), *Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis 1* (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021). Several additional studies are cited in the discussion below, repeatedly finding that it was those individuals not subject to INA 212(a)(4) who typically chose to disenroll or refrain from enrolling in public benefits, due to fear of adverse consequences from the 2019 Final Rule throughout its rulemaking process. Relatively few noncitizens in the United States are both subject to INA 212(a)(4) and eligible for public benefits prior to adjustment of status (see Table 3 above).

payments from the Federal Government to public benefits recipients who are members of households that include noncitizens would be approximately $3.79 billion lower, as detailed below.

As noted below, DHS is unable to estimate the downstream effects that would result from such decreases. DHS expects that in some cases, a decrease in transfers associated with one program or service would include an increase in transfers associated with other programs or services, such as programs or services delivered by nonprofits.

In the 2019 Final Rule, DHS estimated the reduction in transfer payments by multiplying a disenrollment/forgone enrollment rate of 2.5 percent by an estimate of the number of public benefits recipients who are members of households that include noncitizens (i.e., the population that may disenroll) and then multiplying the estimated population by an estimate of the average annual benefit received per person or household for the covered benefits.

In the 2019 Final Rule, DHS estimated the 2.5 percent disenrollment/forgone enrollment rate by dividing the annual number of adjustment of status applications by the estimated noncitizen population of the United States.[658] DHS estimated this disenrollment rate as the five-year average annual number of persons seeking to adjust status or as a percentage of the noncitizen population in the United States (2.5 percent). This estimate reflected an assumption that 100 percent of such noncitizens and their household members are either enrolled in or

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[658] Calculation, based on 5-year averages over the period fiscal year 2012–2016: (544,246 receipts for I-485, adjustments of status / 22,214,947 estimated noncitizen population) * 100 = 2.45 = 2.5% (rounded), 84 FR 41292, 41392-93 (Aug. 14, 2019). Source for estimated noncitizen population of 22,214,947, *see* U.S. Census Bureau American Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2012 – 2016 American Community Survey (ACS) 5-year Estimates. Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

eligible for public benefits and will be sufficiently concerned about potential consequences of the policies proposed in this rule to disenroll or forgo enrollment in public benefits. The resulting transfer estimates will therefore have had a tendency toward overestimation, at least as it relates to the population that would be directly regulated by the 2019 Final Rule. DHS assumed that the population likely to disenroll from or forgo enrollment in public benefits programs in any year would be the expected annual number of individuals intending to apply for adjustment of status. But as discussed below, this approach appears to have resulted in an underestimate due to the documented chilling effects associated with the 2019 Final Rule among other parts of the noncitizen and citizen populations who were not part adjustment applicants or members of households of adjustment applicants and other noncitizens who were not adjustment applicants. For the low estimate, DHS uses the same methodology, but with updated data, to estimate the low rate of disenrollment or forgone enrollment due to the Alternative would be 3.1 percent.[659]

Since the publication of the 2019 Final Rule, several studies have been published that discuss the impact of the 2019 Final Rule on the rate of public benefit disenrollment or forgone enrollment, i.e., a chilling effect. Studies conducted between 2016 and 2020 show reductions in enrollment in public benefits programs due to a chilling effect ranging from 4.1 percent to 36.1

[659] Calculation, based on 5-year averages over the period fiscal year 2014–2018: (690,837 receipts for I-485, adjustments of status / 22,289,490 estimated noncitizen population) * 100 = 3.1 percent (rounded). 22,289,490 (estimated noncitizen population): U.S. Census Bureau American Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2014 – 2018 American Community Survey (ACS) 5-year Estimates. Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

percent.[660, 661] The results of these studies depend on several factors, such as the sample examined or the period or method of analysis. The Public Charge NPRM was published in late 2018 and the 2019 Final Rule was finalized in August 2019. The 2019 Final Rule became effective in February 2020. However, after subsequent legal challenges to the 2019 Final Rule, it was vacated in March 2021. Given this timeline, several studies show that the largest observed disenrollment from or forgone enrollment in public benefit programs occurred between 2018 and 2019.[662] Capps, R., Fix, M., & Batalova, J. (2020) looked at benefits usage across all groups and observed that enrollment was declining over this time period for all groups (albeit with consistently more significant reductions in enrollment among noncitizens or those in mixed-status households than among the public at large). Capps, R., Fix, M., & Batalova, J. (2020) attributed the reduction in enrollment in the overall U.S. population to the improving economic conditions between 2016 and 2019, although other factors may also have influenced these rates.[663]

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[660] Capps, R., Fix, M., & Batalova, J. (2020). *Anticipated "Chilling Effects" of the public-charge rule are real: Census data reflect steep decline in benefits use by immigrant families*. Migration Policy Institute, available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 19, 2022). Note: This study finds a 4.1-percent decrease in Medicaid/CHIP enrollment from 2016 to 2017 for low-income noncitizens.

[661] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), *Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis 1* (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).

[662] Capps, R., Fix, M., & Batalova, J. (2020). *Anticipated "Chilling Effects" of the public-charge rule are real: Census data reflect steep decline in benefits use by immigrant families*. Migration Policy Institute, available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 19, 2022).

[663] *See, e.g.*, Capps, R., Fix, M., & Batalova, J. "Anticipated "Chilling Effects" of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families." Available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Feb. 10, 2022).

Some studies examined different samples such as low-income noncitizens,[664] low-income citizen,[665] adults in immigrant families,[666] immigrant families with children,[667] or low-income immigrant adults.[668] The studies show that the 2019 Final Rule directly or indirectly affected adult noncitizens and indirectly affected adults in immigrant families who are lawful permanent residents or naturalized citizens.[669] One study shows that immigrant families with children reported a greater reduction in public benefit enrollment (20.4 percent) compared to immigrant families without children (10 percent) in 2019.[670] Another study shows the reduction in public benefit program enrollment also differs by the type of the public benefit program examined.[671] This study found reduced enrollment in SNAP, Medicaid/CHIP, and TANF and General Assistance (TANF/GA), but noted that the reduction was relatively larger for TANF/GA (12 percent annualized reduction among low-income individuals from 2016 to 2019) and SNAP (12

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[664] *Ibid*. Capps, R., Fix, M., & Batalova, J. (2020).
[665] Sommers, B, Allen, H, Bhanja, A, Blendon, R, Orav, J, and Epstein, A, (2020). *Assessment of Perceptions of the Public Charge Rule Among Low-Income Adults in Texas*, JAMA Network.
[666] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (Urban Institute, 2019).
[667] Haley, J M., Kenney, G M., Bernstein, H, and Gonzalez, D (2020), *One in Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019*, Urban Institute, *https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019.pdf*.
[668] Babey, S H, Wolstein, J, Shimkhada, R, Ponce N A (2021). *One in 4 Low-Income Immigrant Adults in California Avoided Public Programs, Likely Worsening Food Insecurity and Access to Health Care*, UCLA Center for Health Policy Research. *https://healthpolicy.ucla.edu/publications/Documents/PDF/2021/publiccharge-policybrief-mar2021.pdf*.
[669] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (Urban Institute, 2019).
[670] Haley, J M., Kenney, G M., Bernstein, H, and Gonzalez, D (2020), *One in Five Adults in Immigrant Families with Children Reported Chilling Effects on Public Benefit Receipt in 2019*, Urban Institute, *https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019.pdf*.
[671] Capps, R., Fix, M., & Batalova, J. (2020). *Anticipated "Chilling Effects" of the public-charge rule are real: Census data reflect steep decline in benefits use by immigrant families*. Migration Policy Institute, available at *https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real* (accessed Jan. 19, 2022).

percent annualized reduction), as compared to Medicaid/CHIP (7 percent annualized reduction).[672] The study observed that participation in all three programs fell about twice as fast over the 2016 to 2019 period for U.S.-citizen children with noncitizens in the household as for those with only citizens in the household.

Due to the uncertainty of the rate of disenrollment or forgone enrollment in public benefits programs related to the 2019 Final Rule, DHS uses a range of rates to estimate the change in Federal Government transfer payments that would be associated with the Alternative.[673] For estimating the lower bound of the range, DHS uses a 3.1 percent rate of disenrollment or forgone enrollment in public benefits programs based on the estimation methodology from the 2019 Final Rule (as discussed above).

DHS bases the upper bound of the range on the results of studies by Bernstein, Gonzalez, Karpman, and Zuckerman (Bernstein et al. [2019][674] and Bernstein et al. [2020][675]), which provided an average of 14.7 percent rate of disenrollment or forgone enrollment in public

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[672] *Ibid.* See Figure 1 for changes in participation by low-income noncitizens from 2016 to 2019 (37 percent decrease in SNAP, 37 percent decrease in TANF/GA, and 20 percent decrease in Medicaid/CHIP). DHS calculates annualized reduction among low-income noncitizen from 2016 to 2019: for TANF/GA (12 percent) =37 percent / 3 years =12 (rounded), for SNAP (12 percent) = 37 percent / 3 years = 12(rounded), and Medicaid/CHIP (7 percent) = 20 percent / 3 years = 7(rounded).

[673] DHS seeks comment on potential methodologies to adjust these estimates to account for changes since the 2019 Final Rule was first implemented, including: (1) disenrollment or benefits avoidance that has already occurred; (2) changes in the economy; (3) changes to public benefits eligibility; and (4) changes in public benefits participation rates following the vacatur of the 2019 Final Rule.

[674] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2019), *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (Urban Institute), available at *https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_8.pdf* (accessed Feb. 13, 2021).

[675] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019* (Urban Institute), available at *https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_3.pdf* (accessed Feb. 13, 2021).

benefits programs. These studies observed reductions in the public benefit participation rate for adults in immigrant families in 2018 and 2019. Bernstein et al. (2019; 2020) uses a population of nonelderly adults who are foreign born or living with a foreign-born relative in their household – this matches the population of mixed-status households for which DHS estimates for the Alternative the rate of disenrollment from or foregone future enrollment in a public benefits program. Other studies such as Capps et al. (2020) examined a chilling effect among low-income families, which only covers a subset of the population of interest. One study showed that in 2020, more than one in six adults in immigrant families (17.8 percent) reported avoiding a noncash government benefit program or other help with basic needs because of green card concerns or other worries about immigration status or enforcement. More than one in three adults in families in which one or more members do not have a green card (36.1 percent) reported these broader chilling effects.[676] Looking at the subset of the noncitizen population, however, shows a larger chilling effect as this smaller group likely experienced a larger disenrollment rate. However, this small population does not capture other noncitizen groups that might have also disenrolled in public benefits. DHS chose to use the two Bernstein studies described below, because the studies analyze the impact on the broader population of noncitizens, which includes the smaller subsets identified in the other studies.

Bernstein et al. (2019; 2020) examined beneficiaries of SNAP, Medicaid, and housing subsidies, which are public benefits programs considered for public charge inadmissibility

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[676] Bernstein, H., Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman (2021), *Immigrant Families Continued Avoiding the Safety Net during the COVID-19 Crisis 1* (The Urban Institute), available at *https://www.urban.org/research/publication/immigrant-families-continued-avoiding-safety-net-during-covid-19-crisis* (accessed Feb. 13, 2021).

determinations under the Alternative. However, Bernstein et al. (2019; 2020) does not include other public benefit programs considered for public charge inadmissibility determinations under the Alternative, such as TANF or SSI. Since DHS estimates the change in transfer payments for Medicaid, SNAP, TANF, SSI, and housing subsidies, DHS uses an overall average rate of chilling effect, based on the chilling effects reported by Bernstein et al. (2019; 2020).

Bernstein et al. (2019) showed that 13.7 percent of adults in immigrant families reported that they (i.e., the respondent) or a family member avoided a noncash government benefit program in 2018. Bernstein et al. (2020) showed that 15.6 percent of adults in immigrant families reported that they (the respondent) or a family member avoided a noncash government benefit program in 2019. DHS calculates a simple average of these two percentages (13.7 percent and 15.6 percent) from the Bernstein et al. (2019; 2020) to arrive at the estimated annual decrease of 14.7 percent described above.

DHS uses 8.9 percent as the primary estimate in order to estimate the annual reduction in Federal Government transfer payments associated with the Alternative, which is the midpoint between the lower estimate (3.1 percent) and the upper estimate (14.7 percent) of disenrollment or forgone enrollment in public benefits programs. DHS chose to provide a range due to the difficulty in estimating the effect on various populations. For example, the lower bound estimate of a 3.1 percent rate of disenrollment or foregone enrollment may result in an underestimate to the extent that covered noncitizens may choose to disenroll from or forego enrollment in public benefits programs sooner than in the same year that the noncitizen applies for adjustment of status. Some noncitizens and members of their households may adjust their behavior in anticipation of eventually applying for adjustment of status, but not know exactly when they will submit such applications.

As well, DHS acknowledges that the upper bound estimate of a 14.7 percent rate of disenrollment or foregone enrollment may result in an underestimate since the Bernstein et al. (2019; 2020) studies did not include all the public benefit programs such as TANF and SSI. As shown in Capps, R., Fix, M., & Batalova, J. (2020) study, cash assistance public benefit programs, TANF/GA and SNAP experienced a greater rate in disenrollment relative to Medicaid/CHIP. On the other hand, the upper bound estimate of a 14.7 percent rate of disenrollment or foregone enrollment may result in an overestimate. While Capps, R., Fix, M., & Batalova, J. (2020) study noted that during the period between 2016 and 2019 the participation rate in public benefits was declining for both U.S. citizens and noncitizens (albeit at significantly different rates), the disenrollment rates produced in the Bernstein et al. (2019; 2020) studies did not control for the overall trend in the U.S. population at large.

Bernstein et al. (2019; 2020) population estimates are based on a nationally representative survey of nonelderly adults who are foreign born or living with a foreign-born relative in their household. From there, Bernstein et al. (2019; 2020) compare the disenrollment year over year for Medicaid/CHIP, SNAP, or housing subsidies to arrive at an overall disenrollment rate of 13.7 percent in 2018 and 15.6 percent in 2019. Many studies discussed earlier in this section similarly attempted to measure the disenrollment or forgone enrollment rate due to the 2019 Final Rule. These studies show reductions in enrollment in public benefits programs due to a chilling effect ranging from 4.1 percent to 36.1 percent. DHS uses the estimates of the chilling effect by Bernstein et al. (2019; 2020) as a proxy because their population closely matches the population of interest for this analysis whereas the other studies looked at a smaller subset of the population. DHS welcomes public comments on the estimation of the disenrollment or foregone enrollment rate used in this analysis.

Using the primary estimate rate of disenrollment or forgone enrollment in public benefits programs of 8.9 percent, DHS estimates that the total annual reduction in transfer payments from the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs. Based on the data presented below, DHS estimates that the total annual reduction in transfer payments paid by the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately $3.79 billion for an estimated 819,599 individuals and 31,940 households across the public benefits programs examined.

To estimate the reduction in transfer payments that under the Alternative, DHS must multiply the estimated disenrollment/forgone enrollment rate of 8.9 percent by: (1) the population of analysis (i.e., those who may disenroll from or forgo enrollment in Medicaid, SNAP, TANF, SSI, and Federal rental assistance, the programs that would be covered under the Alternative);[677] and (2) the value of the forgone benefits.

Table 25 shows the estimated population of public benefits recipients who are members of households that include noncitizens. DHS assumes that this is the population of individuals who may disenroll from or forgo enrollment in public benefits under the Alternative. The table also shows estimates of the number of households with at least one noncitizen family member

[677] DHS recognizes that the proposed rule would create a similar disincentive to receipt of TANF and SSI by certain noncitizens, although DHS expects that the scope and relative simplicity of this rule, and the fact that these benefits have been considered in public charge inadmissibility determinations since 1999, would mitigate chilling effects to some extent. Note that the Medicaid enrollment does not include child enrollment because the 2019 Final Rule did not include Medicaid or CHIP for children.

that may have received public benefits.[678, 679] Based on the number of households with at least one noncitizen family member, DHS estimates the number of public benefits recipients who are members of households that include at least one noncitizen who may have received benefits using the U.S. Census Bureau's estimated average household size for foreign-born households.[680, 681]

In order to estimate the population of public benefits recipients who are members of households that include at least one noncitizen DHS uses a 5-year average of public benefit recipients' data from FY 2014 to FY 2018. Although data from FY 2019 to FY 2021 were available, DHS opted not to use data from these years because the populations of public benefit

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[678] *See* U.S. Census Bureau. *American Community Survey 2020 Subject Definitions*. Available at *https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2020_ACSSubjectDefinitions.pdf* (accessed Jan. 14, 2022). The foreign-born population includes anyone who was not a U.S. citizen or a U.S. national at birth, which includes respondents who indicated they were a U.S. citizen by naturalization or not a U.S. citizen. The ACS questionnaires do not ask about immigration status but uses responses to determine the U.S. citizen and non-U.S.-citizen populations as well as to determine the native and foreign-born populations. The population surveyed includes all people who indicated that the United States was their usual place of residence on the survey date. The foreign-born population includes naturalized U.S. citizens, lawful permanent residents, noncitizens with a nonimmigrant status (e.g., foreign students), noncitizens with a humanitarian status (e.g., refugees), and noncitizens present without a lawful immigration status.

[679] To estimate the number of households with at least 1 foreign-born noncitizen family member that have received public benefits, DHS calculated the overall percentage of total U.S. households that are foreign-born noncitizen as 6.9 percent. Calculation: [22,289,490 (Foreign-born noncitizens) / 322,903,030 (Total U.S. population)] * 100 = 6.9 percent. *See* U.S. Census Bureau American Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates." Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

[680] *See* U.S. Census Bureau American Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates." Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022). The average foreign-born household size is reported as 3.31 persons. DHS multiplied this figure by the estimated number of benefits-receiving households with at least 1 foreign-born noncitizen receiving benefits to estimate the population living in benefits-receiving households that include a foreign-born noncitizen.

[681] In this analysis, DHS uses the American Community Survey (ACS) to develop population estimates along with beneficiary data from each of the benefits program. DHS notes that the ACS data were used for the purposes of this analysis because it provided a cross-sectional survey based on a random sample of the population each year including current immigration classifications. Both surveys reflect use by noncitizens of the public benefits included in the Alternative.

recipients in those years were affected by both the 2019 Final Rule and the COVID-19 pandemic.

Consistent with the approach DHS took in the 2019 Final Rule, DHS's methodology was as follows. First, for most of the public benefits programs analyzed, DHS estimated the number of households with at least one person receiving such benefits by dividing the number of people that received public benefits by the U.S. Census Bureau's estimated average household size of 2.63 for the U.S. total population.[682] Second, DHS estimated the number of such households with at least one noncitizen resident. According to the U.S. Census Bureau population estimates, the noncitizen population is 6.9 percent of the U.S. total population.[683] While there may be some variation in the percentage of noncitizens who receive public benefits, including depending on which public benefits program one considers, DHS assumes in this economic analysis that the percentage holds across the populations of the various public benefits programs. Therefore, to estimate the number of households with at least one noncitizen who receives public benefits, DHS multiplies the estimated number of households for each public benefits program by 6.9 percent. This step may introduce uncertainty into the estimate because the percentage of households with at least one noncitizen may differ from the percentage of noncitizens in the population. However, if noncitizens tend to be grouped together in households, then an overestimation of households that include at least one noncitizen is more likely.

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[682] *See* U.S. Census Bureau Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates." Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).
[683] *Ibid*. Calculation: [22,289,490 (Foreign-born noncitizens) / 322,903,030 (Total U.S. population)] * 100 = 6.9 percent.

DHS then estimates the number of noncitizens who received benefits by multiplying the estimated number of households with at least one noncitizen who receives public benefits by the U.S. Census Bureau's estimated average household size of 3.31 for those who are foreign-born.[684]

Table 25. Estimated Population of Public Benefits Recipients Who Are Members of Households that Include at Least One Noncitizen, FY 2014 – FY 2018

Public Benefits Program	Average Annual Total Number of Recipients[1]	Households that May Be Receiving Benefits[2]	Benefits-Receiving Households with at Least One Noncitizen[3]	Public Benefits Recipients Who Are Members of Households Including at Least One Noncitizen[4]
Medicaid[5]	38,070,865	14,475,614	998,817	3,306,084
Supplemental Nutrition Assistance Program (SNAP)[6]	*N/A*	21,630,217	1,492,485	4,940,125
Temporary Assistance for Needy Families (TANF)[7]	2,836,073	1,078,355	74,406	246,284
Supplemental Security Income (SSI)[8]	8,250,666	3,137,135	216,462	716,489
Federal Rental Assistance[9]	*N/A*	5,199,000	358,731	*N/A*

Sources and Notes: USCIS analysis of data provided by the Federal agencies that administer each of the listed public benefits program or research organizations.

[1] Figures for the average annual total number of recipients are based on 5-year averages, whenever possible, for the most recent 5-year period for which data are available (2014-2018). For more information, please *see* the document "Economic Analysis Supplemental Information for Analysis of Public Benefits Programs" in the online docket for the proposed rule.

[2] DHS estimated the number of households by dividing the number of people that received public benefits by the U.S. Census Bureau's estimated average household size of 2.63 for the U.S. total population. *See* U.S. Census Bureau Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2014 – 2018 American Community Survey (ACS) 5-year Estimates." Available at *https://data.census.gov/cedsci* (accessed Jan. 14, 2022). Note that HUD Rental Assistance and HUD Housing Choice Vouchers programs report data on the household level. Therefore, DHS did not use this calculation to estimate the average household size and instead used the data as reported.

[684] *See* U.S. Census Bureau Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2018 American Community Survey (ACS) 5-year Estimates." Available at *https://data.census.gov/cedsci* (accessed Jan. 13, 2022).

[3] To estimate the number of benefits-receiving households with at least one foreign-born noncitizen, DHS multiplied the estimated number of households receiving benefits in the United States by 6.9 percent, which is the foreign-born noncitizen population as a percentage of the U.S. total population using U.S. Census Bureau population estimates. *See Ibid*.

[4] To estimate the population of public benefits recipients who are members of households that include foreign-born noncitizens, DHS multiplied the estimated number of benefits-receiving households with at least one foreign-born noncitizen by the average household size of 3.31 for those who are foreign-born using the U.S. Census Bureau's estimate. *See Ibid*.

[5] Medicaid – *See* U.S. Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS). Monthly Medicaid & CHIP Application, Eligibility Determination, and Enrollment Reports & Data. Available at *https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/monthly-reports/index.html*. Accessed Jan. 14, 2022. Note that each annual total was calculated by averaging the monthly enrollment population over each year. The numbers that were used for the average can be found in Table 1A: Medicaid and CHIP for each month, using the number listed as the "Total Across All States." through the Sept. 2018 report and in the Data.Medicaid.gov interactive database from Oct. 2018 onwards. DHS used "Total Medicaid Enrollment" data for its estimates. Also, note that per enrollee Medicaid costs vary by eligibility group and State. Note that consistent with the analysis conducted for the 2019 Final Rule, the Medicaid enrollment does not include child enrollment. Although DHS did not include Medicaid CHIP for children in the 2019 Final Rule, DHS is aware of evidence of disenrollment effects that would not be captured here

[6] SNAP – *See* U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program. "National and/or State Level Monthly and/or Annual Data: Persons, Households, Benefits, and Average Monthly Benefit per Person & Household," "FY69 through FY22." Available at *https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap*. Accessed Jan. 14, 2022. The number of households receiving SNAP benefits in this table is not calculated using average U.S. household size. Rather, it is 5-year average (FY2014-FY2018) of the number of households as reported by the U.S. Department of Agriculture from the website listed in this footnote.

[7] TANF – *See* U.S. HHS, Office of Family Assistance. "TANF Caseload Data." Available at *https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2018*; *https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2017*;

https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2016;

https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2015; and

https://www.acf.hhs.gov/ofa/data/tanf-caseload-data-2014. Accessed Jan. 14, 2022. Note: The number of participants is listed for the fiscal year, not calendar year since the dollar amount of assistance received is only presented for fiscal years.

[8] SSI – *See* U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. Annual Report of the Supplemental Security Income Program, 20182021. Table IV.B9, p. 4847. Available at *https://www.ssa.gov/OACT/ssir/SSI21/ssi2021.pdf*; *https://www.ssa.gov/oact/ssir/SSI18/ssi2018.pdf*. Accessed Jan. 14, 2022. *See* also U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. "SSI Recipients by State and County, 2018," available at *https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2018/index.html*. "SSI Monthly Statistics, January 2018." Available at *https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2018/table01.html*. Accessed Jan. 14, 2022. Note that the link shows fiscal year 2018 data, but links to data for other fiscal years can also be accessed.

[9] Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total recipient households: *See* Center on Budget and Policy Priorities. National and State Housing Fact Sheets & Data. *See* Federal Rental Assistance, "Download the Data." and Housing Choice Voucher Program, "Download the Data." Available at *https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data*. Accessed Jan. 14, 2022. Note that "Federal Rental Assistance" includes HUD Section 8 Project-based Rental Assistance, HUD Section 8 Housing Choice Vouchers, HUD Public Housing, HUD Section 202/811, and USDA Section 521.

In order to estimate the economic impact of disenrollment or forgone enrollment from public benefits programs, it is necessary to estimate the typical annual public benefits a person receives for each public benefits program included in this economic analysis. DHS estimated the annual benefit received per person for each public benefit program in Table 26. For each benefit

but Medicaid, the benefit per person is calculated for each public benefit program by dividing the average annual program payments for public benefits by the average annual total number of recipients.[685] For Medicaid, DHS uses Centers for Medicare & Medicaid Services' (CMS) median per capita expenditure estimate across all States for 2018. To the extent that data are available, these estimates are based on 5-year annual averages for the years between FY 2014 and FY 2018.

Table 26. Estimated Annual Benefit per Person, by Public Benefit Program, FY 2014 – FY 2018.

Public Benefits Program	Average Annual Total Number of Recipients	Average Annual Public Benefits Payments	Annual Benefit per Person or Household[1]
Medicaid[2]	*N/A*	*N/A*	$8,168
Supplemental Nutrition Assistance Program (SNAP)[3]	43,948,386	$66,161,985,577	$1,505
Temporary Assistance for Needy Families (TANF)[4]	2,836,073	$3,840,827,013	$1,354
Supplemental Security Income (SSI)[5]	8,250,666	$54,684,600,000	$6,628
Federal Rental Assistance[6]	5,199,000	$43,834,000,000	$8,431

Sources and notes: USCIS analysis of data provided by the Federal agencies that administer each of the listed public benefits program or research organizations.

Note that figures for the average annual total number of recipients and the annual total public benefits payments are based on 5-year averages, whenever possible, for the most recent 5-year period for which data are available (2014-2018). For more information, please *see* the document "Economic Analysis Supplemental Information for Analysis of Public Benefits Programs" in the online docket for the proposed rule. Note that DHS acknowledges that there could be overlap among participants in the listed public benefit programs.

[1] Calculation: Average Annual Benefit per Person = (Average Annual Public Benefits Payments) / (Average Annual Total Number of Recipients). Note: Calculations may not be exact due to rounding.

[2] Medicaid- Data on Medicaid Per Capita Expenditures available at *https://www.medicaid.gov/state-overviews/scorecard/how-much-states-spend-per-medicaid-enrollee/index.html*. Accessed Jan. 14, 2022. Table 1. Per capita Expenditure Estimates for States and Data Quality Assessment (2018). Column "Total," Row "Median"

[685] DHS notes that the amounts presented may not account for overhead costs associated with administering each of these public benefits programs. The costs presented are based on amounts recipients have received in benefits as reported by benefits-granting agencies.

[3] SNAP – Data on the annual program expenditure on public benefits: *See* U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program. "National and/or State Level Monthly and/or Annual Data: Persons, Households, Benefits, and Average Monthly Benefit per Person & Household," "FY69 through FY22 National View Summary." Available at *https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap*. Accessed Jan. 14, 2022.

[4] TANF – Data on annual program expenditure on public benefits: *See* U.S. HHS, Office of Family Assistance. "TANF Financial Data." *See* Table A.1.: Federal TANF and State MOE Expenditures Summary by ACF-196 Spending Category, Federal Funds for Basic Assistance. Available at *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2018*; *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2017*; *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2016*; *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2015*; and *https://www.acf.hhs.gov/ofa/data/tanf-financial-data-fy-2014*. Accessed Jan. 14, 2022.

[5] SSI – Data on the annual program expenditure on public benefits: *See* U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. *Annual Report of the Supplemental Security Income Program, 2021*. Table IV.B9—SSI Recipients with Federally Administered Payments in Current-Payment Status, p. 48 (recipients) and Table IV.C1.—SSI Federal Payments, p. 48. Available at: *https://www.ssa.gov/OACT/ssir/SSI21/ssi2021.pdf*. Accessed Jan. 14, 2022; *See also* U.S. Social Security Administration, Office of Research, Statistics & Policy Analysis. "SSI Recipients by State and County, Table 1" Available at *https://www.ssa.gov/policy/docs/statcomps/ssi_sc/2018/index.html*. Accessed Jan. 14, 2022. Note that the link shows fiscal year 2018 data, but links to data for other fiscal years can also be accessed.

[6] Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total expenditure on public benefits: *See* Center on Budget and Policy Priorities. *National and State Housing Fact Sheets & Data*. Federal Rental Assistance, "Download the Data" and Housing Choice Voucher Program, "Download the Data." Available at *https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data*. Accessed Jan. 14, 2022.

As discussed earlier, using the midpoint reduction rate of 8.9 percent, Table 27 shows the estimated population that would be likely to disenroll or forgo enrollment in a federally-funded public benefits program under the Alternative.

Table 27. Estimated Population of Members of Households Including at Least One Noncitizen Likely to Disenroll or Forgo Enrollment in a Public Benefits Program.

Public Benefits Program	Public Benefits Recipients Who Are Members of Households Including at Least One Noncitizen[1]	Benefits-Receiving Households with At Least One Noncitizen [1]	Members of Benefits-Receiving Households Including Noncitizens Based On A 8.9% Rate of Disenrollment or Forgone Enrollment[2]	Benefits-Receiving Households with At Least One Noncitizen Based On A 8.9% Rate of Disenrollment or Forgone Enrollment[3]
Medicaid	3,306,084		294,241	
Supplemental Nutrition Assistance Program (SNAP)	4,940,125		439,671	

Temporary Assistance for Needy Families (TANF)	246,284		21,919	
Supplemental Security Income (SSI)	716,489		63,768	
Federal Rental Assistance	N/A	358,731	N/A	31,927
Totals	**9,208,982**	**358,731**	**819,599**	**31,927**

Source: USCIS analysis.

Notes:

[1] *See* Table 25.

[2] To estimate the population that could choose to disenroll/forgo enrollment, DHS multiplied the population of public benefits recipients who are members of benefits-receiving households including foreign-born noncitizens by 8.9 percent (the midpoint reduction rate). Note that 819,599 total does not include individuals who may have disenrolled from the HUD Federal Rental Assistance. The 31,927 total reports the number of households who may have disenrolled from the HUD Federal Rental Assistance, but the number of individuals affected by the disenrollment from HUD Federal Rental Assistance may be greater than 31,927 because there is more than one member per household.

[3] To estimate the population that could choose to disenroll/forgo enrollment, DHS multiplied the number of households with at least one foreign-born noncitizen by 8.9 percent (the midpoint reduction rate).

Multiplying the 501,520 status adjustments per year (per Table 17, above) by 3.31 (average size of households that include foreign-born non-citizens) and then applying average benefit program participation rates—calculated by dividing the enrollment numbers in Table 26 by the total U.S. population—would yield the following alternative estimates: Medicaid: 222,000; SNAP: 14,000; TANF: 42,000; SSI: 26,000.

Table 27 shows the estimated population that would be likely to disenroll from or forgo enrollment in federally-funded public benefits programs due to the Alternative's indirect chilling effect. The table also presents the previously estimated average annual benefit per person who received benefits for each of the public benefits programs.[686] Multiplying the estimated population that would be likely to disenroll from or forgo enrollment in public benefit programs due to the Alternative by the average annual benefit per person who received benefits for each of the public benefit programs, DHS estimates that the total annual reduction in transfer payments

[686] As previously noted, the average annual benefits per person amounts presented may not account for overhead costs associated with administering each of these public benefits programs since they are based on amounts recipients have received in benefits as reported by benefits-granting agencies. Therefore, the costs presented may underestimate the total amount of transfer payments to the Federal Government.

paid by the Federal Government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately $3.79 billion for an estimated 819,599 individuals and 31,927 households across the public benefits programs examined. As these estimates reflect only Federal financial participation in programs whose costs are shared by U.S. States, there may also be additional reductions in transfer payments from U.S. States to individuals who may choose to disenroll from or forgo enrollment in a public benefits program.

Since the Federal share of Federal financial participation (FFP) varies from State to State, DHS uses the average Federal Medical Assistance Percentages (FMAP) across all States and U.S. territories of 59 percent to estimate the total reduction of transfer payments for Medicaid.[687] Table 28 shows that Federal annual transfer payments for Medicaid would be reduced by about $2.4 billion under the Alternative. From this amount and the average FMAP of 59 percent, DHS calculates the total reduction in transfer payments from Federal and State governments to individuals to be about $4.07 billion.[688] From that total amount, DHS estimates State annual transfer payments would be reduced by approximately $1.67 billion due to the disenrollment or forgone enrollment of foreign-born noncitizens and their households from Medicaid.[689]

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[687] *See* Dept. of Health and Human Servs. Notice, Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2016, through September 30, 2017, 80 FR 73779 (Nov. 25, 2015).

[688] Total annual Federal and State reduction in transfer payment for Medicaid = (Estimated Reduction in Transfer Payments Based On A 8.9% Rate of Disenrollment or Forgone Enrollment for Medicaid from Table 28) / (average Federal Medical Assistance Percentages (FMAP) across all States and U.S. territories) = $2,403,360,488 / 0.59 = $4.07 billion (rounded).

[689] State annual reduction in transfer payment for Medicaid=Total annual Federal and State reduction in transfer payment for Medicaid – Federal annual reduction in transfer payment for Medicaid = $4.07 billion – $2.40 billion = $1.67 billion.

For SNAP, TANF and Federal Rental Assistance, the Federal Government pays 100 percent of benefits values included in Table 26 and Table 27 above. Therefore, Table 28 shows the Federal share of annual transfer payments would be about $0.96 billion for SNAP, TANF, and Federal Rental Assistance.[690] Federal, State, and local governments share administrative costs (with the Federal Government contributing approximately 50 percent) for SNAP.[691] Federal TANF funds can be used for administrative TANF costs, up to 15 percent of a state's family assistance grant amount. [692] For SSI, the maximum Federal benefit changes yearly. Effective January 1, 2018, the rate was $750 monthly for an individual and $1,125 for a couple. Some States supplement the Federal SSI benefit with additional payments, which make the total SSI benefit levels higher in those States.[693] Moreover, the estimates of expenditures for Federal Rental relate to purely Federal funds, although housing programs are administered by State and local public housing authorities which may supplement program funding. Those authorities would incur administrative costs. However, DHS is unable to quantify the State portion of the

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[690] From Table 29 transfer payment reduction for SNAP is $661,704,855, for TANF is $29,678,326, and for Federal Rental Assistance is $269,177,034. Calculation of the sum: $960,560,215 ($0.96 billion).
[691] *See* USDA, Characteristics of Supplemental Nutrition Assistance Program Households: Fiscal Year 2019 at 1, available at *https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2019.pdf*, (accessed Feb. 14, 2022). DHS notes that because State participation in these programs may vary depending on the type of benefit provided, we were unable to fully or specifically quantify the impact of State transfers. For example, the Federal Government funds all of SNAP food expenses, but only 50 percent of allowable administrative costs for regular operating expenses (per section 16(a) of the Food and Nutrition Act of 2008). See also USDA, FNS Handbook 901, p. 41 available at: *https://fns-prod.azureedge.net/sites/default/files/apd/FNS_HB901_v2.2_Internet_Ready_Format.pdf*). Similarly, Federal Medical Assistance Percentages (FMAP) in some HHS programs like Medicaid can vary from between 50 percent to an enhanced rate of 100 percent in some cases (*see* HHS, Notice, Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2016 through September 30, 2017, 80 FR 73779 (Nov. 25, 2015)). Since the State share of Federal financial participation (FFP) varies from State to State, DHS uses the average FMAP across all States and U.S. territories of 59 percent to estimate the amount of State transfer payments.
[692] *See* 45 CFR 263.13(a)(i).
[693]*See* SSI information available at *https://www.ssa.gov/policy/docs/statcomps/supplement/2018/ssi.html*.

transfer payment due to a lack of data related to State-level administration of these public benefit programs. DHS welcomes public comments on data related to the State contributions and share of costs of these public benefit programs.

Table 28. Total Estimated Reduction in Transfer Payments Paid by the Federal Government Due to Disenrollment or Forgone Enrollment in Public Benefits Programs.

Public Benefits Program	Public Benefits Recipients Who Are Members of Households Including Noncitizens Based On A 8.9% Rate of Disenrollment or Forgone Enrollment	Households Receiving Benefits with At Least One Noncitizen Based On A 8.9% Rate of Disenrollment or Forgone Enrollment	Average Annual Benefit per Person or Household	Estimated Reduction in Transfer Payments Based On A 8.9% Rate of Disenrollment or Forgone Enrollment
Medicaid[1]	294,241		$8,168	$2,403,360,488
Supplemental Nutrition Assistance Program (SNAP)	439,671		$1,505	$661,704,855
Temporary Assistance for Needy Families (TANF)	21,919		$1,354	$29,678,326
Supplemental Security Income (SSI)	63,768		$6,628	$422,654,304
Federal Rental Assistance		31,927	$8,431	$269,177,034
Totals	**819,599**	**31,927**	***N/A***	**$3,786,575,007**

Source: USCIS analysis.

Notes:

[1] Neither HHS nor DHS are able to disaggregate emergency and non-emergency Medicaid expenditures. Therefore, this rule considers overall Medicaid expenditures. Note that per enrollee Medicaid costs vary by eligibility group and State.

As shown in Table 29, applying the same calculations using the low estimate of 3.1 percent DHS estimates that the total annual reduction in transfer payments paid by the Federal government to individuals who may choose to disenroll from or forgo enrollment in public

benefits programs would be approximately $1.32 billion for an estimated 285,479 individuals and 11,121 households across the public benefits programs examined. For the high estimate of 14.7 percent DHS estimates that the total annual reduction in transfer payments paid by the Federal government to individuals who may choose to disenroll from or forgo enrollment in public benefits programs would be approximately $6.25 billion for an estimated 1,353,720 individuals and 52,733 households across the public benefits programs examined.

Table 29. Comparison of the High, Low, and Primary Total Estimated Reduction in Transfer Payments Paid by the Federal Government Due to Disenrollment or Forgone Enrollment in Public Benefits Programs.

Public Benefits Program	Estimated Annual Reduction in Transfer Payments Based on a 3.1% Rate of Disenrollment or Forgone Enrollment	Estimated Annual Reduction in Transfer Payments Based on an 8.9% Rate of Disenrollment or Forgone Enrollment	Estimated Annual Reduction in Transfer Payments Based on a 14.7% Rate of Disenrollment or Forgone Enrollment
Medicaid[1]	$837,130,152	$2,403,360,488	$3,969,598,992
Supplemental Nutrition Assistance Program (SNAP)	$230,481,720	$661,704,855	$1,092,927,990
Temporary Assistance for Needy Families (TANF)	$10,337,790	$29,678,326	$49,020,216
Supplemental Security Income (SSI)	$147,214,508	$422,654,304	$698,087,472
Federal Rental Assistance	$93,758,293	$269,177,034	$444,595,776
Totals	**$1,318,922,463**	**$3,786,575,007**	**$6,254,230,446**

In the 2019 Final Rule, DHS anticipated that USCIS' review of public charge inadmissibility would substantially increase the number of denials for adjustment of status applicants because of the rule's provisions and process for public charge determinations.

However, USCIS data show that the 2019 Final Rule did not result in the anticipated increase in denials of adjustment of status applications based on the public charge ground of inadmissibility during the period it was in effect between February 2020 and March 2021. During the year the 2019 Final Rule was in effect, DHS issued only 3 denials and 2 Notices of Intent to Deny based on the totality of the circumstances public charge inadmissibility determination under section 212(a)(4)(A)-(B) of the Act, 8 U.S.C. 1182(a)(4)(A)-(B) . The 2019 Final Rule thus resulted in adverse decisions in only 5 of the 47,555 applications for adjustment of status to which it was applied.[694, 695]

Comparison of the total direct annual cost between the current proposed rule and the Alternative show that the direct costs of the Alternative is greater than that of the proposed rule. Although the Alternative would indirectly have the effect of a larger reduction of transfer payments than the proposed rule, likely primarily among those not regulated by the Alternative, transfer payments are not considered to be costs or benefits of a rule. Rather, they are transfers from one group to another group that do not result in a net gain or loss to society.

For instance, Bernstein et al. (2020) found that the chilling effect on public benefits associated with the 2019 Final Rule is partially attributable to confusion and misunderstanding. That study finds that two-thirds of adults in immigrant families (66.6 percent) were aware of the 2019 Final Rule, and 65.5 percent were confident in their understanding about the rule. Yet only 22.7 percent knew it does not apply to applications for naturalization, and only 19.1 percent

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[694] USCIS Field Operations Directorate (June 2021); USCIS Office of Performance and Quality (June 2021).
[695] USCIS, Field Office Directorate, October 18, 2021.

knew children's enrollment in Medicaid would not be considered in their parents' public charge determinations. These results suggest that under the Alternative, parents might pull their eligible U.S.-citizen children out of crucial benefit programs, and current lawful permanent residents might choose not to enroll in safety net programs for which they might be eligible for fear of risking their citizenship prospects.[696]

iii. Additional Indirect Effects

DHS notes that there would likely be additional indirect effects related to increased disenrollment or forgone enrollment in public benefit programs. In the 2019 Final Rule, DHS recounted at length the many detailed comments received regarding the importance of public benefits programs, and the social harms associated with benefits disenrollment and avoidance.[697] DHS "acknowledge[d] the positive outcomes associated with public benefits programs"[698] and concluded that "the rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children."[699] Similarly, in the RIA accompanying the 2019 Final Rule, DHS wrote that "[d]isenrollment or foregoing enrollment in public benefits programs by aliens who are otherwise eligible could lead to the following:

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[696] Bernstein, H., Dulce Gonzalez, Michael Karpman, and Stephen Zuckerman (2020), *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019* (Urban Institute).
[697] *See, e.g.*, 84 FR at 43130-43134, 41364-41392. DHS notes that this conclusion is similar to the INS's reasoning when issuing the 1999 Interim Field Guidance. In issuing that policy, the INS wrote that a policy that led to benefits disenrollment or avoidance would have "an adverse impact not just on the potential recipients, but on public health and the general welfare." *See* 64 FR at 28692.
[698] *See* 84 FR at 41381.
[699] *See* 84 FR at 41493.

- Worse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children, and reduced prescription adherence;
- Increased use of emergency rooms and emergent care as a method of primary health care due to delayed treatment;
- Increased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated;
- Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient;
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment."[700]

DHS also—

> recognize[d] that reductions in federal and state transfers under federal benefit programs may have impacts on state and local economies, large and small businesses, and individuals. For example, the rule might result in reduced revenues for healthcare providers participating in Medicaid, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.[701]

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[700] *See* DHS, Regulatory Impact Analysis: Inadmissibility on Public Charge Grounds Final Rule, RIN 1615-AA22 at 109 (Aug. 2019), *available at https://www.regulations.gov/document/USCIS-2010-0012-63741* (accessed Jan. 27, 2022).
[701] *Id*. at 6.

In another section of the 2019 Final Rule, DHS stated that it had "determined that the rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children."[702]

At the time of the 2019 Final Rule's issuance, one study estimated that as many as 3.2 million fewer persons might receive Medicaid due to fear and confusion surrounding the 2019 Final Rule, which could lead to as many as 4,000 excess deaths every year.[703] The same study estimated that 1.8 million fewer people would use SNAP benefits, even though many of them are U.S. citizens. In addition, loss of Federal housing security would likely lead to worse health outcomes and dependence on other elements of the social safety net for some persons. As noted above, Executive Orders 12866 and 13563 direct agencies to select regulatory approaches that maximize net benefits while giving consideration, to the extent appropriate and consistent with law, to values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. In addition, Executive Order 13563 emphasizes the importance of not only quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility, but also considering equity, fairness, distributive impacts, and human dignity. DHS recognizes that many of the indirect effects discussed in this section implicate values such as equity, fairness, distributive impacts, and human dignity. DHS acknowledges that although many of these effects are difficult to quantify, they would be an indirect cost of the Alternative.

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[702] 84 FR 41292, 41493 (Aug. 14,2019).
[703] Leighton Ku, "New Evidence Demonstrates That the Public Charge Rule Will Harm Immigrant Families and Others," HEALTH AFFS (Oct. 9, 2019), *https://www.healthaffairs.org/do/10.1377/hblog20191008.70483/full*.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA),[704] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[705] requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.[706]

The proposed rule does not directly regulate small entities and is not expected to have a direct effect on small entities. It does not mandate any actions or requirements for small entities in the process of a Form I-485 Adjustment of Status requestor seeking immigration benefits. Rather, this proposed rule regulates individuals, and individuals are not defined as "small entities" by the RFA.[707] Based on the evidence presented in this analysis and throughout this preamble, the Secretary of Homeland Security certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. DHS nonetheless welcomes comments regarding potential economic impacts on small entities, which DHS may consider as appropriate in a final rule.

C. Unfunded Mandates Reform Act

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[704] 5 U.S.C. Ch. 6.
[705] Pub. L. 104–121, tit. II, 110 Stat. 847 (5 U.S.C. 601 note).
[706] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act (15 U.S.C. 632).
[707] 5 U.S.C. 601(6).

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and Tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may directly result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. The inflation-adjusted value of $100 million in 1995 is approximately $177.8 million in 2021 based on the Consumer Price Index for All Urban Consumers (CPI–U).[708]

The term "Federal mandate" means a Federal intergovernmental mandate or a Federal private sector mandate.[709] The term "Federal intergovernmental mandate" means, in relevant part, a provision that would impose an enforceable duty upon State, local, or Tribal governments (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[710] The term "Federal private sector mandate" means, in relevant part, a provision that would impose an enforceable duty upon the private sector (except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program).[711]

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[708] *See* BLS, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items, https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202112.pdf.*
Steps in calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the most recent current year available (2021); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100.
Calculation of inflation: [(Average monthly CPI-U for 2021 - Average monthly CPI-U for 1995) / (Average monthly CPI-U for 1995)] * 100 = [(270.970 - 152.383) / 152.383] * 100 = (118.587 / 152.383) * 100 = 0.7782 * 100 = 77.82 percent = 77.8 percent (rounded).
Calculation of inflation-adjusted value: $100 million in 1995 dollars * 1.778 = $177.8 million in 2021 dollars.
[709] *See* 2 U.S.C. 1502(1), 658(6).
[710] 2 U.S.C. 658(5).
[711] 2 U.S.C. 658(7).

This proposed rule does not contain such a mandate, because it does not impose any enforceable duty upon any other level of government or private sector entity. Any downstream effects on such entities would arise solely due to their voluntary choices and would not be a consequence of an enforceable duty imposed by this rule. Similarly, any costs or transfer effects on State and local governments would not result from a Federal mandate as that term is defined under UMRA.[712] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA. DHS has, however, analyzed many of the potential effects of this action in the RIA above. DHS welcomes comments on this analysis.

D. Executive Order 13132 (Federalism)

Executive Order 13132 was issued to ensure the appropriate division of policymaking authority between the States and the Federal Government and to further the policies of the Unfunded Mandates Act. This proposed rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of E.O. 13132, this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. DHS welcomes comments on this assessment.

E. Executive Order 12988 (Civil Justice Reform)

This proposed rule was drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform. This proposed rule was written to provide a clear legal standard for affected

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[712] *See* 2 U.S.C. 1502(1), 658(6).

conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. DHS has determined that this proposed rule meets the applicable standards provided in section 3 of E.O. 12988.

F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

This proposed rule does not have "tribal implications" because, if finalized, it would not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, although there are references to Indian Tribes in this proposed rule. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

G. Family Assessment

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Agencies must assess whether the regulatory action: (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) financially impacts families, if at all, only to the extent such impacts are justified; (6) may be carried out by State or local government or by the family; and (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the determination is affirmative, then the agency must prepare an impact assessment to address criteria specified in the law.

DHS has analyzed this proposed regulatory action in accordance with the requirements of section 654 and determined that this proposed rule does not affect family well-being, and therefore DHS is not issuing a Family Policymaking Assessment.

H. National Environmental Policy Act

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023-01 Rev. 01 and Instruction Manual 023-01-001-01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions ("categorical exclusions") that experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an environmental assessment or environmental impact statement. 40 CFR 1507.3(e)(2)(ii) and 1501.4. The Instruction Manual, Appendix A, Table 1 lists categorical exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual, section V.B.2(a-c).

This proposed rule applies to applicants for admission or adjustment of status as long as the individual is applying for an immigration status that is subject to the public charge ground of

inadmissibility. As discussed in detail above, this proposed rule establishes a definition of public charge and specifies the types of public benefits that DHS would consider as part of its public charge inadmissibility determinations. This list of benefits is the same as under the 1999 Interim Field Guidance that governed public charge inadmissibility determinations for over 20 years. This list of public benefits is narrower than under the 2019 Final Rule. The proposed rule, if finalized, would codify a totality of the circumstances framework for the analysis of the factors, including statutory minimum factors, used to make public charge inadmissibility determinations. The proposed rule does not propose to make changes to the regulations governing public charge bonds.

Given the similarity between the proposed rule and the 1999 Interim Field Guidance with respect to public charge inadmissibility determinations, DHS does not anticipate any change in the number of individuals admitted to the United States under the proposed rule. DHS is unable to quantitatively estimate any such change, and any assessment of potential derivative environmental effects at the national level would be unduly speculative.

DHS has therefore determined that this proposed rule clearly fits within Categorical Exclusion A3(d) in DHS Instruction Manual 023-01-001-01, the Department's procedures for implementing NEPA issued November 6, 2014 (available at *https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf)*, because it interprets or amends a regulation without changing its environmental effect.

This proposed rule is a standalone action to prescribe standards regarding inadmissibility determinations on public charge grounds, and it is not part of a larger action. This proposed rule will not result in any major Federal action that will significantly affect the quality of the human

environment. Furthermore, it presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this proposed rule is categorically excluded from further NEPA review.

I. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-12, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule unless they are exempt.

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the *Federal Register* to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615-0023 in the body of the letter and the agency name. Use only the method under the **ADDRESSES** and **Public Participation** section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Overview of information collection:

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Application to Register Permanent Residence or Adjust Status.

(3) Agency form number, if any, and the applicable component of DHS sponsoring the collection: I-485, Supplement A, and Supplement J; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. The information on Form I-485 will be used to request and determine eligibility for adjustment of permanent residence status. Supplement A is used to adjust status under section 245(i) of the Immigration and Nationality Act. Supplement J is used by employment-based applicants for adjustment of status who are filing or have previously filed Form I-485 as the principal beneficiary of a valid Form I-140 in an employment-based immigrant visa category that requires a job offer.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection I-485 is 690,837 and the estimated hour burden per response is 7.92 hours. The estimated total number of respondents for the information collection Supplement A is 29,213 and the estimated hour burden per response is 1.25 hour. The estimated total number of respondents for the information collection Supplement J is 37,358 and the estimated hour

burden per response is 1 hour. The estimated total number of respondents for the information collection of Biometrics is 690,837 and the estimated hour burden per response is 1.17 hour.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 6,353,583 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this collection of information is $236,957,091.

VII. List of Subjects and Regulatory Amendments

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

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

1. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; section 7209 of Pub. L. 108-458 (8 U.S.C. 1185 note); Title VII of Pub. L. 110-229 (8 U.S.C. 1185 note); 8 CFR part 2; Pub. L. 115-218.

Section 212.1(q) also issued under section 702, Pub. L. 110-229, 122 Stat. 754, 854.

2. 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.

3. 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 that of a lawful permanent resident.

§ 212.21 Definitions.

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

(a) *Likely at any time to become a public charge* means likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

(b) *Public cash assistance for income maintenance* means:

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

(2) Cash assistance for income maintenance under the Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 *et seq.*; or

(3) State, Tribal, territorial, or local cash benefit programs for income maintenance (often called "General Assistance" in the State context, but which also exist under other names).

(c) *Long-term institutionalization at government expense* means long-term government assistance for institutionalization (in the case of Medicaid, limited to institutional services under section 1905(a) of the Social Security Act) received by aliens, including in a nursing home or mental health institution. Long-term institutionalization does not include imprisonment for conviction of a crime or institutionalization for short periods for rehabilitation purposes.

(d) *Receipt (of public benefits).* Receipt of public benefits occurs when a public benefit-granting agency provides public cash assistance for income maintenance or long-term institutionalization at government expense to an alien, where the alien is listed as a beneficiary. Applying for a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits by such alien. Approval for future receipt of a public benefit on one's own behalf or on behalf of another does not constitute receipt of public benefits. An alien's

receipt of public benefits solely on behalf of another individual does not constitute receipt of public benefits. The receipt of public benefits solely by another individual, even if an alien assists with the application process, does not constitute receipt for such alien.

(e) *Government* means any Federal, State, Tribal, territorial, or local government entity or entities of the United States.

§ 212.22 Public charge inadmissibility determination.

(a) *Factors to consider.*

(1) *Consideration of minimum factors:* For purposes of a public charge inadmissibility determination, DHS will 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.*

(2) *Consideration of affidavit of support.* DHS will favorably consider an affidavit of support under section 213A of the INA, when required under section 212(a)(4)(C) or (D) of the Act, that meets the requirements of section 213A of the Act and 8 CFR 213a, in making a public charge inadmissibility determination.

(3) *Consideration of current and/or past receipt of public benefits:* DHS will consider the alien's current and/or past receipt of public cash assistance for income maintenance or long-term institutionalization at government expense (consistent with § 212.21(c)). DHS will consider such receipt in the totality of the circumstances, along with the other factors. DHS will consider the amount and duration of receipt, as well as how recently the alien received the benefits, and

for long-term institutionalization, evidence submitted by the applicant that the applicant's institutionalization violates federal law, including the Americans with Disabilities Act or the Rehabilitation Act. However, current and/or past receipt of these benefits will not alone be a sufficient basis to determine whether the alien is likely at any time to become a public charge.

(4) *Disability alone not sufficient*. A finding that an alien has a disability, as defined by Section 504 of the Rehabilitation Act, will not alone be a sufficient basis to determine whether the alien is likely at any time to become a public charge.

(b) *Totality of the circumstances.* The determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances. No one factor outlined in paragraph (a) of this section, other than the lack of a sufficient affidavit of support, if required, should be the sole criterion for determining if an alien is likely to become a public charge. DHS may periodically issue guidance to adjudicators to inform the totality of the circumstances assessment. Such guidance will consider how these factors affect the likelihood that the alien will become a public charge at any time based on an empirical analysis of the best-available data as appropriate.

(c) *Denial Decision*. Every written denial decision issued by USCIS based on the totality of the circumstances set forth in paragraph (b) of this section will reflect consideration of each of the factors outlined in paragraph (a) of this section and specifically articulate the reasons for the officer's determination.

(d) *Receipt of public benefits while an alien is in an immigration category exempt from public charge inadmissibility.* In an adjudication for an immigration benefit for which the public charge ground of inadmissibility applies, DHS will not consider any public benefits received by an alien during periods in which the alien was present in the United States in an immigration

category that is exempt from the public charge ground of inadmissibility, as set forth in 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(c).

(e) *Receipt of benefits available to refugees.* DHS will not consider any public benefits that were received by an alien who, while not a refugee admitted under section 207 of the Act, is eligible for resettlement assistance, entitlement programs, and other benefits available to refugees admitted under section 207 of the Act, including services described under section 412(d)(2) of the Act provided to an unaccompanied alien child as defined under 6 U.S.C. 279(g)(2).

§ 212.23 Exemptions and waivers for public charge ground of inadmissibility.

(a) *Exemptions*. The public charge ground of inadmissibility under section 212(a)(4) of the Act does not apply, based on statutory or regulatory authority, to the following categories of aliens:

(1) Refugees at the time of admission under section 207 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(2) Asylees at the time of grant under section 208 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(3) Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100–202, 101 Stat. 1329–183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;

(4) Afghan and Iraqi Interpreters, or Afghan or Iraqi nationals employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109–163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111–8, title VI (Mar. 11, 2009), as amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended, Public Law 110–181 (Jan. 28, 2008);

(5) Cuban and Haitian entrants applying for adjustment of status under section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

(6) Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89–732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;

(7) Nicaraguans and other Central Americans applying for adjustment of status under section 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105–100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;

(8) Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105–277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

(9) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101–167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;

(10) Special immigrant juveniles as described in section 245(h) of the Act;

(11) Aliens who entered the United States prior to January 1, 1972, and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(12) Aliens applying for or reregistering for Temporary Protected Status as described in section 244 of the Act in accordance with section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);

(13) Nonimmigrants described in section 101(a)(15)(A)(i) and (ii) of the Act (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(14) Nonimmigrants classifiable as C–2 (alien in transit to U.N. Headquarters) or C–3 (foreign government official), 22 CFR 41.21(d);

(15) Nonimmigrants described in section 101(a)(15)(G)(i), (ii), (iii), and (iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), in accordance with section 102 of the Act and 22 CFR 41.21(d);

(16) Nonimmigrants classifiable as NATO–1, NATO–2, NATO–3, NATO–4 (NATO representatives), and NATO–6 in accordance with 22 CFR 41.21(d);

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

(18) Except as provided in section 212.23(b), individuals who are seeking an immigration benefit for which admissibility is required, including but not limited to adjustment of status under section 245(a) of the Act and section 245(l) of the Act and who:

(i) Have a pending application that sets forth a prima facie case for eligibility for nonimmigrant status under section 101(a)(15)(T) of the Act, or

(ii) Have been granted nonimmigrant status under section 101(a)(15)(T) of the Act, provided that the individual is in valid T nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(19) Except as provided in § 212.23(b),

(i) Petitioners for nonimmigrant status under section 101(a)(15)(U) of the Act, in accordance with section 212(a)(4)(E)(ii) of the Act; or

(ii) Individuals who are granted nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act, who are seeking an immigration benefit for which admissibility is required, including, but not limited to, adjustment of status under section 245(a) of the Act, provided that the individuals are in valid U nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated;

(20) Except as provided in section 212.23(b), any aliens who are VAWA self-petitioners under section 212(a)(4)(E)(i) of the Act;

(21) Except as provided in section 212.23(b), qualified aliens described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under section 212(a)(4)(E)(iii) of the Act;

(22) Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108–136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents);

(23) American Indians born in Canada determined to fall under section 289 of the Act;

(24) Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Public Law 97–429 (Jan. 8, 1983);

(25) Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106–429 under 8 CFR 245.21;

(26) Polish and Hungarian Parolees who were paroled into the United States from November 1, 1989 to December 31, 1991, under section 646(b) of the IIRIRA, Public Law 104–208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note;

(27) Applicants adjusting status who qualify for a benefit under Section 7611 of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116-92, 113 Stat. 1198, 2309 (December 20, 2019) (Liberian Refugee Immigration Fairness), later extended by Section 901 of Division O, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116-260 (December 27, 2020) (Adjustment of Status for Liberian Nationals Extension);

(28) Certain Syrian nationals adjusting status under Public Law 106-378; and

(29) Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

(b) *Limited Exemption.* Aliens described in § 212.23(a)(18) through (21) must submit an affidavit of support under section 213A of the INA if they are applying for adjustment of status based on an employment-based petition that requires such an affidavit of support as described in section 212(a)(4)(D) of the Act.

(c) *Waivers.* A waiver for the public charge ground of inadmissibility may be authorized based on statutory or regulatory authority, for the following categories of aliens:

(1) Applicants for admission as nonimmigrants under 101(a)(15)(S) of the Act;

(2) Nonimmigrants admitted under section 101(a)(15)(S) of the Act applying for adjustment of status under section 245(j) of the Act (witnesses or informants); and

(3) Any other waiver of the public charge ground of inadmissibility that is authorized by law or regulation.

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

4. 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.

5. 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.

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Alejandro N. Mayorkas,

Secretary of Homeland Security.