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**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 103, 212, 213, 214, 245 and 248**

**[CIS No. 2499-10; DHS Docket No. USCIS-2010-0012]**

**RIN 1615-AA22**

**Inadmissibility on Public Charge Grounds**

**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 an alien is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act (INA) because he or she is likely at any time to become a public charge. Aliens 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. Moreover, DHS proposes to require all aliens seeking an extension of stay or change of status to demonstrate that they have not received, are not currently receiving, nor are likely to receive, public benefits as defined in the proposed rule.

DHS proposes to define “public charge” as the term is used in sections 212(a)(4) of the Act. DHS also proposes to define the types of public benefits that are considered in public charge inadmissibility determinations. DHS would consider an alien’s receipt of public benefits when such receipt is above the applicable threshold(s) proposed by DHS, either in terms of dollar value or duration of receipt. DHS proposes to clarify that it will make public charge

inadmissibility determinations based on consideration of the factors set forth in section 212(a)(4) and in the totality of an alien's circumstances. DHS also proposes to clarify when an alien seeking adjustment of status, who is inadmissible under section 212(a)(4) of the Act, may be granted adjustment of status in the discretion of DHS upon the giving of a public charge bond. DHS is also proposing revisions to existing USCIS information collections and new information collection instruments to accompany the proposed regulatory changes. With the publication of this proposed rule, DHS withdraws the proposed regulation on public charge that the former Immigration and Naturalization Service (INS) published on May 26, 1999.

**DATES:** Written comments and related material to this proposed rule, including the proposed information collections, must be received to the online docket via [www.regulations.gov](http://www.regulations.gov), or to the mail address listed in the ADDRESSES section below, on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments on this proposed rule, including the proposed information collection requirements, identified by DHS Docket No. USCIS-2010-0012, by any **one** of the following methods:

- Federal eRulemaking Portal (preferred): [www.regulations.gov](http://www.regulations.gov). Follow the website instructions for submitting comments.
- Mail: Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Washington, DC 20529-2140. To ensure proper handling, please reference DHS Docket No. USCIS-2010-0012 in your correspondence. Mail must be postmarked by the comment submission deadline.

**FOR FURTHER INFORMATION CONTACT:** Mark Phillips, Residence and Naturalization Division Chief, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts NW, Washington, DC 20529-2140; telephone 202-272-8377.

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**Table of Abbreviations**

AFM – Adjudicator’s Field Manual  
ASEC – Annual Social and Economic Supplement of the Current Population Survey  
BIA – Board of Immigration Appeals  
BLS – U.S. Bureau of Labor Statistics  
CDC – Centers for Disease Control and Prevention  
CBP – U.S. Customs and Border Protection  
CFR – Code of Federal Regulations  
CHIP – Children’s Health Insurance Program  
CNMI – Commonwealth of the Northern Mariana Islands  
DHS – U.S. Department of Homeland Security  
DOS – U.S. Department of State  
FAM – Foreign Affairs Manual  
FCRA – Fair Credit Reporting Act  
FPG – Federal Poverty Guidelines  
FPL – Federal Poverty Level  
Form DS-2054 – Medical Examination For Immigrant or Refugee Applicant  
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Form N-600K – Application for Citizenship and Issuance of Certificate Under Section 322  
GA – General Assistance

GAO – U.S. Government Accountability Office  
HHS – U.S. Department of Health and Human Services  
ICE – U.S. Immigration and Customs Enforcement  
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 of 1986  
NHE – National Health Expenditure  
PRA – Paperwork Reduction Act  
PRWORA – Personal Responsibility and Work Opportunity Reconciliation Act of 1996  
RFE – Request for Evidence  
SAVE – Systematic Alien Verification for Entitlements  
Secretary – Secretary of Homeland Security  
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  
USDA – U.S. Department of Agriculture  
U.S.C. – United States Code  
USCIS – U.S. Citizenship and Immigration Services  
WIC – Special Supplemental Nutrition Program for Women, Infants, and Children

## **I. Public Participation**

All interested parties are invited to participate in this rulemaking by submitting written data, views, comments and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, legal, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English, or an English translation must be provided. Comments that will provide the most assistance to U.S. Citizenship and Immigration Services (USCIS) in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

**Instructions:** If you submit a comment, you must include the agency name and the DHS Docket No. USCIS-2010-0012 for this rulemaking. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal



eRulemaking Portal at <http://www.regulations.gov>, and will 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 Act notice that is available via the link in the footer of <http://www.regulations.gov>.

**Docket:** For access to the docket and to read background documents or comments received, go to <http://www.regulations.gov>, referencing DHS Docket No. USCIS-2010-0012. 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.

The docket for this rulemaking does not include any comments submitted on the related notice of proposed rulemaking published by INS in 1999.<sup>1</sup> Commenters to the 1999 notice of proposed rulemaking that wish to have their views considered should submit new comments in response to this notice of proposed rulemaking.

## **II. Executive Summary**

DHS seeks to better ensure that aliens subject to the public charge inadmissibility ground are self-sufficient, i.e., do not depend on public resources to meet their needs, but rather rely on their own capabilities, as well as the resources of family members, sponsors, and private organizations.<sup>2</sup> DHS proposes to define the term “public charge” in regulation and to identify the types, amount, and duration of receipt of public benefits that would be considered in public charge inadmissibility determinations. DHS proposes to amend its regulations to interpret the

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<sup>1</sup> See *Inadmissibility and Deportability on Public Charge Grounds*, 64 FR 28676 (May 26, 1999).

<sup>2</sup> See 8 U.S.C. 1601(1), (2)(A).

minimum statutory factors for determining whether an alien is inadmissible because he or she is likely to become a public charge. This proposed rule would provide a standard for determining whether an alien who seeks admission into the United States as a nonimmigrant or as an immigrant, or seeks adjustment of status, is likely at any time to become a public charge under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4). DHS also provides a more comprehensive framework under which USCIS will consider public charge inadmissibility. DHS proposes that certain paper-based applications to USCIS would require additional evidence related to public charge considerations. Due to operational limitations, this additional evidence would not generally be required at ports of entry.

DHS also proposes amending the nonimmigrant extension of stay and change of status regulations by exercising its authority to set additional conditions on granting such benefits. Finally, DHS proposes to revise its regulations governing the discretion of the Secretary of Homeland Security (Secretary) to accept a public charge bond under section 213 of the Act, 8 U.S.C. 1183, for those seeking adjustment of status.

#### **A. Major Provisions of the Regulatory Action**

DHS proposes to include the following major changes:

- Amending 8 CFR 103.6, Surety bonds. The amendments to this section set forth DHS's discretion to approve public charge bonds, cancellation, bond schedules, and breach of bond, and move principles governing public charge bonds to 8 CFR 213.1, as proposed to be revised in this NPRM.
- Amending 8 CFR 103.7, adding fees for new Form I-945, Public Charge Bond, and Form I-356, Request for Cancellation of Public Charge Bond.

- Adding 8 CFR 212.20, Applicability of public charge inadmissibility. This section identifies the categories of aliens that are subject to the public charge inadmissibility determination.
- Adding 212.21, Definitions. This section establishes key regulatory definitions, including public charge, public benefit, likely at any time to become a public charge, and household.
- Adding 212.22, Public charge determination. This section clarifies that evaluating the likelihood of becoming a public charge is a prospective determination based on the totality of the circumstances. This section provides details on how the statute's mandatory factors would be considered when making a public charge inadmissibility determination.
- Adding 212.23, Exemptions and waivers for the public charge ground of inadmissibility. This section provides a list of statutory and regulatory exemptions from and waivers of inadmissibility based on public charge.
- Adding 212.24 Valuation of monetizable benefits. This section provides the methodology for calculating the annual aggregate amount of the portion attributable to the alien for the monetizable benefits and considered in the public charge inadmissibility determination.
- Amending 8 CFR 213.1, Adjustment of status of aliens on submission of a public charge bond. The updates to this section change the title of this section and add specifics to the public charge bond provision for aliens who are seeking adjustment of status, including the discretionary availability and the minimum amount for a public charge bond.
- Amending 8 CFR 214.1, Requirements for admission, extension, and maintenance of status. These amendments provide that, with limited exceptions, an application for extension of nonimmigrant stay will be denied unless the applicant demonstrates that he or she has not received since obtaining the nonimmigrant status he or she seeks to extend, is not receiving, and is not likely to receive, public benefits as described in 8 CFR 212.21(b). Where section

212(a)(4) of the Act does not apply to the nonimmigrant category that the alien seeks to extend, this provision does not apply.

- Amending 8 CFR 245.4 Documentary requirements. These amendments require applicants for adjustment of status to file the new USCIS Form I-944, Declaration of Self-Sufficiency, to facilitate USCIS' public charge inadmissibility determination.
- Amending 8 CFR 248.1, Change of nonimmigrant classification eligibility. This section provides that with limited exceptions, an application to change nonimmigrant status will be denied unless the applicant demonstrates that he or she has not received since obtaining the nonimmigrant status from which the alien seeks to change, is not currently receiving, nor is likely to receive public benefits in the future, as described in proposed 8 CFR 212.21(b). Where section 212(a)(4) of the Act does not apply to the nonimmigrant category to which the alien requests a change of status this provision does not apply.

## **B. Costs and Benefits**

This proposed rule would impose new costs on the population applying to adjust status using Application to Register Permanent Residence or Adjust Status (Form I-485) that are subject to the public charge grounds on inadmissibility. DHS would now require any adjustment applicants subject to the public charge inadmissibility ground to submit Form I-944 with their Form I-485 to demonstrate they are not likely to become a public charge.

The proposed rule would also impose additional costs for seeking extension of stay or change of status by filing Form I-129 (Petition for a Nonimmigrant Worker); Form I-129CW (Petition for a CNMI-Only Nonimmigrant Transitional Worker); or Form I-539 (Application to Extend/Change Nonimmigrant Status) as applicable. The associated time burden estimate for completing these forms would increase because these applicants would be required to

demonstrate that they have not received, are not currently receiving, nor are likely in the future to receive, public benefits as described in proposed 8 CFR 212.21(b). These applicants may also incur additional costs if DHS determines that they are required to submit Form I-944 in support of their applications for extension of stay or change of status. Moreover, the proposed rule would impose new costs associated with the proposed public charge bond process, including new costs for completing and filing Form I-945 (Public Charge Bond), and Form I-356 (Request for Cancellation of Public Charge Bond).

DHS estimates that the additional total cost of the proposed rule would range from approximately \$45,313,422 to \$129,596,845 annually for the population applying to adjust status who also would be required to file Form I-944, the population applying for extension of stay or change of status that would experience opportunity costs in time associated with the increased time burden estimates for completing Form I-485, Form I-129, Form I-129CW, and Form I-539, and the population requesting or cancelling a public charge bond using Form I-945 and Form I-356, respectively.

Over the first 10 years of implementation, DHS estimates the total quantified new direct costs of the proposed rule would range from about \$453,134,220 to \$1,295,968,450 (undiscounted). DHS estimates that the 10-year discounted total direct costs of this proposed rule would range from about \$386,532,679 to \$1,105,487,375 at a 3 percent discount rate and about \$318,262,513 to \$910,234,008 at a 7 percent discount rate.

The proposed rule would impose new costs on the population seeking extension of stay or change of status using Form I-129, Form I-129CW, or Form I-539. For any of these forms, USCIS officers would then be able to exercise discretion in determining whether it would be necessary to issue a request for evidence (RFE) requesting the applicant to submit Form I-944.

DHS conducted a sensitivity analysis estimating the potential cost of filing Form I-129, Form I-129CW, or Form I-539 for a range of 10 to 100 percent of filers receiving an RFE requesting they submit Form I-944. The costs to Form I-129 beneficiaries who may receive an RFE to file Form I-944 range from \$6,086,318 to \$60,863,181 annually and the costs to Form I-129CW beneficiaries who may receive such an RFE from \$114,132 to \$1,141,315 annually. The costs to Form I-539 applicants who may receive an RFE to file Form I-944 range from \$3,164,375 to \$31,643,752 annually.

Simultaneously, DHS is proposing to eliminate the use and consideration of the Request for Exemption for Intending Immigrant's Affidavit of Support (Form I-864W), currently applicable to certain classes of aliens. In lieu of Form I-864W, the alien would indicate eligibility for the exemption of the affidavit of support requirement on Form I-485, Application to Register Permanent Residence or Adjust Status.

The proposed rule would potentially impose new costs on individuals or companies (obligors) if an alien has been found to be inadmissible on public charge grounds, but has been given the opportunity to submit a public charge bond, for which USCIS intends to use the new Form I-945. DHS estimates the total cost to file Form I-945 would be at minimum about \$34,234 annually.<sup>3</sup> The proposed rule would also impose new costs on aliens or obligors who would submit a Form I-356; DHS estimates the total cost to file Form I-356 would be approximately \$825 annually.<sup>4</sup>

Moreover, the proposed rule would also result in a reduction in transfer payments from the federal government to individuals who may choose to disenroll from or forego enrollment in

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<sup>3</sup> Calculation: \$35.66 (cost per obligor to file Form I-945) \* 960 (estimated annual population who would file Form I-945) = \$34,233.60 = \$34,234 (rounded) annual total cost to file Form I-945.

<sup>4</sup> Calculation: \$33.00 (cost per obligor to file Form I-356) \* 25 (estimated annual population who would file Form I-356) = \$825.00 annual total cost to file Form I-356.

a public benefits program. Individuals may make such a choice due to concern about the consequences to that person receiving public benefits and being found to be likely to become a public charge for purposes outlined under section 212(a)(4) of the Act, even if such individuals are otherwise eligible to receive benefits. For the proposed rule, DHS estimates that the total reduction in transfer payments from the federal and state governments would be approximately \$2.27 billion annually due to disenrollment or foregone enrollment in public benefits programs by aliens who may be receiving public benefits. DHS estimates that the 10-year discounted transfer payments of this proposed rule would be approximately \$19.3 billion at a 3 percent discount rate and about \$15.9 billion at a 7 percent discount rate. Because state participation in these programs may vary depending on the type of benefit provided, DHS was only able to estimate the impact of state transfers. For example, the federal government funds all SNAP food expenses, but only 50 percent of allowable administrative costs for regular operating expenses.<sup>5</sup> 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.<sup>6</sup> However, assuming that the state share of federal financial participation (FFP) is 50 percent, the 10-year discounted amount of state transfer payments of this proposed policy would be approximately \$9.65 billion at a 3 percent discount rate and about \$7.95 billion at a 7 percent discount rate. DHS recognizes that reductions in federal and state transfers under federal benefit programs may have downstream and upstream impacts on state and local economies, large and

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<sup>5</sup> Per section 16(a) of the Food and Nutrition Act of 2008. *See also* 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](https://fns-prod.azureedge.net/sites/default/files/apd/FNS_HB901_v2.2_Internet_Ready_Format.pdf)

<sup>6</sup> *See* Dept. of Health and Human Services, “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.” ASPE FMAP 2017 Report. Dec. 29, 2015. Available at <https://aspe.hhs.gov/basic-report/fy2017-federal-medical-assistance-percentages>. Accessed Sept. 13, 2018.

small businesses, and individuals. For example, the rule might result in reduced revenues for healthcare providers participating in Medicaid, pharmacies that provide prescriptions to participants in the Medicare Part D Low Income Subsidy (LIS) program, 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.

Additionally, the proposed rule would add new direct and indirect costs on various entities and individuals associated with regulatory familiarization with the provisions of this rule. Familiarization costs involve the time spent reading the details of a rule to understand its changes. To the extent that an individual or entity directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule. For example, immigration lawyers, immigration advocacy groups, health care providers of all types, non-profit organizations, non-governmental organizations, and religious organizations, among others, may need or want to become familiar with the provisions of this proposed rule. An entity, such as a non-profit or advocacy group, may have more than one person that reads the rule. Familiarization costs incurred by those not directly regulated are indirect costs. DHS estimates the time that would be necessary to read this proposed rule would be approximately 8 to 10 hours per person, resulting in opportunity costs of time.

The primary benefit of the proposed rule would be to help ensure that aliens who apply for admission to the United States, seek extension of stay or change of status, or apply for adjustment of status are self-sufficient, i.e. do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and



private organizations.<sup>7</sup> DHS also anticipates that the proposed rule would produce some benefits from the elimination of Form I-864W. The elimination of this form would potentially reduce the number of forms USCIS would have to process, although it likely would not reduce overall processing burden. DHS estimates the amount of cost savings that would accrue from eliminating Form I-864W would be \$35.78 per petitioner.<sup>8</sup> However, DHS is unable to determine the annual number of filings of Form I-864W and, therefore, is currently unable to estimate the total annual cost savings of this change. A public charge bond process would provide benefits to applicants as they potentially would be given the opportunity to adjust their status if otherwise admissible, at the discretion of DHS, after a determination that they are likely to become public charges.

Table 1 provides a more detailed summary of the proposed provisions and their impacts.

<b>Table 1. Summary of Major Provisions and Economic Impacts of the Proposed Rule</b>		
<b>Provisions</b>	<b>Purpose</b>	<b>Expected Impact of Proposed Rule</b>
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of aliens that are subject to the public charge inadmissibility determination.	<b>Quantitative:</b>  Benefits <ul style="list-style-type: none"> <li>• Cost savings of \$35.78 per petitioner from no longer having to complete and file Form I-864W.</li> </ul> Costs: <ul style="list-style-type: none"> <li>• DHS anticipates a likely increase in the number of denials for adjustment of status applicants based on public charge inadmissibility determinations due to</li> </ul>
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including public charge, public benefit, likely to become a public charge, and household.	

<sup>7</sup> 8 U.S.C. 1601(2).

<sup>8</sup> Calculation for the opportunity cost of time for completing and submitting Form I-864W: (\$34.84 per hour \* 1.0 hours)= \$34.84.

Adding 8 CFR 212.22. Public charge determination.	<p>Clarifies that evaluating public charge is a prospective determination based on the totality of the circumstances.</p> <p>Outlines minimum and additional factors considered when evaluating whether an alien is inadmissible as likely to become a public charge. Positive and negative factors are weighed to determine an individual's likelihood of becoming a public charge at any time in the future.</p>	<p>formalizing and standardizing the criteria and process for public charge determinations.</p> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Better ensure that aliens who are admitted to the United States or apply for adjustment of status are self-sufficient through an improved review process of the mandatory statutory factors.</li> </ul>
Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on public charge grounds.	
Adding 212.24. Valuation of monetizable benefits.	Provides the methodology for calculating value of the benefit attributable to the alien in proportion to the total number of people covered by the benefit in the public charge inadmissibility determination.	
Adding 8 CFR 214.1(a)(3)(iv) and amending 8 CFR 214.1(c)(4). Nonimmigrant general requirements; and amending 8 CFR 248.1(a) and adding 8 CFR 248.1(c)(4). Change of nonimmigrant classification eligibility.	To provide, with limited exceptions, that an application for extension of stay or change of nonimmigrant status will be denied unless the applicant demonstrates that he or she has not received, is not currently receiving, nor is likely to receive, public benefits as defined in proposed 8 CFR 212.21(b).	<p><b>Quantitative:</b></p> <ul style="list-style-type: none"> <li>• Potential annual costs for those filing Form I-129 range from \$6.09 million to \$60.9 million depending on how many beneficiaries are sent an RFE by USCIS to complete Form I-944.</li> <li>• Potential annual costs for those filing Form I-129CW range from \$0.11 million to \$1.14 million depending on how many beneficiaries are sent an RFE by USCIS to complete Form I-944.</li> <li>• Potential annual costs for those filing Form I-539 applicants range from \$3.16 million to \$31.6 million depending on how many beneficiaries are sent an RFE by USCIS to complete Form I-944</li> </ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p>

		<ul style="list-style-type: none"> <li>• Better ensure that aliens who are not exempt from the section 212(a)(4) inadmissibility ground who apply for extension of stay or change of status continue to be self-sufficient during the duration of their temporary stay.</li> <li>• Reduce the likelihood that an alien will receive a public benefit at any time in the future.</li> </ul>
Amending 8 CFR 245. Adjustment of status to that of a person admitted for permanent residence.	To outline requirements that aliens submit a declaration of self-sufficiency on the form designated by DHS and any other evidence requested by DHS in the public charge inadmissibility determination.	<p><b>Quantitative:</b></p> <p><u>Direct Costs</u></p> <ul style="list-style-type: none"> <li>• Total annual direct costs of the proposed rule would range from about \$45.3 to \$129.6 million, including: <ul style="list-style-type: none"> <li>• \$26.0 million to applicants who must file Form I-944;</li> <li>• \$0.69 million to applicants applying to adjust status using Form I-485 with an increased time burden;</li> <li>• \$12.1 to \$66.9 million for an increased time burden for completing and filing Form I-129;</li> <li>• \$0.23 to \$1.25 million for an increased time burden for completing and filing Form I-129CW and potential RFE to complete Form I-944;</li> <li>• \$6.29 to \$34.8 million for an increased time burden for completing and filing Form I-539 and potential RFE to complete Form I-944;</li> <li>• \$0.34 million to obligors for filing Form I-945; and</li> <li>• \$825 million to filers for filing Form I-356.</li> </ul> </li> <li>• Total direct costs over a 10-year period would range from: <ul style="list-style-type: none"> <li>• \$453.1 million to \$1.30 billion for undiscounted costs;</li> <li>• \$386.5 million to \$1.11 billion at a 3 percent discount rate; and</li> <li>• \$318.3 to \$910.2 million at a 7 percent discount rate.</li> </ul> </li> </ul> <p><u>Transfer Payments</u></p> <ul style="list-style-type: none"> <li>• Total annual transfer payments of the proposed rule would be about \$2.27 billion from foreign-born non-citizens and their households who disenroll from or forego enrollment in public benefits programs. The federal-level share of annual transfer payments would be about \$1.51 billion and</li> </ul>

		<p>the state-level share of annual transfer payments would be about \$756 million.</p> <ul style="list-style-type: none"> <li>• Total transfer payments over a 10-year period, including the combined federal- and state-level shares, would be: <ul style="list-style-type: none"> <li>• \$22.7 billion for undiscounted costs;</li> <li>• \$19.3 billion at a 3 percent discount rate; and</li> <li>• \$15.9 billion at a 7 percent discount rate.</li> </ul> </li> </ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Potential to improve the efficiency for USCIS in the review process for public charge inadmissibility.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• DHS anticipates a likely increase in the number of denials for adjustment of status applicants based on public charge inadmissibility determinations due to formalizing and standardizing the criteria and process for public charge determinations.</li> <li>• DHS also anticipates costs to various entities and individuals associated with regulatory familiarization with the provisions of the 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 8 to 10 hours per individual.</li> </ul>
<b>Public Charge Bond Provisions</b>		
Amending 8 CFR 103.6. Public charge bonds.	To set forth the Secretary's discretion to approve bonds, cancellation, bond schedules, and breach of bond, and to move principles governing public charge bonds to proposed 8 CFR 213.1.	<p><b>Quantitative:</b></p> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• \$0.34 million annually to obligors for submitting Public Charge Bond (Form I-945); and</li> <li>• \$825 annually to filers for submitting Request for Cancellation of Public Charge Bond (Form I-356).</li> <li>• Fees paid to surety bond companies to secure public charge bond. Fees could range from 1</li> </ul>

Amending 8 CFR 103.7. Fees.	To add fees for new Form I-945, Public Charge Bond, and Form I-356, Request for Cancellation of Public Charge Bond.	<p>– 15 percent of the public charge bond amount based on an individual’s credit score.</p> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Potentially enable an alien who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li> </ul>
Amending 8 CFR 213.1. Adjustment of status of aliens on giving of a public charge bond.	In 8 CFR 213.1, to add specifics to the public charge bond provision for aliens who are seeking adjustment of status, including the discretionary availability and the minimum amount required for a public charge bond.	<p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• USCIS will need to staff a unit to administer this process.</li> </ul>
Source: USCIS analysis.		

### III. Purpose of the Proposed Rule

#### A. Self-Sufficiency

DHS seeks to better ensure that applicants for admission to the United States and applicants for adjustment of status to lawful permanent resident who are subject to the public charge ground of inadmissibility are self-sufficient, *i.e.*, do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations.<sup>9</sup> Under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), an alien is inadmissible if, at the time of an application for a visa, admission, or adjustment of status, he or she is likely at any time to become a public charge. The statute requires DHS to consider the following minimum factors that reflect the likelihood that an alien will become a public charge: the alien’s age; health; family status; assets, resources, and financial status; and

<sup>9</sup> See 8 U.S.C. 1601(2).

education and skills. DHS may also consider any affidavit of support submitted by the alien's sponsor and any other factor relevant to the likelihood of the alien becoming a public charge.

As noted in precedent administrative decisions, determining the likelihood of an alien becoming a public charge involves "consideration of all the factors bearing on the alien's ability or potential ability to be self-supporting."<sup>10</sup> These decisions, in general, conclude that an alien who is incapable of earning a livelihood, who does not have sufficient funds in the United States for support, and who has no person in the United States willing and able to assure the alien will not need public support generally is inadmissible as likely to become a public charge.<sup>11</sup> Furthermore, the following congressional policy statements relating to self-sufficiency, immigration, and public benefits inform DHS's proposed administration of section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4).

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

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

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

(B) The availability of public benefits not constitute an incentive for immigration to the United States.<sup>12</sup>

Within this administrative and legislative context, DHS's view of self-sufficiency is that aliens subject to the public charge ground of inadmissibility must rely on their own capabilities

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<sup>10</sup> *Matter of Vindman*, 16 I&N Dec. 131, 132 (Reg'l Comm'r 1977).

<sup>11</sup> *See, e.g., Matter of Vindman*, 16 I&N Dec. 131 (Reg'l Comm'r 1977); *Matter of Harutunian*, 14 I&N Dec. 583 (Reg'l Comm'r 1974).

<sup>12</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105, codified in part at 8 U.S.C. 1601.

and secure financial support, including from family members and sponsors, rather than seek and receive public benefits to meet their needs. Aliens subject to the public charge ground of inadmissibility include: immediate relatives of U.S. citizens, fiancé(e)s, family-preference immigrants, most employment-based immigrants, diversity visa immigrants, and certain nonimmigrants. Most employment-based immigrants are coming to work for their petitioning employers; DHS believes that by virtue of their employment, such immigrants should have adequate income and resources to support themselves without resorting to seeking public benefits. Similarly, DHS believes that, consistent with section 212(a)(4), nonimmigrants should have sufficient financial means or employment, if authorized to work, to support themselves for the duration of their authorized admission and temporary stay. In addition, immediate relatives of U.S. citizens, fiancé(e)s, most family-preference immigrants, and some employment-based immigrants require a sponsor and a legally binding affidavit of support under section 213A of the Act showing that the sponsor agrees to provide support to maintain the alien at an annual income that is not less than 125 percent of the FPG.<sup>13</sup>

DHS's view of self-sufficiency also informs other aspects of this proposal. DHS proposes that aliens who seek to change their nonimmigrant status or extend their nonimmigrant stay generally should also be required to continue to be self-sufficient and not remain in the United States to avail themselves of any public benefits for which they are eligible, even though the public charge inadmissibility determination does not directly apply to them. Such aliens should have adequate financial resources to maintain the status they seek to extend or to which they seek to change for the duration of their temporary stay, and must be able to support themselves.

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<sup>13</sup> See INA section 213A(a), 8 U.S.C. 1183a(a).

## B. Public Charge Inadmissibility Determinations

DHS seeks to interpret the term “public charge” for purposes of making public charge inadmissibility determinations. As noted above, Congress codified the minimum mandatory factors that must be considered as part of the public charge inadmissibility determination under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4): age, health, family status, assets, resources, financial status, education, and skills.<sup>14</sup> In addition to these minimum factors, the statute states that any affidavit of support under section 213A of the Act may also be considered.<sup>15</sup> In fact, since an affidavit of support is required for family-sponsored immigrant applicants and certain employment-sponsored immigrant applicants, these aliens are inadmissible as likely to become a public charge if they do not submit such a sufficient affidavit of support.<sup>16</sup>

Although INS<sup>17</sup> issued a proposed rule and Interim Field Guidance in 1999, neither the proposed rule nor Interim Field Guidance sufficiently described the mandatory factors or explained how to weigh these factors in the public charge inadmissibility determination.<sup>18</sup> The 1999 Interim Field Guidance allows consideration of the receipt of cash public benefits when determining whether an applicant meets the definition of “public charge,” but excluded consideration of non-cash public benefits. In addition, the 1999 Interim Field Guidance placed its emphasis on primary dependence on cash public benefits. This proposed rule would improve upon the 1999 Interim Field Guidance by removing the artificial distinction between cash and

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<sup>14</sup> See INA section 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

<sup>15</sup> See INA section 212(a)(4)(B)(iii), 8 U.S.C. 1182(a)(4)(B)(iii).

<sup>16</sup> See INA section 212(a)(4)(C), 8 U.S.C. 1182(a)(4)(C).

<sup>17</sup> On March 1, 2003, INS functions were transferred from the Department of Justice to DHS. See Homeland Security Act of 2002, Pub. L. 107-296, sections 402(3), 441, 116 Stat. 2135, 2178, 2192.

<sup>18</sup> See *Inadmissibility and Deportability on Public Charge Grounds*, 64 FR 28676 (May 26, 1999); *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689 (May 26, 1999). Due to a printing error, the *Federal Register* version of the field guidance appears to be dated “March 26, 1999” even though the guidance was actually signed May 20, 1999, became effective May 21, 1999 and was published in the *Federal Register* on May 26, 1999, along with the NPRM.



non-cash benefits, and aligning public charge policy with the self-sufficiency principles set forth in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).<sup>19</sup>

The proposed rule would provide clarification and guidance on the mandatory factors, including how these factors would be evaluated in relation to the new proposed definition of public charge and in making a public charge inadmissibility determination.<sup>20</sup>

#### **IV. Background**

Three principal issues<sup>21</sup> have framed the development of public charge inadmissibility:

(1) the factors involved in determining whether or not an alien is likely to become a public charge, (2) the relationship between public charge and receipt of public benefits, and (3) the consideration of a sponsor's affidavit of support within public charge inadmissibility determinations.

##### **A. Legal Authority**

DHS's authority for making public charge inadmissibility determinations and related decisions is found in several statutory provisions. Section 102 of the Homeland Security Act of

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<sup>19</sup> Pub. L. 104-193, 110 Stat. 2105.

<sup>20</sup> Moreover, this proposed policy change is consistent with the March 6, 2017 Presidential Memorandum directing DHS to issue new rules, regulations, and/or guidance to enforce laws relating to such grounds of inadmissibility and subsequent compliance. *See Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry Into the United States, and Increasing Transparency Among Departments and Agencies of the Federal Government and for the American People*, 82 FR 16279 (Apr. 3, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-secretary-state-attorney-general-secretary-homeland-security>.

<sup>21</sup> *See, e.g., Report of the Committee of the Judiciary Pursuant to S. Res. 137*, S. Rep. No. 81-1515, at 346-50 (1950). Prior to passage of the INA of 1952, the Senate Judiciary Committee issued a report assessing issues within the immigration system, including public charge. The committee recommended retention of public charge exclusion in the statute but highlighted two main problems related to its implementation: 1) how to determine who is likely to become a public charge and 2) how to find a better way of meeting the purpose for which affidavits of support were executed on the alien's behalf. The committee noted that there was no definition of the term "likely to become a public charge" and that the meaning of the term had been left to the interpretation of administrative officials and the courts. Factors such as financial status, business ownership, health, and employability were considerations, as were decisions rendered by the courts and in public charge determinations made by consular and immigration officers. The committee advised against defining public charge in the INA. Instead, it recommended that the determination of whether an alien falls into the public charge category should rest within the discretion of consular and immigration officials because the elements constituting public charge are varied. It also recommended the use of a bond or suitable undertaking over the practice of using affidavits of support.

2002 (Public Law 107-296, 116 Stat. 2135), 6 U.S.C. 112, and section 103 of the Immigration and Nationality Act (INA, or the Act), 8 U.S.C. 1103, charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States. In addition to establishing the Secretary's general authority for the administration and enforcement of immigration laws, section 103 of the Act enumerates various related authorities including the Secretary's authority to establish regulations and prescribe such forms of bond as are necessary for carrying out her authority. Section 212 of the Act, 8 U.S.C. 1182, establishes classes of aliens that are ineligible for visas, admission, or adjustment of status and paragraph (a)(4) of that section establishes the public charge ground of inadmissibility, including the minimum factors the Secretary must consider in making a determination that an alien is likely to become a public charge. Section 212(a)(4) of the Act also establishes the affidavit of support requirement as applicable to certain family-based and employment-based immigrants, and exempts certain aliens from both the public charge ground of inadmissibility and the affidavit of support requirement. Section 213 of the Act, 8 U.S.C. 1183, provides the Secretary with discretion to admit into United States an alien who is determined to be inadmissible as a public charge under section 212(a)(4) of the Act, but is otherwise admissible, upon the giving of a proper and suitable bond. That section authorizes the Secretary to establish the amount and conditions of such bond. Section 213A of the Act, 8 U.S.C. 1183a, sets out requirements for the sponsor's affidavit of support, including reimbursement of government expenses where the sponsored alien received means-tested public benefits. Section 214 of the Act, 8 U.S.C. 1184, addresses requirements for the admission of nonimmigrants, including authorizing the Secretary to prescribe the conditions of such admission through regulations and when necessary establish a bond to ensure that those admitted as nonimmigrants or who change their nonimmigrant status

under section 248 of the Act, 8 U.S.C. 1258, depart if they violate their nonimmigrant status or after such status expires. Section 245 of the Act, 8 U.S.C. 1255, generally establishes eligibility criteria for adjustment of status to lawful permanent residence. Section 248 of the Act, 8 U.S.C. 1258, authorizes the Secretary to prescribe conditions under which an alien may change his or her status from one nonimmigrant classification to another. The Secretary proposes the changes in this rule under these authorities.

## **B. Immigration to the United States**

The INA governs whether an alien may obtain a visa, be admitted to or remain in the United States, or obtain an extension of stay, change of status, or adjustment of status.<sup>22</sup> The INA establishes separate processes for aliens seeking a visa, admission, change of status, and adjustment of status. For example, where an immigrant visa petition is required, USCIS will adjudicate the petition. If USCIS approves the petition, the alien may apply for a visa with the U.S. Department of State (DOS) and thereafter seek admission in the appropriate immigrant classification. If the alien is present in the United States, he or she may be eligible to apply to USCIS for adjustment of status to that of a lawful permanent resident. In the nonimmigrant context, the nonimmigrant typically applies directly to the U.S. consulate or embassy abroad for a visa to enter for a limited purpose, such as to visit for business or tourism.<sup>23</sup> Applicants for admission are inspected at or, when encountered, between the port of entry. The inspection is conducted by immigration officers in a timeframe and setting distinct from the visa adjudication process. If a nonimmigrant alien is present in the United States, he or she may be eligible to apply to USCIS for an extension of nonimmigrant stay or change of nonimmigrant status.

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<sup>22</sup> See, e.g., INA section 212(a), 8 U.S.C. 1182(a) (listing grounds of inadmissibility).

<sup>23</sup> Certain nonimmigrant classifications are subject to petition requirements and require that a petition be filed and approved by USCIS prior to application for a visa. See, e.g., INA section 214(c), 8 U.S.C. 1184(c). In addition, certain aliens are not subject to a visa requirement in order to seek admission as a nonimmigrant. See, e.g., INA section 217, 8 U.S.C. 1187.

DHS has the discretion to waive certain grounds of inadmissibility as designated by Congress. Where an alien is seeking an immigration benefit that is subject to a ground of inadmissibility, DHS cannot approve the immigration benefit being sought if a waiver of that ground is unavailable under the INA, the alien does not meet the statutory and regulatory requirements for the waiver, or the alien does not warrant the waiver in any authorized exercise of discretion.

### **C. Extension of Stay and Change of Status**

Pursuant to section 214(a)(1) of the Act, 8 U.S.C. 1184(a)(1), DHS permits certain nonimmigrants to remain in the United States beyond their current period of authorized stay to continue engaging in activities permitted under their current nonimmigrant status. The extension of stay regulations require a nonimmigrant applying for an extension of stay to demonstrate that he or she is admissible to the United States.<sup>24</sup> For some extension of stay applications, the applicant's financial status is an element of the eligibility determination.<sup>25</sup> DHS has the authority to set conditions in determining whether to grant the extension of stay request.<sup>26</sup> The decision to grant an extension of stay application, with certain limited exceptions, is discretionary.<sup>27</sup>

Under section 248 of the Act, 8 U.S.C. 1258, DHS may permit an alien to change his or her status from one nonimmigrant status to another nonimmigrant status, with certain exceptions, as long as the nonimmigrant is continuing to maintain his or her current nonimmigrant status and is not inadmissible under section 212(a)(9)(B)(i) of the Act, 8 U.S.C. 1182(a)(9)(B)(i).<sup>28</sup> An applicant's financial status is currently part of the determination for changes to certain

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<sup>24</sup> See 8 CFR 214.1(a)(3)(i).

<sup>25</sup> See, e.g., 8 CFR 214.2(f)(1)(i)(B).

<sup>26</sup> See INA section 214(a)(1), 8 U.S.C. 1184(a)(1); 8 CFR 214.1(a)(3)(i).

<sup>27</sup> See 8 CFR 214.1(c)(5).

<sup>28</sup> See INA section 248(a), 8 U.S.C. 1258(a); 8 CFR 248.1(a).

nonimmigrant classifications.<sup>29</sup> Like extensions of stay, change of status adjudications are discretionary determinations, and DHS has the authority to set conditions that apply for a nonimmigrant to change his or her status.<sup>30</sup>

#### **D. Public Charge Inadmissibility**

Section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), provides that an alien applicant for a visa, admission, or adjustment of status is inadmissible if he or she is likely at any time to become a public charge. The public charge ground of inadmissibility, therefore, applies to any alien 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.<sup>31</sup> Section 212(a)(4) of the Act, does not, however, directly apply to applications for extension of stay or change of status because extension of stay and change of status applications are not applications for a visa, admission, or adjustment of status.

The INA does not define public charge. It does, however, specify that when determining if an alien is likely at any time to become a public charge, consular officers and immigration officers must, at a minimum, consider the alien's age; health; family status; assets, resources, and financial status; and education and skills.<sup>32</sup>

Some immigrant and nonimmigrant categories are exempt from the public charge inadmissibility ground. DHS proposes to list these categories in the regulation. DHS also

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<sup>29</sup> See, e.g., Adjudicator's Field Manual Ch. 30.3(c)(2)(C) (applicants to change status to a nonimmigrant student must demonstrate that they have the financial resources to pay for coursework and living expenses in the United States) [hereinafter AFM].

<sup>30</sup> See INA section 248(a), 8 U.S.C. 1258(a); 8 CFR 248.1(a).

<sup>31</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>32</sup> See INA section 212(a)(4)(B)(i), 8 U.S.C. 1182(a)(4)(B)(i).

proposes to list in the regulation the applicants that the law permits to apply for a waiver of the public charge inadmissibility ground.<sup>33</sup>

Additionally, section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), permits the consular officer or the immigration officer to consider any affidavit of support submitted under section 213A of the Act, 8 U.S.C. 1183a, on the applicant's behalf when determining whether the applicant may become a public charge.<sup>34</sup> In fact, with very limited exceptions, aliens seeking family-based immigrant visas and adjustment of status, and a limited number of employment-based immigrant visas or adjustment of status, must have a sufficient affidavit of support or will be found inadmissible as likely to become a public charge.<sup>35</sup>

In general, an alien whom DHS has determined to be inadmissible based on the public charge ground may, if otherwise admissible, be admitted at the discretion of the Secretary upon giving a suitable and proper bond or undertaking approved by the Secretary.<sup>36</sup> The purpose of issuing a public charge bond is to ensure that the alien will not become a public charge in the future.<sup>37</sup> Since the introduction of enforceable affidavits of support in section 213A of the Act, the use of public charge bonds has decreased and USCIS does not currently have a public charge bond process.<sup>38</sup> This rule would outline a process under which USCIS could, in its discretion, offer public charge bonds to applicants for adjustment of status who are inadmissible only on public charge grounds.

## **1. Public Laws and Case Law**

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<sup>33</sup> See proposed 8 CFR 212.23.

<sup>34</sup> See INA section 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).

<sup>35</sup> See INA section 212(a)(4)(C), (D), 8 U.S.C. 1182(a)(4)(C), (D).

<sup>36</sup> See INA section 213, 8 U.S.C. 1183.

<sup>37</sup> See *Matter of Viado*, 19 I&N Dec. 252 (BIA 1985).

<sup>38</sup> See AFM Ch. 61.1(b).

Since at least 1882, the United States has denied admission to aliens on public charge grounds.<sup>39</sup> The INA of 1952 excluded aliens 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, are likely at any time to become public charges.<sup>40</sup> The Government has long interpreted the words “in the opinion of” as evincing the subjective nature of the determination.<sup>41</sup>

A series of administrative decisions after passage of the Act clarified that a totality of the circumstances review was the proper framework for making public charge determinations and that receipt of welfare 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.”<sup>42</sup> 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

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<sup>39</sup> See Immigration Act of 1882, ch. 376, sections 1-2, 22 Stat. 214, 214. Section 11 of the Act also provided that an alien who became a public charge within 1 year of arrival in the United States from causes that existed prior to his or her 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 alien into the United States.

<sup>40</sup> See INA of 1952, ch. 477, section 212(a)(15), 66 Stat. 163, 183.

<sup>41</sup> See *Matter of Harutunian*, 14 I&N Dec. 583, 588 (Reg’l Cmm’r 1974) (“[T]he determination of whether an alien falls into that category [as likely to become a public charge] rests within the discretion of the consular officers or the Commissioner . . . Congress inserted the words ‘in the opinion of’ (the consular or the Attorney General) with the manifest intention of putting borderline adverse determinations beyond the reach of judicial review.” (citation omitted)); *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421 (Att’y Gen. 1962) (“[U]nder the statutory language the question for visa purposes seems to depend entirely on the consular officer’s subjective opinion.”).

<sup>42</sup> 10 I&N Dec. 409, 421-23 (BIA 1962).

an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge.”<sup>43</sup> As stated in *Matter of Harutunian*,<sup>44</sup> public charge determinations should take into consideration factors such as an alien’s age, incapability of earning a livelihood, a lack of sufficient funds for self-support, and a lack of persons in this country willing and able to assure that the alien will not need public support.

The totality of circumstances approach to public charge inadmissibility determinations was codified in relation to one specific class of aliens in the 1980s. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), providing eligibility for lawful status to certain aliens who had resided in the United States continuously prior to January 1, 1982.<sup>45</sup> No changes were made to the language of the public charge exclusion ground under former section 212(a)(15) of the Act, but IRCA contained special public charge rules for aliens seeking legalization under 245A of the Act. Although IRCA provided otherwise eligible aliens an exemption or waiver for some grounds of excludability, the aliens generally remained excludable on public charge grounds.<sup>46</sup> Under IRCA, however, if an applicant demonstrated a history of self-support through employment and without receiving public cash assistance, he or she would not be ineligible for adjustment of status on public charge grounds.<sup>47</sup> In addition, aliens who were “aged, blind or disabled” as defined in section 1614(a)(1) of the Social Security Act, could obtain a waiver from the public charge provision.<sup>48</sup>

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<sup>43</sup> 15 I&N Dec. 136, 137 (BIA 1974).

<sup>44</sup> See 14 I&N Dec. 583, 589 (Reg’l Comm’r 1974).

<sup>45</sup> See IRCA of 1986, Pub. L. 99-603, section 201, 100 Stat. 3359, 3394.

<sup>46</sup> See INA section 245A(d)(2)(B)(ii)(IV), 8 U.S.C. 1255(d)(2)(B)(ii)(IV).

<sup>47</sup> See INA section 245A(d)(2)(B)(iii), 8 U.S.C. 1255(d)(2)(B)(iii).

<sup>48</sup> See INA section 245A(d)(2)(B)(ii); see also 42 U.S.C. 1382c(a)(1). DHS does not propose to apply this proposed rule to legalization applications filed pursuant to section 245A of the INA or otherwise amend the regulations at 8 CFR Part 245a. That provision is subject to legal standards and settlement agreements that impact public charge inadmissibility determinations in this specific context. See, e.g., *Catholic Soc. Servs., Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993); *League of United Latin Am. Citizens v. INS*, vacated sub nom. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993).



INS promulgated 8 CFR 245a.3,<sup>49</sup> which established that immigration officers would make public charge determinations by examining the “totality of the alien’s circumstances at the time of his or her application for legalization.”<sup>50</sup> 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.<sup>51</sup> Further, the regulation established that the determination is a “prospective evaluation based on the alien’s age, health, income, and vocation.”<sup>52</sup> A special provision in the rule stated that aliens with incomes below the poverty level are not excludable if they are consistently employed and show the ability to support themselves.<sup>53</sup> Finally, an alien’s past receipt of public cash assistance would be a significant factor in a context that also considers the alien’s consistent past employment.<sup>54</sup> In *Matter of A-*,<sup>55</sup> INS again pursued a totality of circumstances approach in public charge determinations. “Even though the test is prospective,” INS “considered evidence of receipt of prior public assistance as a factor in making public charge determinations.” INS also considered an alien’s work history, age, capacity to earn a living, health, family situation, affidavits of support, and other relevant factors in their totality.<sup>56</sup>

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 Act and re-designated the public charge provision as section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4).<sup>57</sup> In 1996, PRWORA<sup>58</sup> and the Illegal Immigration

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<sup>49</sup> See *Adjustment of Status for Certain Aliens*, 54 FR 29442 (Jul. 12, 1989).

<sup>50</sup> 8 CFR 245a.3(g)(4)(i).

<sup>51</sup> 8 CFR 245a.3(g)(4)(i).

<sup>52</sup> 8 CFR 245a.3(g)(4)(i).

<sup>53</sup> 8 CFR 245a.3(g)(4)(iii).

<sup>54</sup> See 8 CFR 245a.3(g)(4)(iii).

<sup>55</sup> 19 I&N Dec. 867 (Comm’r 1988).

<sup>56</sup> See 19 I&N Dec. 867, 869 (Comm’r 1988).

<sup>57</sup> See Immigration Act of 1990, Pub. L. 101-649, section 601(a), 104 Stat. 4978, 5072.

Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>59</sup> altered the legislative landscape of public charge considerably.<sup>60</sup> Through PRWORA, which is commonly known as the 1996 welfare reform law, Congress declared that aliens generally should not depend on public resources and that these resources should not constitute an incentive for immigration to the United States.<sup>61</sup> Congress also created section 213A of the Act and made a sponsor's affidavit of support for an alien beneficiary legally enforceable.<sup>62</sup> The affidavit of support provides a mechanism for public benefit granting agencies to seek reimbursement in the event a sponsored alien received means-tested public benefits.<sup>63</sup>

## **2. Public Benefits Under PRWORA**

PRWORA also significantly restricted alien eligibility for many Federal, State, and local public benefits.<sup>64</sup> With certain exceptions, Congress defined the term "Federal public benefit" broadly as:

(A) Any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and

(B) Any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which

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<sup>58</sup> Pub. L. 104-193, 110 Stat. 2105.

<sup>59</sup> Pub. L. 104-208, div. C, 110 Stat 3009-546.

<sup>60</sup> In 1990, Congress reorganized INA section 212(a), redesignated the public charge provision as INA section 212(a)(4), and eliminated the exclusion of paupers, beggars, and vagrants as these grounds were sufficiently covered under the public charge provision. *See* Immigration Act of 1990, Pub. L. 101-649, section 601(a), 104 Stat. 4978, 5072.

<sup>61</sup> *See* Pub. L. 104-193, section 400, 110 Stat. 2105, 2260 (codified at 8 U.S.C. 1601).

<sup>62</sup> *See* Pub. L. 104-193, section 423, 110 Stat. 2105, 2271 (codified at INA section 213A, 8 U.S.C. 1183a). The provision was further amended with the passage of IIRIRA.

<sup>63</sup> *See* INA section 213A(b), 8 U.S.C. 1183a(b).

<sup>64</sup> *See* 8 U.S.C. 1601-1646.

payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.<sup>65</sup>

### (a) Qualified Aliens

Generally, under PRWORA, “qualified aliens” are eligible for federal means-tested benefits after 5 years and are not eligible for “specified federal programs,” and states are allowed to determine whether the qualified alien is eligible for “designated federal programs.”<sup>66</sup> The following table provides a list of immigration categories that are qualified aliens under PRWORA.<sup>67</sup>

<b>Table 2. Qualified Aliens under PRWORA</b>	
<b>Category</b>	<b>Subject to Public Charge Inadmissibility under 212(a)(4)?</b>
An alien who is lawfully admitted for permanent residence under the INA	Generally no, <sup>68</sup> however, a lawful permanent resident is subject to public charge inadmissibility under section 212(a)(4) if one of the situations in section 101(a)(13)(C) of the Act, 8 U.S.C. 1101(a)(13)(C), applies.
An alien who is granted asylum under section 208 of the Act	No
A refugee who is admitted to the United States under section 207 of the Act	No

<sup>65</sup> See Pub. L. 104-193, section 401(c), 110 Stat. 2105, 2262 (1996) (codified as amended at 8 U.S.C. 1611(c)). Congress provided that such term shall not apply—

(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;

(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treaty agreements is required to pay benefits, as determined by the Attorney General, after consultation with the Secretary of State; or

(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States. 8 U.S.C. 1611(c)(2).

<sup>66</sup> See Pub. L. 104-193, tit. IV, 110 Stat. 2105, 2260-77.

<sup>67</sup> See Pub. L. 104-193, section 431, 110 Stat. 2105, 2274 (codified at 8 U.S.C. 1641); Trafficking Victims Protection Act of 2000 section 107(b)(1), 22 U.S.C. 7105(b)(1).

<sup>68</sup> Lawful permanent residents seeking entry into the United States typically are not applicants for admission, and therefore, generally are not subject to section 212(a) of the INA, 8 U.S.C. 1182(a), including INA section 212(a)(4), 8 U.S.C. 1182(a)(4), but lawful permanent residents described in INA section 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C), are regarded as seeking admission and generally are subject to inadmissibility grounds.

An alien who is paroled into the United States under section 212(d)(5) of the Act for a period of at least 1 year <sup>69</sup>	Yes <sup>70</sup>
An alien whose deportation is being withheld under section 243(h) of the Act <sup>71</sup> or section 241(b)(3) of the Act, as amended	No
An alien who is granted conditional entry under section 203(a)(7) of the Act as in effect before April 1, 1980)	No
An alien who is a Cuban and Haitian entrant as defined in section 501(e) of the Refugee Education Assistance Act of 1980	No

The Trafficking Victims Protection Act of 2000 further provided that an alien who is a victim of a severe form of trafficking in persons, or an alien classified as a nonimmigrant under section 101(a)(15)(T)(ii) of the Act, 8 U.S.C. 1101(a)(15)(T)(ii), is eligible for benefits and services under any Federal or State program or activity funded or administered by any official or agency.<sup>72</sup> These individuals are generally exempt from the public charge inadmissibility ground.<sup>73</sup>

With certain exceptions, aliens who were not “qualified aliens,” including nonimmigrants and unauthorized aliens, were generally barred from obtaining Federal benefits.<sup>74</sup> In addition to

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<sup>69</sup> Parole is not a category of admission. *See* INA section 101(a)(13)(B), 8 U.S.C. 1101(a)(13)(B); INA section 212(d)(5), 8 U.S.C. 1182(d)(5).

<sup>70</sup> While an alien paroled into the United States is not subject to an admission determination at the time the decision to parole the alien is made, if an alien who has been paroled into the United States is applying for an immigration benefit for which admissibility is required, e.g. adjustment of status, the parolee will be subject to section 212(a)(4) of the Act in the context of seeking the subsequent immigration benefit.

<sup>71</sup> As in effect immediately before the effective date of section 307 of division C of Pub. L. 104-208, 110 Stat. 3009-546.

<sup>72</sup> *See* Trafficking Victims Protection Act of 2000 section 107(b)(1), 22 U.S.C. 7105(b)(1).

<sup>73</sup> However, while lawful permanent residents seeking entry into the United States typically are not applicants for admission, and therefore, generally are not subject to section 212(a) of the INA (including section 212(a)(4)), a lawful permanent resident described in section 101(a)(13)(C) of the INA is regarded as seeking admission and is subject to section 212(a)(4).

<sup>74</sup> *See* PRWORA, Pub. L. 104-193, section 401(a), 110 Stat. 2105, 2261 (codified at 8 U.S.C. 1611(a)).

the federal public benefits definitions, PRWORA categorizes the benefits into the following categories:

- Specified Federal Programs;
- Designated Federal Programs; and
- Federal Means-Tested Benefits.

The following tables provide a summary of the definition of federal public benefit and the three categories of public benefits under PRWORA as applicable to aliens and qualified aliens.

<b>Table 3. PRWORA Public Benefits Summary</b>	
<b>Federal Public Benefit</b>	
<b>Definition</b> 8 U.S.C. 1611(c)(1)	<ul style="list-style-type: none"> <li>• Any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and</li> <li>• Any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.</li> </ul>
8 U.S.C. 1611(c)(2)	<p>The definition of federal public benefit does not include the following:</p> <ul style="list-style-type: none"> <li>• Any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States or to a citizen of a freely associated state;<sup>75</sup></li> <li>• Benefits where there is a reciprocal treaty agreement for payment with another country for nonimmigrants aliens authorized to work or aliens admitted as lawful permanent residents; or</li> <li>• Professional license issued to or renewed by a foreign national not physically present in the United States.</li> </ul>
<b>Exceptions from the definition</b> 8 U.S.C. 1611(b)	<ul style="list-style-type: none"> <li>• Medical assistance for emergency medical condition (42 U.S.C. 1396(v)(3)).</li> <li>• Short-term, non-cash, in-kind emergency disaster relief.</li> <li>• Public health assistance for immunizations for immunizable diseases and for testing and treatment of symptoms of communicable diseases.</li> <li>• Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) as specified by the Attorney General, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.<sup>76</sup></li> <li>• Programs for housing or community development assistance or financial assistance administered by the Secretary of Housing and Urban Development, any program under title V of the Housing Act of 1949 or any assistance under section 1926c of title 7 which the</li> </ul>

<sup>75</sup> If section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect.

<sup>76</sup> See *Final Specification of Community Programs Necessary For Protection Of Life Or Safety Under Welfare Reform Legislation*, 66 FR 3613 (Jan. 16, 2001); see also *Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 61 FR 45985 (Aug. 30, 1996).

	<p>alien is receiving since before August 22, 1996.</p> <ul style="list-style-type: none"> <li>Any benefit payable under title II of the Social Security Act<sup>77</sup> to an alien who is lawfully present<sup>78</sup> in the United States, any benefit if nonpayment of such benefit would contravene an international agreement described in section 233 of the Social Security Act,<sup>79</sup> any benefit if nonpayment would be contrary to section 202(t) of the Social Security Act,<sup>80</sup> or any benefit payable under title II of the Social Security Act to which entitlement is based on an application filed in or before August 1996.</li> <li>Any benefit<sup>81</sup> relating to the Medicare program to an alien who is lawfully present in the United States<sup>82</sup> with respect to benefits payable under part A of such title,<sup>83</sup> who was authorized to be employed with respect to wages attributable such benefits.</li> <li>Any benefit payable under the Railroad Retirement Act of 1974<sup>84</sup> or the Railroad Unemployment Insurance Act<sup>85</sup> to an alien who is lawfully present in the United States or to an alien residing outside the United States.</li> <li>Receipt of benefits on or before August 22, 1996 (including SSI and SNAP (Food Stamps)).</li> </ul>
<b>Categories of Aliens Eligible</b> 8 U.S.C. 1611(a)	<ul style="list-style-type: none"> <li>Qualified aliens</li> </ul>
<b>Categories of Aliens Not Eligible</b> 8 U.S.C. 1611(a)	<ul style="list-style-type: none"> <li>Aliens not listed as qualified aliens</li> </ul>
<b>Specified Federal Program</b>	
<b>Definition</b> 8 U.S.C. 1612(a)(3)	<ul style="list-style-type: none"> <li>SSI<sup>86</sup></li> <li>SNAP (Food Stamps)<sup>87</sup></li> </ul>
<b>Exemption</b>	<ul style="list-style-type: none"> <li>Qualified aliens eligible after 5 years</li> <li>Certain grandfathering provision for aliens already receiving SSI<sup>88</sup> and SNAP<sup>89</sup></li> </ul> <p>SNAP (Food-Stamps) specific exemptions:</p> <ul style="list-style-type: none"> <li>Children under 18.<sup>90</sup></li> <li>SNAP (Food Stamps) by- aliens who were lawfully residing in the United States on August 22, 1996 and were over the age of 65.</li> <li>SNAP (Food Stamps) Hmong and Highland Laotians tribe members who are lawfully residing in the United States and were members of a Hmong or Highland Laotian tribe at the</li> </ul>

<sup>77</sup> See 42 U.S.C. 401-434.

<sup>78</sup> See 8 CFR 1.3(a).

<sup>79</sup> 42 U.S.C. 433.

<sup>80</sup> 42 U.S.C. 402(t).

<sup>81</sup> Benefits payable under title XVIII of the Social Security Act. See 42 U.S.C. 1395-1395III.

<sup>82</sup> See 8 CFR 1.3(a).

<sup>83</sup> See 42 U.S.C. 1395c to 1395i-5.

<sup>84</sup> See 45 U.S.C. 231-231v.

<sup>85</sup> See 45 U.S.C. 351-369.

<sup>86</sup> See 42 U.S.C. 1381-1383f.

<sup>87</sup> See Food Stamp Act of 1977.

<sup>88</sup> In addition, there are certain extensions for SSI benefits through fiscal year 2011. See 8 U.S.C. 1612(a)(2)(M).

<sup>89</sup> See 8 U.S.C. 1612(a)(2)(D).

<sup>90</sup> See 8 U.S.C. 162(a)(2)(J).

<b>Specified Federal Program</b>	
	time that the tribe rendered assistance to United States personnel by taking part in a military or rescue operation during the Vietnam era, <sup>91</sup> and the spouse, unmarried dependent child, or un-remarried surviving spouse of such individuals.
<b>Categories of Aliens Eligible</b>	<ul style="list-style-type: none"> <li>• Lawful permanent residents with 40 Social Security quarters<sup>92</sup></li> <li>• Veterans and active duty military with honorable service lawfully residing in the United States, and their spouses and unmarried dependent children<sup>93</sup></li> <li>• American Indians born in Canada<sup>94</sup> or who are members of an Indian tribe<sup>95</sup></li> <li>• Aliens who were receiving SSI on August 22, 1996<sup>96</sup></li> <li>• Aliens who were lawfully residing in the United States on August 22, 1996 and blind or disabled<sup>97</sup></li> </ul> <p>The following categories are eligible for benefits within the first 7 years:<sup>98</sup></p> <ul style="list-style-type: none"> <li>• Refugee from the time of admission and asylee from the time status was granted;</li> <li>• Aliens whose deportation was withheld under section 243(h) of the Act, 8 U.S.C. 1253<sup>99</sup> or section 241(b)(3) of such Act, as amended;<sup>100</sup></li> <li>• Cuban and Haitians entrant from the time the status was granted;<sup>101</sup> and Amerasians<sup>102</sup></li> </ul>
<b>Categories of Aliens Not Eligible</b>	<ul style="list-style-type: none"> <li>• Qualified aliens and all other aliens</li> </ul>
<b>Designated Federal Programs<sup>103</sup></b>	
<b>Definition</b> 8 U.S.C. 1612(b)	<ul style="list-style-type: none"> <li>• TANF<sup>104</sup></li> <li>• Social Services Block Grant<sup>105</sup></li> <li>• Medicaid<sup>106</sup></li> </ul>
<b>Categories of Aliens Eligible</b>	<p>States are authorized to determine the eligibility of an alien who is a qualified alien (as defined in 8 U.S.C. 1641) for any designated Federal program.</p> <p>The following categories are eligible for Designated Federal programs without a time limit:</p> <ul style="list-style-type: none"> <li>• Lawful permanent residents with 40 Social Security quarters<sup>107</sup></li> </ul>

<sup>91</sup> As defined in 38 U.S.C. 101.

<sup>92</sup> See 8 U.S.C. 1612(a)(2)(B).

<sup>93</sup> See 8 U.S.C. 1612(a)(2)(C).

<sup>94</sup> See 8 U.S.C. 1612(a)(2)(G); see also INA section 289, 8 U.S.C. 1359.

<sup>95</sup> See 8 U.S.C. 1612(a)(2)(G); see also 25 U.S.C. 5304(e) (defining Indian tribe).

<sup>96</sup> See 8 U.S.C. 1612(a)(2)(E).

<sup>97</sup> See 8 U.S.C. 1612(a)(2)(F).

<sup>98</sup> See 8 U.S.C. 1612(a)(2)(A).

<sup>99</sup> As in effect immediately before the effective date of section 307 of division C of Public Law 104-208.

<sup>100</sup> 8 U.S.C. 1231(b)(3).

<sup>101</sup> As defined in section 501(e) of the Refugee Education Assistance Act of 1980.

<sup>102</sup> See section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in section 101(e) of Pub. L. 100-202, 101 Stat. 1329, and amended by the 9th proviso under migration and refugee assistance in title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989, Pub. L. 100-461, 102 Stat. 2268, as amended).

<sup>103</sup> An alien who was lawfully residing in the United States and receiving benefits on August 2, 1996, would have continued to receive benefits until January 1, 1997. In addition, an alien who was receiving SSI would still be eligible to receive Medicaid. See 8 U.S.C. 1612(b)(2)(F).

<sup>104</sup> See 42 U.S.C. 601-619.

<sup>105</sup> See 42 U.S.C. 1397-1397h.

<sup>106</sup> See 42 U.S.C. 1396 to 1396w-5

<b>Specified Federal Program</b>	
	<ul style="list-style-type: none"> <li>• Veterans and active duty personnellawfully residing in the United States, with a discharge of honorable service who fulfill minimum active-duty service requirements, and their spouse and unmarried dependent child or unmarried surviving spouse<sup>108</sup></li> <li>• American Indian born in Canada or who is a member of an Indian tribe would still be eligible for Medicaid<sup>109</sup></li> </ul> <p>Medicaid, the following categories are eligible for benefits within the first 7 years and Social Services Block Grants and TANF for the first 5 years:<sup>110</sup></p> <ul style="list-style-type: none"> <li>• Refugee from the time of admission and asylee from the time status was granted;</li> <li>• Aliens whose deportation was withheld under section 243(h) of the Act, 8 U.S.C. 1253<sup>111</sup> or section 241(b)(3) of such Act, as amended;<sup>112</sup></li> <li>• Cuban and Haitians entrant from the time the status was granted;<sup>113</sup> and</li> <li>• Amerasians<sup>114</sup></li> </ul>
<b>Categories of Aliens Not Eligible</b>	Aliens not listed as qualified aliens
<b>Federal Means-Tested Benefits</b>	
<b>Definition</b> 8 U.S.C. 1613	No statutory definition under PRWORA, however, some agencies have defined which benefits would be considered means-tested. <sup>115</sup>
<b>Categories of Aliens Eligible</b>	<p>In addition, qualified aliens eligible for all other means-tested benefits after 5 years of entry.</p> <p>However, all aliens are eligible for the following programs:<sup>116</sup></p> <ul style="list-style-type: none"> <li>• Emergency Medical assistance 8 U.S.C. 1611(b)(1)(A)</li> <li>• Short-term, non-cash, in-kind emergency disaster relief.</li> <li>• National School Lunch Act</li> <li>• Child Nutrition Act of 1966</li> <li>• Public health assistance for immunizations</li> <li>• Payments for foster care and adoption</li> <li>• Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter)</li> <li>• Programs of student assistance the Higher Education Act of 1965</li> <li>• Means-tested programs under the Elementary and Secondary Education Act of 1965</li> <li>• Benefits under the Head Start Act</li> <li>• Benefits under title I of the Workforce Innovation and Opportunity Act</li> <li>• Food Stamps for children under 18</li> </ul>

<sup>107</sup> See 8 U.S.C. 1612(b)(2)(B).

<sup>108</sup> See 8 U.S.C. 1612(b)(2)(C).

<sup>109</sup> See 8 U.S.C. 1612(b)(2)(E).

<sup>110</sup> See 8 U.S.C. 1612(b)(2)(A).

<sup>111</sup> As in effect immediately before the effective date of section 307 of division C of Pub. L. 104-208, 110 Stat. 3009.

<sup>112</sup> 8 U.S.C. 1231(b)(3).

<sup>113</sup> As defined in section 501(e) of the Refugee Education Assistance Act of 1980.

<sup>114</sup> See section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988 (as contained in section 101(e) of Pub. L. 100-202, 101 Stat. 1329, and amended by the 9th proviso under migration and refugee assistance in title II of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1989, Pub. L. 100-461, 102 Stat. 2268, as amended).

<sup>115</sup> See *Federal Means-Tested Public Benefits*, 63 FR 36653 (July 7, 1998).

<sup>116</sup> See 8 U.S.C. 1613(c).



Specified Federal Program	
	<p>In addition, the following aliens are eligible for federal means-tested benefits:<sup>117</sup></p> <ul style="list-style-type: none"> <li>• Refugees and asylees;</li> <li>• Aliens whose deportation was withheld under section 243(h) of the Act, 8 U.S.C. 1253;</li> <li>• Cuban and Haitian entrants;<sup>118</sup></li> <li>• Amerasians;<sup>119</sup></li> <li>• Veterans lawfully residing in the United States, with a discharge of honorable service who fulfill minimum active-duty service requirement, and active duty personnel lawfully residing in the United States, and their spouse and unmarried dependent child or unmarried surviving spouse;<sup>120</sup> and</li> <li>• American Indian born in Canada or who is a member of an Indian tribe<sup>121</sup></li> </ul>
<b>Categories of Aliens Not Eligible</b>	Aliens who enter the United States on or after August 22, 1996, not listed as qualified aliens

Congress chose not to restrict eligibility for certain benefits, including emergency medical assistance; short-term, in-kind, non-cash emergency disaster relief; and public health assistance related to immunizations and treatment of the symptoms of a communicable disease.<sup>122</sup>

PRWORA defined the term “State or local public benefit” in broad terms except where the term encroached upon the definition of Federal public benefit.<sup>123</sup> With certain exceptions for qualified aliens, nonimmigrants, or parolees, PRWORA also limited aliens’ ability to obtain certain State and local public benefits.<sup>124</sup> Under PRWORA, States may enact their own legislation to provide public benefits to certain aliens not lawfully present in the United States.<sup>125</sup> PRWORA also provided that a State that chooses to follow the Federal “qualified alien” definition in determining aliens’ eligibility for public assistance “shall be considered to have

<sup>117</sup> See 8 U.S.C. 1613(b)(1).

<sup>118</sup> See section 501(e) of the Refugee Education Assistance act of 1980.

<sup>119</sup> See 8 U.S.C. 1612(a)(2)(A)(i)(V).

<sup>120</sup> See 8 U.S.C. 1613(b)(2).

<sup>121</sup> See 8 U.S.C. 1613(d).

<sup>122</sup> See 8 U.S.C. 1611(b)(1); see also *Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 66 FR 3613 (Jan. 16, 2001); *Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 62 FR 61344 (Nov. 17, 1997).

<sup>123</sup> See 8 U.S.C. 1621(c).

<sup>124</sup> See generally 8 U.S.C. 1621.

<sup>125</sup> See 8 U.S.C. 1621(d).

chosen the least restrictive means available for achieving the compelling governmental interest of assuring that aliens be self-reliant in accordance with national immigration policy.”<sup>126</sup> Still, some States and localities have funded public benefits (particularly medical and nutrition benefits) that aliens may be not eligible for federally.<sup>127</sup>

While PRWORA allows both qualified aliens and non-qualified aliens to receive certain benefits (e.g., emergency benefits (all aliens); SNAP (qualified alien children under 18)), Congress did not exempt the receipt of such benefits from consideration for purposes of INA section 212(a)(4).”<sup>128</sup> Therefore, DHS may take into consideration for purposes of a public charge determination, receipt of public benefits even if an alien may receive such benefits under PRWORA.

#### **(b) Public Benefits Exempt under PRWORA**

Although PRWORA provided a broad definition of public benefits that only qualified aliens are eligible to receive,<sup>129</sup> it also made certain public benefits available even to non-qualified aliens.<sup>130</sup> Congress excluded certain benefits, such as contracts, professional licenses, and commercial licenses from the “federal public benefit” definition.<sup>131</sup> In addition, Congress further provided that the following public benefits are available to all aliens, regardless of whether an individual is a qualified alien:<sup>132</sup>

- Medical assistance under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] (or

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<sup>126</sup> 8 U.S.C. 1601(7).

<sup>127</sup> See U.S. Dep’t of Health & Human Servs., 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>.

<sup>128</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>129</sup> See Pub. L. 104-193, section 401(c), 110 Stat. 2105, 2262 (codified as amended at 8 U.S.C. 1611(c)). Only qualified aliens may be eligible for certain benefits. See 8 U.S.C. 1641.

<sup>130</sup> See 8 U.S.C. 1611(b).

<sup>131</sup> See 8 U.S.C. 1611(c)(2).

<sup>132</sup> See 8 U.S.C. 1611(b).

any successor program to such title) for care and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of such Act [42 U.S.C. 1396b(v)(3)]) of the alien involved and are not related to an organ transplant procedure, if the alien involved otherwise meets the eligibility requirements for medical assistance under the State plan approved under such title (other than the requirement of the receipt of aid or assistance under title IV of such Act [42 U.S.C. 601 et seq.], supplemental security income benefits under title XVI of such Act [42 U.S.C. 1381 et seq.], or a State supplementary payment).

- Short-term, non-cash, in-kind emergency disaster relief.<sup>133</sup>
- Public health assistance (not including any assistance under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.]) 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.
- Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life

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<sup>133</sup> Such relief would include a range of services and benefits provided by the Federal Emergency Management Agency and other agencies. For instance, it would include the Disaster Supplemental Nutrition Assistance Program (D-SNAP), which “gives food assistance to low-income households with food loss or damage caused by a natural disaster.” See DHS, Disaster Assistance.gov, *Disaster Supplemental Nutrition Assistance Program (D-SNAP)*, available at <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/5769> (last updated June 25, 2018).

or safety.

- Programs for housing or community development assistance or financial assistance administered by the Secretary of Housing and Urban Development, any program under title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], or any assistance under section 1926c of title 7, to the extent that the alien is receiving such a benefit on August 22, 1996.

These benefits, which are described in 8 U.S.C. 1611(b), were further clarified by the Department of Justice and some of the agencies that administer these public benefits. On January 16, 2001, the Department of Justice published a notice of final order, "Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation,"<sup>134</sup> which indicated that PRWORA does not preclude aliens from receiving police, fire, ambulance, transportation (including paratransit), sanitation, and other regular, widely available services programs, services, or assistance. In addition, the notice provided for a three-part test in identifying excluded benefits and services for the protection of life and safety. Specified programs must satisfy all three prongs of this test:

1. The government-funded programs, services, or assistance specified are those that: deliver in-kind (non-cash) services at the community level, including through public or private non-profit agencies or organizations; do not condition the provision, amount, or cost of the assistance on the individual recipient's income or resources; and serve purposes of the type described in the list below, for the protection of life or safety.

2. The community-based programs, services, or assistance are limited to those that

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<sup>134</sup> See *Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 66 FR 3613 (Jan. 16, 2001); see also *Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 61 FR 45985 (Aug. 30, 1996).

provide in-kind (non-cash) benefits and are open to individuals needing or desiring to participate without regard to income or resources. Programs, services, or assistance delivered at the community level, even if they serve purposes of the type described, are not within this specification if they condition on the individual recipient's income or resources: (a) the provision of assistance; (b) the amount of assistance provided; or (c) the cost of the assistance provided on the individual recipient's income or resources.

3. Included within the specified programs, services, or assistance determined to be necessary for the protection of life or safety are the following types of programs:

- Crisis counseling and intervention programs; services and assistance relating to child protection, adult protective services, violence and abuse prevention, victims of domestic violence or other criminal activity; or treatment of mental illness or substance abuse;
- Short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused, or abandoned children;
- Programs, services, or assistance to help individuals during periods of heat, cold, or other adverse weather conditions;
- Soup kitchens, community food banks, senior nutrition programs such as meals on wheels, and other such community nutritional services for persons requiring special assistance;
- Medical and public health services (including treatment and prevention of diseases and injuries) and mental health, disability, or substance abuse assistance necessary to protect life or safety;
- Activities designed to protect the life or safety of workers, children and youths, or community residents; and

- Any other programs, services, or assistance necessary for the protection of life or safety.

In congressional debates leading up to the passage of IIRIRA, Senator Kennedy stated that “[t]hese benefit all, because they relate to the public health and are in the public interest.

Where the public interest is not served, we should not provide the public assistance to illegal immigrants.”<sup>135</sup> Therefore, these benefits were provided to all aliens including illegal aliens.

These benefits would not be part of the public charge determination under the proposed rule.<sup>136</sup>

### **3. Changes under IIRIRA**

Under IIRIRA,<sup>137</sup> the public charge inadmissibility statute changed significantly. IIRIRA codified the following minimum factors that must be considered when making public charge determinations:<sup>138</sup>

- Age;
- Health;
- Family status;
- Assets, resources, and financial status; and
- Education and skills.<sup>139</sup>

Congress also generally permitted but did not require consular and immigration officers to consider an enforceable affidavit of support as a factor in the determination of

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<sup>135</sup> See 142 Cong. Rec. S3282 (daily ed. Apr. 15, 1996) (statement of Sen. Kennedy), available at <https://www.congress.gov/crec/1996/04/15/CREC-1996-04-15-pt1-PgS3276.pdf>.

<sup>136</sup> See 8 U.S.C. 1611(b)(1)(B); see also *Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 66 FR 3613 (Jan. 16, 2001); *Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, 61 FR 45985 (Aug. 30, 1996).

<sup>137</sup> Pub. L. 104-208, div. C, 110 Stat 3009-546 (1996).

<sup>138</sup> Pub. L. 104-208, div. C, section 531, 110 Stat. 3009-546, 3009-674 (1996) (amending INA section 212(a)(4), 8 U.S.C. 1182(a)(4)).

<sup>139</sup> See INA section 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

inadmissibility,<sup>140</sup> except in certain cases where an affidavit of support is required and must be considered at least in that regard.<sup>141</sup> The law required affidavits of support for most family-based immigrants and certain employment-based immigrants and provided that these aliens are inadmissible unless a satisfactory affidavit of support is filed on their behalf.<sup>142</sup> In the Conference Report, the committee indicated that the amendments to INA section 212(a)(4), 8 U.S.C. 1182(a)(4), were designed to expand the public charge ground of inadmissibility.<sup>143</sup> The report indicated that self-reliance is one of the fundamental principles of immigration law and aliens should have affidavits of support executed.<sup>144</sup>

DHS believes that the policy goals articulated in PRWORA and IIRIRA should inform its administrative implementation of the public charge ground of inadmissibility. There is no tension between the availability of public benefits to some aliens as set forth in PRWORA and Congress's intent to deny visa issuance, admission, and adjustment of status to aliens who are likely to become a public charge. Indeed, Congress, in enacting PRWORA and IIRIRA very close in time, must have recognized that it made certain public benefits available to some aliens who are also subject to the public charge grounds of inadmissibility, even though receipt of such benefits could render the alien inadmissible as likely to become a public charge.

Under the carefully devised scheme envisioned by Congress, aliens generally would not be issued visas, admitted to the United States, or permitted to adjust status if they are likely to become public charges. This prohibition may deter aliens from making their way to the United States or remaining in the United States permanently for the purpose of availing themselves of

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<sup>140</sup> See INA section 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

<sup>141</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4); INA section 213A, 8 U.S.C. 1183A.

<sup>142</sup> See INA section 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

<sup>143</sup> 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).

<sup>144</sup> See H.R. Rep. No. 104-828, at 241 (1996) (Conf. Rep.).

public benefits.<sup>145</sup> Congress must have understood, however, that certain aliens who were unlikely to become public charges when seeking a visa, admission, or adjustment of status might thereafter reasonably find themselves in need of public benefits that, if obtained, would render them a public charge. Consequently, in PRWORA, Congress made limited allowances for that possibility. But Congress also did not correspondingly limit the applicability of the public charge statute; if an alien subsequent to receiving public benefits wished to adjust status in order to remain in the United States permanently or left the United States and later wished to return, the public charge inadmissibility consideration (naturally including consideration of receipt of public benefits) would again come into play. In other words, although an alien may obtain public benefits for which he or she is eligible, the receipt of those benefits may be considered for future public charge inadmissibility determination purposes.

#### **4. INS 1999 Interim Field Guidance**

On May 26, 1999, INS issued interim *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*.<sup>146</sup> This guidance identified how the agency would determine if a person is likely to become a public charge under section 212(a)(4) of the Act, 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 Act, 8 U.S.C. 1227(a)(5).<sup>147</sup> INS proposed promulgating these policies as regulations in a proposed rule issued on May 26, 1999.<sup>148</sup> 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.<sup>149</sup>

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<sup>145</sup> H.R. Rep. No. 104-469(I), at 144-45 (1996).

<sup>146</sup> See 64 FR 28689 (May 26, 1999).

<sup>147</sup> See 64 FR 28689 (May 26, 1999).

<sup>148</sup> See *Inadmissibility and Deportability on Public Charge Grounds*, 64 FR 28676 (May 26, 1999).

<sup>149</sup> See 64 FR 28676, 28680 (May 26, 1999).



USCIS has continued to follow the 1999 Interim Field Guidance in its adjudications, and DOS has continued following the public charge guidance set forth in the FAM.<sup>150</sup>

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.”<sup>151</sup> INS sought to reduce negative public health and nutrition consequences generated by the confusion and to provide aliens, 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 determinations.<sup>152</sup> 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. With its guidance, INS aimed to stem the fears that were causing noncitizens to refuse limited public benefits, such as transportation vouchers and child care assistance, so that they would be better able to obtain and retain employment and establish self-sufficiency.<sup>153</sup>

INS defined public charge in its proposed rule and 1999 Interim Field Guidance to mean “the likelihood of a foreign national becoming primarily dependent<sup>154</sup> on the government for subsistence, as demonstrated by either:

- Receipt of public cash assistance for income maintenance; or
- Institutionalization for long-term care at government expense.”

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<sup>150</sup> See Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, section 214, 123 Stat. 8, 56; 9 FAM 302.8-2(B)(2), Determining “Totality of Circumstances,” (g) Public Charge Bonds, *available at* <https://fam.state.gov/fam/09fam/09fam030208.html>.

<sup>151</sup> See 64 FR 28676, 28676 (May 26, 1999).

<sup>152</sup> See 64 FR 28676, 28676-77 (May 26, 1999).

<sup>153</sup> See 64 FR 28676, 28676-77 (May 26, 1999).

<sup>154</sup> Former INS defined “primarily dependent” as “the majority” or “more than 50 percent.”

When developing the proposed rule, INS consulted with Federal benefit-granting agencies such as the Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA). The Deputy Secretary of HHS, which 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.<sup>155</sup> The Deputy Commissioner for Disability and Income Security Programs at SSA agreed that the receipt of SSI "could show primary dependence on the government for subsistence fitting the INS definition of public charge provided that all of the other factors and prerequisites for admission or deportation have been considered or met."<sup>156</sup> And 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."<sup>157</sup> 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 adopting a different definition consistent with statutory authority.

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<sup>155</sup> See 64 FR 28676, 28686-87 (May 26, 1999).

<sup>156</sup> 64 FR 28676, 28687 (May 26, 1999).

<sup>157</sup> 64 FR 28676, 28688 (May 26, 1999). The USDA letter did not include supportive reasoning. As noted in greater detail elsewhere in this preamble, DHS no longer believes that primary dependence on the government for subsistence is the appropriate standard for public charge determination purposes. In light of the proposed change in the public charge standard and the passage of time, DHS does not believe that the views expressed in those interagency consultations remain fully relevant. DHS has nonetheless considered such views, and has addressed the relevant considerations – legal authority, predictability, administrability, and adverse impacts – throughout this proposed rule.

The 1999 proposed rule provided that non-cash, supplemental and certain limited cash, special purpose benefits should not be considered for public charge purposes, in light of INS' decision to define public charge by reference to primary dependence on public benefits. Ultimately, however, INS did not publish a final rule conclusively addressing these issues.

### **E. Public Charge Bond**

If an alien is determined to be inadmissible on public charge grounds under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), he or she may be admitted in the discretion of the Secretary of Homeland Security, if otherwise admissible, upon the giving of a suitable and proper bond.<sup>158</sup>

Historically, bond provisions started with states requiring certain amounts to assure an alien would not become a public charge.<sup>159</sup> Bond provisions were codified in federal immigration laws in 1903.<sup>160</sup> Notwithstanding codification in 1903, the acceptance of a bond posting in consideration of an alien's admission and to assure that he or she 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 aliens who were likely to become public charges because the aliens lacked funds or relatives or friends who could provide support.<sup>161</sup> In these cases, the Board of Special

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<sup>158</sup> See INA section 213, 8 U.S.C. 1183; see also 8 CFR 103.6; 8 CFR 213.1.

<sup>159</sup> 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).

<sup>160</sup> 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).

<sup>161</sup> Immigration Act of 1891, ch. 551, 26 Stat. 1084, 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,

Inquiry usually admitted the alien if someone could post bond or one of the immigrant aid societies would accept responsibility for the alien.<sup>162</sup>

The present language of section 213 of the Act, 8 U.S.C. 1183, has been in the law without essential variation since 1907.<sup>163</sup> Under section 21 of the Immigration Act of 1917, an immigration officer could admit an alien if a suitable bond was posted. In 1970, Congress amended section 213 of the Act 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.<sup>164</sup> 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.<sup>165</sup> Subsequently, IIRIRA amended the provision yet again when adding a parenthetical which clarified that a bond is provided in addition to, and not in lieu of, the affidavit of support and the deeming requirements under section 213A of the Act, 8 U.S.C. 1183A.<sup>166</sup> Regulations implementing the public charge bond were promulgated in 1964 and 1966,<sup>167</sup> and are currently found at 8 CFR 103.6 and 8 CFR 213.1.

## **V. Discussion of Proposed Rule**

This proposed rule would establish a proper nexus between public charge and receipt of public benefits by defining the terms public charge and public benefit, among other terms. DHS

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<https://www.uscis.gov/history-and-genealogy/our-history/agency-history/origins-federal-immigration-service> (last updated Feb. 4, 2016).

<sup>162</sup> 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> (last updated Feb. 4, 2016).

<sup>163</sup> See Act of February 20, 1907, ch. 1134, section 26, 34 Stat. 898, 907.

<sup>164</sup> See Pub. L. 91-313, 84 Stat. 413, 413 (1970); *see also* 116 Cong. Rec. S9957 (daily ed. June 26, 1970).

<sup>165</sup> See Pub. L. 91-313, 84 Stat. 413, 413 (1970).

<sup>166</sup> See Pub. L. 104-208, div. C, section 564(f), 110 Stat. 3009-546, 3009-684.

<sup>167</sup> See *Miscellaneous Amendments to Chapter, 29* FR 10579 (July 30, 1964); *Miscellaneous Edits to Chapter, 31* FR 11713 (Sept. 7, 1966).

proposes to interpret the minimum statutory factors involved in public charge determinations and to establish a clear framework under which DHS would evaluate those factors to determine whether or not an alien is likely at any time in the future to become a public charge. DHS also proposes to clarify the role of a sponsor's affidavit of support within public charge inadmissibility determinations.

In addition, DHS proposes that certain factual circumstances would weigh heavily in favor of determining that an alien is not likely to become a public charge and other factual circumstances would weigh heavily in favor of determining that an alien is likely to become a public charge.<sup>168</sup> The purpose of assigning greater weight to certain factual circumstances is to provide clarity for the public and immigration officers with respect to how DHS would fulfill its statutory duty to assess public charge admissibility. Ultimately, each determination would be made in the totality of the circumstances based on consideration of the relevant factors. In addition, DHS proposes that for applications for adjustment of status, the alien would be required to submit a Form I-944.

DHS also proposes to establish a public charge bond process in the adjustment of status context, and proposes to clarify DHS's authority to set conditions for nonimmigrant extension of stay and change of status applications.

Finally, this proposed rule interprets the public charge inadmissibility ground under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), not the public charge deportability ground under section 237(a)(5) of the Act, 8 U.S.C. 1227(a)(5). Department of Justice precedent decisions would continue to govern the standards regarding public charge deportability determinations.

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<sup>168</sup> See proposed 8 CFR 212.22.

## **A. Applicability, Exemptions, and Waivers**

This rule would apply to any alien subject to section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), who is applying for admission to the United States or is applying for adjustment of status to that of lawful permanent resident before DHS.<sup>169</sup> DOS screens applicants who are subject to public charge inadmissibility grounds and who are seeking nonimmigrant or immigrant visas at consular posts worldwide. Nearly sixty percent of the 2.7 million immediate relatives, family-sponsored,<sup>170</sup> employment-based, and diversity visa-based immigrants who obtained lawful permanent resident status in the United States between fiscal years 2014 and 2016 consular processed immigrant visa applications overseas prior to being admitted to the United States as lawful permanent residents at a port-of-entry. Fifty-one percent of immediate relatives, ninety-two percent of family-sponsored immigrants, and ninety-eight percent of diversity visa immigrants obtained an immigrant visa at a consular post overseas before securing admission as a lawful permanent resident at a port-of-entry between fiscal years 2014 and 2016.<sup>171</sup>

This rule also addresses eligibility for extension of stay and change of status.<sup>172</sup> Because the processes, evidentiary requirements, and nature of the stay in the United States for aliens seeking a visa, admission, extension of stay, change of status, and adjustment of status differ,

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<sup>169</sup> See proposed 8 CFR 212.20.

<sup>170</sup> Including first, second, third and fourth preferences of family sponsored immigrants and immediate relatives. See DHS, *Yearbook of Immigration Statistics 2016, Table 6, Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2014 to 2016*, available at <https://www.dhs.gov/immigration-statistics/yearbook/2016/table6> (last updated Dec. 18, 2017).

<sup>171</sup> See DHS, *Yearbook of Immigration Statistics 2016, Table 6, Persons Obtaining Lawful Permanent Resident Status by Type and Major Class of Admission: Fiscal Years 2014 to 2016*, available at <https://www.dhs.gov/immigration-statistics/yearbook/2016/table6> (last updated Dec. 18, 2017). The 2016 Yearbook of Immigration Statistics is a compendium of tables that provide data on foreign nationals who are granted lawful permanent residence (i.e., immigrants who receive a “green card”), admitted as temporary nonimmigrants, granted asylum or refugee status, or are naturalized.

<sup>172</sup> See proposed 8 CFR 214.1(a)(3)(iv); proposed 8 CFR 214.1(c)(4)(iv); proposed 8 CFR 248.1(a); proposed 8 CFR 248.1(c)(4).

DHS proposes public charge processes appropriately tailored to the benefit the alien seeks. For instance, aliens seeking adjustment of status undergo a different process than a temporary visitor for pleasure from Canada seeking admission to the United States. The length and nature of the stay of these two subsets of aliens differs significantly, as does frequency of entry. Accordingly, the processes and evidentiary requirements proposed in this rule vary in certain respects depending on the type of benefit and status an alien is seeking, as set forth below.

### **1. Applicants for Admission**

Under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), any alien who is applying for a visa or for admission to the United States is inadmissible if he or she is likely at any time to become a public charge. A nonimmigrant is admitted into the United States to stay for the limited period and purpose of the classification under which he or she was admitted and, in most instances, then is expected to depart the United States and return to his or her country. A visa applicant 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.<sup>173</sup> DOS consular officers assess whether the alien would be inadmissible, including under section 212(a)(4) of the Act, as applicable.

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 Act, including section 212(a)(4). Under the proposed rule, the type of nonimmigrant status and the duration of the nonimmigrant's stay in the United States would be considered in assessing whether the applicant has met his or her burden of

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<sup>173</sup> Certain nonimmigrant classifications are subject to petition requirements, and a petition generally must be approved on an alien's behalf by USCIS prior to application for a visa. *See, e.g.*, INA section 214(c), 8 U.S.C. 1184(c). In addition, certain aliens are not subject to a visa requirement in order to seek admission as a nonimmigrant. *See, e.g.*, INA section 217, 8 U.S.C. 1187; *see also* 8 CFR 212.1.

demonstrating that he or she is likely to become a public charge. For example, in determining whether an applicant for admission as a B-2 nonimmigrant visitor for pleasure who is coming to the United States for a one-week vacation is inadmissible on public charge grounds, DHS would consider that this temporary visit is short in nature and that the individual likely would only need financial resources to cover the expenses associated with the vacation.

Similarly, an alien who is the beneficiary of an immigrant visa petition approved by USCIS may apply to a DOS consulate abroad for an immigrant visa to allow him or her to seek admission to the United States as an immigrant.<sup>174</sup> As part of the immigrant visa process, DOS determines whether the applicant is eligible for the visa, which includes a determination of whether the alien has demonstrated that he or she is admissible to the United States and that no inadmissibility grounds in section 212(a) of the Act apply. In determining whether the applicant has demonstrated that he or she is not inadmissible on the public charge ground, DOS reviews all of the mandatory factors, including any required affidavits of support submitted under section 213A of the Act, 8 U.S.C. 1183a.

This process would not change under the proposed rule, but it is likely that DOS will amend its guidance to prevent the issuance of visas to inadmissible aliens,<sup>175</sup> except as otherwise provided in the Act. DOS would continue to review affidavits of support and screen aliens for public charge inadmissibility in accordance with applicable regulations and instructions prior to the alien undergoing inspection and applying for admission at a pre-inspection location or port-of-entry

Additionally, although lawful permanent residents generally are not considered to be applicants for admission upon their return from a trip abroad, in certain limited circumstances a

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<sup>174</sup> See INA sections 221 and 222, 8 U.S.C. 1201 and 1202; 8 CFR 204; 22 CFR Part 42.

<sup>175</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).



lawful permanent resident will be considered an applicant for admission and, therefore, subject to an inadmissibility determination.<sup>176</sup> This inadmissibility determination includes whether the alien is inadmissible as likely to become a public charge, which will be determined upon the lawful permanent resident's return to the United States.

## **2. Extension of Stay and Change of Status Applicants**

As mentioned above, a nonimmigrant is admitted into the United States to stay for the limited period and purpose of the classification under which he or she was admitted and, in most instances, then is expected to depart the United States and return to his or her country. However, consistent with the INA and controlling regulations, DHS may, in its discretion, extend an alien's nonimmigrant status or change an alien's nonimmigrant status from one classification to another.<sup>177</sup> Furthermore, DHS is authorized under the INA to set conditions on the extension of stay or change of status. Consistent with this authority, DHS is proposing to require an applicant for an extension of stay or change of status to attest that he or she has neither received since obtaining the nonimmigrant status he or seeks to extend or to which he or she seeks to change, is not receiving, nor is likely to receive at any time in the future one or more public benefits as defined in this proposed rule.

Although section 212(a)(4) of the Act by its terms only applies to applicants for visas, admission, and adjustment of status, and thus does not, by its terms, render aliens who are likely

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<sup>176</sup> Lawful permanent residents are regarded as applicants for admission in the following circumstances: (1) lawful permanent residents who have abandoned or relinquished that status; (2) lawful permanent residents who have been outside the United States for a continuous period in excess of 180 days; (3) lawful permanent residents who have engaged in illegal activity after departing the United States; (4) lawful permanent residents who have departed the United States while under legal process seeking removal of the alien from the United States, including removal proceedings and extradition proceedings; (5) lawful permanent residents who have 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) lawful permanent residents attempting to enter at a time or place other than as designated by immigration officers or who have not been admitted to the United States after inspection and authorization by an immigration officer. *See* INA section 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C).

<sup>177</sup> *See* INA sections 214(a)(1) and 248(a), 8 U.S.C. 1184(a)(1) and 1258(a); *see also* 8 CFR 214.1, 248.1.

to become a public charge ineligible for the extension of stay or change of status, the government's interest in a nonimmigrant alien's ability to maintain self-sufficiency for the duration of the temporary stay does not end with his or her admission as a nonimmigrant. In particular, the government has an interest in ensuring that aliens present in the United States do not depend on public benefits to meet their needs.<sup>178</sup> Aliens therefore should remain self-sufficient for the entire period of their stay, including any extension of stay or additional period of stay afforded by a change of status. Accordingly, DHS is proposing to consider whether the alien has received since obtaining the nonimmigrant status he or she seeks to extend or to which he or she seeks to change, is currently receiving, or is likely to receive public benefits as defined in the proposed rule, when adjudicating an application to extend a nonimmigrant stay or change a nonimmigrant status.

Extension of stay and change of status applicants are already required to provide evidence of maintenance of their current nonimmigrant status.<sup>179</sup> As part of that determination, for some applicants, DHS considers the alien's financial status<sup>180</sup> and believes it sound policy to extend that consideration to extensions of stay and change of status generally, rather than to just subsets of nonimmigrants. Although the INA does not indicate that aliens seeking an extension of stay or change of status must establish self-sufficiency, consideration of such alien's self-sufficiency aligns with the aforementioned policy statements set forth in PRWORA.<sup>181</sup>

Except where the nonimmigrant status that the alien seeks to extend or to which the alien seeks to change is exempted by law from section 212(a)(4) of the Act, in order for an alien to

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<sup>178</sup> See 8 U.S.C. 1601(2)(A).

<sup>179</sup> See INA 214(a)(1), 8 U.S.C. 1184; 8 CFR 214.1(c)(4); INA 248(a), 8 U.S.C. 1258; 8 CFR 248.1(a)

<sup>180</sup> See 8 CFR 214.2(f)(1)(i)(B); AFM Ch. 30.2(c)(2)(F) ("Students seeking reinstatement must submit evidence of eligibility, including financial information . . . ."); AFM Ch. 30.3(c)(2)(C) (applicants applying to change status to a nonimmigrant student must demonstrate that they have the financial resources to pay for coursework and living expenses in the United States).

<sup>181</sup> 8 U.S.C. 1601.

demonstrate that he or she has neither received since obtaining the nonimmigrant status he or she seeks to extend or from which he or she seeks to change, nor is currently receiving or likely to receive any such public benefits, DHS will require applicants to answer questions on their application form,<sup>182</sup> under penalty of perjury, regarding their receipt of these public benefits. The responses to these questions would be used in determining whether the applicant has met his or her burden to establish eligibility for extension of stay or change of status under the proposed regulation.

In adjudicating whether the applicant has demonstrated that he or she is not likely to receive public benefits as defined in the proposed rule, at any time in the future, DHS would consider the status to which the alien seeks to extend or to which to change, as well as the anticipated additional period of stay. DHS would also consider whether the applicant has provided evidence of maintenance of status and that he or she has sufficient financial means to maintain the status he or she seeks, or that he or she will be gainfully employed in such status, as applicable. Based on the information the alien provides in support of the application for extension of stay or change of status, USCIS would determine whether the applicant should also submit Form I-944 in order to demonstrate that he or she is unlikely to receive public benefits during the temporary stay in the United States.

For example, if the alien is a B-2 nonimmigrant who was admitted to the United States to seek medical treatment and is seeking to extend his or her visit because he or she requires additional medical treatment that was unanticipated at the time of admission, the alien would need to submit evidence that he or she has the financial means to pay for this additional medical treatment and otherwise support himself or herself during the extended duration of his or her

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<sup>182</sup> Aliens in nonimmigrant classifications whose employers will be filing Form I-129 or Form I-129CW on their behalf will be required to provide this information to their employer.

temporary stay. An alien seeking to extend his or her stay in, or change status to, F-1 or M-1 nonimmigrant status would submit evidence of his or her financial ability to pay for his or her study and to financially support himself or herself.<sup>183</sup> An alien seeking to extend stay in or change to an employment-based nonimmigrant status, such as H-2B temporary non-agricultural worker status, would need to submit evidence such as tax return transcripts, W-2, or other documentation evidencing income from gainful employment appropriate to the nonimmigrant status being sought.<sup>184</sup>

Table 4 below provides a summary of nonimmigrant categories and the applicability of the public charge condition to such categories.

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
A-1 - Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family A-2 - Other Foreign Government Official or Employee, or Immediate Family INA 101(a)(15)(A), 22 CFR 41.21	No. Not applicable as admitted for Duration of Status, 8 CFR 214.1(c)(3)(v)	Yes. Files I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)

<sup>183</sup> See 8 CFR 214.2(f)(1)(i)(B) (students must present “documentary evidence of financial support in the amount indicated on the SEVIS Form I-20 (or the Form I-20A-B/I-20ID)”; AFM Ch. 30.2(b)(2)(F) (“(F) Students seeking reinstatement must submit evidence of eligibility, including financial information and a current I-20.”); AFM Ch. 30.3(c)(2)(C) (“Aliens seeking F-1 or M-1 status must submit the appropriate Form I-20 and evidence of financial ability to maintain the new status. Aliens seeking J-1 status must submit Form IAP-66.”); AFM Ch. 30.3(b)(3)(D) (“[T]he applicant [for change of status] must demonstrate he or she is able to maintain him or herself in the status sought, particularly financially. This issue needs particular examination when the applicant seeks a prolonged stay in any status where employment is not a routine part of the status, for example student status.”).

<sup>184</sup> See, e.g., AFM Ch. 30.3(b)(3)(E) (“Because the alien applicant on Form I-129 will be gainfully employed once the new status is granted, it is generally not necessary to further explore an applicant’s ability to maintain status financially (unless the rate of remuneration is so low that the principal would be unable to support him/herself and all dependents).”).

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
A-3 - Attendant, Servant, or Personal Employee of A-1 or A-2, or Immediate Family INA 101(a)(15)(A), 22 CFR 41.21	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes. INA 102; 22 CFR 41.21(d)(3)
B-1 - Temporary Visitor for Business B-2 - Temporary Visitor for Pleasure * not admitted under Visa Waiver Program INA 101(a)(15)(B)	Yes. Files Form I-539, 8 CFR 214.1(c)(2), 8 CFR 214.2(b)(1)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
C-1 - Alien in Transit C-1/D - Combined Transit and Crewmember Visa INA 101(a)(15)(C) and (D), INA 212(d)(8)	No. 8 CFR 214.1(c)(3)(ii)	No. 8 CFR 248.2(a)(2), except for change to T and U, 8 CFR 248.2(b) using Form I-914 or I-918	Not Applicable as not eligible for extension of stay or change of status
C-2 - Alien in Transit to United Nations Headquarters District Under Section 11.(3), (4), or (5) of the Headquarters Agreement INA 101(a)(15)(C) and (D), INA 212(d)(8)	No. Not applicable as admitted for Duration of Status. 8 CFR 214.1(c)(3)(ii)	No, 8 CFR 248.2(a)(2) , except for change to T and U, 8 CFR 248.2(b) using Form I-914 or I-918	No. 22 CFR 41.21(d)
C-3 - Foreign Government Official, Immediate Family, Attendant, Servant or Personal Employee, in Transit INA 101(a)(15)(C) and (D), INA 212(d)(8)	No. 8 CFR 214.1(c)(3)(ii)	No, 8 CFR 248.2(a)(2) , except for change to T and U, 8 CFR 248.2(b) using Form I-914 or I-918	No. 22 CFR 41.21(d)
CW-1 - Commonwealth of Northern Mariana Islands Transitional Worker Section 6(d) of Public Law 94–241, as added by Section 702(a) of Public Law 110–229. 8 CFR 214.2(w)	Yes. Files Form I-129CW, 8 CFR 214.1(c)(2) and 8 CFR 214.2(w)(17)	Yes. Files Form I-129CW, 8 CFR 248.1(a); 8 CFR 214.2(w)(18)	Yes.
CW-2 - Spouse or Child of CW-1	Yes. Files Form I-539, 8 CFR 214.1(c)(2) and 8 CFR 214.2(w)(17)(v)	Yes. Files Form I-539, 8 CFR 248.1(a); 8 CFR 214.2(w)(18)	

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
D - Crewmember (Sea or Air) D-2 - Crewmember departing from a different vessel than one of arrival INA 101(a)(15)(D)	No. 8 CFR 214.1(c)(3)(iii)	No, 8 CFR 248.2(a)(2), except for change to T and U, 248.2(b) using Form I-914 or Form I-918	Yes.
E-1, E-2 - Treaty Trader (Principal) INA 101(a)(15)(E)	Yes. Files Form I-129, 8 CFR 214.1(c)(1); 8 CFR 214.2(e)(20)	Yes, Files Form I-129, 8 CFR 248.1(a), 8 CFR 214.2(e)(21)(i)	Yes.
E-1, E-2 - Treaty Trader, Spouse or Child INA 101(a)(15)(E)	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 214.2(e)(21)(ii),	Yes.
E-2-CNMI - Commonwealth of Northern Mariana Islands Investor (Principal) Section 6(c) of Public Law 94–241, as added by Section 702(a) of Public Law 110–229. 8 CFR 214.2(e)(23)	Yes. Files Form I-129, 8 CFR 214.2(e)(23)(xii)	Yes. Files Form I-129, 8 CFR 248.1(a), 8 CFR 214.2(e)(23)(xiii)	Yes.
E-2-CNMI - Commonwealth of Northern Mariana Islands Investor, Spouse or Child Section 6(c) of Public Law 94–241, as added by Section 702(a) of Public Law 110–229. 8 CFR 214.2(e)(23)(x)	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
E-3 - Australian Treaty Alien coming to the United States Solely to Perform Services in a Specialty Occupation	Yes. Files Form I-129, 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
E-3D - Spouse or Child of E-3 E-3R - Returning E-3 INA 101(a)(15)(E)(iii)	Yes. Files I-539, 8 CFR 214.1(c)(1) and (2)	Yes. Files I-539, 8 CFR 248.1(a)	Yes.

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
F-1 - Student in an academic or language training program (principal) INA 101(a)(15)(F).	Yes, only if the F-1 requesting reinstatement to F-1 status or if the F-1 received a date-specific admission to attend high school and is now seeking an extension to D/S to attend college. 8 CFR 214.1(c)(3)(v); 8 CFR 214.2(f)(7); 8 CFR 214.2(f)(16)	Yes. Files Form I-539, 8 CFR 248.1(a),	Yes.
F-2 - Spouse or Child of F-1 INA 101(a)(15)(F).	No, not applicable as admitted for Duration of Status. 8 CFR 214.1(c)(3)(v); 8 CFR 214.2(f)(3)	Yes. Files Form I-539, 8 CFR 214.2(f)(3)	Yes.
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 Nonrecognized or Nonmember Foreign Government to International Organization, or Immediate Family G-4 - International Organization Officer or Employee, or Immediate Family INA 101(a)(15)(G).	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. 22 CFR 41.21(d)
G-5 - Attendant, Servant, or Personal Employee of G-1 through G-4, or Immediate Family.	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
H-1B - Alien in a Specialty Occupation, Fashion Models of Distinguished Merit and Ability, and workers performing services of	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129. 8 CFR 248.1(a)	Yes.

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project INA 101(a)(15)(H)(i)(b); Section 222 of Pub. L. 101-649.			
H-1B1 - Chilean or Singaporean National to Work in a Specialty Occupation INA 101(a)(15)(H)(i)(b1).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129. 8 CFR 248.1(a)	Yes.
H-1C <sup>185</sup> - Nurse in health professional shortage area INA 101(a)(15)(H)(i)(c).	Yes. Filed Form I-129, 8 CFR 212.2(h)(4)(v)(E)	Yes. Filed Form I-129, 8 CFR 212.2(h)(4)(v)(E)	Yes.
H-2A- Temporary Worker Performing Agricultural Services Unavailable in the United States INA 101(a)(15)(H)(ii)(a).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129	Yes.
H-2B - Temporary Worker Performing Other Services Unavailable in the United States INA 101(a)(15)(H)(ii)(b).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129	Yes.
H-3 - Trainee INA 101(a)(15)(H)(iii)	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-539	Yes.
H-4 - Spouse or Child of Alien Classified H1B/B1/C, H2A/B, or H-3 INA 101(a)(15)(H)(iv).	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539. 8 CFR 248.1(a)	Yes.
I - Representative of Foreign Information Media, Spouse and Child INA 101(a)(15)(I).	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539	Yes.

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<sup>185</sup> This classification can no longer be sought as of December 20, 2009. See the Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005, Pub. L. 109-423.



<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
J-1 - Exchange Visitor J-2 - Spouse or Child of J1 INA 101(a)(15)(J).	No, not applicable, as generally admitted for Duration of Status <sup>186</sup> 8 CFR 214.1(c)(3)(v)	Yes, subject to receiving a waiver of the foreign residence requirement, if necessary, Files I-539. 8 CFR 248.2(a)(4); may apply for change to T and U, using for Form I-914 or I-918, 8 CFR 248.2(b)	Yes.
K-1 - Fiance(e) of United States Citizen K-2 - Child of Fiance(e) of U.S. Citizen INA 101(a)(15)(K).	No. 8 CFR 214.1(c)(3)(iv)	No. 8 CFR 248.2(a)(2) except for change to T and U, 248.2(b) using Form I-914 or I-918	Not Applicable
K-3 - Spouse of U.S. Citizen awaiting availability of immigrant visa K-4 - Child of K-3 INA 101(a)(15)(K).	Yes. Files Form I-539, 8 CFR 214.1(c)(2) and 8 CFR 214.2(k)(10)	No. 8 CFR 248.2(2) except for change to T and U, 248.2(b) using Form I-914 or I-918	Yes.
L-1 - Intracompany Transferee (Executive, Managerial, and Specialized Knowledge Personnel Continuing Employment with International Firm or Corporation) INA 101(a)(15)(L).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
L-2 - Spouse or Child of Intracompany Transferee	Yes. Files I-539 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
M-1 - Vocational Student or Other Nonacademic Student INA 101(a)(15)(M).	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539. Not eligible if requesting F-1, 8 CFR 248.1(c)(1)	Yes.
M-2 - Spouse or Child of M-1 INA 101(a)(15)(M).	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539	Yes.

<sup>186</sup> J nonimmigrant who are admitted for a specific time period are not eligible for an extension of stay.

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
<p>N-8 - Parent of an Alien Classified SK3 (Unmarried Child Employee of International Organization) or SN-3</p> <p>N-9 - Child of N-8 or of SK-1 (Retired Employee International Organization), SK-2 (Spouse), SK-4 (surviving spouse), SN-1 (certain retired NATO 6 civilian employee), SN-2 (spouse) or SN-4 (surviving spouse)</p> <p>INA 101(a)(15)(N).</p>	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(e)	Yes.
<p>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</p> <p>Art. 12, 5 UST 1094; Art. 20, 5 UST 1098.</p>	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
<p>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</p> <p>Art. 13, 5 UST 1094; Art. 1, 4 UST 1794; Art. 3, 4 UST 1796.</p>	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
NATO-3 - Official Clerical Staff Accompanying Representative of Member State to NATO (including any of its Subsidiary Bodies), or Immediate Family Art. 14, 5 UST 1096.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
NATO-4 - Official of NATO (Other Than Those Classifiable as NATO1), or Immediate Family Art. 18, 5 UST 1098.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
NATO-5 - Experts, Other Than NATO Officials Classifiable Under NATO 4, Employed in Missions on Behalf of NATO, and their Dependents Art. 21, 5 UST 1100.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
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 Art. 1, 4 UST 1794; Art. 3, 5 UST 877.	No, not applicable as admitted for Duration of Status 8 CFR 214.1(c)(3)(v)	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)
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 Arts. 12–20, 5 UST 1094–1098	Yes. Files Form I-539, 8 CFR 214.2(s)(1)(ii).	Yes. Files Form I-539, 8 CFR 248.1(a)	No. INA 102; 22 CFR 41.21(d)

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
O-1 - Alien with Extraordinary Ability in Sciences, Arts, Education, Business or Athletics or Extraordinary Achievement in the Motion Picture or Television Industry O-2 - Essential Support Workers Accompanying and Assisting in the Artistic or Athletic Performance by O-1 INA 101(a)(15)(O).	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
O-3 - Spouse or Child of O-1 or O-2 INA 101(a)(15)(O).	Yes. Files Form I-539, 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
P-1 - Internationally Recognized Athlete or Member of Internationally Recognized Entertainment Group P-2 - Artist or Entertainer in a Reciprocal Exchange Program P-3 - Artist or Entertainer in a Culturally Unique Program INA 101(a)(15)(P). P-1S/P-2S/P-3S – Essential Support Workers 8 CFR 214.2(p)	Yes. Files Form I-129, 8 CFR 213.1(c)(3)(i)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
P-4 - Spouse or Child of P-1, P-2, or P-3 INA 101(a)(15)(P).	Yes. Files Form I-539, 8 CFR 214.1(c) (1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
Q-1 - Participant in an International Cultural Exchange Program INA 101(a)(15)(Q)(i).	Yes. Files Form I-129, 8 CFR 213.1(c)(3)(i)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
R-1 - Alien in a Religious Occupation INA 101(a)(15)(R).	Yes. Files Form I-129, 8 CFR 213.1(c)(3)(i)	Yes. Files Form I-129, 8 CFR 248.1(a)	Yes.
R-2 - Spouse or Child of R-1 INA 101(a)(15)(R).	Yes. Files Form I-539, 8 CFR 214.1(c)(1) and (2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
S-5 - Certain Aliens Supplying Critical Information Relating to a Criminal Organization or Enterprise S-6 - Certain Aliens Supplying Critical Information Relating to Terrorism S-7 - Qualified Family Member of S-5 or S-6 INA 101(a)(15)(S).	No. 8 CFR 213.1(c)(3)(vi)	No. 8 CFR 248.2(2) except for change to T and U, 248.2(b) using Form I-914 or I-918	Yes.
T-1 - Victim of a severe form of trafficking in persons INA 101(a)(15)(T).	Yes. Files Form I-539. INA § 214(o)(7)(B); 8 CFR 214.11(l)(1) and (2); 8 CFR 214.1(c)(2).	Yes. Files Form I-539, 8 CFR 248.1(a).	No.
T-2 - Spouse of T-1 T-3 - Child of T-1 T-4 - Parent of T-1 under 21 years of age T-5 - Unmarried Sibling under age 18 of T-1 T-6 - Adult or Minor Child of a Derivative Beneficiary of a T-1 INA 101(a)(15)(T).	Yes. Files Form I-539. INA 214(o)(7)(B); 8 CFR 214.1(c)(2)	Yes. Files Form Files I-539, 8 CFR 248.1(a)	No.
TN - NAFTA Professional INA 214(e)(2)	Yes. Files Form I-129, 8 CFR 214.1(c)(1)	Yes. Files Form Files I-129, 8 CFR 248.1(a)	Yes.
TD - Spouse or Child of NAFTA Professional INA 214(e)(2)	Yes. Files Form I-539, 8 CFR 214.1(c)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	Yes.
U-1 - Victim of criminal activity U-2 - Spouse of U-1 U-3 - Child of U-1 U-4 - Parent of U-1 under 21 years of age U-5 - Unmarried Sibling under age 18 of U-1 under 21 years of age INA 101(a)(15)(U).	Yes. Files Form I-539, 8 CFR 214.1(c)(2); 8 CFR 214.14(g)(2)	Yes. Files Form I-539, 8 CFR 248.1(a)	No.

<b>Table 4. Summary of Nonimmigrant Categories Subject to Public Benefits Condition</b>			
<b>Category</b>	<b>Eligible to apply for Extension of Stay (i.e. May File Form I-129 or Form I-539)*</b>	<b>Eligible to apply for Change of Status (i.e. May File Form I-129 or I-Form 539)*</b>	<b>Subject to Public Benefit Condition under proposed 8 CFR 214.1(a)(3)(iv), 214.1(a)(4)(iv); 248.1(c)(4)</b>
V-1 - Spouse of a Lawful Permanent Resident Alien Awaiting Availability of Immigrant Visa V-2 - Child of a Lawful Permanent Resident Alien Awaiting Availability of Immigrant Visa V-3 - Child of a V-1 or V-2 INA 101(a)(15)(V)(i) or INA 101(a)(15)(V)(ii). INA 203(d).	Yes. Files Form I-539, 8 CFR 214.1(c)(2); 8 CFR 214.15(g)(3)	Yes. Files Form I-539, 8 CFR 248.1(a); 214.15(g)(3)	Yes.
W-B - Visa Waiver for visitor for business, W-T - visitor for pleasure, Visa Waiver Program INA 217	No. 8 CFR 214.1(c)(3)(i) and 214.1(c)(3)(viii)	No, except for change to T and U, using Form I-914 or I-918; INA 248.2(b)	Not Applicable

\*Includes questions on Form I-129 and Form I-539 about previous applications for or receipt of public benefits, and applicant may be required to File Form I-944 if requested by USCIS. Whether the alien must file an I-129 or an I-539 depends on the status the alien is applying to change to or extend.

### 3. Adjustment of Status Applicants

In general, an alien 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.<sup>187</sup> As part of the adjustment process, USCIS is responsible for determining whether the applicant has met his or her burden of proof to establish

<sup>187</sup> See INA section 245, 8 U.S.C. 1255. Aliens in removal proceedings before an immigration judge may also apply for adjustment of status pursuant to 8 CFR 1245.

eligibility for the benefit,<sup>188</sup> which includes a determination of whether the alien has demonstrated that no inadmissibility grounds in section 212(a) of the Act apply (or, if they do apply, the alien is eligible for a waiver of the inadmissibility ground). In determining whether the adjustment applicant has demonstrated that he or she is not inadmissible on the public charge ground, DHS proposes to review the mandatory statutory factors together with any required affidavit of support and any other relevant information, in the totality of the circumstances.

Tables 5 through 9 below provide a summary of immigrant categories for adjustment of status and the applicability of the public charge inadmissibility determination to such categories.

<b>Table 5. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications<sup>189</sup></b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A and Form I-864, Affidavit of Support Required or Exempt?</b>
Immediate Relatives of U.S. citizens including spouses, children and parents <sup>190</sup>	Yes. INA 212(a)(4)(A)	Required. INA 212(a)(4)(C)
Family-Based First Preference: Unmarried sons/daughters of U.S. citizens and their children <sup>191</sup>	Yes. INA 212(a)(4)(A)	Required. INA 212(a)(4)(C)

<sup>188</sup> See INA section 291, 8 U.S.C. 1361.

<sup>189</sup> Applicants who filed a Form I-485 prior to December 19, 1997 are exempt from the Affidavit of Support requirement. See Pub. L. 104-208, div. C., section 531(b), 110 Stat. 3009-546, 3009-675; 8 CFR 213a.2(a)(2)(i) (adjustment applicants) and 213a.2(a)(2)(ii)(B) (applicants for admission). Aliens who acquired citizenship under section 320 of the Act upon admission to the United States are exempt from submitting an affidavit of support. See 8 CFR 213a.2(a)(2)(ii)(E); Child Citizenship Act, Pub. L. 106-395, section 101, 114 Stat. 1631, 1631 (2000) (amending INA section 320). 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 National Defense Authorization Act For Fiscal Year 2004, Pub. L. 108-136, section 1703(e), 117 Stat. 1392, 1695 (2003).

<sup>190</sup> Including 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. Note children adopted abroad generally do not apply for adjustment of status.

<sup>191</sup> Including 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.

<b>Table 5. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications<sup>189</sup></b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A and Form I-864, Affidavit of Support Required or Exempt?</b>
Family-Preference Second: Spouses, children, and unmarried sons/daughters of alien residents <sup>192</sup>	Yes. INA 212(a)(4)(A)	Required. INA 212(a)(4)(C)
Family Preference Third: Married sons/daughters of U.S. citizens and their spouses and children <sup>193</sup>	Yes. INA 212(a)(4)(A)	Required. INA 212(a)(4)(C)
Family Preference Fourth: Brothers/sisters of U.S. citizens (at least 21 years of age) and their spouses and children <sup>194</sup>	Yes. INA 212(a)(4)(A)	Required. INA 212(a)(4)(C)
Fiance <sup>195</sup> * admitted as nonimmigrant K-1/K2	Yes. INA 212(a)(4)(A)	Required. INA 212(a)(4)(C)

<sup>192</sup> Including the following categories: F-26 Spouses of alien residents, subject to country limits; C-26 Spouses of alien residents, subject to country limits, conditional; FX-6 Spouses of alien residents, exempt from country limits; CX-6 Spouses of alien residents, exempt from country limits, conditional; F-27 Children of alien 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 alien residents, subject to country limits, conditional; FX-7 Children of alien residents, exempt from country limits; CX-8 Children of CX-7, exempt from country limits, conditional; FX-8 Children of FX-7, or FX-8, exempt from country limits; CX-7 Children of alien residents, exempt from country limits, conditional; F-29 Unmarried sons/daughters of alien residents, subject to country limits; C-29 Unmarried children of alien residents, subject to country limits, conditional.

<sup>193</sup> Including 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.

<sup>194</sup> 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, adjustments.

<sup>195</sup> Includes the following categories: CF-1 Spouses, entered as fiance(e), adjustments conditional; IF-1 Spouses, entered as fiance(e), adjustments.



<b>Table 5. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications<sup>189</sup></b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A and Form I-864, Affidavit of Support Required or Exempt?</b>
Amerasians based on preference category -born between December 31, 1950 and before October 22, 1982. <sup>196</sup>	Yes. INA 212(a)(4)(A)	Exempt. Amerasian Act, Pub. L. 97-359 (Oct. 22, 1982).
Amerasians, born in Vietnam between 1/1/62-1/1/76 Immediate Relative : AM-6, AR-6 Children  Amerasians under Amerasian Homecoming Act, ;Pub. L. 100-202 (Dec. 22, 1987) <sup>197</sup> - born between 1/1/1962-1/1/1976	No. (I-360 and adjustment) Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202	Exempt. Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Pub. L. 100-202
IW-6 Spouses, widows or widowers	Yes. INA 212(a)(4)(A)	Exempt. 8 CFR 204.2 and 71 FR 35732.
Immediate Relative VAWA applicant, including spouses and children <sup>198</sup>	No. INA 212(a)(4)(E)	Exempt. INA 212(a)(4)(E)
First Preference VAWA B-16 Unmarried sons/daughters of U.S. citizens, self-petitioning B-17 Children of B-16	No. INA 212(a)(4)(C)(i)	Exempt. INA 212(a)(4)(C)(i)
Second Preference VAWA applicant, including spouses and children <sup>199</sup>	No. INA 212(a)(4)(C)(i)	Exempt. INA 212(a)(4)(C)(i)

<sup>196</sup> 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 INA 204(f). Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

<sup>197</sup> 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.

<sup>198</sup> 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.

<sup>199</sup> Includes the following categories: B-26 Spouses of alien residents, subject to country limits, self-petitioning; BX-6 Spouses of alien residents, exempt from country limits, self-petitioning; B-27 Children of alien residents, subject to country limits, self-petitioning; BX-7 Children of alien 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 alien residents, subject to country limits, self-petitioning.

<b>Table 5. Applicability of INA 212(a)(4) to Family-Based Adjustment of Status Applications<sup>189</sup></b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A and Form I-864, Affidavit of Support Required or Exempt?</b>
Third Preference VAWA Married son/daughters of U.S. citizen, including spouses and children <sup>200</sup>	No. INA 212(a)(4)(C)(i)	Exempt. INA 212(a)(4)(C)(i)

\* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), permanent departure of the alien, or otherwise as outlined in proposed 8 CFR 213.1(g), if the alien did not receive any public benefits as defined in the proposed rule.

<b>Table 6. Applicability of INA 212(a)(4) to Employment-Based Adjustment of Status Applications</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
First Preference : Priority workers <sup>201</sup>	Yes. INA 212(a)(4)(D)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5% or more) <sup>202</sup> in filed Form I-140. INA 212(a)(4)(D), 8 CFR 213a.1
Second Preference: Professionals with advanced degrees or aliens of exceptional ability <sup>203</sup>	Yes. INA 212(a)(4)(D)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5% or more) in filed Form I-140. INA 212(a)(4)(D), 8 CFR 213a.1

<sup>200</sup> Includes the following categories: 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; 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; Third Preference VAWA; B-37 Spouses of B-36, adjustments; B-38 Children of B-36, subject to country limits.

<sup>201</sup> Includes the following categories: E-16 Aliens 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 E-18; E-10 Children of E-11, E-12, E-13, E-16, E-17, or E-18.

<sup>202</sup> Relative means a husband, wife, father, mother, child, adult son, adult daughter, brother, or sister. Significant ownership interest means an ownership interest of 5 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 Act. *See* 8 CFR.213a.1.

<sup>203</sup> Includes the following categories: E-26 Professionals holding advanced degrees; ES-6 Soviet scientists; E-27 Spouses of E-21 or E-26; E-28 Children of E-21 or E-26.

<b>Table 6. Applicability of INA 212(a)(4) to Employment-Based Adjustment of Status Applications</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency?*</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
Third: Skilled workers, professionals, and other workers <sup>204</sup>	Yes. INA 212(a)(4)(D)	Exempt, unless qualifying relative or entity in which such relative has a significant ownership interest (5% or more) in filed Form I-140. INA 212(a)(4)(D), 8 CFR 213a.1
Fifth: I-526 Immigrant Petition by Alien Entrepreneur (EB-5) <sup>205</sup>  INA 203(b)(5), 8 CFR 204.6	Yes. INA 212(a)(4)(D)	Not Applicable <sup>206</sup>

\* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), or permanent departure of the alien, or upon the fifth year of the alien's anniversary of the adjustment of status, or, if the alien, following the initial grant of lawful permanent resident status, obtains a status that is exempt from the public charge ground of inadmissibility, and provided that the alien did not receive any public benefits as defined in the proposed rule.

<b>Table 7. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>

<sup>204</sup> 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 E-36, 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.

<sup>205</sup> 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.

<sup>206</sup> EB-5 applicants are Form I-526, Immigrant Petition by Alien Entrepreneur, 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 INA section 212(a)(4)(D) is inapplicable.

<b>Table 7. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
Special Immigrant (EB-4)- Religious Workers <sup>207</sup> 8 CFR 204.5(m); INA 101(a)(27)(C)	Yes. INA 212(a)(4)	Not Applicable <sup>208</sup>
Special Immigrant (EB-4) – International employees of US government abroad <sup>209</sup>  INA 101(a)(27)(D), 22 CFR 42.32(d)(2)	Yes. INA 212(a)(4)	Not Applicable <sup>210</sup>
Special Immigrant (EB-4) Employees of Panama Canal <sup>211</sup>  22 CFR 42.32(d)(3); INA 101(a)(27)(E), INA 101(a)(27)(F), and INA 101(a)(27)(G)	Yes. INA 212(a)(4)	Not Applicable <sup>212</sup>
Special Immigrant (EB-4) - Foreign Medical School Graduates <sup>213</sup>  INA 101(a)(27)(H), INA 203(b)(4)	Yes. INA 212(a)(4)	Not Applicable <sup>214</sup>

<sup>207</sup> 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.

<sup>208</sup> For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers (for example, a religious institution), would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

<sup>209</sup> 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.

<sup>210</sup> For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers (for example, the U.S. armed forces), would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

<sup>211</sup> 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.

<sup>212</sup> For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers generally would not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

<sup>213</sup> 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.

<sup>214</sup> For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

<b>Table 7. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
Special Immigrant (EB-4) -Retired employees of International Organizations including G-4 International Organization Officer <sup>215</sup>  International Organizations (G-4s international organization officer/ Retired G-4 Employee) <sup>216</sup> INA 101(a)(27)(I) and INA 101(a)(27)(L) ; 8 CFR 101.5; 22 CFR 42.32(d)(5); 22 CFR 41.24;22 CFR 41.25	Yes. INA 212(a)(4)	Not Applicable <sup>217</sup>
Special Immigrant (EB-4) -SL-6 Juvenile court dependents, adjustments	No. SIJ are exempt under 245(h).	Not Applicable. INA 245(h)
Special Immigrant (EB-4)- U.S. Armed Forces Personnel <sup>218</sup>  INA 101(a)(27)(K)	Yes. INA 212(a)(4)	Not Applicable <sup>219</sup>
Special Immigrant - International Broadcasters <sup>220</sup>  INA 101(a)(27)(M) ; 8 CFR 204.13	Yes - INA 212(a)(4)	Not Applicable <sup>221</sup>

<sup>215</sup> 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.

<sup>216</sup> Includes 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.

<sup>217</sup> For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

<sup>218</sup> Includes the following categories: SM-6 U.S. Armed Forces personnel, service (12 years) after 10/1/91 SM-9 U.S. Armed Forces personnel, service (12 years) by 10/91; 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.

<sup>219</sup> For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

<sup>220</sup> 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.

<sup>221</sup> For this category, although the applicants are subject to public charge under INA section 212(a)(4), the employers would generally not be a relative of the alien or a for-profit entity and therefore the requirements for an affidavit of support under INA section 212(a)(4)(D) is inapplicable.

<b>Table 7. Applicability of INA 212(a)(4) to Special Immigrant Adjustment of Status Application</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
Special Immigrant (EB-4) - Special immigrant interpreters who are nationals of Iraq or Afghanistan <sup>222</sup>	No. Section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006, as amended; Public Law 109-163—Jan. 6, 2006, 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 section (a)(2)(C), Pub. L. 111-8 (Mar. 11, 2009)	Exempt. Section 602(b)(9) of the Afghan Allies Protection Act of 2009, Title VI of Pub. L. 111-8, 123 Stat. 807, 809 (March 11, 2009) which states that INA 245(c)(2), INA 245(c)(7), and INA 245(c)(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 (January 6, 2006) to state that INA 245(c)(2), INA 245(c)(7), and INA 245(c)(8) do not apply to Iraq or Afghan translator adjustment applicants.

\* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), or permanent departure of the alien, if the alien did not receive any public benefits as defined in the proposed rule.

<b>Table 8. Applicability of INA 212(a)(4) to Refugee, Asylee, and Parolee Adjustment of Status Applications</b>
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<sup>222</sup> 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, SQ-7, 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.

<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
Asylees <sup>223</sup>	No. INA 209(c)	Exempt. INA 209(c)
Indochinese Parolees from Vietnam, Cambodia, and Laos 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	No. Section 586, Pub. L. 106-429 (Nov. 6, 2000)	Exempt. Section 586, Pub. L. 106-429 (Nov. 6, 2000)
Polish and Hungarian Parolees (Poland or Hungary who were paroled into the United States from November 1, 1989 to December 31, 1991) <sup>224</sup>	No. Title VI, Subtitle D, Section 646(b), Pub. L. 104-208; 8 CFR 245.12	Exempt. Title VI, Subtitle D, Section 646(b), Pub. L. 104-208; 8 CFR 245.12
Refugees <sup>225</sup>	No. INA 207(c)(3); INA 209(c)	Exempt. INA 207; INA 209(c)
Cuban-Haitian Entrant under IRCA - CH-6, CH-7 <sup>226</sup>	No. Section 202, Pub. L. 99-603, 100 Stat. 3359 (1986) (as amended), 8 U.S.C. 1255a.	Exempt. Section 202, Pub. L. 99-603, 100 Stat. 3359 (1986) (as amended), 8 U.S.C. 1255a.
HRIFA - Principal HRIFA Applicant who applied for asylum before December 31, 1995 <sup>227</sup>	No. Section 902 Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.	Exempt. Section 902 Pub. L. 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255.

\* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), or permanent departure of the alien, if the alien did not

<sup>223</sup> Including the following categories: AS-6 Asylees; AS-7 Spouses of AS-6; AS-8 Children of AS-6; SY-8 Children of SY-6; GA-6 Iraqi asylees; GA-7 Spouses of GA-6; GA-8 Children of GA-6.

<sup>224</sup> Note that this program does not have a specific sunset date and technically applicants could apply but should have already applied.

<sup>225</sup> Includes the following categories: RE-6 Other refugees (Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102); RE-7 Spouses of RE-6; RE-8 Children of RE-6; RE-9 Other relatives.

<sup>226</sup> Note that this program has a sunset date of two years after enactment, however, some cases may still be pending.

<sup>227</sup> Includes the following categories: 1995 - HA-6 Principal HRIFA Applicant; Spouse of HA-6, HA-7 and 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, HE-9. Note that this program has a sunset date of March 31, 2000; however, dependents may still file for adjustment of status.

receive any public benefits as defined in the proposed rule.

<b>Table 9. Applicability of INA 212(a)(4) to Other Applicants Who Must be Admissible</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
Diplomats Section 13	Yes. Section 13 of Public Law 85-316 (September 11, 1957), as amended by Public Law 97-116 (December 29, 1981); 8 CFR 245.3.	Exempt, by statute, as they are not listed in INA 212(a)(4) as a category that requires an Affidavit of Support.
Individuals Born in the US under Diplomatic Status (NA-3) 8 CFR 101.3	Yes. INA 212(a)(4)	Exempt. 8 CFR 101.3
Diversity, DV-1 diversity immigrant, spouse and child	Yes. INA 212(a)(4)	Exempt, by statute, as they are not listed in INA 212(a)(4) as a category that requires an Affidavit of Support. Diversity visas are issued under INA 203(c) which do not fall under INA 212(a)(4)(C) or (D).
W-16 Entered without inspection before 1/1/82 W-26 Entered as nonimmigrant and overstayed visa before 1/1/82. Certain Entrants before January 1, 1982	Yes. INA 212(a)(4) (except for certain aged, blind or disabled individuals as defined in 1614(a)(1) of the Social Security Act). INA 245A(b)(1)(C)(i) and (a)(4)(a) – application for adjustment 42 U.S.C. 1382c(a)(1). Special Rule for determination of public charge - See INA 245A(d)(2)(B)(iii).	Exempt, by statute as they are not listed in INA 212(a)(4) as a category that requires an Affidavit of Support.
T, T-1 victim, spouse, child, parent, sibling INA 101(a)(15)(T), INA 212(d)(13)(A)	Yes. Under INA 212(d)(13)(A), INA 212(a)(4) only does not apply at the nonimmigrant status stage. However, a waiver is available for T nonimmigrant adjustment applicants. INA 245(l)(c) INA 101(a)(15)(T),	Exempt, by statute as they are not listed in INA 212(a)(4) as a category that requires an Affidavit of Support. Adjustment of status based on T nonimmigrant status is under INA 245(l) which does not fall under INA 212(a)(4)(C) or (D).
American Indians - INA 289	No. INA 289	Exempt. INA 289
Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 97-429 (Jan. 8, 1983)	No. Pub. L. 97-429 (Jan. 8, 1983)	Exempt. Pub. L. 97-429 (Jan. 8, 1983)



<b>Table 9. Applicability of INA 212(a)(4) to Other Applicants Who Must be Admissible</b>		
<b>Category</b>	<b>Subject to INA 212(a)(4) and must file Form I-944, Declaration of Self-Sufficiency? *</b>	<b>INA 213A, and Form I-864, Affidavit of Support Required or Exempt?</b>
KIC - Kickapoo Indian Citizen KIP - Kickapoo Indian Pass		
S (Alien witness or informant)	Yes, but there is a waiver available - INA 245(j); INA 101(a)(15)(S); 8 CFR 214.2(t)(2); 8 CFR 1245.11 (Waiver filed on Form I-854, Inter-Agency Alien Witness and Informant Record)	Exempt. INA 245(j); INA 101(a)(15)(S); 8 CFR 214.2(t)(2); 8 CFR 1245.11 (Waiver filed on I-854, Inter-Agency Alien Witness and Informant Record)
Private Immigration Bill providing for alien's adjustment of status	Dependent on the text of the Private Bill.	Dependent on the text of the Private Bill.
NACARA (202) <sup>228</sup> Principal NC-6, (NC 7-9) spouse and children	No. Section 202(a), Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.	Exempt. Section 202(a), Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.
NACARA 203 Cancellation of removal (Z-13) Battered spouses or children (Z-14) Salvadoran, Guatemalan and former Soviet bloc country nationals (Form I-881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105-100 (NACARA))	No. Section 203, Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.	Exempt. Section 203, Pub. L. 105-100, 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255.
Lautenberg, LA-6 <sup>229</sup>	No. Section 599E, Pub. L. 101-167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255.	Exempt. Section 599E, Pub. L. 101-167, 103 Stat. 1195 (Nov. 21, 1989), 8 U.S.C.A. 1255.
Registry, Z-66 - Aliens who entered the United States prior to January 1, 1972 and who meet the other conditions	No. INA 249 of the Act and 8 CFR part 249	Exempt. INA 249 of the Act and 8 CFR part 249
U, U-1 Crime Victim, spouse, children and parents, and siblings under INA 245(m)	No. INA 212(a)(4)(E)	Exempt. INA 212(a)(4)(E)
Temporary Protected Status (TPS)	No. 8 CFR 244.3(a) <sup>230</sup>	Exempt. 8 CFR 244.3(a) <sup>231</sup>

\* If found inadmissible based on the public charge ground, USCIS, at its discretion, may permit the alien to post a

<sup>228</sup> Note that this program has a sunset date of April 1, 2000; however, some cases may still be pending.

<sup>229</sup> Note that this program sunset date of September 30, 2014, only applies to parole. Eligible applicants may still apply for adjustment of status.

<sup>230</sup> INA section 244(c)(2)(ii), 8 U.S.C. 1254a(c)(2)(ii), authorizes DHS to waive any section 212(a) ground, except for those that Congress specifically noted could not be waived.

<sup>231</sup> See INA section 244(c)(2)(ii), 8 U.S.C. 1254a(c)(2)(ii).

public charge bond (Form I-945). A public charge bond may be cancelled (Form I-356) upon the death, naturalization (or otherwise obtaining U.S. citizenship), or permanent departure of the alien, if the alien did not receive any public benefits as defined in the proposed rule.

#### **4. Exemptions**

The public charge inadmissibility ground does not apply to all applicants who are seeking a visa, admission, or adjustment of status.<sup>232</sup> Congress has specifically exempted certain groups from the public charge inadmissibility ground and DHS regulations permit waivers of the ground for certain other groups, as follows:

- Refugees and asylees at the time of admission and adjustment of status to lawful permanent resident, pursuant to sections 207(c)(3) and 209(c) of the Act, 8 U.S.C. 1157(c)(3), 1159(c);
- 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 Interpreter, or Afghan or Iraqi national 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, 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;
- Aliens applying for adjustment of status, pursuant to the Cuban Adjustment Act, Pub. L. 89-732 (Nov. 2, 1966) as amended; 8 U.S.C. 1255, note;

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<sup>232</sup> See proposed 8 CFR 212.23(a).

- Nicaraguans and other Central Americans who are adjusting status, pursuant to 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;
- Haitians who are adjusting status, 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 Act, 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 Act, 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 Act, 8 U.S.C. 1254a(c)(2)(ii) and 8 CFR 244.3(a);<sup>233</sup>
- A nonimmigrant described in section 101(a)(15)(A)(i) and (A)(ii) of the Act, 8 U.S.C. 1101(a)(15)(A)(i) and (A)(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 Act, 8 U.S.C. 1102, 22 CFR 41.21(d);
- A nonimmigrant classifiable as C-2 (alien in transit to U.N. Headquarters) or C-3 (foreign government official), pursuant to 22 CFR 41.21(d);

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<sup>233</sup> INA section 244(c)(2)(ii), 8 U.S.C. 1254a(c)(2)(ii), authorizes DHS to waive any INA section 212(a), 8 U.S.C. 1182(a) ground, except for those that Congress specifically noted could not be waived.

- A nonimmigrant described in section 101(a)(15)(G)(i), (G)(ii), (G)(iii), and (G)(iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories),<sup>234</sup> 8 U.S.C. 1101(a)(15)(G)(i), (G)(ii), (G)(iii), and (G)(iv), pursuant to section 102 of the Act, 8 U.S.C. 1102, 22 CFR 41.21(d);
- A nonimmigrant classifiable as a NATO representative and related categories,<sup>235</sup> pursuant to 22 CFR 41.21(d);
- A nonimmigrant described in section 101(a)(15)(T) of the Act (Victim of Severe Form of Trafficking), 8 U.S.C. 1101(a)(15)(T), pursuant to section 212(d)(13)(A) of the Act, 8 U.S.C. 1182(d)(13)(A), at time of admission;
- An applicant for, or who is granted, nonimmigrant status under section 101(a)(15)(U) of the Act, 8 U.S.C. 1101(a)(15)(U) (Victim of Criminal Activity), pursuant to section 212(a)(4)(E)(ii) of the Act, 8 U.S.C. 1182(a)(4)(E)(ii);
- Nonimmigrants who were admitted under section 101(a)(15)(U) (Victim of Criminal

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<sup>234</sup> 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.

<sup>235</sup> 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

Activity) of the Act, 8 U.S.C. 1101(a)(15)(U), at the time of their adjustment of status under section 245(m) of the Act, 8 U.S.C. 1155(m), and 8 CFR 245.24;

- An alien who is a VAWA self-petitioner as defined in section 101(a)(51) of the Act, 8 U.S.C. 1101, pursuant to section 212(a)(4)(E)(i) of the Act, 8 U.S.C. 1182(a)(4)(E)(i);
- A qualified alien described in section 431(c) of the PRWORA of 1996 (8 U.S.C. 1641(c)) (certain battered aliens as qualified aliens), pursuant to section 212(a)(4)(E)(iii) of the Act, 8 U.S.C. 1182(a)(4)(E)(iii);
- Applicants adjusting status under section National Defense Authorization Act For Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1392 (Nov. 24, 2003) (posthumous benefits to surviving spouses, children, and parents);
- American Indians Born in Canada, pursuant to section 289 of the Act, 8 U.S.C. 1359; and
- Nationals of Vietnam, Cambodia, and Laos adjusting status, pursuant to section 586 of Pub. L. 106-429 (Nov. 1 2000).

In general, the aforementioned classes of aliens 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. Admission of these aliens also serves distinct public policy goals separate from the general immigration system. Other legal provisions may permit waivers of public charge provisions under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4).

## **5. Waivers**

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

- Nonimmigrants who were admitted under section 101(a)(15)(T) of the Act, 8 U.S.C.

1101(a)(15)(T) (Victims of Severe Form of Trafficking in Persons) at the time of their adjustment of status under section 245(l)(2)(A) of the Act, 8 U.S.C. 1255(l)(2)(A);

- S (alien witness or informant) nonimmigrants described in section 101(a)(15)(S), of the Act, 8 U.S.C. 1101(a)(15)(S);
- Applicants for admission and adjustment of status under section 245(j) of the Act, 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 Act permissible under the law.

## **B. Definitions of Public Charge and Related Terms**

DHS proposes to add several definitions that apply to public charge inadmissibility determinations.

### **1. Public Charge**

The term “public charge,” as used in section 212(a)(4) of the Act, is not defined.<sup>236</sup> DHS is proposing to define a public charge as an alien who receives one or more public benefits, as defined in 8 CFR 212.21(b).<sup>237</sup> DHS believes that its proposed definition of public charge is consistent with legislative history, case law, and the ordinary meaning of public charge.

Consistent with the public charge inadmissibility statute<sup>238</sup> and Congressional objectives announced in PRWORA, DHS proposes that aliens subject to the public charge inadmissibility

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<sup>236</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>237</sup> See proposed 8 CFR 212.21(a) and (c).

<sup>238</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4) (emphasis added). The alien is inadmissible if he or she “is likely at any time to become a public charge.”

ground<sup>239</sup> should “not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.”<sup>240</sup>

There is a scarcity of legislative guidance and case law defining public charge. Legislative history, however, suggests a link between public charge and the receipt of public benefits. According to a 1950 Senate Judiciary Committee report, which preceded the passage of the 1952 Act, a Senate subcommittee highlighted concerns raised by an immigration inspector about aliens receiving old age assistance. The Senate subcommittee recommended against establishing a strict definition of the term public charge by law. Because the elements that could constitute any given individual’s likelihood of becoming a public charge vary, the subcommittee instead recommended that the determination of whether an alien is likely to become a public charge should rest within the discretion of consular officers and the Commissioner.<sup>241</sup>

Before Congress passed IIRIRA in 1996, debates on public charge exclusion and deportation grounds considered the significance of an alien’s use of public benefits and self-sufficiency.<sup>242</sup> One Senator opined that immigrants, upon seeking admission, make a “promise to the American people that they will not become a burden on the taxpayers,”<sup>243</sup> and expressed that it is not “unreasonable for the taxpayers of this country to require recently arrived immigrants to depend on their sponsors for the first 5 years under all circumstances if the

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<sup>239</sup> Aliens subject to the public charge ground of inadmissibility are aliens outside the United States seeking admission to the country, seeking a visa to permit them to apply for admission as a nonimmigrant or immigrant to the United States, or in the United States seeking to adjust status to that of lawful permanent residents.

<sup>240</sup> See 8 U.S.C. 1601(2)(A).

<sup>241</sup> See The 1950 Omnibus Report of the Senate Judiciary Committee, S. Rep. No. 81-1515, at 349 (1950); *see also Matter of Harutunian*, 14 I&N Dec. 583 (Reg’l Comm’r 1974).

<sup>242</sup> See 142 Cong. Rec. S4609 (May 2, 1996) (statement of Sen. Byrd) (“[S]elf-sufficiency will be the watchword for those coming to the United States. By making noncitizens ineligible for Federal means-tested programs, and by ‘deeming’ a sponsor’s income attributable to an immigrant, the American taxpayer will no longer be financially responsible for new arrivals.”), available at <https://www.congress.gov/crec/1996/05/02/CREC-1996-05-02-pt1-PgS4592.pdf>.

<sup>243</sup> 142 Cong. Rec. S4495 (May 1, 1996) (statement of Sen. Simon), available at <https://www.congress.gov/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf>.

sponsor has the assets.”<sup>244</sup> Congress through PRWORA<sup>245</sup> further emphasized that “the availability of public benefits not constitute an incentive for immigration to the United States.”<sup>246</sup>

Absent a clear statutory definition, some courts and administrative authorities have tied public charge to receipt of public benefits without quantifying the level of public support or the type of public support required. For example, in analyzing the term public charge in the context of deportability under section 19 of the Immigration Act of 1917,<sup>247</sup> the U.S. District Court for the Northern District of California in *Ex parte Kichmiriantz* explained that public charge should be interpreted as “a money charge upon, or an expense to, the public for support and care.”<sup>248</sup> The court made clear that the money charge or expense must be upon the public, rather than relatives, but did not specifically identify how much public support renders a person a public charge. Similarly, the U.S. District Court for the Northern District of New York and the U.S. District Court for the Southern District of New York, in *Ex parte Mitchell* and *In re Keshishian* respectively, indicated that a public charge is one who is supported at public expense without qualifying or quantifying the level of support at public expense necessary.<sup>249</sup> Furthermore, when the Fifth Circuit Court of Appeals considered criminal misconduct and imprisonment within the context of public charge in *Coykendall v. Skrmetta*, the court opined: “It cannot well be supposed that the words in question were intended to refer to anything other than a condition of dependence on the public for support.”<sup>250</sup> The Second Circuit Court of Appeals, in *Iorio v. Day*, likewise stated: “The language (sic) itself, ‘public charge,’ suggests rather dependency than

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<sup>244</sup> 142 Cong. Rec. S4495 (May 1, 1996) (statement of Sen. Simon), *available at* <https://www.congress.gov/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf>.

<sup>245</sup> 8 U.S.C. 1601(2)(A).

<sup>246</sup> 8 U.S.C. 1601(2)(B).

<sup>247</sup> Section 19 of the Immigration Act of 1917 addresses aliens who are deportable within five years of entry.

<sup>248</sup> 283 F. 697, 698 (N.D. Cal. 1922).

<sup>249</sup> See *Ex parte Mitchell* 256 F. 230, 234 (N.D. NY 1919) and *In re Keshishian* 299 F. 804 (S.D. NY 1924)

<sup>250</sup> See *Coykendall v. Skrmetta* 22 F.2d 121 (5th Cir. 1927)



imprisonment.”<sup>251</sup> Neither circuit court elaborated on the degree of dependence required to sustain a public charge finding.

In *Matter of Martinez-Lopez*, the Attorney General indicated that public support or the burden of supporting the alien being cast on the public was a fundamental consideration in public charge inadmissibility determinations.<sup>252</sup> While an alien’s past receipt of welfare alone does not establish that he or she is likely to become a public charge, case law strongly suggests that an alien’s ability or inability to remedy his or her past or current reliance on public welfare for financial support plays a critical role in the outcome of a public charge inadmissibility determination.<sup>253</sup> For example, in *Matter of Perez*, the BIA acknowledged the respondent’s ability to remedy her reliance on welfare in determining that she may be able to overcome the public charge ground inadmissibility ground in a prospective application for a visa.<sup>254</sup> On the other hand, in *Matter of Harutunian* and *Matter of Vindman*, the respondents failed to show a capacity to overcome their dependence on public support.<sup>255</sup> INS expected them to continue receiving public support and determined that they were inadmissible as public charges.<sup>256</sup>

Bearing in mind the operative legislative history and case law examined above, DHS is proposing a new definition of public charge.<sup>257</sup> The definitions cited in the 1999 Interim Field Guidance and proposed rule indicates that a person becomes a public charge when he or she is committed to the care, custody, management, or support of the public, but DHS does not believe that these definitions suggest or require a primary dependence on the government in order for

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<sup>251</sup> See *Iorio v. Day* 34 F.2d 921 (2d Cir. 1929).

<sup>252</sup> See *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421 (Att’y Gen. 1964)

<sup>253</sup> See, e.g., *Matter of Vindman*, 16 I&N Dec. 131 (Reg’l Comm’r 1977); *Matter of Perez*, 15 I&N Dec. 136 (BIA 1974); *Matter of Harutunian*, 14 I&N Dec. 583 (Reg’l Comm’r 1974).

<sup>254</sup> See *Matter of Perez*, 15 I&N Dec. at 137.

<sup>255</sup> See *Matter of Harutunian*, 14 I&N Dec. at 590 and *Matter of Vindman*, 16 I&N Dec. at 132.

<sup>256</sup> See *id.*

<sup>257</sup> See, e.g., *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012) (“When a term goes undefined in statute, we give the term its ordinary meaning.”).

someone to be a public charge.<sup>258</sup> DHS believes that a person should be considered a public charge based on the receipt of financial support from the general public through government funding (i.e. public benefits).

This is consistent with various dictionary definitions of public charge and "charge" also support a definition that involves the receipt of public benefits. The current edition of the Merriam-Webster Dictionary defines public charge simply as "one that is supported at public expense."<sup>259</sup> Black's Law Dictionary (6th ed.) further defines public charge as "an indigent; a person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty."<sup>260</sup> In addition, the term "charge" is defined in Merriam-Webster Dictionary as "a person or thing committed into the care of another"<sup>261</sup> and Black's Law Dictionary defines charge as "a person or thing entrusted to another's care," e.g., "a charge of the estate."<sup>262</sup> These definitions generally suggest that an impoverished or ill individual who receives public benefits for a substantial component of their support and care can be reasonably viewed as being a public charge. The proposed definition of public charge is also consistent with the concept of an indigent, which is defined as "one who is needy and poor...and ordinarily indicates one who is destitute of means of comfortable subsistence so as to be in want."<sup>263</sup> DHS believes its proposed

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<sup>258</sup> DHS acknowledges the importance of increasing access to health care and helping people to become self-sufficient in certain contexts (such as with respect to other agencies' administration of government assistance programs). The INA, however, does not dictate advancement of those goals in the context of public charge inadmissibility determinations.

<sup>259</sup> Merriam-Webster Online Dictionary, *Definition of Public Charge*, <https://www.merriam-webster.com/dictionary/public%20charge> (last visited Sept. 4, 2018).

<sup>260</sup> *Black's Law Dictionary* 233 (6th ed. 1990), available at [http://www.republicsg.info/dictionaries/1990\\_black's-law-dictionary-edition-6.pdf](http://www.republicsg.info/dictionaries/1990_black's-law-dictionary-edition-6.pdf).

<sup>261</sup> Merriam-Webster Online Dictionary, *Definition of Charge*, <https://www.merriam-webster.com/dictionary/charge> (last updated Sept. 5, 2018).

<sup>262</sup> *Black's Law Dictionary* Charge (10th ed. 2014).

<sup>263</sup> *Black's Law Dictionary* 773 (6th ed. 1990), available at [http://www.republicsg.info/dictionaries/1990\\_black's-law-dictionary-edition-6.pdf](http://www.republicsg.info/dictionaries/1990_black's-law-dictionary-edition-6.pdf).

definition reflects Congress's intent in having aliens be self-sufficient and not reliant on the government (*i.e.*, public benefits) for assistance to meet their needs.

## **2. Public Benefit**

DHS proposes to define public benefit<sup>264</sup> to include a specific list of cash aid and noncash medical care, housing, and food benefit programs where either (1) the cumulative value of one or more such benefits that can be monetized (*i.e.*, where DHS can determine the cash value of such benefit) exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within a period of 12 consecutive months based on the per-month FPG for the months during which the benefits are received (hereafter referred to as the 15 percent of FPG or the proposed 15 percent standard or threshold); or (2) for benefits that cannot be monetized, the benefits are received for more than 12 months in the aggregate within a 36-month period. The proposed definition also addresses circumstances where an alien receives a combination of monetizable benefits equal to or below the 15 percent threshold together with one or more benefits that cannot be monetized. In such cases, DHS proposes that the threshold for duration of receipt of the non-monetizable benefits would be 9 months in the aggregate within a 36-month period.<sup>265</sup>

As proposed in this rule, DHS would consider the following public benefits:

- Monetizable benefits:
  - Any Federal, State, local, or tribal cash assistance<sup>266</sup> for income maintenance, including: Supplemental Security Income (SSI),<sup>267</sup> Temporary Assistance for Needy Families

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<sup>264</sup> See proposed 8 CFR 212.21(b).

<sup>265</sup> See proposed 8 CFR 212.21(c).

<sup>266</sup> Cash assistance would include any government assistance in the form of cash, checks or other forms of money transfers, or instruments.

<sup>267</sup> See 42 U.S.C. 1381-1383f

(TANF),<sup>268</sup> and Federal, State or local cash benefit programs for income maintenance (often called “General Assistance” in the State context, but which may exist under other names);

- Benefits that can be monetized in accordance with proposed 8 CFR 212.24;
- Supplemental Nutrition Assistance Program (SNAP, or formerly called “Food Stamps”), 7 U.S.C. 2011 to 2036c;
- Public housing defined as Section 8 Housing Choice Voucher Program;<sup>269</sup>
- Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation);<sup>270</sup> and
- Non-cash benefits that cannot be monetized:
  - Benefits paid for by Medicaid, 42 U.S.C. 1396 et seq., except for emergency medical conditions as prescribed in in section 1903(v) of Title XIX of the Social Security Act, 42 U.S.C. 1396b(v), 42 CFR 440.255(c), and for services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA); and benefits provided to foreign-born children of U.S. citizen parents;
  - Premium and Cost Sharing Subsidies for Medicare Part D;<sup>271</sup> Benefits provided for institutionalization for long-term care at government expense;
  - Subsidized Housing under the Housing Act of 1937, 42 U.S.C. 1437 et seq.

#### **(a) Types of Public Benefits**

In formulating the proposed definition of public benefits, DHS contemplated pertinent case law, the definition of public benefits in PRWORA, and the treatment of certain public benefits under the current public charge policy. The cases examined draw a distinction between the types of public benefits that are appropriately considered in public charge determinations,

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<sup>268</sup> See 42 U.S.C. 601-619.

<sup>269</sup> See 24 CFR part 984; 42 U.S.C. 1437f and 1437u.

<sup>270</sup> See 24 CFR Parts 5, 402, 880-884 and 886.

<sup>271</sup> See 42 U.S.C. 1395w-14.

and the types that are not. In *Matter of Harutunian*, an INS Regional Commissioner noted a fundamental difference between consideration of “individualized public support to the needy” and “essentially supplementary benefits directed to the general welfare of the public as a whole.”<sup>272</sup> The BIA similarly observed a distinction between individualized receipt of welfare benefits and “the countless municipal and State services which are provided to all residents, alien and citizen alike, without specific charge of the municipality or the State, and which are paid out of the general tax fund” in assessing the relevance of receipt of a government benefit or service to public charge determinations.<sup>273</sup> Specific public benefits considered relevant to public charge determinations have included old age assistance, Supplemental Security Income (SSI), and receipt of “public funds from the New York Department of Social Services.”<sup>274</sup>

PRWORA, with certain exceptions, defined Federal public benefits as “any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and . . . any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.”<sup>275</sup> DHS believes the definition of public benefits used in PRWORA is in some respects too broad for public charge inadmissibility determinations. The principal reason PRWORA’s definition does not work in the public charge inadmissibility determination is that it includes grants, contracts, and licensures that are transactional in nature

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<sup>272</sup> See *Matter of Harutunian*, 14 I&N Dec. 583, 589 (Reg’l Comm’r 1974).

<sup>273</sup> See *Matter of B ---*, 3 I&N Dec. 323, 324-25 (BIA 1948).

<sup>274</sup> See *Matter of Harutunian* 14 I&N Dec. 583, 590 (Reg’l Comm’r 1974) (considering old age assistance for public charge excludability purposes); *Matter of Vindman*, 16 I&N Dec. 131, 132 (Reg’l Comm’r 1977) (receipt of public funds from the New York Department of Social Services).

<sup>275</sup> See 8 U.S.C. 1611(c)(1) and (2).

and may involve the exchange of government resources for value provided by the alien.<sup>276</sup>

Because they are value-exchanged benefits and do not evidence a lack of self-sufficiency, DHS does not believe that grants, contracts, and licensures are appropriate for consideration in public charge inadmissibility determinations.

Certain cash aid and non-cash benefits directed toward food, housing, and healthcare, on the other hand, are directly relevant to public charge inadmissibility determinations. Food, shelter, and necessary medical treatment are basic necessities of life. A person who needs the public's assistance to provide for these basic necessities is not self-sufficient.

DHS proposes to consider specific public benefit programs as part of the public charge inadmissibility analysis. Consistent with the 1999 Interim Field Guidance, DHS is proposing to consider all federal, state, local, and tribal cash assistance for income maintenance as part of the public benefits definition. The receipt of these public benefits indicates that the recipient, rather than being self-sufficient, needs the government's assistance to meet basic living requirements such as housing, food, and medical care. Therefore, DHS believes that continuing to consider these benefits in the public charge inadmissibility consideration is appropriate.<sup>277</sup>

DHS also proposes consideration of certain non-cash benefits, because receipt of such benefits is relevant to determining whether an alien is self-sufficient. DHS recognizes that the universe of non-cash benefits is quite large, and that some benefits are more commonly used, at greater taxpayer expense, than others. In addition, incorporating specific non-cash benefit

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<sup>276</sup> See 8 U.S.C. 1611(c).

<sup>277</sup> Not all cash assistance would qualify as cash assistance for income maintenance under the proposed rule. For instance, DHS would not consider Stafford Act disaster assistance, including financial assistance provided to individuals and households under Individual Assistance under the Federal Emergency Management Agency's Individuals and Households Program (42 U.S.C. 5174) as cash assistance for income maintenance. The same would hold true for comparable disaster assistance provided by State, local, or tribal governments. Other categories of cash assistance that are not intended to maintain a person at a minimum level of income would similarly not fall within the definition.

programs into the public charge inadmissibility determination entails certain indirect costs – for instance, as a result of a final rule, the benefits-granting agency may make changes to forms or to enrollment or disenrollment procedures. In light of these considerations, and to provide consistency in adjudications and appropriate certainty for aliens and benefits-granting agencies, DHS proposes to incorporate consideration of a limited list of non-cash benefits in the public charge inadmissibility determination context. Specifically, as indicated above, DHS would consider the following non-cash benefits: Nonemergency Medicaid, Premium and Cost Sharing Subsidies for Medicare Part D; the Supplemental Nutrition Assistance Program (SNAP); benefits provided for institutionalization for long-term care at government expense; and housing programs, including Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation), and Subsidized Public Housing.

Cash 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. Table 10 illustrates the estimated average annual public benefits payments and average annual benefit for each assistance program under consideration in this rule.

<b>Program</b>	<b>Average Annual Public Benefits Payments<sup>279</sup></b>	<b>Average Annual Benefit<sup>280</sup></b>	<b>Included in Proposal?</b>
Medicaid <sup>281</sup>	\$477,395,691,240	\$7,426.59 per person	Yes
Supplemental Nutrition Assistance Program (SNAP)	\$69,192,042,274	\$1,527.59 per person	Yes
Supplemental Security Income (SSI)	\$54,743,370,400	\$6,593.72 per person	Yes

<sup>278</sup> For a list of federal expenditures by program, see fiscal year 2016 data from table 2 of Gene Falk et al., Cong. Research Serv., R45097, *Federal Spending on Benefits and Services for People with Low Income: In Brief* (2018), available at <https://fas.org/sgp/crs/misc/R45097.pdf>.

<sup>279</sup> See Table 50: *Estimated Average Annual Benefit per Person, by Public Benefit Program*, unless otherwise noted.

<sup>280</sup> *Ibid.*

<sup>281</sup> Note that per enrollee Medicaid costs will vary by eligibility group and State.

Federal Rental Assistance <sup>282</sup>	\$41,020,000,000	\$8,121.16 per household	Yes
Low Income Subsidy (LIS) for Medicare Part D Prescription Drug Coverage <sup>283</sup>	\$25,400,000,000	\$2,099.17 per person	Yes
Children's Health Insurance Program (CHIP)	\$15,026,000,000 <sup>284</sup>	\$2,324.52 per person <sup>285</sup>	Being Considered, Requesting Comments
Temporary Assistance for Needy Families (TANF) (cash aid only)	\$4,389,219,525	\$1,272.56	Yes

In addition to federal expenditure impact, participation rates in these cash and non-cash benefits programs are significant. In fact, participation rates in some non-cash programs are far higher than participation rates in some cash programs, regardless of a person's immigration status or citizenship. Using the 2014 Panel of the Survey of Income and Program Participation (SIPP), DHS analyzed data detailing the participation rates for various cash and non-cash federal public benefits programs.<sup>286</sup> The results suggest that receipt of non-cash public benefits is more prevalent than receipt of cash benefits.<sup>287</sup> When analyzed by nativity and citizenship status, the

<sup>282</sup> 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.

<sup>283</sup> Note that spending on LIS beneficiaries varies by individual.

<sup>284</sup> See U.S. Dep't of Health and Human Servs. (HHS), Centers for Medicare & Medicaid (CMS), *Expenditure Reports from MBES/CBES*. Available at <https://www.medicaid.gov/medicaid/finance/state-expenditure-reporting/expenditure-reports/index.html>. (Accessed Aug. 2, 2018).

<sup>285</sup> The estimated CHIP enrollment is 6,464,117, which is shown in the *Medicaid & CHIP Enrollment Data Highlights*, available at <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> (last visited Aug. 23, 2018).

<sup>286</sup> The 2014 Panel represents the most recent full year of data, and may not represent current participation rates.

<sup>287</sup> The SIPP is a longitudinal survey providing detailed information about public benefit receipt and the economic status of the U.S. civilian non-institutionalized population residing in households or group quarters. See U.S. Census Bureau, *Survey of Income and Program Participation: 2014 Panel Users' Guide* (2016), available at <https://www.census.gov/content/dam/Census/programs-surveys/sipp/methodology/2014-SIPP-Panel-Users-Guide.pdf>. In this proposed rule, estimates of income, poverty, and program participation by immigration status are produced from the September 27, 2017 re-release of Wave 1 of the SIPP. See U.S. Census Bureau, *Release Notes: 2014 SIPP Wave 1*, available at <https://www2.census.gov/programs-surveys/sipp/tech-documentation/2014/2014-wave1-releasenotes.pdf>. The 2014 Panel may be used for estimates representative of any month in calendar year 2013. In the tables presenting SIPP data throughout this preamble, annual averages are presented, which are averages across the 12 monthly estimates for the calendar year. Estimates represent persons residing in the household at the time of the interview, and exclude those who lived in the household during the month but not at the time of interview (referred to as "Type 2" people in SIPP documentation). See *id.*; see also Memorandum from James B. Treat, Chief, Demographic Statistical Methods Div., to Jason Fields, Survey Director, Source and



results also suggest comparable levels of program participation by native-born individuals, foreign-born individuals, and noncitizens.<sup>288</sup> DHS recognizes that the SIPP Panel includes respondent-provided data on nativity, citizenship status, and initial immigration status, but does not provide data on current immigration classification. Additionally, the categories represented in the SIPP immigration status item do not align precisely with the populations covered by this rule – for instance, the results include refugees, asylees, and other populations that may access public benefits but are not subject to the public charge ground of inadmissibility. The SIPP data and DHS’s analysis of this data do not examine whether the receipt of public benefits was authorized, and DHS did not examine program payment rate error information for this purpose. Notwithstanding these limitations, DHS believes the SIPP data on noncitizen participation is instructive with respect to the receipt of non-cash benefits by the noncitizen population on the whole. DHS welcomes comments on its use of this data, and whether alternative reliable data sources are available.

Table 11 shows public benefit participation, by nativity and citizenship status, in 2013. The total population studied was 310,867,000. The data shows that the rate of receipt for either cash or non-cash public benefits was approximately 20 percent among the native-born and foreign-born, including noncitizens. The rate of receipt of cash benefits was only 2 to 4 percent for these populations, with receipt of non-cash benefits dominating the overall rate.<sup>289</sup>

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*Accuracy Statement for Wave 1 Public Use Files (S&A-20) (Apr. 7, 2017), available at <https://www2.census.gov/programs-surveys/sipp/tech-documentation/source-accuracy-statements/2014/sipp-2014-source-and-accuracy-statement.pdf> [hereinafter Source and Accuracy Statement].*

<sup>288</sup> For this study, the foreign-born include those who were not born in the U.S. and were either noncitizens or became citizens through naturalization, military service, or adoption. Noncitizens are identified by self-responses to the question of whether they are citizens of the United States.

<sup>289</sup> In the discussion of SIPP data in this proposed rule, the estimates provided are based on a sample, which may not be identical to the totals and rates if all households and group quarters in the population were interviewed. The standard errors provided in the tables give an indication of the accuracy of the estimates. Any estimate for which the estimate divided by its standard error (the relative standard error) is greater than 30 percent is considered unreliable. The standard errors themselves are estimates, and were calculated using design effects described in the Source and

Table 11 also shows Medicaid participation rates were 16.1 percent (43,301,000) among native-born individuals and 15.1 percent (6,272,000) among foreign-born persons, while rates among noncitizens were 15.5 percent (3,130,000). Participation rates in SNAP among native-born, foreign-born, and noncitizen populations are 11.6 percent (31,308,000), 8.7 percent (3,605,000), and 9.1 percent (1,828,000), respectively. The rate of receipt of cash benefits was 3.5 percent among the native-born and foreign-born, and about 2 percent among noncitizens. Although these results do not precisely align with the categories of aliens subject to this rule, they support the general proposition that non-cash public benefits play a significant role in the Nation's social safety net, including with respect to noncitizens generally.

<b>Table 11: Public Benefit Participation by Nativity and Citizenship, 2013 (in thousands)</b>						
	<b>Total population</b>			<b>Native-born</b>		
	<b>Population</b>			<b>% of Total Population</b>		
	310,867			269,413 86.7%		
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	65,038	20.9%	0.2%	56,385	20.9%	0.2%
Cash benefits	10,799	3.5%	0.1%	9,285	3.4%	0.1%
SSI	7,906	2.5%	0.1%	6,590	2.4%	0.1%
TANF	2,254	0.7%	0.0%	2,124	0.8%	0.0%

Accuracy Statement. Participation in Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and General Assistance (GA) for a given month is identified by the monthly coverage variables for those benefits. These variables identify household members who were eligible for the benefit and were reported as being covered in the given month. Supplemental Security Income (SSI) and Medicaid receipt are defined by the coverage spell; if a given month is contained in the range of months of coverage, then the individual is identified as a recipient of the benefit for that month. The rent subsidy benefit for a given month indicates the respondent reported that their rent was lower because of a federal, state, or local government housing program, and the housing voucher benefit furthermore indicates that the renter was able to choose where to live. Finally, the 2014 Panel of SIPP does not distinguish between Medicaid, CHIP, and other types of comprehensive medical assistance for low-income people. For a number of reasons, DHS anticipates that CHIP enrollees represent a relatively small portion of the "Medicaid/CHIP" population. Typically, only persons below age 20 are eligible for CHIP, which reduces its impact on the overall estimates of Medicaid/CHIP. Furthermore, using data from the 2008 Panel of SIPP (Wave 13, reference month 1, representing September through December, 2012), it was found that 0.7 percent of noncitizen respondents reported receiving CHIP, and 23% of noncitizen Medicaid/CHIP recipients below age 20 overall reported receiving CHIP. For general reference, see the following publications, in addition to the cited sources in the preceding footnotes: Carmen DeNavas-Walt & Bernadette D. Proctor, U.S. Census Bureau, *Current Population Reports: Income and Poverty in the United States: 2013* (Sept. 2014), available at <https://www2.census.gov/library/publications/2014/demographics/p60-249.pdf>; Kayla Fontenot et al., U.S. Census Bureau, *Monthly and Average Monthly Poverty Rates by Selected Demographic Characteristics: 2013* (Mar. 2017), available at <https://www.census.gov/content/dam/Census/library/publications/2017/demo/p70br-145.pdf>.

<i>GA</i>	947	0.3%	0.0%	844	0.3%	0.0%
Non-cash benefits	63,527	20.4%	0.2%	55,082	20.4%	0.2%
<i>Medicaid</i>	49,573	15.9%	0.2%	43,301	16.1%	0.2%
<i>SNAP</i>	34,913	11.2%	0.2%	31,308	11.6%	0.2%
<i>Housing vouchers</i>	4,932	1.6%	0.1%	4,215	1.6%	0.1%
<i>Rent subsidy</i>	12,431	4.0%	0.1%	10,455	3.9%	0.1%
	<b>Foreign-born citizens and non-citizens</b>			<b>Foreign-born noncitizens</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	41,454	13.3%		20,163	6.5%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	8,653	20.9%	0.6%	4,558	22.6%	0.9%
Cash benefits	1,514	3.7%	0.3%	370	1.8%	0.3%
<i>SSI</i>	1,316	3.2%	0.3%	254	1.3%	0.2%
<i>TANF</i>	130	0.3%	0.1%	*73	*0.4%	0.1%
<i>GA</i>	*103	*0.2%	0.1%	*47	*0.2%	0.1%
Non-cash benefits	8,445	20.4%	0.6%	4,498	22.3%	0.9%
<i>Medicaid</i>	6,272	15.1%	0.6%	3,130	15.5%	0.8%
<i>SNAP</i>	3,605	8.7%	0.4%	1,828	9.1%	0.6%
<i>Housing vouchers</i>	718	1.7%	0.2%	287	1.4%	0.3%
<i>Rent subsidy</i>	1,976	4.8%	0.3%	869	4.3%	0.4%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\* Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

Table 12 reflects that noncitizens showed comparable rates of program participation regardless of whether their status at admission to the U.S. was as a lawful permanent resident or not. For example, approximately 20 percent of noncitizens who were lawful permanent residents at admission to the U.S., as well as noncitizens who were not lawful permanent residents at admission, received non-cash benefits, and approximately 2 percent of these populations receive cash benefits. Among the cash benefits considered, about 1 percent of noncitizens who were lawful permanent residents at admission, as well as those who were not, received SSI while less than 1 percent received either TANF or General Assistance.

<b>Table 12: Public Benefit Participation of Noncitizens, by Class of Admission to the U.S. (Lawful Permanent Resident or Other), 2013 (in thousands)</b>						
	<b>Noncitizen and LPR at admission</b>			<b>Noncitizen and not LPR at admission</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	11,268	3.6%		8,895	2.9%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	2,658	23.6%	1.2%	1,900	21.4%	1.3%
Cash benefits	219	1.9%	0.4%	151	1.7%	0.4%
SSI	131	1.2%	0.3%	123	1.4%	0.4%
TANF	*65	*0.6%	0.2%	*8	*0.1%	0.1%
GA	*22	*0.2%	0.1%	*25	*0.3%	0.2%
Non-cash benefits	2,630	23.3%	1.2%	1,868	21.0%	1.3%
Medicaid	1,926	17.1%	1.1%	1,205	13.5%	1.1%
SNAP	1,069	9.5%	0.8%	760	8.5%	0.9%
Housing vouchers	163	1.4%	0.3%	124	1.4%	0.4%
Rent subsidy	490	4.4%	0.6%	379	4.3%	0.6%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\* Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

In sum, the data from Tables 11 and 12 show that for native-born and foreign-born populations alike, non-cash public benefits play a significant role in many peoples' lives. DHS does not believe it is appropriate to ignore the receipt of non-cash benefits in its public charge inadmissibility analysis. Further, we note that certain non-cash benefits, just like cash benefits, provide assistance to those who are not self-sufficient. DHS, therefore, proposes to consider cash benefits and non-cash public benefits. DHS believes that consideration of cash and non-cash benefit receipt represents an appropriately comprehensive and also readily administrable application of the public charge ground of inadmissibility.

#### **(b) Consideration of Monetizable and Non-Monetizable Public Benefits**

While an alien's receipt of one or more of these benefits alone would not establish that he or she is likely at any time in the future to become a public charge, as explained above, case law strongly suggests that an alien's self-sufficiency, *i.e.*, the alien's ability to meet his or her needs

without depending on public resources, plays a critical role in the outcome of a public charge inadmissibility determination.<sup>290</sup> DHS recognizes the challenges of quantifying or qualifying reliance or dependence on public benefits. Indeed, in the course of evaluating welfare dependence or dependence on public benefits, HHS acknowledges that “welfare dependence, like poverty, is a continuum, with variations in degree and in duration.”<sup>291</sup> As discussed below, DHS believes that its proposed monetizable, non-monetizable, and combined standards appropriately capture sufficient levels of dependence on public benefits in degree and duration to sustain a finding of public charge or likelihood of becoming a public charge. In arriving at these thresholds, DHS considered the current policy’s “primarily dependent” standard, other agencies’ definitions of dependence, and the Federal Poverty Guidelines. DHS notes, as discussed elsewhere in the rule, that for admissibility and adjustment of status purposes, the receipt of such benefits would be determined on a prospective basis, *i.e.* likely at any time to receive benefits above the proposed threshold(s). For extension of stay and change of status applicants, the determination regarding the receipt of such benefits above the proposed threshold is not exclusively prospective and is instead based on whether an alien has received since obtaining the nonimmigrant status that the alien seeks to end or from which the alien seeks to change, is receiving, or is likely at any time to receive benefits above the proposed threshold(s).

*i. "Primarily Dependent" Standard and Its Limitations*

The proposed 15 percent of FPG threshold would represent a change from the standard set forth in the 1999 INS proposed rule and Interim Field Guidance, which generally define a public charge as a person who is “primarily dependent” on public benefits, *i.e.*, a person for

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<sup>290</sup> See, *e.g.*, *Matter of Vindman*, 16 I&N Dec. 131 (Reg’l Comm’r 1977); *Matter of Perez*, 15 I&N Dec. 137 (BIA 1974); *Matter of Harutunian* 14 I&N Dec. 583 (Reg’l Comm’r 1974).

<sup>291</sup> See U.S. Dep’t of Health & Human Servs., *Welfare Indicators and Risk Factors*, at I-2 (2015), available at <https://aspe.hhs.gov/report/welfare-indicators-and-risk-factors-fourteenth-report-congress>.

whom public benefits represent more than half of their income and support. INS stated that the primary dependence model of public assistance provided context to the development of public charge exclusion in immigration in the late 19<sup>th</sup> century, because individuals who became dependent on the Government were institutionalized in asylums or placed in “almshouses” for the poor. At the time, the wide array of limited-purpose public benefits now available did not yet exist. After consulting with SSA, HHS, and USDA, INS suggested that the best evidence of primary dependence on the government was the receipt of cash assistance for income maintenance or institutionalization for long-term care at government expense. INS further argued that non-cash public benefits generally provide only “supplementary” support in the form of vouchers or direct services to support nutrition, health, and living condition needs.

The current policy’s definition is consistent, in some respects, with how other agencies have defined dependence in certain contexts. For example, in certain congressional reports, HHS has defined welfare dependence as “the proportion of individuals who receive more than half of their total family income in one year from the Temporary Assistance for Needy Families (TANF) program, the Supplemental Nutrition Assistance Program (SNAP) and/or the Supplemental Security Income (SSI) program.”<sup>292</sup> The IRS has also defined a qualifying dependent child as one who cannot have provided more than half of his or her own support for the year and a qualifying dependent relative as generally someone who depends on another for more than half of his or her total support during the calendar year.<sup>293</sup> Within the context of preparing reports to Congress on welfare dependence or constructing certain tax rules, a “primary dependence” approach may be appropriate. As HHS has noted, “using a single point – in this case 50 percent

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<sup>292</sup> The Welfare Indicators Act of 1994 requires HHS to submit annual welfare dependence indicators reports to Congress. See U.S. Dep’t of Health & Human Servs., *Welfare Indicators and Risk Factors* 1 (2018), available at <https://aspe.hhs.gov/pdf-report/welfare-indicators-and-risk-factors-seventeenth-report-congress>.

<sup>293</sup> See IRS Publication 501 (Jan. 2, 2018), available at <https://www.irs.gov/pub/irs-pdf/p501.pdf>.

– yields a relatively straightforward measure that can be tracked easily over time, and is likely to be associated with any large changes in total dependence.”<sup>294</sup>

DHS agrees with HHS that although a 50 percent threshold creates a bright line that may be useful for certain purposes, it is possible and likely probable that individuals below such threshold will lack self-sufficiency and be dependent on the public for support. Because of the nature of the public benefits that would be considered under this rule – which are generally means-tested and provide cash for income maintenance and for basic living needs such as food, medical care, and housing – DHS believes that receipt of such benefits even in a relatively small amount or for a relatively short duration would in many cases be sufficient to render a person a public charge. This is because a person with limited means to satisfy basic living needs who uses government assistance to fulfill such needs frequently will be dependent on such assistance to such an extent that the person is not self-sufficient.

In addition, as noted above, DHS considers the current policy’s focus on cash benefits to be insufficiently protective of the public budget, particularly in light of significant public expenditures on non-cash benefits. Therefore, the DHS proposal takes into account a finite list of non-cash benefits, including some that can be monetized and some that cannot. DHS proposes to apply the aforementioned 15 percent threshold for the cumulative value of benefits only to the former, and to apply a standard tied to the duration of receipt of public benefits to the latter, as discussed in more detail below.

In sum, DHS does not believe that the plain text of section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), requires an alien to be “primarily” (50 percent or more) dependent on the government or rely on only cash assistance to be considered a public charge. Nor does DHS

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<sup>294</sup> See U.S. Dep’t of Health & Human Servs., *Welfare Indicators and Risk Factors*, at I-2 (2015), available at <https://aspe.hhs.gov/report/welfare-indicators-and-risk-factors-fourteenth-report-congress>.

believe that such limitations are mandated by the principles of PRWORA or the century-plus of case law regarding the public charge ground of inadmissibility. As discussed above, the term public charge is ambiguous as to how much government assistance an individual must receive or the type of assistance an individual must receive to be considered a public charge. The statute and case law do not prescribe the degree to which an alien must be receiving public benefits to be considered a public charge. Given that neither the statute nor the case law prescribe 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.

*ii. Fifteen Percent of Federal Poverty Guidelines (FPG) Standard for Monetizable Benefits*

DHS proposes to consider receipt of monetizable public benefits as listed in 8 CFR 212.21(b)(1), where the cumulative value of one or more of the listed benefits exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any period of 12 consecutive months, based on the per-month average FPG for the months during which the benefits are received. This proposed threshold is most straightforward to calculate within the context of a 12-month period that spans a single calendar year (January through December). For example, this 15 percent of FPG threshold would exclude up to \$1,821 worth of monetizable public benefits for a household of one if the monetizable public benefits are received from January 2018 through December 2018.<sup>295</sup> On the other hand, the threshold requires a slightly more complex calculation when evaluating 12 consecutive months spanning two calendar years. To illustrate, an alien receives monetizable public benefits between April 2017 and March 2018.

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<sup>295</sup> The calculation is an FPG of \$12,140 for a household of one, multiplied by 0.15. See U.S. Dep't of Health & Human Servs., *HHS Poverty Guidelines for 2018*, available at <https://aspe.hhs.gov/poverty-guidelines> (last visited Feb. 11, 2018).



DHS would compare the amount received for the 12 consecutive month period against 15 percent of FPG applicable to each month in question. Fifteen percent of FPG is \$150.75 per month for April through December 2017 and \$151.75 per month for January through March 2018 based on the respective poverty guidelines in effect for calendar years 2017 and 2018, which would equal \$1,812 for this 12 month consecutive period. In evaluating likely receipt of future monetizable public benefits, DHS would use the FPG in effect on the date of adjudication.

In formulating this 15 percent of FPG threshold, DHS proposes to use FPG as the baseline for the percentage of monetizable public benefits receipt being considered in the totality of the circumstances because the poverty guidelines are authoritative and transparent. The poverty guidelines are a simplified version of the Census Bureau's poverty thresholds, which Census uses to prepare its estimates of the number of individuals and families in poverty.<sup>296</sup> HHS updates and adjusts the FPG annually based on the Consumer Price Index for All Urban Consumers (CPI-U).<sup>297</sup> As HHS notes, a number of federal programs use the poverty guidelines as an eligibility criterion.<sup>298</sup> "Some federal programs use a percentage multiple of the guidelines (for example, 125 percent or 185 percent of the guidelines)" to determine public benefit eligibility.<sup>299</sup> In the immigration context, DHS uses the FPG as a standard for purposes of the affidavit of support requirement under section 213A of the Act, 8 U.S.C. 1183a.<sup>300</sup> DOS also uses FPG to evaluate immigrant visa applicants who are not subject to the requirements of 213A of the Act, 8 U.S.C. 1183a, and who are relying solely on personal income to establish eligibility under section 212(a)(4) of the Act, 8 U.S.C. 1183a.<sup>301</sup> The poverty guidelines thus provides a

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<sup>296</sup> See *Annual Update of the HHS Poverty Guidelines*, 83 FR 2642 (Jan. 18, 2018).

<sup>297</sup> See *Annual Update of the HHS Poverty Guidelines*, 83 FR 2642 (Jan. 18, 2018).

<sup>298</sup> See *Annual Update of the HHS Poverty Guidelines*, 83 FR 2642 (Jan. 18, 2018).

<sup>299</sup> See *Annual Update of the HHS Poverty Guidelines*, 83 FR 2642 (Jan. 18, 2018).

<sup>300</sup> See INA section 213A(f)(1)(E), 8 U.S.C. 1183a(f)(1)(E).

<sup>301</sup> See 22 CFR 40.41(f).

proven, useful, and easily administrable measure of the level of income and resources below which a person becomes increasingly likely to need public benefits to satisfy basic living (and other) needs.

DHS believes that the 15 percent threshold is a reasonable approach. The threshold would not lead to unintended consequences, as could be the case if there was no threshold or the threshold was much smaller. Indeed, DHS recognizes that individuals may receive public benefits for in relatively small amounts to supplement their ability to meet their needs and the needs of their household without seriously calling into question their self-sufficiency.

At the same time, DHS believes that an individual who receives monetizable public benefits in excess of 15 percent of FPG is neither self-sufficient nor on the road to achieving self-sufficiency. Receipt of monetizable public benefits above the 15 percent threshold exceeds what could reasonably be defined as a nominal level of support that merely supplements an alien's independent ability to meet his or her basic living needs; individuals who receive the designated benefits in such an amount are not self-sufficient and so would be considered public charges under this rule.

DHS believes the proposed 15 percent threshold is consistent with DHS's interpretation of the term public charge and would achieve the policy aims of this proposed rulemaking. The proposed threshold is consistent with the self-sufficiency policy objective set forth in PRWORA that aliens should be able to financially support themselves with their own resources or by relying on the aid of family members, without depending on government's assistance.<sup>302</sup> Though not defined in PRWORA, self-sufficiency, as used in PRWORA, is tied to an alien's ability to

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<sup>302</sup> See 8 U.S.C. 1601(a)(2).

support him or herself without depending on public benefits.<sup>303</sup> DHS seeks public comments on whether the proposed 15 percent threshold applicable to monetizable public benefits is an appropriate threshold in light of the stated goals of the rule. For instance, DHS welcomes the submission of views and data regarding whether the proposed standard is appropriate, too low, or too high for assessing reliance on public benefits (and why), and whether there is a more appropriate basis for a monetizable threshold, other than value as a percentage of the FPG or duration of receipt, that indicates whether an alien is a public charge.

DHS also seeks public comments on whether DHS should consider the receipt of designated monetizable public benefits at or below the 15 percent threshold as evidence in the totality of the circumstances. For instance, DHS could revise the rule to allow adjudicators to assign some weight to past or current receipt of designated monetized public benefits in an amount equal to 10 percent of FPG, and less weight to past or current receipt of such benefits in an amount equal to 5 percent of FPG. The ultimate inquiry would remain whether the alien is likely in the totality of the circumstances to become a public charge, *i.e.*, to receive the designated public benefits above the applicable threshold(s), either in terms of dollar value or duration of receipt.

### *iii. Twelve Month Standard for Non-Monetizable Benefits*

In addition to proposing a 15 percent threshold for assessing the alien's likelihood to remain or become self-sufficient in the context of receipt of monetizable public benefits (*e.g.*, cash assistance and SNAP), DHS is proposing to consider the receipt of certain non-monetizable public benefits (*e.g.*, Medicaid) if received for more than 12 cumulative months during a 36-month period. As indicated above, DHS believes that it is appropriate to expand the list of

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<sup>303</sup> See 8 U.S.C. 1601(a)(2).

previously included public benefits (under the 1999 INS Interim Field Guidance) to include certain non-cash benefits based on the Federal government's expenditures and non-citizen participation rates in those programs. However, following consultation with interagency partners such as HHS and HUD, DHS lacks an easily administrable standard for assessing the monetary value of an alien's receipt of some non-cash benefits. DHS believes that, like the 15 percent of FPG threshold described above, the duration of the alien's receipt of these benefits over a period of time is also reasonable proxy for assessing an alien's reliance on public benefits.

The duration of receipt is a relevant factor under the existing guidance with respect to covered benefits and is specifically accounted for in the guidance's inclusion of long-term institutionalization at government's expense.<sup>304</sup> Additionally, in the context of both state welfare reform efforts and the 1990s Federal welfare reform, Federal government and state governments imposed various limits on the duration of benefit receipt as an effort to foster self-sufficiency among recipients and prevent long-term or indefinite dependence. States have developed widely varying approaches to time limits. Currently, 40 states have time limits that can result in the termination of families' welfare benefits; 17 of those states have limits of fewer than 60 months.<sup>305</sup> Similarly, on the Federal level, PRWORA established a 60-month time limit on the receipt of TANF.<sup>306</sup>

As with the proposed 15 percent of FPG standard, DHS believes that an individual who receives monetizable public benefits for more than 12 cumulative months during a 36-month

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<sup>304</sup> In assessing the probative value of past receipt of public benefits, "the length of time . . . is a significant factor." 64 FR 28689, 28690 (May 26, 1999) (internal quotation marks and citation omitted).

<sup>305</sup> See, e.g., MDRC, formerly Manpower Demonstration Research Corporation, *Welfare Time Limits: State Policies, Implementation, and Effects on Families*, [https://www.mdrc.org/sites/default/files/full\\_607.pdf](https://www.mdrc.org/sites/default/files/full_607.pdf) (last visited Sep. 12, 2018).

<sup>306</sup> See Temporary Assistance for Needy Families Program (TANF), Final Rule; 64 FR 17720, 17723 (Apr. 12, 1999) ("The [Welfare to Work (WtW)] provisions in this rule include the amendments to the TANF provisions at sections 5001(d) and 5001(g)(1) of Pub. L. 105-33. Section 5001(d) allows a State to provide WtW assistance to a family that has received 60 months of federally funded TANF assistance. . .").

period is neither self-sufficient nor on the road to achieving self-sufficiency. Receipt of public benefits for such a duration exceeds what could reasonably be defined as a nominal level of support that merely supplements an alien's independent ability to meet his or basic living needs. In DHS's view, individuals who receive the non-monetizable public benefits covered by this rule for more than 12 months are unable to meet their basic needs without government help; they therefore are not self-sufficient and so would be considered public charges under this rule.

By way of illustration, under the proposed policy, an alien's receipt of Medicaid for 9 months and receipt of public housing for 6 months, if both occurred within the same 36-month period, would amount to 15 months of receipt of non-monetizable benefits, regardless of whether these periods of time overlapped, were consecutive, or occurred at different points in time during the 36-month period. As such, the receipt of those benefits would be considered for purposes of this rule.

DHS seeks public comments on this proposed approach, including any alternatives for assessing self-sufficiency based on the receipt of non-monetizable benefits. DHS seeks public comments on whether the proposed 12-month threshold applicable to non-monetizable public benefits is an appropriate threshold in light of the stated goals of the rule. For instance, DHS welcomes the submission of views and data regarding whether the proposed standard is appropriate, too low, or too high for assessing reliance on public benefits (and why), and whether there is a more appropriate basis for a non-monetizable threshold, other than duration of receipt, that indicates whether an alien is a public charge.

DHS also seeks public comments on whether DHS should consider the receipt of one or more designated non-monetizable public benefits for any period less of than 12 months in the aggregate as part of the public charge inadmissibility determination. For instance, similar to the

potential alternative described in the call for comment in the preceding section, DHS could revise the rule to allow adjudicators to assign some weight to past or current receipt of 2 designated non-monetized benefits for a total of 8 months, and less weight to past or current receipt of such benefits for a total of 4 months. The ultimate inquiry would remain whether the alien is likely in the totality of the circumstances to become a public charge, i.e., to receive the designated public benefits above the applicable threshold(s), either in terms of dollar value or duration of receipt.

DHS is also considering whether there are other potential approaches to monetizing these benefits, and seeks comments on any such alternatives. In addition, DHS seeks comments on the proposed timeframes, including, if applicable, any studies or data that would provide a basis for an alternative duration.

*iv. Combination of Monetizable Benefits under 15 percent of FPG and One or More Non-Monetizable Benefits.*

DHS is proposing a separate approach when an alien receives a combination of monetizable benefits in an amount that is equal to or less than the proposed 15 percent threshold while also receiving one or more non-monetizable public benefits. This approach is intended to address circumstances where an alien's self-sufficiency is in question by virtue of a combination of receipt of both monetizable and non-monetizable benefits, even if his or her receipt of monetizable designated public benefits does not reach the 15 percent threshold and his or her receipt of non-monetizable benefits does not surpass the 12-month duration threshold. Under this proposal, if an alien receives a combination of monetizable benefits equal to or below the 15 percent threshold together with one or more benefits that cannot be monetized, the threshold for duration of receipt of the non-monetizable benefits would be 9 months in the aggregate (rather

than 12 months) within a 36-month period (e.g, receipt of two different non-monetizable benefits in one month counts as two months, as would receipt of one non-monetizable benefit for one month in January 2018 and another such benefit for one month in June 2018).

DHS believes that reducing the 12-month timeframe by 3 months to account for use of monetizable benefits is a reasonable and easily administrable guideline for determining whether an individual who receives both monetizable and non-monetizable public benefits is self-sufficient or on the road to achieving self-sufficiency. In line with the other thresholds described above, receipt of a designated non-monetizable public benefits for three-quarters of a year, compounded by receipt of a designated monetizable public benefit, exceeds what could reasonably be defined as a nominal level of support that merely supplements an alien's independent ability to meet his or basic living needs. In DHS's view, individuals who receive public benefits in these combinations are unable to meet their basic needs without government help, consequently are not self-sufficient, and therefore would be considered public charges under this rule.

DHS seeks public comments on this approach, including any alternatives for addressing receipt of a combination of public benefits, some of which can be monetized and others which cannot to ensure a consistent methodology for treating recipients of these two types of benefits.

### **(c) Monetizable Public Benefits**

#### *i. Supplemental Security Income (SSI)*

SSI, which is monetizable public benefit, provides monthly income payments intended to help ensure that a disabled, blind, or aged person with limited income and resources has a

minimum level of income.<sup>307</sup> Unlike Social Security retirement benefits, which are financed through payroll taxes, SSI is financed by general revenues.<sup>308</sup> According to one analysis, SSI expenditures totaled approximately \$54.7 billion in fiscal year 2017, and represented one of the largest Federal expenditures for low-income people.<sup>309</sup>

*ii. Temporary Assistance for Needy Families (TANF)*<sup>310</sup>

TANF, which is a monetizable public benefit, provides monthly income assistance payments to low-income families and is intended to foster self-sufficiency, economic security, and stability for families with children.<sup>311</sup> According to one analysis, TANF cash assistance expenditures totaled approximately \$4.4 billion in fiscal year 2016, and represented one of the largest Federal expenditures out of all Federal programs for low-income people.<sup>312</sup>

*iii. General Assistance Cash Benefits*

Federal, State, local, and tribal cash benefit programs for income maintenance (often called “General Assistance” in the State context, but sometimes given other names), is a term

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<sup>307</sup> See U.S. Soc. Sec. Admin., *Social Security Handbook*, Ch. 21, section 2102.1, available at [https://www.ssa.gov/OP\\_Home%2Fhandbook/handbook.21/handbook-2102.html](https://www.ssa.gov/OP_Home%2Fhandbook/handbook.21/handbook-2102.html) (last updated Feb. 24, 2009); U.S. Soc. Sec. Admin., *Social Security, Understanding Supplemental Security Income (SSI) Overview -- 2018 Edition*, available at <https://www.ssa.gov/ssi/text-over-ussi.htm> (last visited July 27, 2018).

<sup>308</sup> See U.S. Soc. Sec. Admin., Office of Research, Statistics, & Policy Analysis, *Annual Report of the Supplemental Security Income Program* 46 tbl.IV.B9, 47 tbl.IV.C1 (2017), available at <https://www.ssa.gov/oact/ssir/SSI17/ssi2017.pdf> (last visited July 31, 2018); see also U.S. Soc. Sec. Admin., Office of Research, Statistics, & Policy Analysis, *SSI Monthly Statistics, January 2018*, available at [https://www.ssa.gov/policy/docs/statcomps/ssi\\_monthly/2018-01/table01.html](https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2018-01/table01.html) (last visited July 31, 2018).

<sup>309</sup> See Gene Falk et al., Cong. Research Serv., R45097, *Federal Spending on Benefits and Services for People with Low Income: In Brief* (2018), available at <https://fas.org/sgp/crs/misc/R45097.pdf>.

<sup>310</sup> See 42 U.S.C. 601.

<sup>311</sup> See U.S. Dep’t of Health & Human Servs., Admin. for Children & Families, Office of Family Assistance, *About TANF*, available at <https://www.acf.hhs.gov/ofa/programs/tanf/about> (last visited February 23, 2018); U.S. Dep’t of Health and Human Servs., Admin. for Children and Families, Office of Family Assistance, *TANF 12th Report to Congress*.

<sup>312</sup> See Gene Falk et al., Cong. Research Serv., R45097, *Federal Spending on Benefits and Services for People with Low Income: In Brief* (2018), available at <https://fas.org/sgp/crs/misc/R45097.pdf>; U.S. Dep’t of Health & Human Servs., Office of Family Assistance, *TANF Financial Data - FY 2016*, available at <https://www.acf.hhs.gov/ofa/resource/tanf-financial-data-fy-2016> (last visited June 11, 2018). Note that the latter link shows fiscal year 2016 TANF financial data, but links to financial data for other fiscal years can also be accessed.



used to describe "aid provided by State and local governments to needy individuals or families who do not qualify for major assistance programs and to those whose benefits from other assistance programs are insufficient to meet basic needs. 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."<sup>313</sup> To the extent that such aid is in the form of cash, check, or money instrument (as compared to in-kind goods or services through vouchers and similar means) and intended for income maintenance, it would qualify as a cash public benefit under this rule. For example, in Minnesota, the "General Assistance (GA) 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."<sup>314</sup>

*iv. Supplemental Nutrition Assistance Program (SNAP)*

DHS proposes to consider SNAP<sup>315</sup> benefits, because the program is among the largest Federal expenditures for low-income people, and because receipt of SNAP benefits indicates a lack of self-sufficiency in satisfying a basic living need, i.e., food and nutrition. SNAP, which is a non-cash, monetizable public benefit, provides nutrition assistance to low-income individuals and households<sup>316</sup> who must meet certain income and resource limitations to be eligible. An eligible person or household receives SNAP benefits on an Electronic Benefit Transfer (EBT) card on which the dollar amount of benefits are automatically available each month. The

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<sup>313</sup> See U.S. Soc. Sec. Admin., *Social Security Programs in the United States - General Assistance*, available at <https://www.ssa.gov/policy/docs/prodesc/sspus/genasist.pdf> (last visited June 24, 2018).

<sup>314</sup> 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> (last visited June 24, 2018).

<sup>315</sup> Formerly called "Food Stamps." See 7 U.S.C. 2011-2036c.

<sup>316</sup> See USDA, Food and Nutrition Service, *Supplemental Nutrition Assistance Program (SNAP)*, available at <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap> (last visited Feb. 24, 2018).

household can then purchase eligible food at authorized retail food stores.<sup>317</sup>

*v. Housing Programs*

DHS is also proposing to include certain high-expenditure housing-related benefits. As noted in Table 10 above, the Federal government expends significant resources on Section 8 Housing Choice Vouchers, Section 8 Project-Based Rental Assistance, and Public Housing. These programs impose a significant expense upon multiple levels of government, and because these benefits relate to a basic living need (i.e., shelter), receipt of these benefits suggests a lack of self-sufficiency. At the same time, DHS recognizes that these programs do not involve the same level of expenditure as the other programs listed in this proposed rule, and that noncitizen participation in these programs is currently relatively low.<sup>318</sup> DHS nonetheless proposes to consider these programs as part of public charge determinations, for the above-stated reasons and because the total Federal expenditure for the programs overall remains significant.

There are also numerous programs that provide incentives for private-sector affordable housing preservation and development.<sup>319</sup> The Housing Act of 1961<sup>320</sup> provides housing to low- and moderate-income households through the private sector.<sup>321</sup> U.S. Department of Housing and Urban Development (HUD) oversees and administers the various programs. There are various programs within the public housing program which provide payment for rent or housing either to

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<sup>317</sup> The listing of SNAP would not include Disaster SNAP, which is provided under a separate legal authority, under different circumstances. *See* 42 U.S.C. 5179.

<sup>318</sup> An analysis of Wave 13 of the 2008 Panel of the Survey of Income and Program Participation (SIPP) suggests that 0.2% of noncitizens lived in Section 8 housing, while 0.4% lived in housing subsidized through some other government program. Similarly, 0.7 percent of noncitizens reported receiving CHIP benefits.

<sup>319</sup> *See* Pub. L. 86-372, 73 Stat. 654. *See also* Maggie McCarty et al., Cong. Research Serv., RL34591, *Overview of Federal Housing Assistance Programs and Policy* 3 (2014), available at <https://www.hsdl.org/?view&did=752738>.

<sup>320</sup> *See* Pub. L. 87-70, 75 Stat. 149.

<sup>321</sup> *See* Maggie McCarty et al., Cong. Research Serv., RL34591, *Overview of Federal Housing Assistance Programs and Policy* 4 (2014), available at <https://www.hsdl.org/?view&did=752738>.

the person or the housing unit or owner on behalf of the person (privately owned subsidized housing).

These programs provide low-income individuals and families with housing at below-market rent or rent subsidies for market-rate housing. While there are important variations between these programs, they all use the same or similar standard when establishing income eligibility and contribution towards rent. Specific to aliens, DHS notes that Section 214 of the HCD Act of 1980 requires that HUD may not make financial assistance available for the benefit of any alien, notwithstanding any other provision of law, unless that alien is a resident of the United States and fits into one of the clearly enumerated 7 categories.<sup>322</sup>

*a. Section 8 Housing Choice Voucher Program*

The Section 8 Housing Choice Voucher Program,<sup>323</sup> which is a non-cash public benefit that can be monetized, provides assistance to very low-income families to afford decent, safe, and sanitary housing.<sup>324</sup> The Housing Choice Vouchers are administered locally by Public Housing Agencies. The participant is responsible for finding their own suitable housing unit, where the owner agrees to rent under the program. Once an owner has been identified, the public housing agency enters into a housing assistance payment contract with the landlord. The PHA pays the landlord housing subsidies based on a payment standard established by HUD and the participant is responsible for paying the difference between the actual rent charged and the amount subsidized by the program.<sup>325</sup> Under certain circumstances, housing vouchers may also

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<sup>322</sup> See section 214 of the Housing and Community Development Act of 1980, 42 U.S.C. 1436a.

<sup>323</sup> See 24 CFR part 982; 42 U.S.C. 1437f, 1437u.

<sup>324</sup> See U.S. Dep't of Housing & Urban Dev., *Housing Choice Vouchers Fact Sheet*, available at [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited Feb. 24, 2018).

<sup>325</sup> See U.S. Dep't of Housing & Urban Dev., *Housing Choice Vouchers Fact Sheet*, available at [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited Feb. 24, 2018).

be used to purchase homes.<sup>326</sup>

*b. Section 8 Project-Based Rental Assistance*

The Section 8 Project-Based Rental Assistance Program (including Moderate Rehabilitation), which is a non-cash but monetizable public benefit, provides rental assistance for extremely low- to low-income households in obtaining decent, safe, and sanitary housing in private accommodations.<sup>327</sup> This program refers to a category of federally assisted housing produced through a public-private partnership to build and maintain affordable rental housing for low-income households. HUD provides subsidies to private owners of multifamily housing to lower rental costs for low-income families and help offset construction, rehabilitation, and preservation costs. The rental assistance is the difference between what the household can afford and the approved rent for the housing unit in the multifamily project. Authority to use project-based rental assistance for new construction or substantial rehabilitation was repealed in 1983. Therefore, HUD renews Section 8 project-based housing assistance payments ("HAP") contracts for units already assisted with project-based Section 8 renewal assistance.<sup>328</sup> The contracts are with private owners of multifamily rental housing including both profit-motivated and nonprofit or cooperative organizations.

**(d) Non-Monetizable Public Benefits**

*i. Medicaid*

*a. Description of Program*

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<sup>326</sup> See U.S. Dep't of Housing & Urban Dev., *Housing Choice Vouchers Fact Sheet*, available at [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) (last visited July 11, 2018).

<sup>327</sup> U.S. Dep't of Housing & Urban Dev., *Moderate Rehabilitation*, available at [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/ph/modrehab](https://www.hud.gov/program_offices/public_indian_housing/programs/ph/modrehab) (last visited July 3, 2018).

<sup>328</sup> U.S. Dep't of Housing & Urban Dev., *Moderate Rehabilitation*, available at [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/ph/modrehab](https://www.hud.gov/program_offices/public_indian_housing/programs/ph/modrehab) (last visited July 3, 2018).

Medicaid, which is a non-cash, non-monetizable public benefit, is a joint Federal and state program that provides health coverage to individuals in the United States.<sup>329</sup> Medicaid is generally available to needy persons who meet specific income and resource requirements. Certain individuals are generally covered under Medicaid, including low-income families, qualified pregnant women and children, and people already receiving SSI.<sup>330</sup> In addition, a State may opt to cover other groups.<sup>331</sup> Medicaid provides continuous coverage, services, and funding for medical treatment and can impose substantial costs on multiple levels of government, and a person's participation generally indicates a lack of ability to be self-sufficient in satisfying a basic living need, *i.e.*, medical care. As indicated in Table 10 above, the total Federal expenditure for the Medicaid program overall is larger by far than any other programmatic Federal expenditure for low-income people.<sup>332</sup> Table 13 below highlights average costs per enrollee by eligibility group as a percentage of FPG.

<b>Table 13: Estimated Medicaid Expenditures Per Enrollee by Enrollment Group and as Percentage of the Federal Poverty Guidelines</b>										
<b>Eligibility Group</b>	<b>2011</b>	<b>% of 2011 FPG</b>	<b>2012</b>	<b>% of 2012 FPG</b>	<b>2013</b>	<b>% of 2013 FPG</b>	<b>2014</b>	<b>% of 2014 FPG</b>	<b>2015</b>	<b>% of 2015 FPG</b>
Children	\$2,851	26%	\$2,700	24%	\$2,807	24%	\$3,141	27%	\$3,389	29%
Adults	\$4,362	40%	4,101	37%	\$4,391	38%	\$4,914	42%	\$4,986	42%
Persons with Disabilities	\$17,958	165%	17,255	154%	\$17,352	151%	\$18,789	161%	\$19,478	165%
Aged	\$15,931	146%	\$15,688	140%	\$15,483	135%	\$15,113	130%	\$14,323	122%
<b>Sources:</b> See United States Department of Health & Human Services, Centers for Medicare & Medicaid Services, Office of the Actuary, 2012-2016 Actuarial Reports on the Financial Outlook for Medicaid at										

<sup>329</sup> See Ctrs. for Medicare & Medicaid Services, Eligibility, *available at* <https://www.medicaid.gov/medicaid/eligibility/index.html> (last visited Feb. 23, 2018).

<sup>330</sup> See Ctrs. for Medicare & Medicaid Services, Eligibility, *available at* <https://www.medicaid.gov/medicaid/eligibility/index.html> (last visited Feb. 23, 2018).

<sup>331</sup> See Ctrs. for Medicare & Medicaid Services, Eligibility, *available at* <https://www.medicaid.gov/medicaid/eligibility/index.html> (last visited Feb. 23, 2018).

<sup>332</sup> See Table 26-1 Policy, Net Budget Authority by Function, Category, and Program, available at <https://www.whitehouse.gov/wp-content/uploads/2018/02/26-1-fy2019.pdf> (last visited Aug. 8, 2018). Expenditure amounts are net outlays unless otherwise noted. See also Gene Falk et al., Cong. Research Serv., R45097, Federal Spending on Benefits and Services for People with Low Income: In Brief (2018), *available at* <https://fas.org/sgp/crs/misc/R45097.pdf>. Note however that neither HHS nor DHS are able to disaggregate emergency and non-emergency Medicaid expenditures. Therefore, this rule considers overall Medicaid expenditures.

<https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/MedicaidReport.html>. (Site last checked 9/10/2018) and Prior HHS Poverty Guidelines and Federal Register References at <https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references> (Site last checked 9/13/2018), which shows the following FPG figures for a household size of 1:

2011 – \$10,890  
2012 – \$11,170  
2013 – \$11,490  
2014 – \$11,670  
2015 – \$11,770

DHS divided expenditures per enrollee by enrollment group for each year by FPG for each corresponding year (e.g. \$2,851 for children in 2011 divided by \$10,890 for 2011) to calculate expenditures per enrollee by enrollment group for each year as a percentage of FPG for each corresponding year (e.g. 26 percent).

Child Medicaid enrollees include non-disabled children, children of unemployed parents, and foster care children. Adult Medicaid enrollees include non-disabled non-aged adults, unemployed adults, and women covered under the Breast and Cervical Cancer Act expansion. Disabled Medicaid enrollees include blind or disabled persons.

On the whole, Medicaid expenditures per enrollee by enrollment group are significant and are particularly pronounced among persons with disabilities and the aged. In its 2016 report, HHS observes that these average costs reflect the relatively healthier status of children and adults enrolled in the program as compared to aged enrollees and persons with disabilities, who represent the smallest enrollment groups in Medicaid but account for the majority of expenditures.<sup>333</sup> Despite the high level of Medicaid expenditure in aggregate and per enrollee by enrollment group, Medicaid is one of the most daunting public benefits to monetize on an individual basis. Medicaid eligibility, enrollment, and receipt vary state-by-state and receipt of goods and services vary enrollee-to-enrollee. Therefore, DHS does not propose a methodology to monetize Medicaid benefits for purposes of the 15 percent of FPG standard. Rather, DHS Medicaid would be categorized as a non-monetizable benefit under the proposed rule.

*b. Exceptions for Certain Medicaid Services*

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<sup>333</sup> See United States Department of Health & Human Services, Centers for Medicare & Medicaid Services, Office of the Actuary, 2016 Actuarial Reports on the Financial Outlook for Medicaid, pp. 7-8, at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/MedicaidReport2016.pdf>. (Site last checked 9-11-2018)

Notwithstanding DHS's proposal to consider benefits under Medicaid, DHS proposes to exclude two main types of Medicaid services from consideration. First, DHS proposes to except consideration of assistance for an "emergency medical condition" as provided under section 1903(v) of Title XIX of the Social Security Act, 42 U.S.C. 1396b(v) and in implementing regulations at 42 CFR 440.255(c). These provisions specifically indicate that payment may be made to a State for medical assistance furnished to an alien under certain specific emergency circumstances.<sup>334</sup> Under 42 CFR 440.255(c), "'emergency medical condition' means a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part." States determine whether an illness or injury is an "emergency medical condition" and provide payment to the healthcare provider as appropriate. Under this proposed rule, DHS would exclude receipt of Medicaid if the State determines that the relevant treatment falls under 42 U.S.C. 1396b(v) and 42 CFR 440.255(c).

In 8 U.S.C. 1611(b), Congress specifically excluded emergency medical conditions from the definition of Federal public benefits, and States are required to provide Medicaid payments for "emergency medical conditions" regardless of the alien's status. PRWORA sets apart treatment for emergency medical conditions and makes funds available for the reimbursement of states regardless of an alien's immigration status, and regardless of whether or not an alien would be subject to INA section 212(a)(4) or other grounds of inadmissibility.<sup>335</sup> Congress intended

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<sup>334</sup> See 42 U.S.C. 1396b(v); 42 CFR 440.255(c).

<sup>335</sup> H.R. Rep. No. 104-469 (VI), at 263-64 (1996) ("This section provides that sections 601 and 602 shall not apply

that PRWORA exceptions generally, and treatment of emergency medical conditions in particular, be narrowly construed. To qualify for emergency medical condition exclusion, medical conditions must be of an emergency nature, such as medical treatment administered in an emergency room, critical care unit, or intensive care unit. The same principle applies to pre-natal or delivery care assistance; it was intended to be of emergency nature. Similarly, treatment for mental health disorders was intended to be limited to circumstances in which the alien's condition is such that he is a danger to himself or to others and has therefore been judged incompetent by a court of appropriate jurisdiction.<sup>336</sup> Over the years since the enactment of PRWORA, courts have refined the definition of emergency medical condition. Depending on the state, and the medical condition, categorization as an "emergency medical condition" for purposes of Medicaid reimbursement may not be limited to hospital emergency room visits. For example, in *Szewczyk v. Department of Social Services*,<sup>337</sup> the Supreme Court of Connecticut indicated that coverage for an "emergency medical condition" did not limit an alien patient to treatment rendered in the emergency room, but applied to treatment for leukemia that had "reached a crisis stage" and required "immediate medical treatment, without which the patient's physical well-being would likely be put in jeopardy or serious physical impairment or dysfunction would result." However, in *Diaz v. Division of Social Services and Div. of Medical*

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to the provision of emergency medical services, public health immunizations, short-term emergency relief, school lunch programs, child nutrition programs, and family violence services. Section 601 restricted unauthorized aliens from receiving public assistance, contracts, and licenses, and section 602 made unauthorized aliens ineligible for employment benefits.")

<sup>336</sup> H.R. Rept. 104-469 (VI), at 264-65 (1996). This report also discusses treatment of communicable diseases and indicates that such treatment is intended "to only apply where absolutely necessary to prevent the spread of such diseases. This is only a short term measure until the deportation of an alien who is unlawfully present in the U.S. It is not intended to provide authority for continued long-term treatment of such diseases as a means for illegal aliens to delay their removal from the country."

<sup>337</sup> See 881 A.2d 259, 273 (Conn. 2005) (quoting *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 233 (2d Cir.1998)).



*Assistance, North Carolina Dept. of Health and Human Services*,<sup>338</sup> the Supreme Court of North Carolina indicated that an alien's acute lymphocytic leukemia was not an "emergency medical condition" where there was nothing to indicate that the prolonged chemotherapy treatments must have been "immediate" to prevent placing the alien's health in serious jeopardy, or causing serious impairment or dysfunction.<sup>339</sup>

In addition, DHS believes that preservation of life from an immediate threat is an important policy consideration. "Emergency medical services" are often involuntary and must be provided by doctors and hospitals regardless of the ability to pay,<sup>340</sup> such as medical services at a hospital after a car accident. Further, Congress did not authorize any consideration of an alien's immigration status for purposes of eligibility for these benefits or to allow for continuous services/treatment relating to them. Therefore, DHS will not consider treatment for emergency medical conditions funded by Medicaid in the context of a public charge determination.

The second proposed exclusion is for services or benefits under the Individuals with Disabilities Education Act (IDEA)<sup>341</sup> and school-based benefits provided to children who are at or below the oldest age of children eligible for secondary education as determined under State

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<sup>338</sup> See 628 S.E.2d 1, 5 (N.C. 2006).

<sup>339</sup> See also *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 233 (2d Cir. 1998) (aliens who suffered serious traumatic head injuries initially satisfied the plain meaning of Sec. 1902(v)(3), but the continuous and regimented care subsequently provided to them did not constitute emergency medical treatment pursuant to the statute); *Luna ex rel. Johnson v. Div. of Soc. Servs.*, 589 S.E.2d 917, 920 (N.C. 2004) (the absence of the continued medical services could be expected to result in one of the three consequences outlined in the Medicaid statute for cancer patient that underwent surgery after presenting at hospital's emergency room with weakness and numbness in the lower extremities); *Scottsdale Healthcare, Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 75 P.3d 91, 98 (Ariz. 2003) (medical conditions had not ceased when patients' conditions had been stabilized and they had been transferred from an acute ward to a rehabilitative type ward after initial injury); *Spring Creek Mgmt., L.P. v. Dep't of Pub. Welfare*, 45 A.3d 474, 483-84 (Pa. Commw. Ct. 2012) (alien's condition as result of stroke, which had sent her to emergency room, was not "emergency medical condition" when alien received medical services from rehabilitation and health care center even though alien could eventually, suffer another stroke or other medical problem; coverage was not being sought for an acute condition, but for long term or open-ended nursing care); *Quiceno v. Dep't of Soc. Servs.*, 728 A.2d 553, 554 (Conn. Super. Ct. 1999) (permanent dialysis treatment was not for "emergency medical condition").

<sup>340</sup> See Emergency Medical Treatment & Labor Act (EMTALA), 42 U.S. Code § 1395dd.

<sup>341</sup> See 20 U.S.C. 1400-1482.

law. The IDEA protects educational opportunities for all students with disabilities and requires schools to provide certain services to all children with disabilities. States and school districts may bill and receive reimbursement for the cost of providing special education and health care related services from a State's public insurance program (e.g., Medicaid). Benefits or services under these laws generally are not based on income eligibility, and where a reimbursement is available, it is provided to the school or eligible entity. For example, under the statutory framework created by Congress for Part B of IDEA, school districts, in meeting their obligation to make a free appropriate public education available to all children with disabilities, may receive reimbursement for the cost of providing special education and related services if parents provide consent for the school districts to release their personally identifiable information to a State public insurance program (e.g., Medicaid) for billing purposes. Subject to parental consent, schools, and not individual parents or students, may obtain reimbursement for the cost of providing certain health-related services included in a child's individualized education program (IEP) that are considered covered services under such subsidized health insurance programs. The IDEA provides in 20 U.S.C. 1412(a)(12)(B) that, when a non-educational public agency, such as a State Medicaid agency, is assigned responsibility under State or Federal law to provide or pay for any services that are also considered special education and related services, the financial responsibility of the State Medicaid agency or other public insurer of children with disabilities must precede that of the LEA or State agency responsible for developing a child's IEP. Also, 20 U.S.C. 1412(e) reinforces that Part B of the IDEA may not be construed to permit a State to reduce medical or other assistance available, or to alter eligibility, under the Social Security Act. There are no restrictions on how school districts and schools are permitted to spend any funds that Medicaid or other public insurance program reimburses for the provision of

IDEA services. By excluding services provided under IDEA that may be funded in whole or in part by Medicaid, DHS would better ensure that schools continue to receive financial resources to cover the cost of special education and related services, which they would be legally required to provide at no cost to the parents regardless of the outcome of this rulemaking.

*c. Exception for Receipt of Medicaid by Foreign-Born Children of U.S. Citizens*

DHS proposes to exclude consideration of the receipt of all Medicaid benefits by foreign-born children as defined in section 101(c) of the Act who either have U.S. citizen parents, who have been adopted by U.S. citizens, or who are coming to the United States to be adopted by U.S. citizens, where such children will automatically acquire U.S. citizenship under section 320 of the Act or be eligible to naturalize under section 322 of the Act upon or after being admitted to the United States. In some cases, these children will acquire citizenship upon finalization of their adoption in the United States, under section 320 of the Act, or the children will naturalize upon taking the Oath of Allegiance (or having it waived) under section 322 of the Act. In other cases, the children will acquire citizenship upon taking up residence in United States in the legal and physical custody of their U.S. citizen parent as a lawful permanent resident.

Alien children of U.S. citizens, who must first establish eligibility for admission, are subject to section 212(a)(4) even though they may automatically acquire U.S. citizenship upon taking up residence in the United States after admission as lawful permanent residents.<sup>342</sup>

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<sup>342</sup> Note that children born abroad to U.S. citizen parents may also acquire U.S. citizenship at birth under certain circumstances, such as where both parents are U.S. citizens and one parent had resided in the United States prior to the child's birth, or where one parent is a U.S. citizen who was physically present in the United States for at least five years, two of which were after age 14. Such children would enter the United States as U.S. citizens and would not be subject to an admissibility determination. See INA sections 301 and 309, 8 U.S.C. 1401 and 1409. DOS would issue a Consular Report of Birth Abroad upon request. See Dep't of State, *Birth of U.S. Citizens Abroad*, available at <https://travel.state.gov/content/travel/en/international-travel/while-abroad/birth-abroad.html> (last visited Aug. 28, 2018).

Children of U.S. citizens eligible for acquisition of citizenship under section 320 of the Act, however, are exempt from the affidavit of support requirement.<sup>343</sup>

Children of U.S. citizens, including those adopted abroad, typically receive one of several types of immigrant visas as listed below and are admitted to the United States as lawful permanent residents. Such children may become U.S. citizens (1) automatically, (2) following their admission to the United States and upon the finalization of their adoption, or (3) upon meeting other eligibility criteria.<sup>344</sup>

The following categories of children acquire citizenship upon admission as lawful permanent residents and beginning to reside in the legal and physical custody of their U.S. citizen parent(s):

- IR-2/IR-7 (Child of a U.S. citizen) – requires an approval of a Form I-130 (Petition for Alien Relative). These children are generally admitted as lawful permanent residents or their status is adjusted to that of lawful permanent resident. The child must then file a Form N-600 (Application for Certificate of Citizenship) to receive the Certificate of Citizenship. The certificate generally would be dated as of the date the child was admitted as a lawful permanent resident.

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<sup>343</sup> See Child Citizenship Act, Pub. L. 106-395, 114 Stat. 1631 (Oct. 30, 2000); 8 CFR 213a.2(a)(2)(ii)(E). Stepchildren of U.S. citizens are not eligible for acquisition of citizenship under section 320 of the Act or naturalization under section 322 of the Act unless the child is adopted by the U.S. citizen step-parent. See INA section 101(c)(1), 8 U.S.C. 1101(c)(1).

<sup>344</sup> International adoptions vary depending on the laws of the country of origin, the laws of the U.S. state of residence, and multiple other factors. In the majority of cases, adoptions are finalized in the country of origin before the child enters the United States and the child automatically acquires U.S. citizenship. A minority of children whose adoptions are not finalized until after their admission do not automatically acquire citizenship after admission, but may acquire it upon being readopted, and are eligible to naturalize after they have been finally adopted in the United States or had the foreign adoption recognized by the state where they are permanently residing. See U.S. Dep't of State, *2017 Annual Report on Intercountry Adoptions*, available at [https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Annual%20Report%20on%20Intercountry%20Adoptions%20FY2017%20\(release%20date%20March%2023%202020...pdf](https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Annual%20Report%20on%20Intercountry%20Adoptions%20FY2017%20(release%20date%20March%2023%202020...pdf).

- IR-3/IR-8 (Orphan adopted abroad by a U.S. citizen) – requires an approval of the Form I-600 (Petition to Classify Orphan as an Immediate Relative). These children are generally admitted as lawful permanent residents, and USCIS will send a Certificate of Citizenship to the child without a Form N-600 being filed or adjudicated.
- IH-3 (Hague Convention orphan adopted abroad by a U.S. citizen) – requires an approval of the Form I-800 (Petition to Classify Convention Adoptee as an Immediate Relative). These children are generally admitted as lawful permanent residents and USCIS will send a Certificate of Citizenship to the child without a Form N-600 being filed or adjudicated.

The following categories of children are admitted as lawful permanent residents for finalization of adoption:

- IR-4/ IR-9 (Orphan to be adopted by a U.S. citizen). Generally, the parent(s) must complete the adoption in the United States. However, the child will also be admitted as an IR-4 if the foreign adoption was obtained without either parent having seen the child, or when the parent(s) must establish that they have either “readopted” the child or obtained recognition of the foreign adoption in the State of residence (this requirement can be waived if there is a statute or precedent decision that clearly shows that the foreign adoption is recognized in the State of residence).<sup>345</sup>
- IH-4 (Hague Convention Adoptee to be adopted by a U.S. citizen). These children are admitted as lawful permanent residents and the parent(s) must complete the adoption in the United States.<sup>346</sup>

Furthermore, children of U.S. citizens, who are residing outside of the United States and are eligible to naturalize under section 322 of the Act,<sup>347</sup> must apply for an immigrant or

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<sup>345</sup> See 8 CFR 320.1.

<sup>346</sup> See INA section 101(b)(1), 8 U.S.C. 1101(b).

nonimmigrant visa to enter the U.S. before they naturalize. These children are generally issued a B-2 nonimmigrant visa in order to complete the process for naturalization through an interview and taking the Oath of Allegiance under section 322 of the Act.

Congress has enacted numerous laws over the last two decades to ensure that foreign-born children of U.S. citizens are not subject to adverse immigration consequences in the United States on account of their foreign birth. Most notably, the Child Citizenship Act of 2000<sup>347</sup> provides that children, including adopted children, of U.S. citizen parents automatically acquire U.S. citizenship if certain conditions are met.<sup>349</sup> The same year, Congress passed the Intercountry Adoption Act of 2000 (IAA)<sup>350</sup> to implement the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,<sup>351</sup> which established international standards of practices for intercountry adoptions. The IAA protects the rights of children, birth families, and adoptive parents, and improves the Government's ability to assist U.S. citizens seeking to adopt children from abroad.<sup>352</sup>

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<sup>347</sup> These children would file the N-600K, Application for Citizenship and Issuance of Certificate Under Section 322 and then receive an interview notice to in come into the United States.

<sup>348</sup> Pub. L. 106-395, section 101(a), 114 Stat. 1631, 1631 (codified at INA section 320(a)-(b), 8 U.S.C. 1431(a)-(b)); *see also Children Born Outside the United States; Applications for Certificate of Citizenship*, 66 FR 32138 (June 13, 2001). The CCA applies to children who were under 18 as of February 27, 2001. The law was passed after several high-profile cases in which children who were adopted abroad were subject to deportation despite having grown up in the United States and having believed that they were United States citizens.

<sup>349</sup> *See* 8 CFR Part 320; *see also* Dep't of State, *FAQ: Child Citizenship Act of 2000*, available at [https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt\\_ref/adoption-FAQs/child-citizenship-act-of-2000.html](https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-FAQs/child-citizenship-act-of-2000.html) (last visited Aug. 16, 2018).

<sup>350</sup> Pub. L. 106-279, 114 Stat. 1631 (codified at 42 U.S.C. 14901-14954); *see also Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons*, 71 FR 8064 (Feb. 15, 2006).

<sup>351</sup> The United States signed the Convention in 1994, and the Convention entered into force for the United States on April 1, 2008. *Deposit of Instrument of Ratification by the United States of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 72 FR 71730 (Dec. 18, 2007). The full text of the Convention is available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> (last visited Aug. 16, 2018).

<sup>352</sup> IAA § 2, 42 U.S.C. 14901(a); *see also* 146 Cong. Rec. S8938-01, S8938 (daily ed. Sept. 21, 2000) (statement by Sen. Landrieu) ("I have said it before and I believe it rings true here, adoption brings people, whether they are Republican, Democrat, conservative, liberal, American, Russian or Chinese, together. United by the belief that all children deserve to grow in the love of a permanent family. Adoption breaks down barriers and helps build

DOS has advised DHS that many U.S. citizens seek to adopt children with disabilities or serious medical conditions, and that a significant proportion of children adopted abroad have special medical needs. U.S. citizens seeking to adopt foreign-born children abroad generally must undergo a rigorous home study that includes a detailed assessment of finances, emotional, mental, and physical health, and other factors to determine their eligibility and suitability as prospective adoptive parents.<sup>353</sup> Accordingly, such parents generally will have sufficient financial resources to provide for the child.<sup>354</sup>

Nevertheless, many U.S. citizens who have foreign-born children with special medical needs may seek Medicaid for their children.<sup>355</sup> Medicaid programs vary by state, and may be based on the child's disability alone rather than financial means of the parents. Excluding consideration of the receipt of public benefits by such children would be consistent with Congress' strong interest in supporting U.S. citizens seeking to welcome foreign-born children into their families.

Additionally, because the children are being brought to the United States by their U.S. citizen parents (including adoptive parents) and will generally become U.S. citizens upon or after admission, and because their families have been found to have the resources to care for them, such a reading is not at odds with Congress' concerns in enacting PRWORA, or as reflected in its concurrent enactment of the public charge grounds of inadmissibility, that aliens should rely on their own capabilities and the resources of their families, their sponsors, and private

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families.”). A year earlier, Congress passed Pub.L. 106-139, 113 Stat. 1696 (1999), to amend the definition of “child” in section 101(b)(1)(E) of the INA, 8 U.S.C. 1101(b)(1)(E), a change that allowed children adopted abroad to maintain their familial relationship with their natural siblings, making it easier for siblings to be adopted together.

<sup>353</sup> See 8 CFR 204.3(e), 204.311(g)(3).

<sup>354</sup> See 8 CFR 204.311(h) (financial considerations); see also USCIS, *Home Study Information*, available at <https://www.uscis.gov/adoption/home-study-information> (last visited Aug. 16, 2018).

<sup>355</sup> See Pub. L. 97-248, 96 Stat. 324.

organizations; and that the availability of public benefits should not constitute an incentive for immigration to the United States.<sup>356</sup>

Accordingly, DHS proposes to exclude from consideration for purposes of the public charge inadmissibility determination receipt of Medicaid benefits by children of U.S. citizen parents:

- Whose lawful admission for permanent residence and subsequent residence in the legal and physical custody of the U.S. citizen parent will result automatically in the child's acquisition of citizenship or whose lawful admission for permanent residence will result automatically in the child's acquisition of citizenship upon finalization of the adoption in the United States by the U.S. citizen parent(s) or upon meeting other eligibility criteria pursuant to the Child Citizenship Act of 2000, Pub. L. 106-395 (section 320(a)-(b) of the Act, 8 U.S.C. 1431(a)-(b)), in accordance with 8 CFR part 320; or
- Who are entering the United States for the primary purpose of attending an interview under the Child Citizenship Act of 2000, Pub. L. 106-395 (section 322 of the Act, 8 U.S.C. 1433)), in accordance with 8 CFR part 322.

*ii. Institutionalization for Long-Term Care*

Consistent with the 1999 Interim Field Guidance, DHS proposes to consider institutionalization for long-term care at government expense – at any level of government – as a form of government assistance included in the definition of public benefit. Institutionalization for long-term care at government expense is a non-cash, non-monetizable public benefit. The U.S. government subsidizes health insurance, which pays for expenses associated with institutionalization of individuals in the United States for both long-term care; therefore, the

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<sup>356</sup> See Pub. L. 104-193, section 400, 110 Stat. 2105, 2260 (codified at 8 U.S.C. 1601).



receipt of benefits to provide for the costs of institutionalization indicates a lack of self-sufficiency in satisfying a basic living need, i.e., cost of medical care, housing, and food. There are certain inpatient, comprehensive services provided by institutions which may be covered under Medicaid or the Social Security Act, including hospital services, Intermediate Care Facilities for People with Intellectual disability (ICF/ID), Nursing Facility (NF), Preadmission Screening & Resident Review (PASRR), Inpatient Psychiatric Services for Individuals Under Age 21, and Services for Individuals Age 65 or Older in an Institution for Mental Diseases.<sup>357</sup>

Institutions are residential facilities, and assume total care of the basic living requirements of individuals who are admitted, including room and board.<sup>358</sup> Benefits provided by Medicaid for institutions may depend on the person's need and institutional level of care.<sup>359</sup> In general, DHS would not assume that a child or a person who is severely disabled or has severe medical conditions that may need institutionalization would be inadmissible under the public charge ground. Instead, DHS would, in the totality of the circumstances, take into account the assets, resources, and financial status of the alien's parents or legal guardians to determine whether there is sufficient income and resources to provide for his or her care. Parents and legal guardians at the time of adjudication of a petition may have sufficient sources to provide for the alien in the future and may also have the ability to gather assets and resources for the alien's future care (i.e. long-term care insurance).

### *iii. Premium and Cost Sharing Subsidies under Medicare Part D*

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<sup>357</sup> See Ctrs. for Medicare & Medicaid Servs., *Institutional Long Term Care*, available at <https://www.medicaid.gov/medicaid/ltss/institutional/index.html> (last visited Feb. 26, 2018).

<sup>358</sup> See Ctrs. for Medicare & Medicaid Servs., *Institutional Long Term Care*, available at <https://www.medicaid.gov/medicaid/ltss/institutional/index.html> (last visited Feb. 26, 2018).

<sup>359</sup> See Ctrs. for Medicare & Medicaid Servs., *Institutional Long Term Care*, available at <https://www.medicaid.gov/medicaid/ltss/institutional/index.html> (last visited Feb. 26, 2018).

Like Medicaid, Medicare helps an individual satisfy a basic living need, i.e., medical care. Medicare provides health insurance for people 65 or older, certain people under 65 with disabilities, and people of any age with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a kidney transplant).<sup>360</sup> Medicare has four parts. Medicare Part A is for hospital coverage and is mandatory for eligible participants; Part B provides optional medical coverage; Part C provides a managed care option through contracts with commercial insurers; and Part D is the optional Prescription Drug Plan.<sup>361</sup> In general, people over age 65 or young people with disabilities are eligible for Medicare<sup>362</sup> if the person or his or her spouse worked and paid Medicare taxes for at least 10 years.<sup>363</sup> People who did not pay Medicare taxes, are age 65 or older, and are U.S. citizens or lawful permanent residents may also be able to buy Medicare.<sup>364</sup> Generally, DHS does not propose to consider all of Medicare as part of the definition of public benefits. DHS is only proposing to consider Premium and Cost Sharing Subsidies (*i.e.*, low-income subsidies) for Medicare Part D as part of the definition of public benefits, for the reasons stated below.

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), provides subsidies for prescription drugs for eligible individuals whose income and resources are

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<sup>360</sup> See Ctrs. for Medicare and Medicaid Servs., *A Quick Look at Medicare* (October 2017), available at <https://www.medicare.gov/Pubs/pdf/11514-A-Quick-Look-at-Medicare.pdf>. Medicare may also be subsidized if he or she qualifies for both Medicare and Medicaid. Medicare.gov, *Are Medicare Advantage Plans Subsidized?*, available at <https://www.medicare.gov/medicare-advantage-plans-subsidized> (last visited Feb. 27, 2018).

<sup>361</sup> See *id.*

<sup>362</sup> See HHS, *Who is Eligible for Medicare?*, available at <https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicare/index.html> (last visited Feb. 24, 2018).

<sup>363</sup> See HHS, *Who is Eligible for Medicare?*, available at <https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicare/index.html> (last visited Feb. 24, 2018).

<sup>364</sup> See HHS, *Who is Eligible for Medicare?*, available at <https://www.hhs.gov/answers/medicare-and-medicaid/who-is-eligible-for-medicare/index.html> (last visited Feb. 24, 2018).

limited.<sup>365</sup> Beneficiaries may apply for the Low-Income Subsidy with the Social Security Administration (SSA) or with their State Medicaid agency.<sup>366</sup> The provision of a Part D low-income subsidy to an individual can impose substantial costs on multiple levels of government and generally indicates a lack of ability to be self-sufficient in satisfying a basic living need, i.e., medical care. As noted above, by at least one measure, this program entails one of the most largest Federal expenditures for low-income people.<sup>367</sup>

#### *iv. Subsidized Public Housing*

The considerations leading to inclusion of high-expenditure housing-related benefits, generally, including subsidized public housing, are outlined above. Subsidized public housing is available to low-income individuals in certain areas. Public housing was “established to provide decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities by entering into Annual Contributions Contracts (ACC) with Public Housing Agencies, which are state-created agencies with jurisdiction to operate within a clearly delineated area.”<sup>368</sup> Public housing may include single-family houses or high-rise apartments.<sup>369</sup> HUD administers “[f]ederal aid to local housing agencies (HAs) that manage the housing for

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<sup>365</sup> See Ctrs. for Medicare & Medicaid Servs., *Guidance to States on the Low Income Subsidy Guidance 5* (Feb. 2009), available at <https://www.cms.gov/Medicare/Eligibility-and-Enrollment/LowIncSubMedicarePresCov/Downloads/StateLISGuidance021009.pdf>.

<sup>366</sup> See Ctrs. for Medicare & Medicaid Servs., *Guidance to States on the Low Income Subsidy Guidance 5* (Feb. 2009), available at <https://www.cms.gov/Medicare/Eligibility-and-Enrollment/LowIncSubMedicarePresCov/Downloads/StateLISGuidance021009.pdf>

<sup>367</sup> See Table 26-1 Policy, Net Budget Authority by Function, Category, and Program, available at <https://www.whitehouse.gov/wp-content/uploads/2018/02/26-1-fy2019.pdf> (last visited Aug. 8, 2018). Expenditure amounts are net outlays unless otherwise noted. See also Gene Falk et al., Cong. Research Serv., R45097, *Federal Spending on Benefits and Services for People with Low Income: In Brief* (Feb. 6, 2018), available at <https://fas.org/sgp/crs/misc/R45097.pdf>.

<sup>368</sup> See U.S. Dep’t of Housing & Urban Dev., *HUD’s Public Housing Program*, available at [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog) (last visited July 3, 2018).

<sup>369</sup> See U.S. Dep’t of Housing & Urban Dev., *HUD’s Public Housing Program*, available at [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog) (last visited July 3, 2018).

low-income residents at rents they can afford.”<sup>370</sup> HUD uses the median income of the county or metropolitan area of where the person chooses to live to determine the income eligibility standards.<sup>371</sup> Specially, HUD sets the “lower income limits at 80% and very low income limits at 50% of the median income.”<sup>372</sup>

(e) Receipt of Public Benefits by Active Duty and Reserve Servicemembers and Their Families

DHS proposes to exclude consideration of the receipt of any public benefits by active duty servicemembers, including those in the Ready Reserve of the U.S. Armed Forces, and their families. The United States Government is profoundly grateful for the unparalleled sacrifices of the members of our armed services and their families. Servicemembers who, during their service, receive public benefits, in no way burden the public; indeed, their sacrifices are vital to the public's safety and security. The Department of Defense (DOD) has advised DHS that many of the aliens who enlist in the military are early in their careers, and therefore, consistent with statutory pay authorities, earn relatively low salaries that are supplemented by certain allowances and tax advantages.<sup>373</sup> Although data limitations exist, evidence suggests that as a consequence of the unique compensation and tax structure afforded by Congress to aliens enlisting for military service, some active duty alien servicemembers, as well as their spouses and children, as defined

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<sup>370</sup> See U.S. Dep’t of Housing & Urban Dev., *HUD’s Public Housing Program*, available at [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog) (last visited July 3, 2018).

<sup>371</sup> See U.S. Dep’t of Housing & Urban Dev., *HUD’s Public Housing Program*, available at [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog) (last visited July 3, 2018).

<sup>372</sup> See U.S. Dep’t of Housing & Urban Dev., *HUD’s Public Housing Program*, available at [https://www.hud.gov/topics/rental\\_assistance/phprog](https://www.hud.gov/topics/rental_assistance/phprog) (last visited July 3, 2018).

<sup>373</sup> See, e.g., 37 U.S.C. 201-212, 401-439 (Basic Pay and Allowances Other than Travel and Transportation Allowances, respectively); Lawrence Kapp, Cong. Research Serv., *Defense Primer: Regular Military Compensation* 2 tbl.1 (Jan. 2, 2018), available at <https://fas.org/sgp/crs/natsec/IF10532.pdf> (reporting average regular military compensation of \$41,384 at the E-1 level in 2017, comprised of \$19,199 in average annual basic pay, plus allowances and tax advantage); Lawrence Kapp et al., Cong. Research Serv., RL33446, *Military Pay: Key Questions and Answers* 6-9 (2018), available at <https://fas.org/sgp/crs/natsec/RL33446.pdf> (describing types of military compensation and federal tax advantages).

in section 101(b) of the Act, may rely on SNAP<sup>374</sup> and other listed public benefits. As a result, the general standard proposed in this rule could result in a finding of inadmissibility under section 212(a)(4) when such aliens apply for adjustment of status.

Following consultation with DOD, DHS has concluded that such an outcome may give rise to concerns about servicemembers' immigration status or the immigration status of servicemembers' spouses and children as defined in section 101(b) of the Act, which would reduce troop readiness and interfere significantly with U.S. armed forces recruitment efforts. This exclusion is consistent with DHS's longstanding policy of ensuring support for our military personnel who serve and sacrifice for our nation, and their families, as well as supporting military readiness and recruitment.

Accordingly, DHS proposes to exclude the consideration of the receipt of all benefits listed in 8 CFR 212.21(b) from the public charge inadmissibility determination, when received by active duty servicemembers, including those in the Ready Reserve and their spouses and children. Applicants that fall under this exclusion would be required to submit proof that the servicemember is serving in active duty or the Ready Reserve.

#### **(f) Unenumerated Benefits**

The definition of the term "public charge" would not include receipt of any non-cash public benefit not listed under the proposed 8 CFR 212.21(b). Benefits such as Social Security

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<sup>374</sup> 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, § 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").

retirement benefits, general Medicare, and a wide range of Veteran's benefits would not be included in the definition. Similarly, the proposed definition would not include social insurance programs such as worker's compensation and non-cash benefits that provide education, child development, and employment and job training. Furthermore, DHS believes that exclusion of education-related benefits is justifiable in the interest of administrability (e.g., many such benefits are received indirectly through schools). In sum, under this proposal, any exclusively state, local or tribal public benefit that is not cash assistance for income maintenance, institutionalization for long-term care at government expense, or another public benefit program not specifically listed in the regulation, would not be included in the definition of the term "public charge."

As noted above, the definition of public charge is based on DHS's preference to prioritize those programs that impose the greatest cost on the Federal government as well as those programs that assist an individual with satisfying basic living needs. DHS welcomes comment regarding whether it should expand the list of designated public benefits in a final rule, to include specific public benefits that recipients are generally aware they receive and must opt into receipt and otherwise similar in nature to the benefits currently designated under the proposed rule, *i.e.*, other benefits intended to help low-income people meet basic living needs. Consistent with the proposal described in the section of this preamble entitled "Previously Excluded Benefits", any such expansion would be prospective in nature (*i.e.*, not effective until following publication of a final rule).

In addition, DHS seeks public comments on whether an alien's receipt of benefits other than those proposed to be included in this rule as public benefits should nonetheless be considered in the totality of circumstances, either above the thresholds set forth in the proposed

rule for public monetizable and non-monetizable public benefits, or at some other threshold.

DHS could construct a process under which it provides appropriate notice for consideration of such benefits to the extent that they have a bearing on the public charge inquiry, *i.e.*, whether the alien is likely in the totality of the circumstances to receive the designated public benefits above the applicable threshold(s), either in terms of dollar value or duration of receipt. DHS welcomes comments and data on this potential alternative.

**(g) Request for Comment Regarding the Children's Health Insurance Program (CHIP)**

In addition to the public benefits listed in proposed 8 CFR 212.21(b), DHS is considering adding to the list of included benefits. The Children's Health Insurance Program (CHIP),<sup>375</sup> formerly known as the State Children's Health Insurance Program (SCHIP),<sup>376</sup> provides low-cost health coverage to children in families that earn too much money to qualify for Medicaid but still need assistance to pay for healthcare.<sup>377</sup> CHIP is administered by states in accordance with federal requirements. Eligibility for CHIP is based on income levels and the upper income level varies by state. According to the Centers for Medicare & Medicaid Services, 46 States and the District of Columbia cover children up to or above 200 percent the Federal Poverty Level (FPL), and 24 of these states offer coverage to children in families with income at 250 percent of the FPL or higher. States may get the CHIP enhanced match for coverage up to 300 percent of the FPL.<sup>378</sup> While coverage differs from state to state, all states provide comprehensive coverage,

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<sup>375</sup> See 42 U.S.C. 1397aa to 1397mm.

<sup>376</sup> Beginning with the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), SCHIP was referred to simply as CHIP. Older references to SCHIP were not changed, and any statutory or regulatory reference to one applies interchangeably to the other. See Pub. L. 111-3, 123 Stat. 8.

<sup>377</sup> See HealthCare.gov, *The Children's Health Insurance Program (CHIP)*, available at <https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program> (last visited Feb. 23, 2018).

<sup>378</sup> See Medicaid.gov, *Eligibility*, available at <https://www.medicaid.gov/chip/eligibility-standards/index.html> (last visited Feb. 23, 2018).

like routine check-ups, immunizations, doctor visits, and prescriptions. The program is funded jointly by states and the federal government.<sup>379</sup>

As noted in Table 10, the Federal government expends significant resources on CHIP.<sup>380</sup> CHIP imposes a significant expense upon multiple levels of government, and because these benefits relate to a basic living need (i.e., medical care), receipt of these benefits suggests a lack of self-sufficiency. At the same time, DHS recognizes that this program does not involve the same level of expenditure as most of the other programs listed in this proposed rule, and that noncitizen participation in these programs is currently relatively low.<sup>381</sup>

DHS is nonetheless considering including this program in a final rule, because the total Federal expenditure for the program remains significant, and because it does provide for basic living needs (i.e. medical care), similar to Medicaid (elements of which are included on the proposed list of public benefits). DHS specifically requests public comments on whether to include CHIP in the final rule.

#### **(h) Request for Comment Regarding Public Benefit Receipt by Certain Alien Children**

The language of the public charge statute under section 212(a)(4)(B)(i) of the Act states that an alien's "age" shall be one of several minimum enumerated considerations in a public charge determination, alongside "health," "family status," "assets, resources, and financial status," and "education and skills." Each of these factors must be taken into account in

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<sup>379</sup> See Benefits.gov, *State Children's Health Insurance Program*, available at <https://www.benefits.gov/benefits/benefit-details/607> (last visited July 11, 2018).

<sup>380</sup> DHS would not consider services or benefits funded by CHIP but provided under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400-1482, nor would DHS consider school-based services provided to children who are at or below the oldest age of children eligible for secondary education as determined under State law.

<sup>381</sup> An analysis of Wave 13 of the 2008 Panel of the Survey of Income and Program Participation (SIPP) suggests that 0.7 percent of noncitizens reported receiving CHIP benefits.



determining whether an alien will be a charge on the federal taxpayer. The United States has separate immigration programs, such as refugee admissions and asylum, where aliens regardless of age and financial circumstance are exempted from public charge inadmissibility. Alien children who are not asylees, refugees, or otherwise exempt from the public charge ground of inadmissibility are subject to it, just as adult aliens are. However, because the public charge inadmissibility determination is a prospective determination in the totality of the circumstances, the circumstances surrounding an alien's receipt of public benefits as a child, including the age at which such benefits were received, are a relevant consideration. For instance, as alien children approach or reach adulthood, they may age out of eligibility for certain benefits, choose to disenroll from such benefits (for which their parents may have enrolled them), or modify their chances of becoming self-sufficient depending upon whether they acquire education and skills, secure employment, and accumulate assets and resources. Therefore, DHS seeks public comment on the best mechanism to administer public charge inadmissibility determinations for those aliens who receive benefits while under the age of majority (frequently 18) or while still children under section 101(b) of the INA, 8 U.S.C. 1101(b). DHS is particularly interested in views and data that would inform whether and to what extent DHS should weigh past or current receipt of benefits by such an alien in the totality of the circumstances as a potential indicator of likely future receipt of public benefits.

**(i) Request for Comment Regarding Potential Modifications by Public Benefit Granting Agencies**

DHS recognizes that as a result of a future final rule, some benefit-granting agencies may decide to modify enrollment processes and program documentation for designated benefits

programs. For instance, agencies may choose to advise potential beneficiaries of the potential immigration consequences of receiving certain public benefits. DHS requests public comments regarding such potential modifications, including information regarding how long it would take to make such modifications, and the resources required to make such modifications. DHS may use this information to determine the appropriate effective date for a final rule, among other purposes. DHS seeks comments and recommendations from potentially affected state, local and tribal governments and from the public generally.

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

DHS proposes to define “likely at any time to become a public charge” to mean likely at any time in the future to receive one or more public benefits, as defined in 8 CFR 212.21(b), based on the totality of the alien’s circumstances. Under this proposed definition, DHS would find an alien inadmissible as a public charge if DHS finds the alien is likely *at any time in the future* to receive one or more public benefits, as defined in 8 CFR 212.21(b), in an amount or for a duration exceeding the thresholds described above.

DHS proposes to distinguish between an alien who is a public charge based on current receipt of public benefits and an alien who is likely to become a public charge at any time in the future. This distinction is consistent with the prospective nature of the statute. DHS understands that its proposed definition of public charge may suggest that DHS would automatically find an alien who is *currently* receiving public benefits, as defined in this proposed rule, to be inadmissible as likely to become a public charge. But DHS does not propose to establish a *per se* policy whereby an alien is likely at any time to become a public charge if the alien is receiving public benefits at the time of the application for a visa, admission, or adjustment of status. Under the “likely at any time to become a public charge” definition, an alien who is currently receiving

public benefits is not necessarily inadmissible, because current receipt of public benefits does not automatically mean that the alien is likely to receive public benefits at any time in the future.

As discussed above and explained further below, receiving public benefits by itself does not establish that an alien is likely to become a public charge; rather, as set forth in the statute, a public charge inadmissibility determination requires a determination predicated on an opinion as to the likelihood of future events.<sup>382</sup> Accordingly, as set forth in proposed 8 CFR 212.21, DHS proposes that an alien who is currently receiving public benefits is not necessarily inadmissible, because such current receipt of public benefits does not necessarily mean that the alien will continue to receive public benefits at any time in the future.

#### **4. Household**

For purposes of public charge inadmissibility determinations under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), DHS proposes to consider the alien's household size as part of the family status factor, as well as the assets, resources, and financial status factor. The number of people in the alien's household has an effect on the alien's assets and resources, and in many cases may influence the likelihood that an alien will become a public charge. Household size would be used to determine whether the alien's household income is at least 125 percent of the FPG in the public charge inadmissibility determination, because the alien is either a head of household who has responsibilities to the household or is a member of a household who is supported by other members of the household beyond the sponsor. DHS notes that while the number of children, including U.S. citizen children, may count towards an alien's household size for purposes of determining inadmissibility on the public charge ground, the direct receipt of

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<sup>382</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

public benefits by those children would not factor into the public charge inadmissibility determination.

As discussed in greater detail below, in developing the proposed definition of an alien's household, DHS reviewed the individuals that public benefit granting agencies include as part of a household and/or as dependents in determining eligibility for a public benefit, as well as how USCIS determines household size and income in the affidavit of support context. The individuals identified as part of the alien's household are intended to include individuals who are financially interdependent with the alien, either legally or otherwise.

**(a) Definition of Household in Public Charge Inadmissibility Context**

DHS proposes to define an alien's household for the purposes of making a public charge inadmissibility determination as follows. First, if the alien is 21 years of age or older, or under the age of 21 and married, and therefore not a child as defined in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), the alien's household would include:

- The alien;
- The alien's spouse, if physically residing with the alien;
- The alien's children, as defined in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), physically residing with the alien;
- The alien's other children, as defined in section 101(b)(1) of the Act, 8 U.S.C.

1101(b)(1), not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided to the alien;

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

Thus, for example, the applicant's household size would include the applicant, her children, and her parents, if:

- The applicant is an unmarried 23 year-old applicant for adjustment of status;
- The applicant lives with two children and her parents, who provide 53 percent of financial support to the applicant; and
- The applicant has no other individuals for whom she provides or is required to provide (or from whom she receives) financial support or who list her on their tax return.

DHS would consider the income, assets, and resources of all of these household members (total of 5) in determining whether the applicant has income at or above 125 percent of the FPG.

Second, if the alien is a child as defined in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), the alien's household would include:

- The alien;
- The alien's children, as defined in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), physically residing with the alien;
- The alien's other children, as defined in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), not physically residing with the alien, for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by

a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;

- The alien's parents, legal guardians, or any other individuals providing or required to provide at least 50 percent of financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
- The parents' or legal guardians' other children, as defined in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), physically residing with the alien;
- The parents' or legal guardians' other children, as defined in section 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), not physically residing with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and
- Any other individuals to whom the alien's parents or legal guardians provide or are required to provide at least at least 50 percent of the individuals' financial support, or who are listed as a dependent on the parents' or legal guardians' federal income tax return.

For example, if a five year old is applying for adjustment of status, the applicant's household would include the applicant, the applicant's mother and father, the applicant's two siblings, and the applicant's maternal grandparents, if:

- The applicant lives with his mother, father, and two siblings and has no other siblings;

- The mother and father provide 52 percent of the financial support to the mother's parents (i.e., the alien's maternal grandparents) and do not and are not required to provide financial support to anyone else;
- Nobody else provides financial support to the applicant;
- Neither the mother or the father have any other children and have no other dependents listed on their tax return; and
- The mother and father do not receive financial support from anyone else.

DHS would consider the income of all of the above individuals in determining whether the alien can meet 125 percent of the FPG.

As another example, if an 18 year old is applying for adjustment of status, the alien's household would only include the alien and the alien's daughter, if:

- The 18 year old lives in her own apartment with only her 1 year old daughter;
- The applicant has no other children or siblings;
- The applicant does not receive any financial support from his or her parents or any other individual and has no legal guardian;
- No individuals are required to provide the applicant with any financial support; and
- The applicant's parents and the applicant do not provide and are not required to provide any support to anyone else and list no one else as a dependent on their federal income tax returns.

The proposed household definition would not include any person employed by the household who is living in the home, such as a nanny, or an individual who is renting a part of the home from one of the household members, or a landlord, unless such individual otherwise meets one of the enumerated criteria.

## **(b) Definitions of “Household” and Similar Concepts in other Public Benefits**

### **Contexts**

The poverty guidelines do not define who should be considered part of the household, and different agencies and programs have different requirements.<sup>383</sup> Public benefit granting agencies generally consider an applicant’s income for purposes of public benefit eligibility and either use the household size or family size to determine the income threshold needed to qualify for a public benefit. Each federal program or State determines the general eligibility requirements needed to qualify for the public benefits and how to define whose income is included for purposes of determining income based eligibility thresholds. For example, SNAP uses the term "household" and includes everyone who lives together and purchases and prepares meals together. DHS is not proposing to incorporate the SNAP definition because an alien or an individual who is financially responsible for the alien’s support may not have the legal responsibility to support each person living in the home. Instead, the proposed DHS definition would take into account individuals for whom the alien or the alien’s parent(s) or legal guardian(s) or other individual is providing at least 50 percent of financial support because such expenditure would have significant bearing on whether the alien has sufficient assets and resources in the context of a public charge determination.

The U.S. Department of Housing and Urban Development (HUD), per the 1937 Act, uses the term "families"<sup>384</sup> which includes: (i) single persons in the case of an elderly person, a disabled person, a displaced person, the remaining member of a tenant family, and any other single persons; or (ii) families with children and in the cases of elderly families, near-elderly

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<sup>383</sup> See *Annual Update of the HHS Poverty Guidelines*, 83 FR 2642 (Jan. 18, 2018).

<sup>384</sup> See U.S. Dep’t of Hous. & Urban Dev., *Occupancy Handbook* ch.3 (June 2007), available at [https://www.hud.gov/sites/documents/DOC\\_35645.PDF](https://www.hud.gov/sites/documents/DOC_35645.PDF).



families, and disabled families respectively.<sup>385</sup> The U.S. Housing Act of 1937 (The 1937 Act)<sup>386</sup> requires that dwelling units assisted under it must be rented only to families who are low-income<sup>387</sup> at the time of their initial occupancy. Section 3 of the 1937 Act also defines income as income from all sources of each member of the household, excluding earned income of minors, as determined by the Secretary. Beyond the statutory framework defining families, and as provided by the 1937 Act, HUD allows public housing agencies the discretion to determine particularities related to family composition, as determined under each public housing agency's plan.

While DHS's proposed definition does not precisely track HUD's definition, it would encompass many of the individuals identified in the HUD definition including spouses and children as defined under the Act.<sup>388</sup> In addition, the DHS definition focuses on both individuals living in the alien's home, as well as individuals not living in the alien's home but for whom the alien and/or the alien's parent(s)/legal guardian(s) is providing or is required to provide at least 50 percent of financial support.

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<sup>385</sup> The term includes in cases of elderly, near-elderly, and disabled families, 2 or more elderly persons, near-elderly persons, or persons with disabilities living together, and 2 or more such persons living with 1 or more persons determined under the public housing agency plan to be essential to their care of well-being. *See* U.S. Dep't of Hous. & Urban Dev., Occupancy Handbook ch. 3 (June 2007), *available at* [https://www.hud.gov/sites/documents/DOC\\_35645.PDF](https://www.hud.gov/sites/documents/DOC_35645.PDF). HUD also makes their income determination based on Median Family Income estimates and Fair Market Rent area definitions for each metropolitan area, parts of some metropolitan areas, and each non-metropolitan county. *See* U.S. Dep't of Hous. & Urban Dev., Office of Policy Dev. & Research, *Income Limits*, *available at* <https://www.huduser.gov/portal/datasets/il.html> (last visited June 14, 2018). The 1937 Act also provides that the temporary absence of a child from the home due to placement in foster care shall not be considered in determining family composition and family size.

<sup>386</sup> *See* ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. 1437 to 1437zz-10).

<sup>387</sup> Section 3 of the 1937 Act defines "low-income families" as those families whose incomes do not exceed 80 percent of the median income for the area, as determined by the Secretary.

<sup>388</sup> The definition of child in INA section 101(b), 8 U.S.C. 1101(b), generally includes unmarried persons under 21 years of age who are born in or out of wedlock, stepchildren, legitimated children, adopted children if adopted under the age of 16 or the age of 18 if natural siblings of another adopted child.

The IRS defines "dependent" to include a qualifying child (which has a 5-part test), or a qualifying relative (which has a 4-part test).<sup>389</sup> These tests generally include some type of relationship to the person filing (including step and foster children and their children) whether or not the dependent is living with the person filing and the amount of support being provided by the person filing (over 50 percent).<sup>390</sup> In general, the dependent must also be a U.S. citizen or lawful permanent resident in order to qualify as a dependent for tax purposes.<sup>391</sup>

Because the IRS definition of "dependent" would generally exclude alien dependents and the DHS definition would not, DHS's proposed definition of household results in a larger number of people being captured than if DHS simply tracked the IRS's definition of "dependent." DHS also proposes to consider those individuals who are supported by the alien and are themselves aliens, or those who may be contributing to the alien's income, in order to determine whether the alien's financial resources are sufficient to support the alien and other members of the alien's household. For example, if an alien is living with a younger sibling who is attending school and providing 51 percent or more financial support for the younger sibling, that sibling is a part of the alien's household, even though the younger sibling may be earning some wages from a part-time job. Similarly, if the alien has an older sibling who is providing 51 percent of support to the alien, that older sibling would also be included in the alien's household and his/her income counted toward the requisite income threshold along with any income earned by the alien. DHS's definition would adopt the IRS consideration of the amount of support being provided to the individuals (50 percent) as the threshold for considering as an individual as part

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<sup>389</sup> See 26 U.S.C. 152; see also IRS Publication 501 (Jan 2, 2018), *available at* <https://www.irs.gov/pub/irs-pdf/p501.pdf>.

<sup>390</sup> See IRS Publication 501 (Jan 2, 2018), *available at* <https://www.irs.gov/pub/irs-pdf/p501.pdf>.

<sup>391</sup> See IRS Publication 501 (Jan 2, 2018), *available at* <https://www.irs.gov/pub/irs-pdf/p501.pdf>.

of the household in the public charge determination, rather than consider any support being provided.<sup>392</sup>

DHS believes that the “at least 50 percent of financial support” threshold as used by the IRS is reasonable to apply to the determination of who belongs in an alien’s household, without regard to whether these individuals physically reside in the alien’s home. This would include those individuals the alien may not have a legal responsibility to support but may nonetheless be supporting. For example, this may include a parent, legal guardian, sibling, or a grandparent living with the alien, or an adult child, sibling, or any other adult who the alien may be supporting or required to support or who contributes to the alien’s financial support.

### **(c) Definitions of Household and Similar Concepts in other Immigration Contexts**

DHS also considered how household size is determined in the affidavit of support context. There, USCIS defines the terms “household income” and “household size.”<sup>393</sup>

“Household income” is used to determine whether a sponsor meets the minimum income requirements based on the FPG.<sup>394</sup> The affidavit of support household income generally includes the income of:

- The sponsor;
- The sponsor's spouse;
- Any other person included in determining the sponsor's household size who must also be over the age of 18 and must have signed the additional household member contract through the Form I-864A; and

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<sup>392</sup> See Internal Revenue Serv., *Dependency Exemptions*, available at [https://apps.irs.gov/app/vita/content/globalmedia/4491\\_dependency\\_exemptions.pdf](https://apps.irs.gov/app/vita/content/globalmedia/4491_dependency_exemptions.pdf) (last visited Aug. 10, 2018); see also Internal Revenue Serv., *Table 2: Dependency Exemption for Qualifying Relative*, available at [https://apps.irs.gov/app/vita/content/globalmedia/table\\_2\\_dependency\\_exemption\\_relative\\_4012.pdf](https://apps.irs.gov/app/vita/content/globalmedia/table_2_dependency_exemption_relative_4012.pdf) (last visited Aug. 10, 2018).

<sup>393</sup> See 8 CFR 213a.1.

<sup>394</sup> See INA section 213A, 8 U.S.C. 1183a.

- The intending immigrant only if he or she either is the sponsor's spouse or has the same principal residence as the sponsor and certain additional criteria.<sup>395</sup>

Also, in the affidavit of support context, the "household size" is generally defined as the total number of people including:

- The sponsor;
- The intending immigrant(s) being sponsored on the Form I-864;<sup>396</sup>
- The sponsor's spouse;
- All of the sponsor's children as defined in 101(b)(1) of the Act, 8 U.S.C. 1101(b)(1), (including a stepchild who meets the requirements of 101(b)(1)(b) of the Act, 8 U.S.C. 1101(b)(1), unless the stepchild does not reside with the sponsor, is not claimed by the sponsor as a dependent for tax purposes, and is not seeking to immigrate based on the stepparent/stepchild relationship), except those children that have reached the age of majority or are emancipated under the law of the person's domicile and are not claimed as dependents on the sponsor's most recent tax return;
- Any other persons (whether related to the sponsor or not) whom the sponsor has claimed as dependents on the sponsor's federal income tax return for the most recent tax year, even if such persons do not have the same principal residence as the sponsor;
- Any aliens the sponsor has sponsored under any other affidavit of support for whom the sponsor's support obligation has not terminated; and

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<sup>395</sup> See 8 CFR 213a.1.

<sup>396</sup> If a child, as defined in INA section 101(b)(1), 8 U.S.C. 1101(b)(1), or spouse of the principal intending immigrant is an alien who does not currently reside in the United States and who either is not seeking to immigrate at the same time as, or will not seek to immigrate within six months of the principal intending immigrant's immigration, the sponsor may exclude that child or spouse in calculating the sponsor's household size.

- If the sponsor elects, any siblings, parents, and/or adult children who have the same principal residence as the sponsor, and have combined their income with the sponsor's income by submitting Form I-864A.<sup>397</sup>

The affidavit of support is part of the public charge determination in that an alien who is required to submit an affidavit of support pursuant to sections 212(a)(4)(C) and (D) of the Act but does not submit a sufficient affidavit of support is de facto deemed to be inadmissible as likely to become a public charge. In addition, because the affidavit of support serves as an agreement that the sponsor will use his or her resources to support the alien if necessary, DHS is proposing to consider the affidavit of support in the totality of the circumstances when determining whether the alien is likely at any time to become a public charge. However, the proposed definition of household in this rule does not specifically include or exclude the sponsor and the sponsor's household. Rather, DHS is only including those persons who rely upon or contribute to the alien's assets and resources. Therefore, if the sponsor is already providing 50 percent or more of financial support to the alien, the sponsor would be included in the proposed definition of household. For example, when a child, as defined in section 101(b) of the Act, 8 U.S.C. 1101(b)(1), is filing for adjustment of status as the child of a U.S. citizen or lawful permanent resident, the affidavit of support sponsor would also be the parent. Because the parent is part of the household, the parent's income would be included as part of the household income.<sup>398</sup> The parent's income would be reviewed as part of the assets, resources, and financial status factor based on the total household size. However, for example, if there is a co-sponsor, who is the alien's cousin and who is not physically residing with the alien, then the cousin would not be counted as part of the household and his or her income would not be included as part of the

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<sup>397</sup> See 8 CFR 213a.1, 213a.2(c)(2)(i)(C)(1).

<sup>398</sup> See INA section 213A(3)(f), 8 U.S.C. 1183a(3)(f).

assets, resources or financial status unless the sponsor is already contributing 50 percent or more of the alien's financial support.

In addition, if the sponsor is a member of the alien's household and included in the calculation of the 125 percent of the FPG, DHS would only count the sponsor's income once for purposes of determining the alien's total household assets and resources. A sponsor's income as reported on the affidavit of support would be added to the income of the other members of the alien's household. The sponsor's income that is added to the alien's total household assets and resources would not be increased because the sponsor also submitted an affidavit of support promising to support the alien at least 125 percent of the FPG for the sponsor's household size. For example, assuming the alien and sponsor's household sizes are the same, if the sponsor's total income reported on the affidavit of support is 250 percent of the FPG for the household size, that income would be added to the alien's assets and resources; the alien's total household income would then be at least 250 percent of the FPG, which constitutes a heavily weighed positive factor.

As discussed above, in proposing this definition of household, DHS aims to account for both (1) the persons whom the alien is supporting and (2) those persons who are contributing to the household, and thus the alien's assets and resources. DHS believes that an alien's ability to support a household is relevant to DHS's consideration of the alien's assets, resources, financial status, and family status. DHS recognizes that household circumstances can vary and expects the proposed definition could in certain circumstances be over- or under-inclusive. DHS welcomes public comments on who should be counted as members of a household, and whose income, assets and resources should be reviewed in the totality of the circumstances when USCIS makes a public charge inadmissibility determination.

## **C. Public Charge Inadmissibility Determination**

DHS proposes codifying the public charge inadmissibility determination as a prospective determination based on the totality of an alien's circumstances at the time of adjudication. As provided by statute, if an alien is required to provide an affidavit of support and the affidavit is insufficient, the alien will be found inadmissible based on public charge regardless of any other evidence the alien may submit.<sup>399</sup>

### **1. Absence of a Required Affidavit of Support**

Section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), permits DHS to consider any submitted affidavit of support under 213A of the Act, 8 U.S.C. 1183a, in public charge inadmissibility determinations. The absence of a statutorily required affidavit of support under section 213A of the Act, 8 U.S.C. 1183a, conclusively establishes an alien's inadmissibility on public charge grounds.<sup>400</sup> Family-sponsored immigrants and employment-based immigrants petitioned by a relative (or by an entity in which a relative has a significant ownership interest) are subject to such a requirement.<sup>401</sup> Other than failure to submit an affidavit of support when required under section 213A of the Act, 8 U.S.C. 1183a, DHS would not make a public charge determination based on any single factor.<sup>402</sup>

### **2. Prospective Determination Based on Totality of Circumstances**

As noted above, section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), uses the words "likely at any time."<sup>403</sup> DHS's review is predictive: an assessment of an alien's likelihood at any time in

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<sup>399</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>400</sup> See INA section 212(a)(4)(C), 8 U.S.C. 1182(a)(4)(C); 8 CFR 213a.2.

<sup>401</sup> See INA sections 212(a)(4) and 213A, 8 U.S.C. 1182(a)(4), 1183a.

<sup>402</sup> See generally *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421-22 (Att'y Gen. 1964).

<sup>403</sup> The "likely" language in the public charge inadmissibility provision also appeared in the initial codification in the INA of 1952. See ch. 477, 66 Stat. 163, 183.

the future to become a public charge.<sup>404</sup> DHS would, as required by the statute, assess whether the alien is likely to become a public charge and not whether the alien is currently a public charge. While past or current receipt of public benefits may make an alien, at present, a public charge, the past or current receipt of public benefits, alone, is insufficient to sustain a finding that an alien is likely to become a public charge at any point in the future.<sup>405</sup> Other than an absent or insufficient required affidavit of support,<sup>406</sup> no single factor or circumstance that Congress mandated DHS to consider, or which DHS may otherwise determine to consider, would determine the outcome of a public charge inadmissibility determination.

Consistent with the statute, DHS proposes to codify the totality of the circumstances standard,<sup>407</sup> as follows: an alien's age; health; family status; assets, resources, and financial status; and education and skills. In the Government's discretion, the determination can also account for an affidavit of support filed under section 213A of the Act, 8 U.S.C. 1183a. Courts previously considered similar factors when evaluating the likelihood of an alien to become a public charge.<sup>408</sup> INS, the Board, and DHS have consistently reviewed the totality of the

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<sup>404</sup> See *Matter of Perez*, 15 I&N Dec. 136, 137 (BIA 1974) (concluding that the determination of whether an alien is likely to become a public charge requires consideration of the totality of circumstances, including specific circumstances such as mental or physical disability, health, age, current reliance on welfare benefits, capacity to find employment, and friends or relatives in the United States willing and able to provide assistance); see also *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689, 28689-93 (May, 26 1999) (in addition to the statutory factors, the public charge inadmissibility analysis also includes consideration of the alien's current and past receipt of cash public assistance for income maintenance, repayment of cash public assistance, current or past institutionalization for long-term care at government expense, specific circumstances "reasonably tending to show that the burden of supporting the alien is likely to be cast on the public," and whether the alien has a sponsor who is willing and able to assist).

<sup>405</sup> See *Matter of Perez*, 15 I&N Dec. 136, 137 (BIA 1974) ("The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge.").

<sup>406</sup> See INA section 213A, 8 U.S.C. 1183a.

<sup>407</sup> See proposed 8 CFR 212.22.

<sup>408</sup> See, e.g., *Matter of Perez*, 15 I&N Dec. 136, 137 (BIA 1974); see also *Zambrano v. INS*, 972 F.2d 1122 (9th Cir. 1992), vacated on other grounds, 509 U.S. 918 (1993); *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421-22 (Att'y Gen. 1964) (in determining whether a person is likely to become a public charge, factors to consider include age, health and physical condition, physical or mental defects which might affect earning capacity, vocation, past record of employment, current employment, offer of employment, number of dependents, existing conditions in the United States, sufficient funds or assurances of support by relatives or friends in the United States, bond or undertaking, or



circumstances in determining whether an alien is likely to become a public charge.<sup>409</sup>

DHS's proposed totality of the circumstances standard would involve weighing all the positive and negative considerations related to an alien's age; health; family status; assets, resources, and financial status; education and skills; required affidavit of support; and any other factor or circumstance that may warrant consideration in the public charge inadmissibility determination.<sup>410</sup> If the negative factors outweigh the positive factors, then the alien would be found to be inadmissible as likely to become a public charge; if the positive factors outweigh the negative factors, then the alien would not be found inadmissible as likely to become a public charge.

The proposed totality of the circumstances approach is also consistent with the body of administrative case law that has developed over the past 50 years, which generally directs the agency to "consider[] all the factors bearing on the alien's ability or potential ability to be self-supporting . . . ."<sup>411</sup> On the whole, this case law strongly supports the forward-looking totality of the circumstances approach, considering the following factors, where no one factor is outcome-determinative:

- The ability of the alien to earn a living, as evidenced or impacted by the alien's age, health, work history, current employment status, future employment prospects, and skills;
- The sufficiency of the alien's funds for self-support;
- The obligation and sufficiency of sponsorship to assure that the alien will not need public support; and

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any "specific circumstance . . . reasonably tending to show that the burden of supporting the alien is likely to be cast on the public"); *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689 (May 26, 1999).

<sup>409</sup> See *Matter of A-*, 19 I&N Dec. 867, 869 (Comm'r 1988) (citing *Matter of Perez*, 15 I&N Dec. 136, 137 (BIA 1974)).

<sup>410</sup> See proposed 8 CFR 212.22.

<sup>411</sup> See *Matter of Vindman* 16 I&N Dec. 131, 132 (Reg'l Comm'r 1977).

- The ability of the alien to remedy any current dependence on public benefits in the United States, as evidenced or impacted by the alien's age, health, ability to earn a living, funds, and sponsorship.<sup>412</sup>

To illustrate, in *Matter of Martinez-Lopez*,<sup>413</sup> rather than concluding that the respondent was likely to become a public charge based solely on the fact that the respondent had no job offer in the United States, the Attorney General considered the respondent's future ability to earn a living based on his 10-year work history in the United States, his age, and his health.<sup>414</sup> The Attorney General also considered the fact that the respondent had a brother and other close family members who could provide financial support.<sup>415</sup> In *Matter of Perez*,<sup>416</sup> the Board made clear that the respondent's past and current receipt of welfare was not determinative as to whether she was likely to become a public charge in the future, instead looking to the totality of her circumstances, including her age, health, ability to find employment in the future, and the availability of family support.<sup>417</sup> In *Matter of A-*,<sup>418</sup> although the respondent and her husband had been unemployed for the 4 years prior to the filing of her application for temporary resident status, the INS Commissioner held that the respondent was not likely to become a public charge "due to her age and ability to earn a living," as shown by her recent employment among other factors.<sup>419</sup>

An INS Regional Commissioner took a similar totality of the circumstances approach in

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<sup>412</sup> DHS derived this framework from its analysis of the statements and findings in *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (Att'y Gen. 1964), *Matter of Harutunian* 14 I&N Dec. 583 (Reg'l Comm'r 1974), *Matter of Perez* 15 I&N Dec. 136 (BIA 1974), *Matter of Vindman* 16 I&N Dec. 131 (Reg'l Comm'r 1977), and *Matter of A-*, 19 I&N Dec. 867 (Comm'r 1988).

<sup>413</sup> See 10 I&N Dec. 409 (Att'y Gen. 1964).

<sup>414</sup> See 10 I&N Dec. 409, 422-23 (Att'y Gen. 1964).

<sup>415</sup> See 10 I&N Dec. 409, 423 (Att'y Gen. 1964).

<sup>416</sup> 15 I&N Dec. 136 (BIA 1974).

<sup>417</sup> 15 I&N Dec. 136, 137 (BIA 1974).

<sup>418</sup> 19 I&N Dec. 867 (Comm'r 1988). DHS notes, however, that this case involves the special public charge rule applicable only to applications under INA section 245A, 8 U.S.C.1255a.

<sup>419</sup> See 19 I&N Dec. 867, 870 (Comm'r 1988).

*Matter of Harutunian*<sup>420</sup> and determined that the respondent in that case was inadmissible as likely to become a public charge because the respondent lacked the means to support herself, the ability to earn a living, and the presence of a sponsor to assure that she would not need public support.<sup>421</sup> Furthermore, the alien was increasingly likely to become dependent, disabled, and sick because of her older age, and accordingly was expected to become dependent on old-age assistance for support.<sup>422</sup> Similarly, an INS Regional Commissioner, in *Matter of Vindman*, held that a husband and wife were inadmissible as likely to become public charges, because they had been receiving public benefits for approximately three years, they were unemployed in the United States, and they presented no prospect of future employment.<sup>423</sup>

DHS proposes that certain factors and circumstances would generally carry heavy weight, as discussed below. The weight given to an individual factor not designated as carrying heavy weight would depend on the particular facts and circumstances of each case and the relationship of the factor to other factors in the analysis. Some facts and circumstances may be positive while other facts and circumstances may be negative. Any factor or circumstance that decreases the likelihood of an applicant becoming a public charge is positive; any factor or circumstance that increases the likelihood of an applicant becoming a public charge is negative. Multiple factors operating together may be weighed more heavily since those factors in tandem may show that the alien is already a public charge or is or is not likely to become one.

For example, an alien's assets, resources, and financial status together would frequently carry considerable positive weight, because they are the most tangible factors to consider in public charge determinations. An alien's assets, resources, and financial status examined

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<sup>420</sup> *Matter of Harutunian* 14 I&N Dec. 583 (Reg'l Comm'r 1974).

<sup>421</sup> See 14 I&N Dec. 583, 589-90 (Reg'l Comm'r 1974).

<sup>422</sup> See 14 I&N Dec. 583, 589-90 (Reg'l Comm'r 1974).

<sup>423</sup> See *Matter of Vindman*, 16 I&N Dec. 131, 132 (Reg'l Comm'r 1977).

together may show that the alien is not likely to be a public charge despite concerns about the alien's age, education, skills, and health. At the same time, an alien's assets, resources, and financial status examined together may be so limited that a finding that the alien is not likely to become a public charge would have to be based on positive attributes associated with the alien's education, skills, health, family status, age, or sponsorship.

Ultimately, DHS recognizes that, as the Attorney General has noted, "the statute requires 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 reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present."<sup>424</sup> Indeed, if DHS finds that the specific positive factors and circumstances outweigh the specific negative factors and circumstances in an alien's case, indicating that the alien is less likely than not to receive one or more public benefits at any time in the future as described in 8 CFR 212.21(b), then DHS would conclude that the alien is not likely to become a public charge. If DHS finds that the specific negative factors and circumstances outweigh the specific positive factors and circumstances in an alien's case indicating that the alien is more likely than not to receive public benefits as described in 8 CFR 212.21(b), at any time in the future, then DHS would conclude that the applicant is likely to become a public charge.<sup>425</sup>

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<sup>424</sup> *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421 (Att'y Gen. 1964).

<sup>425</sup> As explained, the proposed public charge policy is consistent with the totality of the circumstances approach undertaken by the former INS Commissioner in *Matter of A-*. We recognize the Commissioner, in that decision, cited an earlier decision of the Attorney General for the proposition that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency." 19 I&N Dec. 867, 869 (Comm'r 1988) (quoting *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421-22 (Att'y Gen. 1964)). In *Matter of A-* and *Matter of Martinez-Lopez*, the INS Commissioner and the Attorney General, respectively, implicitly acknowledge that, although individuals in the prime of life will not *ordinarily* become public charges, they certainly may; otherwise, it would have been pointless to assert that what ordinarily is the case is especially true in certain instances. See *Matter of A-*, 19 I&N Dec. 867, 869 (Comm'r 1988) (acknowledging that "all factors should be considered in their totality" in determining whether an individual is likely to become a public charge). Accordingly, adverse factors particular to a given circumstance may counterbalance what otherwise is

## D. Age

An alien's age is a mandatory factor that must be considered when determining whether an alien is likely to become a public charge in the future.<sup>426</sup> As discussed below, a person's age may impact his or her ability to legally or physically work and is therefore relevant to being self-sufficient, and the likelihood of becoming a public charge. Accordingly, DHS proposes to consider the alien's age primarily in relation to employment or employability, and secondarily to other factors as relevant to determining whether someone is likely to become a public charge.

Specifically, DHS proposes to assess whether the alien is between 18 and the minimum "early retirement age" for social security purposes (*see* 42 U.S.C. 416(l)(2)) (61 as of 2017), and whether the alien's age otherwise makes the alien more or less likely to become a public charge, such as by impacting the alien's ability to work. DHS would consider a person's age between 18 and 61 as a positive factor in the totality of the circumstances, and consider a person's age under 18 or over 61 to be a negative factor in the totality of the circumstances when determining the likelihood of becoming a public charge. However, DHS acknowledges that people under the age of 18 and over the age of 61 may be working or have adequate means of support, and would recognize such means as positive factors.

The 18 through 61 age range is based on the age at which people are generally able to work full-time and the age at which people are generally able to retire with some social security

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ordinarily true in a vacuum, such that aliens may still be found inadmissible under INA section 212(a)(4), 8 U.S.C. 1182(a)(4) notwithstanding their being "in the prime of life." Also consistent with those decisions, which instruct that additional positive weight should be afforded where friends or relatives in the United States are willing and able to assist in emergencies, DHS would give positive weight to a Form I-864, Affidavit of Support, that satisfies statutory and regulatory requirements and to income and resources of certain household members, although the filing of the Form I-864 and shared resources likewise would not be determinative. To the extent this proposed rule may be viewed as inconsistent with *Matter of A-*, however, including because the scope of the public benefits covered by this proposed rule is broader than under the longstanding administration of the public charge ground, and the threshold for being considered a public charge under the definition of that term in this proposed rule is lower than it has been for at least the past two decades, that decision would be superseded if this rule is finalized as drafted.

<sup>426</sup> See INA section 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B).

retirement benefits under Federal law.<sup>427</sup> At one end of the spectrum, children under the age of 18 generally face difficulties working full-time.<sup>428</sup> In general, the Fair Labor Standards Act sets 14 years of age as the minimum age for employment, and limits the number of hours worked by children until the age of 16.<sup>429</sup> States have varying laws addressing at what age and for how many hours children may work up to the age of 18.<sup>430</sup> Further, most States require children to attend school until a certain age, generally until the ages of 16 or 18.<sup>431</sup> DHS notes that the Fair Labor Standards Act provides for certain exemptions for children under 16 to work,<sup>432</sup> and children may be otherwise able to work.

At the other end of the age range, retirement is the age at which a person may begin receiving retirement benefits from Social Security.<sup>433</sup> The minimum age for retirement for purposes of Social Security is generally 62.<sup>434</sup> People who are at the minimum retirement age may stop working and start receiving retirement benefits such as Social Security. If a person does have access to Social Security benefits or a retirement pension, he or she may not need public benefits for income maintenance or other benefits to be self-sufficient as the income from Social Security or the pension may suffice.

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<sup>427</sup> See 29 U.S.C. 213(c), 42 U.S.C. 416(l)(2).

<sup>428</sup> See 29 U.S.C. 213(c); 29 CFR Part 570; see also Dep't of Labor, *Table of Employment/Age Certification Issuance Practice Under State Child Labor Laws*, available at <https://www.dol.gov/whd/state/certification.htm> (last updated Jan. 1, 2018).

<sup>429</sup> See 29 U.S.C. 213(c); 29 CFR Part 570; see also Dep't of Labor, *Table of Employment/Age Certification Issuance Practice Under State Child Labor Laws*, available at <https://www.dol.gov/whd/state/certification.htm> (last updated Jan. 1, 2018).

<sup>430</sup> See 29 U.S.C. 213(c); 29 CFR Part 570; see also Dep't of Labor, *Table of Employment/Age Certification Issuance Practice Under State Child Labor Laws*, available at <https://www.dol.gov/whd/state/certification.htm> (last updated Jan. 1, 2018).

<sup>431</sup> See Nat'l Ctr. for Educ. Statistics, *Table 5.1: Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015*, available at [https://nces.ed.gov/programs/statereform/tab5\\_1.asp](https://nces.ed.gov/programs/statereform/tab5_1.asp) (last visited Sept. 10, 2018).

<sup>432</sup> See 29 CFR 570.122.

<sup>433</sup> See 42 U.S.C. 416(l); see also U.S. Soc. Sec. Admin., *Retirement Planner: Benefits by Year of Birth*, available at <https://www.ssa.gov/planners/retire/agereduction.html> (last visited Sept. 10, 2018).

<sup>434</sup> See 42 U.S.C. 416(l); see also U.S. Soc. Sec. Admin., *Retirement Planner: Benefits by Year of Birth*, available at <https://www.ssa.gov/planners/retire/agereduction.html> (last visited Sept. 10, 2018).

Other age-related considerations may also be relevant to public charge inadmissibility determinations, in individual circumstances. Individuals under the age of 18 may be more likely to qualify for and receive public benefits. The U.S. Census Bureau reported that 18 percent of persons under the age of 18 (13,253,000) and 11.1 percent of persons aged 18 and over (27,363,000) lived below the poverty level in 2016.<sup>435</sup> The U.S. Census Bureau also reported that persons under the age of 18 were more likely to receive means-tested benefits than all other age groups.<sup>436</sup>

Similarly, studies show a relationship between advanced age and receipt of public benefits. DHS's analysis of SIPP data in Tables 14 and 15 shows noncitizens age 62 and older were more likely to receive cash and non-cash benefits than U.S. citizens in the same age group. Of noncitizens age 62 and older, 11.8 percent received SSI, TANF, or GA in 2013 compared to 4.5 percent of U.S. citizens age 62 and older. The rate of receipt of either cash or non-cash benefits was about 40 percent among U.S. citizens and noncitizens age 0 to 17. Among noncitizens, the receipt of non-cash benefits was much lower among individuals between age 18 and 61 (19.3 percent) than individuals under age 18 (40.2 percent), or individuals over age 61 (36.3 percent). Among U.S. citizens, the receipt of non-cash benefits was lower among individuals between age 18 and 61 (15.3 percent) than individuals under age 18 (39.7 percent), and higher among individuals over age 61 (11.4 percent).

<b>Table 14. Public Benefit Participation Among U.S. Citizens by Age, 2013 (in thousands)</b>
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<sup>435</sup> See Jessica L. Semega et al., U.S. Census Bureau, *Income and Poverty in the United States: 2016*, at 13 tbl.3 (Sept. 2017), available at <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>. Statistics provided for those aged 18 and over were inferred.

<sup>436</sup> In an average month during 2012, 39.2 percent of children received some type of means-tested benefit. See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Household Economic Studies, Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* 6 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>; see also U.S. Census Bureau, News Release, *21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month* (May 28, 2015), available at <https://www.census.gov/newsroom/press-releases/2015/cb15-97.html>.

	0-17			18-61			62+		
<b>Total Population</b> 310,867	<b>Population</b> 68,689	<b>% of Total Population</b> 22.1%		<b>Population</b> 167,058	<b>% of Total Population</b> 53.7%		<b>Population</b> 54,957	<b>% of Total Population</b> 17.7%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	27,406	39.9%	0.5%	26,251	15.7%	0.3%	6,824	12.4%	0.4%
Cash benefits	2,715	4.0%	0.2%	5,268	3.2%	0.1%	2,446	4.5%	0.3%
SSI	1,005	1.5%	0.1%	4,295	2.6%	0.1%	2,352	4.3%	0.2%
TANF	1,564	2.3%	0.2%	606	0.4%	0.0%	*11	*0.0%	0.0%
GA	240	0.3%	0.1%	502	0.3%	0.0%	158	0.3%	0.1%
Non-cash benefits	27,246	39.7%	0.5%	25,529	15.3%	0.3%	6,254	11.4%	0.4%
Medicaid	25,225	36.7%	0.5%	17,084	10.2%	0.2%	4,133	7.5%	0.3%
SNAP	14,158	20.6%	0.4%	15,738	9.4%	0.2%	3,188	5.8%	0.3%
Housing vouchers	1,801	2.6%	0.2%	2,296	1.4%	0.1%	549	1.0%	0.1%
Rent subsidy	3,915	5.7%	0.3%	5,676	3.4%	0.1%	1,970	3.6%	0.2%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\* Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

<b>Table 15. Public Benefit Participation Among Noncitizens by Age, 2013 (in thousands)</b>									
	0-17			18-61			62+		
<b>Total Population</b> 310,867	<b>Population</b> 1,705	<b>% of Total Population</b> 0.5%		<b>Population</b> 17,006	<b>% of Total Population</b> 5.5%		<b>Population</b> 1,452	<b>% of Total Population</b> 0.5%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	685	40.2%	3.5%	3,326	19.6%	0.9%	547	37.6%	3.8%
Cash benefits	*29	*1.7%	0.9%	169	1.0%	0.2%	172	11.8%	2.5%
SSI	-	-	-	*91	*0.5%	0.2%	163	11.2%	2.5%
TANF	*29	*1.7%	0.9%	*44	*0.3%	0.1%	-	-	-
GA	-	-	-	*38	*0.2%	0.1%	*9	*0.6%	0.6%
Non-cash benefits	685	40.2%	3.5%	3,286	19.3%	0.9%	527	36.3%	3.8%
Medicaid	592	34.8%	3.4%	2,123	12.5%	0.8%	415	28.6%	3.5%
SNAP	258	15.1%	2.5%	1,339	7.9%	0.6%	232	16.0%	2.9%
Housing vouchers	*51	*3.0%	1.2%	209	1.2%	0.3%	*27	*1.9%	1.1%
Rent subsidy	104	6.1%	1.7%	625	3.7%	0.4%	140	9.6%	2.3%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\* Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

Regardless of age, DHS recognizes that an alien may have financial assets, resources, benefits through employment, education or skills, family, or other means of support that decrease his or her likelihood of becoming a public charge. For example, the alien or the alien's spouse or



parent may have sufficient income, or savings, investments, or other resources – including Social Security benefits and Medicare – to support him or herself and the household. In addition, as people age, they may become eligible for certain earned benefits including Social Security benefits, health insurance from Medicare, and benefits from an employer pension or retirement benefit.

## **E. Health**

An alien's health is a factor that must be considered when determining whether an alien is likely to become public charge in the future.<sup>437</sup> Prior to Congress establishing health as a factor for the public charge determination, the courts, the BIA and INS had also held that a person's physical and mental condition was of major significance to the public charge determination, generally in relation to the ability to earn a living.<sup>438</sup> Accordingly, DHS proposes that when considering an alien's health, DHS will consider whether the alien has any physical or mental condition that, although not considered a condition or disorder that would render the alien inadmissible under the health-related ground of inadmissibility,<sup>439</sup> is significant enough to interfere with the person's ability to care for him- or herself or to attend school or work, or that is likely to require extensive medical treatment or institutionalization in the future.

The mere presence of a medical condition would not render an alien inadmissible. Instead, DHS would consider the existence of a medical condition in light of the effect that such medical condition is likely to have on the alien's ability to attend school or work, and weigh such evidence in the totality of the circumstances. As part of the assets, resources and financial status

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<sup>437</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>438</sup> See, e.g., *Matter of Martinez-Lopez*, 10 I&N Dec. 409, 421-23 (Att'y Gen. 1964); see also *Matter of A-*, 19 I&N Dec. 867, 869 (Comm'r 1988) (citing *Matter of Harutunian*, 14 I&N Dec. 583 (Reg'l Comm'r 1974); *Matter of Vindman*, 16 I&N Dec. 131 (Reg'l Comm'r 1977)).

<sup>439</sup> See INA section 212(a)(1), 8 U.S.C. 1182(a)(1).

factor, DHS would consider whether the alien has private health insurance, or the financial resources to pay for associated medical costs.

Research and data establish that healthcare is costly, particularly for the government. In 2016, the National Health Expenditure (NHE) grew to \$3.3 trillion, or \$10,348 per person, which represents an increase of 4.3 percent from 2015.<sup>440</sup> Medicaid spending, which is 17 percent of the total NHE, grew by 3.9 percent to \$565.5 billion.<sup>441</sup> The Federal Government (28.3 percent) and households (28.1 percent) paid the largest shares of total health spending.<sup>442</sup>

An alien's medical conditions may impose costs that a person is unable to afford, and may also reduce that person's ability to attend school, work, or financially support him or herself. Such medical conditions may also increase the likelihood that the alien could resort to Medicaid, or Premium and Cost Sharing Subsidies for Medicare Part D.<sup>443</sup> However, DHS recognizes that regardless of the alien's health status, the alien may have financial assets, resources, or support, including private health insurance or the means to purchase it, that allows him or her to be self-sufficient.<sup>444</sup>

Nevertheless, an alien's inability to work due to a medical condition, and failure to maintain health insurance or the financial resources to pay for the medical costs, could make it likely that such alien would become a public charge. In addition, long-term health care expenses to treat such a medical condition could decrease an individual's available financial resources.

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<sup>440</sup> See Ctrs. for Medicare & Medicaid Servs., *NHE Fact Sheet*, available at <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> (last visited Feb. 3, 2018).

<sup>441</sup> See Ctrs. for Medicare & Medicaid Servs., *NHE Fact Sheet*, available at <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> (last visited Feb. 3, 2018).

<sup>442</sup> See Ctrs. for Medicare & Medicaid Servs., *NHE Fact Sheet*, available at <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> (last visited Feb. 3, 2018).

<sup>443</sup> See 42 U.S.C. 1395w-114.

<sup>444</sup> For example, a person may have savings, investments or trust funds.

## 1. USCIS Evidentiary Requirements

DHS proposes that USCIS' review of the health factor would include, but not be limited to, the consideration of the following types of evidence: (1) any required Report of Medical Examination and Vaccination Record (Form I-693) or applicable DOS medical examination form<sup>445</sup> submitted in support of the application for the diagnosis of any medical conditions<sup>446</sup>; or (2) evidence of a medical condition that is likely to require extensive medical treatment or institutionalization after arrival, or that will interfere with the alien's ability to care for him- or herself, to attend school, or to work.

The specific reference to the Form I-693 or similar form is intended to help standardize USCIS' assessment of health as a factor for public charge consideration and avoid multiple medical examinations for the alien. Most immigrant visa applicants applying with the DOS and those aliens applying for adjustment of status with USCIS are required to submit a medical examination.<sup>447</sup> Nonimmigrants applying with DOS and nonimmigrants seeking a change of status or extension of stay with USCIS are generally not required to submit a medical examination with their applications. However, nonimmigrants seeking a change of status to that of a spouse of a legal permanent resident (V-1) or child (V-2) status must submit a medical examination.<sup>448</sup> In addition, a consular officer may request a medical examination if the officer has concerns that the applicant may be inadmissible on health-related grounds.<sup>449</sup> Likewise, a

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<sup>445</sup> This is currently the Immigrant or Refugee Applicant (Form DS-2054).

<sup>446</sup> The medical examination documentation indicates whether the applicant has either a Class A or Class B medical condition. In addition, the alien must provide a vaccination record. Class A and Class B medical conditions are defined in the HHS regulations. *See* 42 CFR 34.2.

<sup>447</sup> *See* INA section 212(a)(1), 8 U.S.C. 1182(a)(1).

<sup>448</sup> *See* INA section 101(a)(15)(v), 8 U.S.C. 1101(a)(15)(v); *see also* 8 CFR 214.15.

<sup>449</sup> *See* INA section 221(d), 8 U.S.C. 1201(d).

CBP officer at a port of entry may require a nonimmigrant to submit to a medical examination to determine medical inadmissibility.<sup>450</sup>

Civil surgeons and panel physicians test for Class A<sup>451</sup> and Class B<sup>452</sup> medical conditions, and report the findings on the appropriate medical examination form. An alien is inadmissible on a health-related ground for being diagnosed with a Class A medical condition unless a waiver is available and authorized.<sup>453</sup> Class A medical conditions, as defined in HHS regulations, include the following:<sup>454</sup>

- Communicable disease of public health significance, including gonorrhea, Hansen's Disease (infectious), syphilis (infectious stage), and active tuberculosis;<sup>455</sup>
- Failure to meet vaccination requirements;<sup>456</sup>
- Present or past physical or mental disorders with associated harmful behavior or harmful behavior that is likely to recur;<sup>457</sup> and
- Drug abuse or addiction.<sup>458</sup>

In identifying a Class A medical condition, the HHS regulations direct physicians conducting the immigration medical examinations to explain on the medical report “the nature and extent of the abnormality; the degree to which the alien is incapable of normal physical activity; and the extent to which the condition is remediable . . . [as well as] the likelihood, that because of the condition, the applicant will require extensive medical care or

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<sup>450</sup> See INA section 232, 8 U.S.C. 1222.

<sup>451</sup> The alien would be inadmissible for health-related grounds under INA section 212(a)(1), 8 U.S.C. 1182(a)(1).

<sup>452</sup> Class B medical conditions do not make an alien inadmissible on health-related grounds under INA section 212(a)(1), 8 U.S.C. 1182(a)(1), but are relevant to the public charge determination.

<sup>453</sup> See INA section 212(a)(1), 8 U.S.C. 1182(a)(1).

<sup>454</sup> See 42 CFR 34.2(d). The alien with a Class A medical condition would be inadmissible based on health-related grounds under INA section 212(a)(1), 8 U.S.C. 1182(a)(1). However, these medical conditions may also be considered as part of the public charge inadmissibility determination.

<sup>455</sup> See 42 CFR 34.2(b) and (d)(1); *see also* INA section 212(a)(1)(i), 8 U.S.C. 1182(a)(1)(i).

<sup>456</sup> See 42 CFR 34.2(d); *see also* INA section 212(a)(1)(ii), 8 U.S.C. 1182(a)(1)(ii).

<sup>457</sup> See 42 CFR 34.2(d); *see also* INA section 212(a)(1)(iii), 8 U.S.C. 1182(a)(1)(iii).

<sup>458</sup> See 42 CFR 34.2(d), (h), (i); *see also* INA section 212(a)(1)(iv), 8 U.S.C. 1182(a)(1)(iv).

institutionalization.”<sup>459</sup> A waiver of the health-related ground of inadmissibility is available for communicable diseases of public health significance, physical or mental disorder accompanied by harmful behavior, and lack of vaccinations.<sup>460</sup>

A Class B medical condition is defined as a physical or mental condition, disease, or disability serious in degree or permanent in nature.<sup>461</sup> Currently, the CDC Technical Instructions for Medical Examinations of Aliens, which direct physicians to provide information about Class B conditions, describe a Class B condition as one that, although it does not “constitute a specific excludable condition, represents a departure from normal health or well-being that is significant enough to possibly interfere with the person’s ability to care for him- or herself, to attend school or work, or that may require extensive medical treatment or institutionalization in the future.”<sup>462</sup>

If the physician conducting the immigration medical examination identifies a Class B medical condition that is “a substantial departure from normal well-being,”<sup>463</sup> the HHS regulations direct the physician to explain in the medical notification<sup>464</sup> “the degree to which the alien is incapable of normal physical activity, and the extent to which the condition is remediable

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<sup>459</sup> 42 CFR 34.4(b)(2).

<sup>460</sup> See INA section 212(g)(1), 8 U.S.C. 1182(g)(1). Although a waiver is unavailable for inadmissibility due to drug abuse or addiction, an applicant may still overcome this inadmissibility if his or her drug abuse or addiction is found to be in remission. See Ctrs. for Disease Control & Prevention, *Technical Instructions for Panel Physicians and Civil Surgeons, Remission*, available at <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/mental-civil-technical-instructions.html> (last updated Oct. 23, 2017).

<sup>461</sup> See 42 CFR 34.2(b)(2).

<sup>462</sup> See Ctrs. for Disease Control & Prevention, *Required Evaluations - Other Physical or Mental Abnormality, Disease, or Disability, Technical Instructions For Medical Examination Of Aliens*, available at <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/panel/technical-instructions/panel-physicians/other-physical-mental.html> (last updated Nov. 23, 2016); Ctrs. for Disease Control & Prevention, *Required Evaluation Components Other Physical or Mental Abnormality, Disease or Disability, Technical Instructions for the Medical Examination of Aliens in the United States*, available at <https://www.cdc.gov/immigrantrefugeehealth/exams/ti/civil/technical-instructions/civil-surgeons/required-evaluation-components/other-disease-disability.html> (last updated Aug. 3, 2010). The HHS regulations require physicians conducting medical examinations for an alien to comply with the CDC’s Technical Instructions for Medical Examinations of Aliens. 42 CFR 34.3(i).

<sup>463</sup> See 42 CFR 34.4(c)(1).

<sup>464</sup> See 42 CFR 34.2(l) (defining a medical notification as “[a] medical examination document issued to a U.S. consular authority or DHS by a medical examiner”).

... [and] the likelihood, that because of the condition, the applicant will require extensive medical care or institutionalization.<sup>465</sup>

DHS would consider any of the above-described conditions in the totality of the circumstances. Any such condition would not serve as the sole factor considered in whether an alien is likely to become a public charge. Absence of a diagnosis of such a condition would be a positive factor. DHS recognizes that some conditions that are Class A and Class B are treatable and the person may in the future be able to work or attend school. These circumstances, as identified by a civil surgeon or panel physician, would also be taken into consideration in the totality of the circumstances.

In addition to the types of evidence described above, DHS would also take into consideration any additional medical records or related information provided by the alien to clarify any medical condition included on the medical form or other information that may outweigh any negative factors. Such documentation may include, for instance, a licensed doctor's attestation of prognosis and treatment of a medical condition.

The presence or absence of a medical condition would only be considered a positive or negative factor as it pertains to the alien's likelihood of becoming a public charge; frequently, this would entail consideration of whether, in light of the alien's health, the alien will be able to adequately care for him- or herself, to attend school, or to work.<sup>466</sup>

## **2. Potential Effects for Aliens with a Disability, Depending on Individual Circumstances**

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<sup>465</sup> 42 CFR 34.4(c)(2).

<sup>466</sup> Relatedly, as part of the assets, resources and financial status factor, DHS would consider whether the alien either has sufficient household assets and resources, including private health insurance, to cover any reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work.

As noted above, DHS would consider any immigration medical examination submitted with the alien's application, as well as any other evidence demonstrating that the individual has a medical condition that will affect the alien's ability to work, attend school, or otherwise support himself or herself. As part of the immigration medical examination, when identifying a Class B medical condition, civil surgeons and panel physicians are required to report on certain disabilities, including the nature and severity of the disability, its impact on the alien's ability to work, attend school, or otherwise support himself or herself, and whether the disability will require hospitalization or institutionalization. Under the proposed rule, DHS would only consider disability as part of the health factor to the extent that such disability, in the context of the alien's individual circumstances, impacts the likelihood of the alien becoming a public charge. Frequently, this would entail consideration of the potential effects on the alien's ability to work, attend school or otherwise support him or herself.

The Rehabilitation Act of 1973<sup>467</sup> and the Americans with Disabilities Act (ADA) of 1990<sup>468</sup> prohibit discrimination against individuals based on their disabilities.<sup>469</sup> Both laws require, among other things, that employers provide reasonable accommodations for individuals with disabilities who need them to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment, absent undue hardship (i.e., significant difficulty or expense). The Individuals with Disabilities Education Act (IDEA)<sup>470</sup> ensures equality of educational opportunity and assists States in providing special education and related services to children with disabilities. Further, DHS is specifically prohibited from discriminating against individuals with disabilities and otherwise preventing individuals with disabilities from

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<sup>467</sup> Pub. L. 93-112, section 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. 794) (prohibiting discrimination solely on the basis of disability in Federal and federally-funded programs and activities).

<sup>468</sup> Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. 12101-12213).

<sup>469</sup> See 42 U.S.C. 12112(b)(5); see also 29 CFR 1630.2(o), 1630.9.

<sup>470</sup> Pub. L. 108-446, 118 Stat 2647 (2004) (codified as amended at 20 U.S.C. 1400-1482).

participating in benefits programs.<sup>471</sup> Congress has noted that “[d]isability is a natural part of the human experience and in no way diminishes the right of individuals to . . . contribute to society; pursue meaningful careers; and enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society.”<sup>472</sup> Individuals with disabilities make substantial contributions to the American economy. For example, in 2010, 41.1 percent of people with disabilities between the ages of 21 to 64 were employed (27.5 percent of adults with severe disability and 71.2 percent of adults with non-severe disabilities were employed) during a study conducted by the CDC.<sup>473</sup> The ADA,<sup>474</sup> the Rehabilitation Act of 1973,<sup>475</sup> and the IDEA<sup>476</sup> provide further protections for individuals with disabilities to better ensure that such individuals have the opportunity to make such contributions.<sup>477</sup>

Ultimately, DHS has determined that considering, as part of the health factor, an applicant’s disability diagnosis that, in the context of the alien’s individual circumstances, affects his or her ability to work, attend school, or otherwise care for him or herself, is not inconsistent with federal statutes and regulations with respect to discrimination, as the alien’s disability is treated just as any other medical condition that affects an alien’s likelihood, in the totality of the circumstances, of becoming a public charge. Under the totality of the circumstances framework,

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<sup>471</sup> See 6 CFR 15.30(b)(1)(i) (“The Department, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability . . . [d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service . . . .”); 6 CFR 15.30(b)(4) (“The Department may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would [s]ubject qualified individuals with a disability to discrimination on the basis of disability; or [d]efeate or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with a disability.”).

<sup>472</sup> See 29 U.S.C. 701(3).

<sup>473</sup> See Mathew W. Brault, U.S. Census Bureau, *Americans With Disabilities: 2010*, at 10 (2012), available at <https://www2.census.gov/library/publications/2012/demo/p70-131.pdf>.

<sup>474</sup> See Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. 12101-12213).

<sup>475</sup> See Pub. L. 93-112, section 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. 794).

<sup>476</sup> See Pub. L. 108-466, 118 Stat 2647 (2004) (codified as amended at 20 U.S.C. 1400-1482).

<sup>477</sup> See generally Dep’t of Justice, Civil Rights Div., Disability Rights Sec., *A Guide to Disability Rights Laws* (July 2009), <https://www.ada.gov/cguide.htm>.



an alien with a disability is not being treated differently, or singled out, and the disability itself would not be the sole basis for an inadmissibility finding. In other words, as with any other factor and consideration in the public charge inadmissibility determination, DHS would look at each of the mandatory factors, and the affidavit of support, if required, as well as all other factors in the totality of the circumstances.

In sum, an applicant's disability could not be the sole basis for a public charge inadmissibility finding. In addition, as part of its totality of the circumstances determination, DHS would always recognize that the ADA, the Rehabilitation Act, IDEA, and other laws provide important protections for individuals with disabilities, including with respect to employment opportunities. Furthermore, as it relates to a determination of inadmissibility under section 212(a)(4) of the Act, DHS does not stand in the position of an employer vis-a-vis when the alien is applying for the immigration benefit. DHS is also not proposing to include employee benefits of any type in the definition of public benefit.

#### **F. Family Status**

An applicant's family status is a factor that must be considered when determining whether the alien is likely to become a public charge in the future.<sup>478</sup> When considering an alien's family status, DHS proposes to consider whether the alien has a household to support, or whether the alien is being supported by another household and whether the alien's household size makes the alien more or less likely to become a public charge. DHS notes that it would frequently view family status in connection with, among other things, the alien's assets and resources, because the amount of assets and resources necessary to support a larger number of people in a household is generally greater. Thus, as described in the Assets, Resources, and

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<sup>478</sup> See proposed 8 CFR 212.2; *see also* INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

Financial Status section below, DHS's proposed standard for evaluating assets, resources and financial status requires DHS to consider whether the alien can support him or herself and the household as defined in 8 CFR 212.21(d), at the level of at least 125 percent of the most recent FPG based on the alien's household size.

As noted in the description above of the proposed definition of the "alien's household," an alien who has no dependents would have a household of one, and would only have to support him or herself. By contrast, a child alien who is part of a parent's household would be part of a larger household, and would have to demonstrate that his or her own assets, resources and financial status and his or her parent's or legal guardian's assets, resources, and financial status are sufficient to support the alien and the rest of the household.

The research and data below discuss how the number of household members may affect the likelihood of receipt of public benefits. Table 16 and Table 17 show that among both U.S. citizens and noncitizens, the receipt of non-cash benefits generally increased as family size increased. Among U.S. citizens, individuals in families with 3 or 4 persons were more likely to receive non-cash benefits compared to families of 2, while individuals in families of 5 or more were about three times as likely to receive non-cash benefits as families of 2. Among noncitizens in families with 3 or 4 people, about 20 percent received non-cash assistance, while about 30 percent of noncitizens in families of 5 or more received non-cash benefits. Across family sizes, the rate of receipt of cash assistance ranged from about 3 to 5 percent among U.S. citizens, and about 1 to 3 percent among noncitizens. The rate of receipt of either TANF or GA was about 1 percent or less regardless of family size or citizenship status.

Table 16. Public Benefit Participation Among U.S. Citizens by Family Size, 2013 (in thousands)									
	Nonfamily household			Family size 2			Family size 3		
	Population	% of Total Population		Population	% of Total Population		Population	% of Total Population	
<b>Total Population</b> 310,867	59,207	19.0%		76,493	24.6%		51,516	16.6%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	11,002	18.6%	0.5%	9,867	12.9%	0.4%	11,296	21.9%	0.5%
Cash benefits	3,072	5.2%	0.3%	2,221	2.9%	0.2%	2,000	3.9%	0.2%
SSI	2,795	4.7%	0.3%	1,794	2.3%	0.2%	1,332	2.6%	0.2%
TANF	*83	*0.1%	0.0%	269	0.4%	0.1%	544	1.1%	0.1%
GA	279	0.5%	0.1%	222	0.3%	0.1%	194	0.4%	0.1%
Non-cash benefits	10,640	18.0%	0.5%	9,451	12.4%	0.4%	11,014	21.4%	0.5%
Medicaid	6,617	11.2%	0.4%	7,108	9.3%	0.3%	8,920	17.3%	0.5%
SNAP	6,095	10.3%	0.4%	5,231	6.8%	0.3%	6,154	11.9%	0.4%
Housing vouchers	1,038	1.8%	0.2%	747	1.0%	0.1%	938	1.8%	0.2%
Rent subsidy	3,488	5.9%	0.3%	2,170	2.8%	0.2%	2,058	4.0%	0.3%
	Family size 4			Family size 5+					
	Population	% of Total Population		Population	% of Total Population				
<b>Total Population</b> 310,867	53,883	17.3%		49,604	16.0%				
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>			
Cash or non-cash	11,200	20.8%	0.5%	17,115	34.5%	0.6%			
Cash benefits	1,342	2.5%	0.2%	1,796	3.6%	0.2%			
SSI	708	1.3%	0.1%	1,023	2.1%	0.2%			
TANF	592	1.1%	0.1%	693	1.4%	0.2%			
GA	*81	*0.2%	0.0%	124	0.3%	0.1%			
Non-cash benefits	11,035	20.5%	0.5%	16,888	34.0%	0.6%			
Medicaid	9,387	17.4%	0.5%	14,412	29.0%	0.6%			
SNAP	5,895	10.9%	0.4%	9,709	19.6%	0.5%			
Housing vouchers	802	1.5%	0.2%	1,121	2.3%	0.2%			
Rent subsidy	1,668	3.1%	0.2%	2,179	4.4%	0.3%			

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

\*\*Nonfamily households consist of an individual living alone or living only with nonrelatives.

<b>Table 17. Public Benefit Participation Among Noncitizens by Family Size, 2013 (in thousands)</b>									
	<b>Nonfamily household</b>			<b>Family size 2</b>			<b>Family size 3</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	3,638	1.2%		3,268	1.1%		3,411	1.1%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	533	14.7%	1.7%	632	19.3%	2.2%	768	22.5%	2.2%
Cash benefits	97	2.7%	0.8%	*81	*2.5%	0.9%	*35	*1.0%	0.5%
SSI	*79	*2.2%	0.7%	*56	*1.7%	0.7%	*20	*0.6%	0.4%
TANF	*4	*0.1%	0.2%	*25	*0.8%	0.5%	*8	*0.2%	0.2%
GA	*14	*0.4%	0.3%	*4	*0.1%	0.2%	*8	*0.2%	0.3%
Non-cash benefits	516	14.2%	1.7%	624	19.1%	2.2%	761	22.3%	2.2%
Medicaid	308	8.5%	1.4%	372	11.4%	1.8%	547	16.0%	1.9%
SNAP	225	6.2%	1.2%	216	6.6%	1.4%	240	7.0%	1.3%
Housing vouchers	*17	*0.5%	0.3%	*69	*2.1%	0.8%	*49	*1.4%	0.6%
Rent subsidy	178	4.9%	1.1%	209	6.4%	1.4%	130	3.8%	1.0%
	<b>Family size 4</b>			<b>Family size 5+</b>					
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>				
<b>Total Population</b> 310,867	4,056	1.3%		5,789	1.9%				
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>			
Cash or non-cash	842	20.7%	1.9%	1,783	30.8%	1.8%			
Cash benefits	*52	*1.3%	0.5%	104	1.8%	0.5%			
SSI	*43	*1.0%	0.5%	*57	*1.0%	0.4%			
TANF	*8	*0.2%	0.2%	*29	*0.5%	0.3%			
GA	*1	*0.0%	0.1%	*19	*0.3%	0.2%			
Non-cash benefits	837	20.6%	1.9%	1,760	30.4%	1.8%			
Medicaid	655	16.1%	1.7%	1,247	21.6%	1.6%			
SNAP	342	8.4%	1.3%	804	13.9%	1.3%			
Housing vouchers	*39	*1.0%	0.5%	113	2.0%	0.5%			
Rent subsidy	111	2.7%	0.8%	241	4.2%	0.8%			

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

\*\*Nonfamily households consist of an individual living alone or living only with nonrelatives.

In light of the above data on the relationship between family size and receipt of public benefits, DHS proposes that in evaluating family status for purposes of the public charge inadmissibility determination, DHS would consider the number of people in a household as defined in the proposed 8 CFR 212.21(d). As with the other factors, household size, on its own, would never dictate the outcome of a public charge inadmissibility determination. Regardless of

household size, that an alien may present other factors (*e.g.*, assets, resources, financial status, education, and skills) that weigh for or against a finding that the alien is likely to become a public charge. For instance, an alien who is part of a large household may have his or her own income or access to additional assets and resources that would assist in supporting the household and therefore would also be considered in the totality of the circumstances.

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

In addition to age, health, and family status, USCIS must consider an applicant's assets, resources, and financial status in making a public charge determination.<sup>479</sup> The statute does not define these terms, but the agency has historically interpreted these terms to include information that would provide an overview of the alien's financial means and overall financial health. Since Legacy INS issued the 1999 Interim Field Guidance, the practical focus has been primarily on the sufficiency of an Affidavit of Support submitted on the alien's behalf. However, given that the statute sets out the Affidavit of Support as a separate requirement and the statute includes the mandatory review of assets, resources and financial status as a factor,<sup>480</sup> DHS is proposing to consider in the totality of the circumstances whether the alien can, taking into account both the alien's assets and liabilities, establish the ability to support himself or herself and the household as defined in the proposed 8 CFR 212.21(d).

All else being equal, the more assets and resources an alien has, the more self-sufficient the alien is likely to be, and the less likely the alien is to receive public benefits. On the other hand, an alien's lack of assets and resources, including income, makes an alien more likely to receive public benefits. Whether a person may be qualified for public benefits frequently

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<sup>479</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>480</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

depends on where the person's household income falls with respect to the FPG.<sup>481</sup> Federal, State, and local public benefit granting agencies frequently use the FPG to determine eligibility for public benefits.<sup>482</sup> Some major means-tested programs, however, rely on different income-related measurements for purposes of determining eligibility.<sup>483</sup>

Because assets and resources include the employment income earned by an alien and the members of an alien's household, and are an important factor in determining whether the alien is likely to receive public benefits in the future, DHS proposes that when considering an alien's assets and resources, DHS will consider whether the alien has gross household income of at least 125 percent of the FPG based on the household size. If the alien's household income is less than 125 percent of the FPG, the alien's other household assets and resources should be at least 5 times the difference between the household income and 125 of the FPG based on the household size.<sup>484</sup>

DHS has chosen a household income of at least 125 percent of the FPG, which has long served as a touchpoint for public charge inadmissibility determinations.<sup>485</sup> As of February 2018, within the contiguous United States, 125 percent of FPG ranges from approximately \$20,300 for

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<sup>481</sup> The poverty guidelines are updated periodically in the *Federal Register* by HHS. The U.S. Census Bureau definition of family and family household can be found in U.S. Census Bureau, *Current Population Survey 2017 Annual Social and Economic Supplement (ASEC)* 9-1 to 9-2, available at <https://www2.census.gov/programs-surveys/cps/techdocs/cpsmar17.pdf> (last visited Sept. 13, 2018).

<sup>482</sup> Different Federal programs use different percentages of the FPG such as 125 percent, 150 percent, or 185 percent. See U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Frequently Asked Questions Related to the Poverty Guidelines and Poverty, What Programs Use the Federal Poverty Guidelines*, available at <https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty#collapseExample9> (last visited Sept. 8, 2018).

<sup>483</sup> See U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Frequently Asked Questions Related to the Poverty Guidelines and Poverty, What Programs Use the Federal Poverty Guidelines*, available at <https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty#collapseExample9> (last visited Sept. 8, 2018).

<sup>484</sup> This is consistent with the provisions for assets under the affidavit of support in 8 CFR 213a.2(c)(2)(iii)(B)(3).

<sup>485</sup> See INA section 213A(f)(1)(E), 8 U.S.C. 1183a(f)(1)(E).

a family of two to \$51,650 for a family of eight.<sup>486</sup> Additionally, consistent with the affidavit of support context, if the alien's household income is under 125 percent of the FPG, the alien may use his or her assets, as well household members' assets, to meet the minimum income threshold to avoid the alien's household income being considered a negative factor in the totality of the circumstances review.<sup>487</sup> If using household assets to demonstrate that the alien can meet the 125 percent of FPG threshold, the alien must present evidence that the assets total value is at least 5 times the difference between the household income and 125 percent of FPG for the household size.

The following example illustrates how an applicant would be able to use his or her household assets and resources to demonstrate that he or she has financial support at 125 percent of the FPG. The applicant has filed an application for adjustment of status. The applicant has a household size of 4, where 125 percent of the FPG for that household size is \$31,375. The applicant's household income is \$24,000, which is \$7,375 below 125 percent of the FPG for a household of 4. Therefore, in order to avoid DHS determining that the applicant's household income is a negative factor in the totality of the circumstances, the alien would need \$36,875 in household assets and resources.

An alien's financial status would also include the alien's liabilities as evidenced by the alien's credit report and score, as well as whether the alien has in the past, or is currently, receiving public benefits, among other considerations. Below, DHS describes the proposed rule's evidentiary requirements for this factor.

DHS welcomes public comments on whether 125 percent of the FPG is an appropriate threshold in considering the alien's assets and resources or if there are other potential

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<sup>486</sup> *Annual Update of the HHS Poverty Guidelines*, 83 FR 2642 (Jan. 18, 2018).

<sup>487</sup> See INA section 213A(f)(1)(E), 8 U.S.C. 1183a(f)(1)(E).

alternatives, including any studies or data that would provide a basis for a different measure or threshold.

### **1. Evidence of Assets and Resources**

DHS proposes that USCIS would consider certain types of evidence when reviewing this factor. USCIS consideration of an alien's assets and resources would include, but not be limited to, a review of such information as:

- The alien's annual gross household income (i.e., all sources of income before deductions), excluding any income from public benefits;
- Any additional income from individuals not included in the alien's household as defined in the proposed 8 CFR 212.21(d) who physically reside with the alien and whose income will be relied on by the alien to meet the proposed standard of household income at or above 125 percent of FPG;
- Any additional income to the alien from another person or source not included in the alien's household on a continuing monthly or yearly basis for the most recent calendar year, excluding any income from public benefits;
- The household's cash assets and resources, including as reflected in checking and savings account statements in the last 12 months;
- The household's non-cash assets and resources that can be converted into cash within 12 months, such as net cash value of real estate holdings minus the sum of all loans secured by a mortgage, trust deed, or other lien on the home; annuities; securities; retirement and educational accounts; and any other assets that can be converted into cash easily.

All of this information is potentially relevant to a determination of the alien's assets and resources, and likelihood of becoming a public charge.



## **2. Evidence of Financial Status**

When reviewing whether the alien has any financial liabilities or past reliance on public benefits that make the alien more or less likely to become a public charge, DHS proposes to review the following evidence:

- Evidence that the alien has applied for or received any public benefit, as defined in the proposed 8 CFR 212.21(b), on or after the effective date of the final rule;
- Been certified or approved to receive public benefits, as defined in 8 CFR 212.21(b), on or after the effective date of the final rule;
- Evidence that the alien has applied for or received a fee waiver for immigration benefits after the effective date of the final rule;
- Credit histories and credit scores; and
- Whether the alien has the private health insurance or the financial resources to pay for medical costs associated with a medical condition identified in 8 CFR 212.22(b)(2).

### **(a) Public Benefits**

Current or past applications for or receipt of public benefits, as defined in the proposed 8 CFR 212.21(b), suggests that the alien's overall financial status is so weak that he or she is or was unable to fully support him or herself without government assistance, *i.e.*, that the alien will receive such benefits in the future. DHS, therefore, proposes to consider any current and past receipt of public benefits as set forth in 8 CFR 212.21(b) as a negative factor in the totality of the circumstances, because it is indicative of a weak financial status and increases the likelihood that the alien will become a public charge in the future. The weight given to this factor would depend on how recently the alien has received public benefits, and whether the person has

received public benefits for an extended period of time (i.e., receives public benefits for multiple years) or at multiple different time periods (i.e., 3 times in the last two years).<sup>488</sup>

DHS would also consider whether the alien has been certified or approved to receive public benefits, as defined in 8 CFR 212.21(b), on or after the effective date of the final rule. For example, a person may be certified for SNAP benefits for a month or up to 24 months at one time and then receive the benefits from the EBT card on a monthly basis. In general, an alien who is certified or preapproved for benefits in the future is likely to continue to receive public benefits in the future. An alien nevertheless may otherwise establish that he or she has terminated the receipt of those benefits through documentation from the benefit-granting agency.

DHS recognizes that a person who previously received public benefits may have changed circumstances and DHS would review those circumstances as part of the totality of the circumstances. For example, where an alien is currently unemployed and finishing a college education and received benefits, the alien may provide evidence that he or she has pending employment with benefits upon graduation from college and attaining a degree. It is possible that in the review of the totality of the circumstances, the alien would not be found likely to become a public charge.

Review of past applications for or receipt of public benefits would include a review of both cash and non-cash public benefits as defined in the proposed 8 CFR 212.21(b). According to the U.S. Census Bureau, in 2012, approximately 52.2 million people in the United States (or 21.3 percent of the overall population) participated in major means-tested government assistance

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<sup>488</sup> This proposed policy is generally consistent with longstanding policy affording less weight to benefits that were received longer ago in the past.

programs each month.<sup>489</sup> In addition, among those with family income below the poverty level<sup>490</sup> an average of 61.3 percent participated in at least one major means tested benefit.<sup>491</sup> Participation rates were highest for Medicaid (15.3 percent) and SNAP (13.4 percent).<sup>492</sup> The largest share of participants (43.0 percent) who benefited from one or more means-tested assistance programs between January 2009 and December 2012 stayed in the programs between 37 and 48 months.<sup>493</sup>

### **(b) Fee Waivers for Immigration Benefits**

Under INA section 286(m), 8 U.S.C. 1356(m), USCIS collects fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including the costs of providing similar services without charge to asylum applicants and other immigrants.

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<sup>489</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>; see also U.S. Census Bureau, *News Release: 21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month* (May 28, 2015), available at <https://www.census.gov/newsroom/press-releases/2015/cb15-97.html>. The U.S. Census Bureau included Temporary Assistance for Needy Families (TANF), General Assistance (GA), Supplemental Security Income (SSI), Supplemental Nutrition Assistance Program (SNAP), Medicaid, and housing assistance as major means-tested benefits as major means-tested government benefits.

<sup>490</sup> See U.S. Census Bureau, *News Release: 21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month* (May 28, 2015), at 5, available at <https://www.census.gov/newsroom/press-releases/2015/cb15-97.html>. Note that the Census reports use the term income to poverty ratio.” A ratio of less than 1 indicates a person’s income is below the poverty level. The census report refers to average monthly participation rates.

<sup>491</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Household Economic Studies, Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* 6 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>. This report includes Temporary Assistance for Needy Families (TANF), General Assistance (GA), Supplemental Security Income (SSI), Supplemental Nutrition Assistance Program (SNAP), Medicaid, and housing assistance as major means-tested benefits.

<sup>492</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Household Economic Studies, Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* 6 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>

<sup>493</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Household Economic Studies, Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* 6 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>

USCIS may waive fees for specific immigration benefit forms if a person demonstrates “inability to pay.”<sup>494</sup>

DHS proposes that USCIS would consider past receipt of a fee waiver as part of the financial status factor.<sup>495</sup> Requesting or receiving a fee waiver for an immigration benefit suggests a weak financial status. Since fee waivers are based on an inability to pay, a fee waiver for an immigration benefit suggests an inability to be self-sufficient. In addition, the Senate Appropriations Report, which accompanied the fiscal year 2017 Department of Homeland Security Appropriations Act,<sup>496</sup> expressed concern about the increased use of fee waivers, as those paying fees are forced to absorb costs for which they receive no benefit.<sup>497</sup> The committee specifically expressed concern that those unable to pay fees are less likely to live in the United States independent of government assistance.<sup>498</sup>

DHS would not consider a fee exemption as part of the determination of whether an alien is likely to become a public charge,<sup>499</sup> as such exemption would have no bearing on whether an alien would be likely to become a public charge in the future. Fee exemptions are not fee waivers and are not affirmatively requested by an alien based on an inability to pay. Instead, fee exemptions are provided either to specific forms or immigrant categories based on statutory authority, regulations, or agency policy.

### **(c) Credit Report and Score**

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<sup>494</sup> See 8 CFR 103.7(c).

<sup>495</sup> This would be inclusive of fee exceptions where an applicant actively requests a fee waiver under 8 CFR 103.7(d).

<sup>496</sup> See Pub. L. 115-31, div. F, 131 Stat. 135, 404.

<sup>497</sup> See S. Rep. No. 114-264, at 125 (2016).

<sup>498</sup> See S. Rep. No. 114-264, at 125 (2016).

<sup>499</sup> See 8 CFR 103.7(d); see also 22 CFR 41.107(c) (listing categories of aliens exempt from nonimmigrant visa fees); 9 FAM 403.4-3 (same). Diplomats, UN visitors, U.S. Government employees, and those coming to perform charitable work are typical classes of aliens whose nonimmigrant visa fees are exempted.

As also noted above, DHS also proposes that USCIS would consider an alien's liabilities and information of such liabilities in a U.S. credit report and score as part of the financial status factor. Not everyone has a credit history in the United States. Nevertheless, a good credit score in the United States is a positive factor that indicates a person is likely to be self-sufficient and support the household. Conversely, a lower credit score or negative credit history in the United States may indicate that a person's financial status is weak and that he or she may not be self-sufficient. Credit reports contain information about a person's bill payment history, loans, current debt, and other financial information.<sup>500</sup> Credit reports may also provide information about work and residences, lawsuits, arrests, and bankruptcies in the United States.<sup>501</sup>

A U.S. credit score is a number that rates a person's credit risk at a point in time.<sup>502</sup> It can help creditors determine whether to give the person credit, affect the terms of credit the person is offered, or impact the rate the person will pay for a loan in the United States.<sup>503</sup> U.S. banks and other entities use credit scoring to determine whether a person is likely to repay any loan or debt. A credit report takes into account a person's bill-paying history, the number and type of accounts with overdue payments, collection actions, outstanding debt, and the age of the accounts in the United States.<sup>504</sup> Because credit reports and scores provide information on a person's financial status, DHS is proposing that USCIS would review any available U.S. credit reports as part of its public charge inadmissibility determinations. USCIS would generally

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<sup>500</sup> See USA.gov, *Credit Reports and Scores*, available at <https://www.usa.gov/credit-reports> (last updated Mar. 8, 2018).

<sup>501</sup> See USA.gov, *Credit Reports and Scores*, available at <https://www.usa.gov/credit-reports> (last updated Mar. 8, 2018).

<sup>502</sup> See USA.gov, *Credit Reports and Scores*, available at <https://www.usa.gov/credit-reports> (last updated Mar. 8, 2018).

<sup>503</sup> See USA.gov, *Credit Reports and Scores*, available at <https://www.usa.gov/credit-reports> (last updated Mar. 8, 2018).

<sup>504</sup> See Fed. Trade Comm'n, *Consumer Information: Credit Scores* (Sept. 2013), available at <https://www.consumer.ftc.gov/articles/0152-credit-scores#how>.

consider a credit score characterized as “good” or better to be a positive factor as it demonstrates an applicant may be able to support him or herself and any dependents assuming all other financial records are sufficient. A “good” credit report is generally near or slightly above the average of U.S. consumers,<sup>505</sup> and therefore the person may be self-sufficient and less likely to become a public charge. A poor credit report is well below the average of U.S. consumers.<sup>506</sup>

DHS recognizes that not everyone has a credit report in the United States. The absence of an established U.S. credit history would not necessarily be a negative factor when evaluating public charge in the totality of the circumstances. Absent a U.S. credit report or score, USCIS may give positive weight to an alien who can show little to no debt and a history of paying bills timely. An alien may provide evidence of regular and timely payment of bills, and limited balances on credit cards and loans. In addition, USCIS would not consider any error on a credit score that has been verified by the credit agency in determining whether an alien is likely to become a public charge in the future. DHS welcomes comments on whether DHS should also consider credit scores that are categorized less than “good,” the types of credit reports to be considered and the type of information from the credit history that should be reviewed.

#### **(d) Financial Means to Pay for Medical Costs**

DHS also proposes that USCIS would consider evidence of whether an alien has the financial means for pay for certain reasonably foreseeable medical costs, including through private health insurance, as part of the financial factor for public charge inadmissibility determinations.

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<sup>505</sup> MyFICO, *Understanding FICO Scores 5*, available at [https://www.myfico.com/Downloads/Files/myFICO\\_UYFS\\_Booklet.pdf](https://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf) (last visited Aug. 6, 2018).

<sup>506</sup> MyFICO, *Understanding FICO Scores 5*, available at [https://www.myfico.com/Downloads/Files/myFICO\\_UYFS\\_Booklet.pdf](https://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf) (last visited Aug. 6, 2018).

Health insurance helps cover the cost of health care and being covered by health insurance programs, other than the ones included in the definition of public benefits under proposed 8 CFR 212.21(b). Some aliens currently obtain health insurance with government funding.<sup>507</sup>

Having private health insurance would be a positive factor in the totality of the circumstances. DHS would not consider health insurance provided through government employment as a public benefit, but instead consider it a positive factor in the totality of the circumstances. By contrast, lack of health insurance or lack of the financial resources to pay for the medical costs would be a negative factor in the totality of the circumstances for any person.<sup>508</sup>

While having health insurance would generally be a positive factor in the totality of the circumstances, recent (within the past 36 months) or current receipt of health insurance that constitutes a public benefit under proposed 8 CFR 212.21(b), would generally be weighed heavily as a negative factor. Regardless of health status, DHS recognizes that an alien may have financial assets, resources, earned benefits, education or skills, or other support that may decrease his or her likelihood of becoming a public charge and would consider those factors in the totality of the circumstances.

## **I. Education and Skills**

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<sup>507</sup> See Jessica C. Barnett & Edward R. Berchick, U.S. Census Bureau, *Health Insurance Coverage in the United States: 2016 Current Population Reports* (Sept. 2017), available at <https://www.census.gov/content/dam/Census/library/publications/2017/demo/p60-260.pdf>.

<sup>508</sup> In 2016, 6,147,000 (26 percent) noncitizens and 1,726,000 (8.4 percent) naturalized citizens did not have health insurance. See U.S. Census Bureau, Current Population Survey, available at <https://www.census.gov/cps/data/cpstablecreator.html> (last visited Feb. 20, 2018) (Nativity and Health Insurance Coverage). In 2005, the estimated number of uninsured noncitizens was 45 percent (9.6 million people); U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Estimating The Number Of Individuals in the U.S. Without Health Insurance*, Table: Immigration Status (Apr. 8, 2005), available at <https://aspe.hhs.gov/dataset/table-1immigration-status>.

An applicant's education and skills are mandatory statutory factors that must be considered when determining whether an alien is likely to become a public charge in the future.<sup>509</sup> In general, an alien with educational credentials and skills is more employable and less likely to become a public charge. DHS, therefore, proposes that when considering this factor, DHS would consider whether the alien has adequate education and skills to either obtain or maintain employment sufficient to avoid becoming a public charge, if authorized for employment.<sup>510</sup>

Various studies and data support the concept that a person's education and skills are positive factors for self-sufficiency. The U.S. Bureau of Labor Statistics (BLS) observed in 2016 that there was a relationship between the educational level and unemployment rate.<sup>511</sup> The unemployment rate for an individual with a doctoral degree was only 1.6 percent compared to 7.4 percent for an individual with less than a high school diploma.<sup>512</sup> According to the U.S. Census Bureau, lower educational attainment was associated with higher public benefit program participation rates for people over the age of 18.<sup>513</sup> In 2012, 37.3 percent of people who did not graduate from high school received means-tested benefits, compared with 21.6 percent of high school graduates and 9.6 percent of individuals with 1 or more years of college.<sup>514</sup>

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<sup>509</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

<sup>510</sup> The level of education may be an indicator for continued employment. See U.S. Bureau of Labor Statistics, *Employment Projections, Unemployment Rates and Earnings by Educational Attainment, 2016*, available at [https://www.bls.gov/emp/ep\\_chart\\_001.htm](https://www.bls.gov/emp/ep_chart_001.htm) (last updated Mar. 27, 2018).

<sup>511</sup> See U.S. Bureau of Labor Statistics, *Employment Projections, Unemployment Rates and Earnings by Educational Attainment, 2016*, available at [https://www.bls.gov/emp/ep\\_chart\\_001.htm](https://www.bls.gov/emp/ep_chart_001.htm) (last updated Mar. 27, 2018).

<sup>512</sup> See U.S. Bureau of Labor Statistics, *Employment Projections, Unemployment Rates and Earnings by Educational Attainment, 2016*, available at [https://www.bls.gov/emp/ep\\_chart\\_001.htm](https://www.bls.gov/emp/ep_chart_001.htm) (last updated Mar. 27, 2018).

<sup>513</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* 10 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>.

<sup>514</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* 10 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>.



Additionally, the data suggest that people who have lower education levels are not only more likely to receive public benefits but they tend to stay on them longer. For example, 49.4 percent of people with less than 4 years of high school who received public benefits from a major means-tested program between January 2009 and December 2012 stayed on the benefit program for 37 to 48 months. In contrast, only 39.3 percent of high school graduates and 29.0 percent of those with 1 or more years of college who received public benefits during the same time period stayed on the public benefit program for 37 to 48 months.<sup>515</sup> The National Center for Education Statistics found that “[i]n 2015, the poverty rate for children under age 18 was highest for those whose parents had not completed high school (52 percent) and lowest for those whose parents had attained a bachelor’s or higher degree (4 percent).”<sup>516</sup> The data suggests that a lack of education increases the likelihood of poverty and unemployment, which may in turn increase the likelihood to need public assistance.

The results of DHS’s analysis of the SIPP data also show a relationship between education level and self-sufficiency. Tables 18 and 19 indicate a relationship between education level and public benefit participation rates among both U.S. citizens and noncitizens in 2013. U.S. citizens with less than a high school education were more likely to participate in either cash or non-cash welfare programs compared to U.S. citizens with any other education level. In particular, 37.2 percent of U.S. citizens with less than a high school education received either cash or non-cash benefits, while 19.2 percent of those with a high school degree and about 13.3 percent with some college received those benefits. When examining the cohort of U.S. citizens that have attained a college degree, only 5.5 percent with a Bachelor’s degree, and 2.8 percent

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<sup>515</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009–2012: Who Gets Assistance?* 10 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>.

<sup>516</sup> See Nat’l Ctr. for Educ. Statistics, *Characteristics of Children’s Families*, available at [https://nces.ed.gov/programs/coe/indicator\\_cce.asp#\(last updated May 2018\)](https://nces.ed.gov/programs/coe/indicator_cce.asp#(last%20updated%20May%202018)).

with a graduate degree received those benefits. For the noncitizen population, the rate of receipt of cash or non-cash benefits among those with less than a high school education was 28.2 percent, while among those with a diploma had a rate of receipt at 23.6 percent. Among those with some college the rate of receipt for cash and non-cash benefits was 18.0 percent, and with a Bachelor's or graduate degree, the rate was about 10 percent. For U.S. citizens and noncitizens alike, the rate of receipt of cash benefits was much higher among those without a high school education (12.2 percent of U.S. citizens and 3.7 percent of noncitizens) than among any other education group (ranging from between 1 and 4 percent of U.S. citizens, and 1 percent or less of noncitizens).

Table 18. Public Benefit Participation of U.S. Citizens Age 18+, by Education Level, 2013 (in thousands)									
	Less than High School			High School graduate			Some college/Associate's degree		
	Population	% of Total Population		Population	% of Total Population		Population	% of Total Population	
<b>Total Population</b> 310,867	23,141	7.4%		65,539	21.1%		67,138	21.6%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	8,607	37.2%	0.9%	12,577	19.2%	0.4%	8,896	13.3%	0.4%
Cash benefits	2,823	12.2%	0.6%	2,835	4.3%	0.2%	1,453	2.2%	0.2%
SSI	2,489	10.8%	0.6%	2,438	3.7%	0.2%	1,182	1.8%	0.1%
TANF	198	0.9%	0.2%	242	0.4%	0.1%	141	0.2%	0.1%
GA	232	1.0%	0.2%	228	0.3%	0.1%	163	0.2%	0.1%
Non-cash benefits	8,250	35.7%	0.9%	12,152	18.5%	0.4%	8,587	12.8%	0.4%
Medicaid	5,904	25.5%	0.8%	8,131	12.4%	0.4%	5,478	8.2%	0.3%
SNAP	5,176	22.4%	0.7%	7,435	11.3%	0.4%	5,051	7.5%	0.3%
Housing vouchers	808	3.5%	0.3%	993	1.5%	0.1%	811	1.2%	0.1%
Rent subsidy	2,155	9.3%	0.5%	2,728	4.2%	0.2%	2,004	3.0%	0.2%
	Bachelor's degree			Graduate degree					
	Population	% of Total Population		Population	% of Total Population				
<b>Total Population</b> 310,867	42,426	13.6%		23,771	7.6%				
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>			
Cash or non-cash	2,319	5.5%	0.3%	676	2.8%	0.3%			
Cash benefits	414	1.0%	0.2%	189	0.8%	0.2%			
SSI	367	0.9%	0.1%	170	0.7%	0.2%			
TANF	*17	*0.0%	0.0%	*19	*0.1%	0.1%			
GA	*37	*0.1%	0.0%	-	-	-			
Non-cash benefits	2,186	5.2%	0.3%	608	2.6%	0.3%			
Medicaid	1,309	3.1%	0.3%	396	1.7%	0.3%			
SNAP	930	2.2%	0.2%	335	1.4%	0.2%			
Housing vouchers	197	0.5%	0.1%	*35	*0.1%	0.1%			
Rent subsidy	609	1.4%	0.2%	151	0.6%	0.2%			

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

<b>Table 19. Public Benefit Participation of Noncitizens Age 18+, by Education Level, 2013 (in thousands)</b>									
	<b>Less than High School</b>			<b>High School graduate</b>			<b>Some college/Associate's degree</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	6,881	2.2%		4,518	1.5%		2,749	0.9%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	1,943	28.2%	1.6%	1,067	23.6%	1.9%	493	18.0%	2.3%
Cash benefits	252	3.7%	0.7%	*53	*1.2%	0.5%	*22	*0.8%	0.5%
SSI	200	2.9%	0.6%	*34	*0.8%	0.4%	*17	*0.6%	0.5%
TANF	*21	*0.3%	0.2%	*19	*0.4%	0.3%	*4	*0.2%	0.2%
GA	*31	*0.4%	0.2%	-	-	-	*4	*0.2%	0.2%
Non-cash benefits	1,911	27.8%	1.6%	1,057	23.4%	1.9%	485	17.7%	2.2%
Medicaid	1,268	18.4%	1.4%	681	15.1%	1.6%	338	12.3%	1.9%
SNAP	856	12.4%	1.2%	452	10.0%	1.4%	172	6.2%	1.4%
Housing vouchers	118	1.7%	0.5%	67	1.5%	0.5%	34	1.2%	0.6%
Rent subsidy	386	5.6%	0.8%	200	4.4%	0.9%	108	3.9%	1.1%
	<b>Bachelor's degree</b>			<b>Graduate degree</b>					
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>				
<b>Total Population</b> 310,867	2,502	0.8%		1,808	0.6%				
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>			
Cash or non-cash	247	9.9%	1.9%	122	6.7%	1.9%			
Cash benefits	*13	*0.5%	0.5%	*2	*0.1%	0.3%			
SSI	*3	*0.1%	0.2%	-	-	-			
TANF	-	-	-	-	-	-			
GA	*10	*0.4%	0.4%	*2	*0.1%	0.3%			
Non-cash benefits	238	9.5%	1.9%	122	6.7%	1.9%			
Medicaid	189	7.6%	1.7%	*61	*3.4%	1.4%			
SNAP	*70	*2.8%	1.1%	*21	*1.1%	0.8%			
Housing vouchers	*18	*0.7%	0.5%	-	-	-			
Rent subsidy	*29	*1.2%	0.7%	*41	*2.3%	1.2%			

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

Moreover, according to the National Center for Education Statistics, increased education is associated with increased employment productivity and increased earnings.<sup>517</sup> Unemployment

<sup>517</sup> See Nat'l Ctr. for Educ. Statistics, *Education and the Economy: An Indicators Report* (Mar. 1997), available at <https://nces.ed.gov/pubs97/web/97939.asp>.

decreases as skills gained through education increase.<sup>518</sup> In 2013, only 27 percent of U.S. jobs required less than a high school degree, while 74 percent required skills associated with formal education (39 percent required a high school degree, 18 percent required a bachelor's degree, and 16 percent required more than a bachelor's degree).<sup>519</sup>

Tables 20 and 21 below show that among U.S. citizens and noncitizens, individuals holding professional certificates or licenses had lower rates of non-cash means-tested public benefits participation compared to their respective overall populations in 2013. In particular, 8.5 percent of U.S. citizens and 13.7 percent of noncitizens with professional certificates or licenses received non-cash benefits compared to about 20 percent of the overall U.S. citizen and noncitizen populations. The rate of receipt of cash benefits among those with a professional certificate was 1.4 percent for U.S. citizens and 0.4 percent for noncitizens, compared to a rate of 3.6 percent among U.S. citizens overall, and 1.8 percent among noncitizens overall.

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<sup>518</sup> See U.S. Bureau of Labor Statistics, *Employment Projections, Unemployment Rates and Earnings by Educational Attainment, 2016*, available at [https://www.bls.gov/emp/ep\\_chart\\_001.htm](https://www.bls.gov/emp/ep_chart_001.htm) (last updated Mar. 27, 2018).

<sup>519</sup> See U.S. Bureau of Labor Statistics, *Education Level and Jobs: Opportunities by State* (Sept. 2014), available at <https://www.bls.gov/careeroutlook/2014/article/education-level-and-jobs.htm>.

<b>Table 20. Public Benefit Participation of U.S. Citizens Overall, and with a Professional Certification or License, 2013 (in thousands)</b>						
<b>Total Population</b> 310,867	<b>Citizen</b>			<b>Citizen with prof. cert.</b>		
	<b>Population</b> 290,704	<b>% of Total Population</b> 93.5%		<b>Population</b> 52,514	<b>% of Total Population</b> 16.9%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	60,480	20.8%	0.2%	4,683	8.9%	0.4%
Cash benefits	10,429	3.6%	0.1%	724	1.4%	0.2%
SSI	7,652	2.6%	0.1%	571	1.1%	0.1%
TANF	2,181	0.8%	0.0%	*76	*0.1%	0.0%
GA	900	0.3%	0.0%	*93	*0.2%	0.1%
Non-cash benefits	59,029	20.3%	0.2%	4,447	8.5%	0.4%
Medicaid	46,443	16.0%	0.2%	2,808	5.3%	0.3%
SNAP	33,085	11.4%	0.2%	2,579	4.9%	0.3%
Housing vouchers	4,645	1.6%	0.1%	381	0.7%	0.1%
Rent subsidy	11,562	4.0%	0.1%	1,032	2.0%	0.2%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

<b>Table 21. Public Benefit Participation of Noncitizens Overall, and with a Professional Certification or License, 2013 (in thousands)</b>						
<b>Total Population</b> 310,867	<b>Noncitizen</b>			<b>Noncitizen with prof. cert.</b>		
	<b>Population</b> 20,163	<b>% of Total Population</b> 6.5%		<b>Population</b> 2,020	<b>% of Total Population</b> 0.6%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	4,558	22.6%	0.9%	280	13.8%	2.4%
Cash benefits	370	1.8%	0.3%	*8	*0.4%	0.4%
SSI	254	1.3%	0.2%	*8	*0.4%	0.4%
TANF	*73	*0.4%	0.1%	-	-	-
GA	*47	*0.2%	0.1%	-	-	-
Non-cash benefits	4,498	22.3%	0.9%	276	13.7%	2.4%
Medicaid	3,130	15.5%	0.8%	197	9.8%	2.1%
SNAP	1,828	9.1%	0.6%	*63	*3.1%	1.2%
Housing vouchers	287	1.4%	0.3%	*16	*0.8%	0.6%
Rent subsidy	869	4.3%	0.4%	*65	*3.2%	1.3%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

Similar to those holding professional certificates or licenses, the rates of non-cash participation among the U.S. citizen and noncitizen populations were lower for those having an

educational certificate compared to their respective overall populations in 2013, as highlighted in Tables 22 and 23. For example, among U.S. citizens, the participation rate for non-cash benefits was 12.7 percent for those having an educational certificate compared to 20.3 percent overall. Among noncitizens, the participation rate for non-cash benefits was very similar to that of U.S. citizens, with a rate of 13.1 percent among those having an educational certificate compared to 21.3 percent overall. The rate of receipt of cash benefits among those having an educational certificate was about 2.4 percent among U.S. citizens and 0.8 percent among noncitizens.

<b>Table 22. Public Benefit Participation of U.S. Citizens Overall, and with an Educational Certificate from a College, University, or Trade School, 2013 (in thousands)</b>						
<b>Total Population</b> 310,867	<b>Citizen</b>			<b>Citizen with ed. certificate</b>		
	<b>Population</b> 290,704	<b>% of Total Population</b> 93.5%		<b>Population</b> 32,068	<b>% of Total Population</b> 10.3%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	60,480	20.8%	0.2%	4,250	13.3%	0.6%
Cash benefits	10,429	3.6%	0.1%	764	2.4%	0.3%
SSI	7,652	2.6%	0.1%	624	1.9%	0.2%
TANF	2,181	0.8%	0.0%	*75	*0.2%	0.1%
GA	900	0.3%	0.0%	*86	*0.3%	0.1%
Non-cash benefits	59,029	20.3%	0.2%	4,061	12.7%	0.5%
Medicaid	46,443	16.0%	0.2%	2,504	7.8%	0.4%
SNAP	33,085	11.4%	0.2%	2,587	8.1%	0.4%
Housing vouchers	4,645	1.6%	0.1%	442	1.4%	0.2%
Rent subsidy	11,562	4.0%	0.1%	1,022	3.2%	0.3%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).<sup>520</sup>

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

<sup>520</sup> The SIPP includes questions on professional certification and licenses developed by the Interagency Working Group on Expanded Measures of Enrollment and Attainment (GEMEnA). See Nat'l Ctr. for Educ. Statistics, *Working Definitions of Non-Degree Credentials*, <https://nces.ed.gov/surveys/gemena/definitions.asp> (last visited Sept. 12, 2018); see also U.S. Bureau of Labor Statistics, *Adding Questions on Certifications and Licenses to the Current Population Survey* (Nov. 2016), available at <https://www.bls.gov/opub/mlr/2016/article/pdf/adding-questions-on-certifications-and-licenses-to-the-current-population-survey.pdf>. GEMEnA developed working definitions that categorize certification as a credential awarded by a non-governmental body, and involve successfully passing an examination. A license is awarded by a government agency and provides legal authority to do a specific job. Both certifications and licenses are time-limited, so must be renewed periodically. Educational certificates are awarded by an educational institution and need not be renewed. See also U.S. Bureau of Labor Statistics, *Education Level and Jobs: Opportunities by State* (Sept. 2014), available at <https://www.bls.gov/careeroutlook/2014/article/education-level-and-jobs.htm>.

<b>Table 23. Public Benefit Participation of Noncitizens Overall, and with an Educational Certificate from a College, University, or Trade School, 2013 (in thousands)</b>						
	<b>Noncitizen</b>			<b>Noncitizen with ed. certificate</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	20,163	6.5%		1,178	0.4%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	4,558	22.6%	0.9%	159	13.5%	3.1%
Cash benefits	370	1.8%	0.3%	*9	*0.8%	0.8%
SSI	254	1.3%	0.2%	*9	*0.8%	0.8%
TANF	*73	*0.4%	0.1%	-	-	-
GA	*47	*0.2%	0.1%	-	-	-
Non-cash benefits	4,498	22.3%	0.9%	155	13.1%	3.0%
Medicaid	3,130	15.5%	0.8%	106	9.0%	2.6%
SNAP	1,828	9.1%	0.6%	*55	*4.7%	1.9%
Housing vouchers	287	1.4%	0.3%	*3	*0.3%	0.5%
Rent subsidy	869	4.3%	0.4%	*40	*3.4%	1.6%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).<sup>521</sup>

\* Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

Relatedly, English language proficiency is a skill that also is relevant in determining whether an alien is likely to become a public charge in the future. An inability to speak and understand English may adversely affect whether an alien can obtain employment.<sup>522</sup> Aliens who cannot speak English may be unable to obtain employment in areas where only English is spoken. People with the lowest English speaking ability tend to have the lowest employment rate, lowest rate of full-time employment, and lowest median earnings.<sup>523</sup> According to U.S. Census Bureau data, people who spoke a language other than English at home were less likely to

<sup>521</sup> See Nat'l Ctr. for Educ. Statistics, *Working Definitions of Non-Degree Credentials*, <https://nces.ed.gov/surveys/genena/definitions.asp> (last visited Sept. 12, 2018).

<sup>522</sup> See Jennifer Cheeseman Day and Hyon B. Shin, U.S. Census Bureau, *How Does Ability to Speak English Affect Earnings?* 2 (2005), available at [https://www.census.gov/hhes/socdemo/language/data/acs/PAA\\_2005\\_AbilityandEarnings.pdf](https://www.census.gov/hhes/socdemo/language/data/acs/PAA_2005_AbilityandEarnings.pdf).

<sup>523</sup> See Jennifer Cheeseman Day and Hyon B. Shin, U.S. Census Bureau, *How Does Ability to Speak English Affect Earnings?* 6 (2005), available at [https://www.census.gov/hhes/socdemo/language/data/acs/PAA\\_2005\\_AbilityandEarnings.pdf](https://www.census.gov/hhes/socdemo/language/data/acs/PAA_2005_AbilityandEarnings.pdf).



be employed, and less likely to find full-time work when employed.<sup>524</sup> In a 2005 study, “on average, workers who spoke only English earned \$5,600 more than people who spoke another language,”<sup>525</sup> however, between the people who spoke English “very well” and people who spoke only English the difference was only \$966.<sup>526</sup> People who spoke English “very well” had higher earnings than people who spoke English “well” – an earning differential of \$7,000.<sup>527</sup>

Table 24 highlights a relationship between English language proficiency and public benefit participation in 2013. Among the noncitizen adults who speak a language other than English at home, the participation rates for both cash and non-cash benefits are higher among those who do not speak English well, or at all, than among those who speak the language well. The SIPP data indicate that the rate of coverage of non-cash benefits among those who spoke English either well or very well (about 15 to 20 percent) was significantly lower than the rate among those who either spoke English poorly or not at all (about 25 to 30 percent). The rate of receipt of cash benefits for each of these groups ranged from about 1 to 5 percent.

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<sup>524</sup> See Jennifer Cheeseman Day and Hyon B. Shin, U.S. Census Bureau, *How Does Ability to Speak English Affect Earnings?* 6 (2005), available at [https://www.census.gov/hhes/socdemo/language/data/acs/PAA\\_2005\\_AbilityandEarnings.pdf](https://www.census.gov/hhes/socdemo/language/data/acs/PAA_2005_AbilityandEarnings.pdf).

<sup>525</sup> See Jennifer Cheeseman Day and Hyon B. Shin, U.S. Census Bureau, *How Does Ability to Speak English Affect Earnings?* 6 (2005), available at [https://www.census.gov/hhes/socdemo/language/data/acs/PAA\\_2005\\_AbilityandEarnings.pdf](https://www.census.gov/hhes/socdemo/language/data/acs/PAA_2005_AbilityandEarnings.pdf).

<sup>526</sup> See Jennifer Cheeseman Day and Hyon B. Shin, U.S. Census Bureau, *How Does Ability to Speak English Affect Earnings?* 6 (2005), available at [https://www.census.gov/hhes/socdemo/language/data/acs/PAA\\_2005\\_AbilityandEarnings.pdf](https://www.census.gov/hhes/socdemo/language/data/acs/PAA_2005_AbilityandEarnings.pdf).

<sup>527</sup> See Jennifer Cheeseman Day and Hyon B. Shin, U.S. Census Bureau, *How Does Ability to Speak English Affect Earnings?* 6 (2005), available at [https://www.census.gov/hhes/socdemo/language/data/acs/PAA\\_2005\\_AbilityandEarnings.pdf](https://www.census.gov/hhes/socdemo/language/data/acs/PAA_2005_AbilityandEarnings.pdf).

**Table 24: Public Benefit Participation of Noncitizens Age 18+ who Speak a Language other than English at Home, by How Well English is Spoken, 2013 (in thousands)**

	Very well			Well		
	Population	% of Total Population		Population	% of Total Population	
<b>Total Population</b> 310,867	4,274	1.4%		3,157	1.0%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	703	16.5%	1.8%	567	18.0%	2.1%
Cash benefits	*50	*1.2%	0.5%	*32	*1.0%	0.5%
SSI	*28	*0.6%	0.4%	*22	*0.7%	0.5%
TANF	*10	*0.2%	0.2%	*10	*0.3%	0.3%
GA	*13	*0.3%	0.3%	*4	*0.1%	0.2%
Non-cash benefits	680	15.9%	1.8%	554	17.6%	2.0%
Medicaid	426	10.0%	1.4%	393	12.4%	1.8%
SNAP	230	5.4%	1.1%	273	8.7%	1.5%
Housing vouchers	*29	*0.7%	0.4%	*34	*1.1%	0.6%
Rent subsidy	121	2.8%	0.8%	*61	*1.9%	0.7%
	Not well			Not at all		
	Population	% of Total Population		Population	% of Total Population	
<b>Total Population</b> 310,867	3,243	1.0%		1,558	0.5%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	797	24.6%	2.2%	488	31.3%	3.4%
Cash benefits	*65	*2.0%	0.7%	*84	*5.4%	1.7%
SSI	*49	*1.5%	0.6%	*79	*5.1%	1.6%
TANF	*8	*0.2%	0.2%	-	-	-
GA	*8	*0.3%	0.3%	*5	*0.3%	0.4%
Non-cash benefits	797	24.6%	2.2%	481	30.8%	3.4%
Medicaid	524	16.2%	1.9%	350	22.5%	3.1%
SNAP	275	8.5%	1.4%	210	13.5%	2.5%
Housing vouchers	*47	*1.5%	0.6%	*20	*1.3%	0.8%
Rent subsidy	180	5.6%	1.2%	97	6.2%	1.8%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

Additionally, numerous studies have shown that immigrants' English language proficiency or ability to acquire English proficiency directly correlate to a newcomer's economic assimilation into the United States.<sup>528</sup>

DHS may also consider an applicant's proficiency in other languages in addition to English, with appropriate consideration given to market demand, when reviewing the education and skills factor.

### **1. USCIS Evidentiary Requirements**

DHS proposes that USCIS would consider certain types of evidence when reviewing this factor. For the reasons expressed above, USCIS' review would include, but not be limited to:

- Evidence of the alien's recent history of employment;
- The alien's academic degree or certifications including a high school degree (or equivalent) or higher;
- The alien's occupational skills, certifications, or licenses; and
- The alien's proficiency in English or proficiencies in additional languages.

### **J. Prospective Immigration Status and Expected Period of Admission**

DHS would also take into consideration the immigration status and duration of admission sought by an alien, and the classification the alien is seeking, as part of this determination. The type of evidence generally required of an applicant for an immigrant visa, admission as an immigrant, or adjustment of status would generally differ in scope from the evidence required of

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<sup>528</sup> Barry R. Chiswick & Paul W. Miller, *Immigrant Earnings: Language Skills, Linguistic Concentrations and the Business Cycle*, 15 J. Population Econ., 31, 31-57 (2002); Christian Dustmann, *Fluency, Writing Fluency, and Earnings of Migrants*, 7 J. Population Econ., 133, 133-156 (1994); Ingo E. Isphording, IZA Discussion Paper No. 7360, *Disadvantages of Linguistic Origin: Evidence from Immigrant Literacy Scores* (2013), available at <http://ftp.iza.org/dp7360.pdf>; Org. for Econ. Cooperation & Dev./European Union, *Indicators of Immigrant Integration 2015: Settling In* (2015), available at <http://www.oecd.org/els/mig/Indicators-of-Immigrant-Integration-2015.pdf>.

a bona fide applicant seeking a nonimmigrant visa or admission as a nonimmigrant. For example, an alien seeking permanent residence in the United States may be eligible for certain public benefits upon his or her entry as a permanent resident or after five years. As a result, there is a chance that he or she would avail him or herself of the available public benefit. USCIS would consider this possibility in the totality of the circumstances.

On the other hand, aliens who are coming to the United States temporarily as a nonimmigrant may be less likely to avail themselves of public benefits, particularly if they are coming to the United States for a short period of time or if they are coming to the United States for employment purposes. For example, an alien coming to the United States on a nonimmigrant visitor (B-2) for a vacation in the United States for two weeks must establish he or she has sufficient funds to cover any expenses in the United States. Therefore, generally, a nonimmigrant visitor would be unlikely to avail him or herself of any public benefits for which he or she would be eligible based on being lawfully present in the United States. Therefore, such an alien, if otherwise entitled to a nonimmigrant visa and admission as a nonimmigrant, generally would not be subject to the public charge inadmissibility ground under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), although it is possible that evidence may exist that gives rise to a public charge concern.

#### **K. Affidavit of Support**

Failure to submit a required affidavit of support when required under section 212(a)(4)(C) or section 212(a)(4)(D) of the Act, 8 U.S.C. 1182(a)(4)(C) or 1182(a)(4)(D), necessarily results in a determination of inadmissibility based on the public charge ground without review of any other statutory factors.<sup>529</sup> For aliens who submit an affidavit of support,

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<sup>529</sup> Certain applicants are exempt from filing the affidavit of support under INA section 213A, 8 U.S.C. 1183a.

the statute allows DHS to consider the affidavit of support under section 213A of the Act, 8 U.S.C. 1183a, in public charge inadmissibility determinations.<sup>530</sup> DHS, therefore, proposes to consider any required affidavit of support<sup>531</sup> as part of the totality of the circumstances.

### **1. General Consideration of Sponsorship and Affidavits of Support**

DHS would consider a sponsor's facially sufficient affidavit of support as a positive factor in the totality of the circumstances, but a sufficient affidavit of support alone would not result in a finding that an alien is unlikely at any time to become a public charge due the statute's requirement to consider the mandatory factors. Moreover, DHS has concerns about relying on sponsors to ensure that aliens will not become a public charge, as submitting a sufficient affidavit of support does not guarantee that the alien will not receive public benefits in the future.

PRWORA and IIRIRA amended the INA by setting forth requirements for submitting what would be an enforceable affidavit of support, i.e., current Form I-864.<sup>532</sup> Approximately 1 month after PRWORA was enacted, Congress amended the public charge inadmissibility ground, through passage of IIRIRA, to require certain applicants for lawful permanent resident status to submit an affidavit of support in accordance with section 213A of the Act, 8 U.S.C. 1183a.<sup>533</sup> An Affidavit of Support under Section 213A of the INA (Form I-864)<sup>534</sup> is a contract between the sponsor and the U.S. Government that imposes on the sponsor a legally enforceable obligation to support the alien. The sponsor generally must demonstrate that he or she is able to maintain the sponsored alien at an annual income of not less than 125 percent of the FPG.<sup>535</sup> By creating these requirements in section 213A of the Act, 8 U.S.C. 1183a, Congress intended to

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<sup>530</sup> See INA section 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii); *see also* proposed 8 CFR 212.22(b)(7).

<sup>531</sup> See INA section 212(a)(4)(C) and (a)(4)(D), 8 U.S.C. 1182(a)(4)(C) and 1182(a)(4)(D).

<sup>532</sup> See INA sections 212(a)(4) and 213A, 8 U.S.C. 1182(a)(4) and 1183a.

<sup>533</sup> See IIRIRA, Pub. L. 104-208, div. C, section 531(b), 110 Stat. 3009-546, 3009-675.

<sup>534</sup> The Affidavit of Support Under Section 213A of the INA, Form I-864EZ, may be used instead of Form I-864 in certain circumstances. References to the affidavit of support in this rule include Form I-864EZ.

<sup>535</sup> See INA section 213A, 8 U.S.C. 1183a.

ensure that affidavits of support were enforceable and that public benefit-granting agencies could be reimbursed for certain aid provided to the sponsored alien.<sup>536</sup>

As part of PRWORA, benefit-granting agencies assess the combined income and resources of the sponsor (and his or her spouse) and the alien to determine whether the combined income and resources meet the eligibility requirements.<sup>537</sup> This is called “sponsor-to-alien deeming.” Public benefits agencies, however, have encountered challenges obtaining information about the sponsor’s income when determining the alien’s eligibility for public benefits. A U.S. Government Accountability Office (GAO) 2009 report found that although the number of sponsored noncitizens potentially affected by such deeming is unknown, most recent information then available suggested that 11 percent (473,000) of sponsored aliens in 2007 applied for TANF, Medicaid, or SNAP during the course of 2007, and less than one percent applied for SSI.<sup>538</sup> In addition, according to a 2002 study of the New York and Los Angeles areas by the Urban Institute for the Office of the Assistant Secretary for Planning and Evaluation of HHS, individuals who have become lawful permanent residents since the affidavit of support under section 213A of the Act was enacted in 1996 were poorer (with incomes below 100 percent of the FPL) than those who arrived earlier.<sup>539</sup> “Legal immigrants who entered the country since 1996 are poorer than those who arrived earlier, despite new policies requiring their sponsors to demonstrate incomes over 125 percent of the [FPL].”<sup>540</sup> The report also indicates

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<sup>536</sup> In explaining the provision, Congress continued to emphasize that the affidavits of support (before 1996) were previously unenforceable. Congress highlighted the difference between the situation at the time, before 1996, and the new law which would make the affidavits enforceable and permit benefit-providing agencies to seek reimbursement. See H.R. Rep. No. 104-651, at 1449 (1996).

<sup>537</sup> See PRWORA, Pub. L. 104-193, section 423, 11 Stat. 2105, 2271-74.

<sup>538</sup> See U.S. Gov’t Accountability Office, GAO-09-375, *Sponsored Noncitizens and Public Benefits* (May 2009), available at <https://www.gao.gov/products/GAO-09-375>.

<sup>539</sup> See Randy Capps et al., *How Are Immigrants Faring After Welfare Reform? Preliminary Evidence from Los Angeles and New York City ii* (Mar. 4, 2002), available at <https://aspe.hhs.gov/system/files/pdf/72691/report.pdf>.

<sup>540</sup> Randy Capps et al., *How Are Immigrants Faring After Welfare Reform? Preliminary Evidence from Los Angeles and New York City ii* (Mar. 4, 2002), available at <https://aspe.hhs.gov/system/files/pdf/72691/report.pdf>.

that some immigrant families with incomes below twice the poverty level<sup>541</sup> received SNAP, TANF or Medicaid from 1999-2000.<sup>542</sup> For example, in Los Angeles 13 percent and in New York City 22 percent of noncitizen families with income below twice the poverty level received food stamps (SNAP).<sup>543</sup>

## **2. Proposal to Consider Required Affidavits of Support**

Certain aliens are required to submit an affidavit of support.<sup>544</sup> With certain exceptions, the requirement to submit an affidavit of support applies to immediate relatives (including orphans), family-preference immigrants, and those employment-based immigrants whose petitioners are relatives or a firm in which a U.S. citizen or lawful permanent resident relative holds a significant ownership interest.<sup>545</sup> Immigrants seeking admission or adjustment of status in these categories are inadmissible under subparagraphs (C) and (D) of section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4)(C) and (D), unless an appropriate sponsor has completed and filed a sufficient affidavit of support.<sup>546</sup>

A sufficient affidavit of support does not guarantee that the alien will not receive public benefits in the future and, therefore, DHS would only consider the affidavit of support as one factor in the totality of the circumstances. When determining the weight to give an affidavit of support in the totality of the circumstances, USCIS would assess the sponsor's annual income,

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<sup>541</sup> The report describes these families as low-income families.

<sup>542</sup> See Randy Capps et al., *How Are Immigrants Faring After Welfare Reform? Preliminary Evidence from Los Angeles and New York City* iv (Mar. 4, 2002), available at <https://aspe.hhs.gov/system/files/pdf/72691/report.pdf>. Note that this report uses a household centered approach to evaluate data.

<sup>543</sup> See Randy Capps et al., *How Are Immigrants Faring After Welfare Reform? Preliminary Evidence from Los Angeles and New York City* iv (Mar. 4, 2002), available at <https://aspe.hhs.gov/system/files/pdf/72691/report.pdf>.

<sup>544</sup> See INA section 212(a)(4).

<sup>545</sup> See INA sections 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D); see also 8 CFR 213a.2(a)(2).

<sup>546</sup> Certain immigrant categories are exempt from the affidavit of support requirements including: qualified battered spouses and children (and their eligible family members) and qualified widow(er)s of citizens, if these aliens have filed visa petitions on their own behalf. For more information on who must file an affidavit of support, see AFM Ch. 20.5.

assets, resources, and financial status, relationship to applicant, the likelihood that the sponsor would actually provide financial support to the alien, and any other related considerations.

In order to assess the sponsor's likelihood of meeting his or her obligation to support the alien, DHS would look at how close of a relationship the sponsor has to the alien, as close family members would be more likely to financially support the alien if necessary. DHS would also look at whether the sponsor lives with this alien, as this could be indicative of the sponsor's willingness to support the alien if needed. Additionally, DHS would look at whether the sponsor has submitted affidavit of support with respect to other individuals, as this may be indicative of the sponsor's willingness or ability to financially support the alien.

To the extent that the initial evidence submitted by the sponsor is insufficient to make this determination, USCIS would request additional information from the sponsor or interview the sponsor to determine whether the sponsor is willing and able to support the alien on a long-term basis. The inability or unwillingness of the sponsor to financially support the alien may be viewed as a negative factor in the totality of the circumstances. DHS expects that a sponsor's sufficient affidavit of support would not be an outcome-determinative factor in most cases; the presence of a sufficient affidavit of support does not eliminate the need to consider all of the mandatory factors in the totality of the circumstances.<sup>547</sup>

#### **L. Heavily Weighed Factors**

DHS proposes a number of factors or factual circumstances that it has determined would generally weigh heavily in determining whether an alien is likely to become a public charge in the future.<sup>548</sup> The mere presence of any one enumerated circumstance would not, alone, be

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<sup>547</sup> However, the statute requires a finding of inadmissibility on public charge grounds if the alien is required to submit an affidavit of support and fails to do so. INA section 212(a)(4)(D), 8 U.S.C. 1182(a)(4)(D).

<sup>548</sup> See proposed 8 CFR 212.22.



determinative. A heavily weighed factor could be outweighed by countervailing evidence in the totality of the circumstances. Other negative and positive factors, including factors not enumerated elsewhere in this rule, may also be weighed heavily in individual determinations, as circumstances warrant.

### **1. Heavily Weighed Negative Factors**

DHS proposes to consider certain factors listed below as heavily negative because these factors are particularly indicative of a likelihood that the alien would become a public charge.

#### **(a) Lack of Employability**

As long as an alien is not a full-time student and is authorized to work, DHS proposes that the absence of current employment, employment history, or reasonable prospect of future employment will be a heavily weighed negative factor.<sup>549</sup> Self-sufficiency generally involves people being capable and willing to work and being able to maintain gainful employment. A person who is capable and able to work but does not work demonstrates a lack of self-sufficiency. As previously discussed, various studies and data support the concept that a person's education and skills may be positive factors for purposes of evidencing self-sufficiency, including the SIPP data reviewed in the Education and Skills section, and the U.S. Census Bureau report that indicates that lower educational attainment is associated with higher public benefit program participation rates for people over the age of 18.<sup>550</sup>

In addition, the concept that a person's education and skills may be positive factors for

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<sup>549</sup> See proposed 8 CFR 212.22(c)(1)(ii). While a full-time student must still demonstrate he or she is not likely to become a public charge, because the public charge determination is based on the totality of the circumstances under the proposed 8 CFR 212.22(d) that includes consideration of the alien's immigration status, the lack of employment or employment history is not counted as a heavily weighed negative factor when making public charge determinations regarding full-time students. The full-time student is working toward a degree, which makes the student more employable in the future, and as such, has a reasonable prospect of employment in the future.

<sup>550</sup> See Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009-2012: Who Gets Assistance?* 10 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>.

purposes of evidencing self-sufficiency is supported by two Census Bureau studies covering 2004 to 2007 and 2009 to 2012, showing that in each of the covered years, individuals with full-time work were less likely to receive means-tested benefits during the year (ranging from 4.5 percent to 5.1 percent) than those with either part-time work (ranging from 12.6 percent to 14.2 percent) or those who were unemployed (ranging from 24.8 percent to 31.2 percent).<sup>551</sup>

DHS recognizes however, that not everyone authorized to work needs to work. Some aliens may have sufficient assets and resources, including a household member's income and assets, which may overcome any negative factor related to lack of employment. DHS would review those considerations in the totality of the circumstances.

**(b) Current Receipt of One or More Public Benefits**

DHS proposes that current receipt of one or more public benefits, as defined in proposed 212.21(b), would be a heavily weighed negative factor in a public charge inadmissibility determination.<sup>552</sup> Current receipt of public benefits, alone, would not justify a finding of inadmissibility on public charge grounds. However, an alien's current receipt of one or more public benefits means that the alien is currently a public charge as defined under proposed 8 CFR 212.21(a), and suggests that the alien may continue to receive public benefits in the future and be more likely to continue to be a public charge.

Research indicates that the largest share of participants (43.0 percent) who benefited from one or more means-tested assistance programs between January 2009 and December 2012 stayed

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<sup>551</sup> See Jeongsoo Kim, Shelley K. Irving, & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2004 to 2007 and 2009 – Who Gets Assistance?* 12 (July 2012), available at <https://www2.census.gov/library/publications/2012/demo/p70-130.pdf>; Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009-2012: Who Gets Assistance?* 10 (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>.

<sup>552</sup> See proposed 8 CFR 212.22(c)(1)(ii) and (iii).

in the programs between 37 and 48 months.<sup>553</sup> DHS is also aware that a separate study showed that receipt of benefits across a two-year timespan is likely to occur in all months, suggesting relatively long welfare spell lengths. Between January 2004 and December 2005, a greater share of the population received one or more means-tested benefits for the entire 24-month study period (10.2 percent) than for either one to 11 months (8.5 percent) or 12 to 23 months (6.5 percent).<sup>554</sup> These studies, though, do not directly address the issue of individuals who stopped receiving benefits later returning to these programs.

Some studies suggest that although most people who leave welfare programs are working after they leave those programs, people may come back to receive additional public benefits.<sup>555</sup> In a research study funded by HHS, *A Profile of Families Cycling On and Off Welfare*, researchers conclude that people who left welfare (leavers) experienced "a fair amount of employment instability — the median proportion of people employed in all four post-exit quarters was 37 percent. Thus, job loss among welfare leavers may give rise to cycling back to welfare."<sup>556</sup> Regarding Medicaid and food stamp participation among leavers, the authors found "the proportion of leavers who receive these benefits at some point in the year after exit is much higher than the proportion who receives them in any given quarter, suggesting a fair amount of

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<sup>553</sup> See U.S. Census Bureau, *News Release: 21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month* (May 28, 2015), available at <https://www.census.gov/newsroom/press-releases/2015/cb15-97.html>.

<sup>554</sup> See Jeongsoo Kim, Shelley K. Irving, & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2004 to 2007 and 2009 – Who Gets Assistance?* 4 fig.4 (July 2012), available at <https://www2.census.gov/library/publications/2012/demo/p70-130.pdf>.

<sup>555</sup> See Lashawn Richburg-Hayes & Stephen Freedman, *A Profile of Families Cycling On and Off Welfare* 4 (Apr. 2004), available at <https://aspe.hhs.gov/system/files/pdf/73451/report.pdf>.

<sup>556</sup> Lashawn Richburg-Hayes & Stephen Freedman, *A Profile of Families Cycling On and Off Welfare* 4 (Apr. 2004) (citing Gregory Arcs & Pamela Loprest, U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Final Synthesis Report of Findings from ASPE "Leavers" Grants* (2001)), available at <https://aspe.hhs.gov/system/files/pdf/73451/report.pdf>. This study was based on the first and fourth quarter.

cycling into and out of these programs.”<sup>557</sup>

HHS also funds various research projects on welfare. Across fifteen state and county welfare studies funded by HHS, it was found that the number of leavers who received food stamps within one year of exit was between 41 and 88 percent.<sup>558</sup> Furthermore, TANF leavers returned to the program at a rate ranging between 17 and 38 percent within one year of exit.<sup>559</sup> Twelve of these studies included household surveys, with some conducting interviews less than a year post-exit, and some as much as 34 months after exit.<sup>560</sup> A review of these surveys found that among those who left Medicaid, the rate of re-enrollment at the time of interview was between 33 and 81 percent among adults, and between 51 and 85 percent among children. Employment rates at the time of interview ranged between 57 and 71 percent.<sup>561</sup>

DHS thus would view current receipt of public benefits as a strong indicator that an alien will continue to receive public benefits, and is therefore likely to become a public charge. However, an alien may be able to establish circumstances indicating that the receipt of public benefits will stop in the near future and he or she will have sufficient income to support him or herself.

### **(c) Receipt of Public Benefits within 36 Months of Filing Application**

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<sup>557</sup> Lashawn Richburg-Hayes & Stephen Freedman, *A Profile of Families Cycling On and Off Welfare* 4 (Apr. 2004), available at <https://aspe.hhs.gov/system/files/pdf/73451/report.pdf>.

<sup>558</sup> See U.S. Dep’t of Health & Human Servs., Office of the Assistant Sec’y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

<sup>559</sup> See U.S. Dep’t of Health & Human Servs., Office of the Assistant Sec’y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

<sup>560</sup> See U.S. Dep’t of Health & Human Servs., Office of the Assistant Sec’y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

<sup>561</sup> See U.S. Dep’t of Health & Human Servs., Office of the Assistant Sec’y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

Similarly, DHS proposes that an alien's past receipt of public benefits within the 36 months immediately preceding his or her application also carries significant weight in determining whether the alien is likely to become a public charge. The weight given to this factor will depend on how recently the alien has received public benefits, and whether the person has received public benefits for an extended period of time (i.e., receives public benefits for multiple years) or at multiple different time periods (i.e., 3 times in the last two years).<sup>562</sup>

As previously discussed, some studies suggest that although most people who leave welfare programs are working after they leave those programs, people may come back to receive additional public benefits.<sup>563</sup> In a research study funded by HHS, *A Profile of Families Cycling On and Off Welfare*, researchers conclude that people who left welfare (leavers) experienced "a fair amount of employment instability — the median proportion of people employed in all four post-exit quarters was 37 percent. Thus, job loss among welfare leavers may give rise to cycling back to welfare."<sup>564</sup> Regarding Medicaid and food stamp participation among leavers, the authors found "the proportion of leavers who receive these benefits at some point in the year after exit is much higher than the proportion who receives them in any given quarter, suggesting a fair amount of cycling into and out of these programs."<sup>565</sup>

HHS also funds various research projects on welfare. Across fifteen state and county welfare studies funded by HHS, it was found that the number of leavers who received food

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<sup>562</sup> This proposed policy is generally consistent with longstanding policy affording less weight to benefits that were received longer ago in the past.

<sup>563</sup> See Lashawn Richburg-Hayes & Stephen Freedman, *A Profile of Families Cycling On and Off Welfare* 4 (Apr. 2004), available at <https://aspe.hhs.gov/system/files/pdf/73451/report.pdf>.

<sup>564</sup> Lashawn Richburg-Hayes & Stephen Freedman, *A Profile of Families Cycling On and Off Welfare* 4 (Apr. 2004) (citing Gregory Arcs & Pamela Loprest, U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Final Synthesis Report of Findings from ASPE "Leavers" Grants* (2001)), available at <https://aspe.hhs.gov/system/files/pdf/73451/report.pdf>. This study was based on the first and fourth quarter.

<sup>565</sup> Lashawn Richburg-Hayes & Stephen Freedman, *A Profile of Families Cycling On and Off Welfare* 4 (Apr. 2004), available at <https://aspe.hhs.gov/system/files/pdf/73451/report.pdf>.

stamps within one year of exit was between 41 and 88 percent.<sup>566</sup> Furthermore, TANF leavers returned to the program at a rate ranging between 17 and 38 percent within one year of exit.<sup>567</sup> Twelve of these studies included household surveys, with some conducting interviews less than a year post-exit, and some as much as 34 months after exit.<sup>568</sup> A review of these surveys found that among those who left Medicaid, the rate of re-enrollment at the time of interview was between 33 and 81 percent among adults, and between 51 and 85 percent among children. Employment rates at the time of interview ranged between 57 and 71 percent.<sup>569</sup>

DHS would view past receipt of public benefits within 36 months as a strong indicator that an alien will continue to receive public benefits, and therefore is likely to become a public charge. However, the weight given to public benefits will depend on whether the alien received multiple benefits, how long ago the benefits were received, and the amounts received.<sup>570</sup> For example, the receipt of a public benefit 5 years ago would be a negative factor; however, a public benefit received six months before the adjustment of status application would be considered a heavily weighed negative factor.

DHS welcomes public comments on the appropriate period of time to examine. DHS is particularly interested in data regarding how frequently individuals who previously used public benefits later do so again, and whether a 24-month or 48-month timeframe would be more

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<sup>566</sup> See U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

<sup>567</sup> See U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

<sup>568</sup> See U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

<sup>569</sup> See U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, *Status Report on Research on the Outcomes of Welfare Reform* app. B (Aug. 2001), available at <https://aspe.hhs.gov/report/status-report-research-outcomes-welfare-reform-2001>.

<sup>570</sup> This proposed policy is generally consistent with longstanding policy affording less weight to benefits that were received longer ago in the past.

appropriate.

**(d) Financial Means to Pay for Medical Costs**

An alien is at high risk of becoming a public charge if he or she does not have private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work. However, the alien may provide evidence of the prospect of obtaining health insurance, such as pending employment that provides employer-sponsored health insurance.

DHS proposes this factual circumstance as a heavily weighed negative factor in 8 CFR 212.22(c)(1)(iv). Certain chronic medical conditions can be costly to treat.<sup>571</sup> Certain conditions may adversely affect an applicant's ability and capacity to obtain and retain gainful employment. Other conditions could result in long-term institutionalization in a health care facility at government expense. According to the *Multiple Chronic Conditions Chartbook 2010 Medical Expenditure Panel Survey Data*,<sup>572</sup> 86 percent of the nation's \$2.7 trillion annual health care

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<sup>571</sup> See U.S. Dep't of Health & Human Servs., *Research In Action, Issue #19: The High Concentration of U.S. Health Care Expenditures* (June 2006), available at <https://archive.ahrq.gov/research/findings/factsheets/costs/expriach/pendria.pdf>; see also Ctrs. for Medicare & Medicaid Servs., *NHE Fact Sheet*, available at <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> (last modified Sept 13, 2018) (in 2016, NHE grew to \$3.3 trillion). For a discussion of expenditures, see generally Ctrs. for Medicare & Medicaid Servs., *National Health Expenditure Data*, available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData> (last modified Sept 13, 2018); see also Ctrs. for Disease Control & Prevention, *Chronic Disease Prevention and Health Promotion, Chronic Disease Data* available at <https://www.cdc.gov/chronicdisease/data/index.htm> (last visited Sept. 13, 2018). The CDC collects large amounts of data on numerous major chronic diseases. In addition, the CDC provides an overview of chronic diseases in the United States, including prevalence and cost. See Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018).

<sup>572</sup> As cited by the CDC. See Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018).

expenditures were for individuals with chronic and mental health conditions.<sup>573</sup> The Centers for Disease Control and Prevention (CDC) has listed the five most expensive health conditions as heart disease, cancer, trauma, mental disorders, and pulmonary conditions.<sup>574</sup> These are all classified as costly medical conditions.<sup>575</sup> In the United States, chronic diseases and conditions that cause them account for most of the health care costs.<sup>576</sup>

- From 2012 to 2013, the total annual direct medical costs for heart disease and strokes were \$190 billion;<sup>577</sup>
- Cancer care cost \$157 billion in 2010 dollars;<sup>578</sup> and
- In 2017, the total estimated direct medical cost for diagnosed diabetes was \$237 billion.<sup>579</sup>

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<sup>573</sup> See Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018).

<sup>574</sup> See U.S. Dep't of Health & Human Servs., *Research In Action, Issue #19: The High Concentration of U.S. Health Care Expenditures* (June 2006), available at <https://archive.ahrq.gov/research/findings/factsheets/costs/expriach/pendria.pdf>; see also Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018). See also generally the [Ctrs. for Disease Control & Prevention, Statistics on Chronic Disease Prevention and Health Promotion, Chronic Disease Data](#) available at <https://www.cdc.gov/chronicdisease/data/index.htm> (last visited Sept. 13, 2018).

<sup>575</sup> See U.S. Dep't of Health & Human Servs., *Research In Action, Issue #19: The High Concentration of U.S. Health Care Expenditures* (June 2006), available at <https://archive.ahrq.gov/research/findings/factsheets/costs/expriach/pendria.pdf>; see also Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018). See also generally the [Ctrs. for Disease Control & Prevention, Statistics on Chronic Disease Prevention and Health Promotion, Chronic Disease Data](#) available at <https://www.cdc.gov/chronicdisease/data/index.htm> (last visited Sept. 13, 2018).

<sup>576</sup> See Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018).

<sup>577</sup> See Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018).

<sup>578</sup> See Nat'l Cancer Inst., *Cancer Prevalence and Cost of Care Projections*, <http://costprojections.cancer.gov/> (last visited Sept. 13, 2018).

<sup>579</sup> See American Diabetes Association, *The Cost of Diabetes*, available at <http://www.diabetes.org/advocacy/news-events/cost-of-diabetes.html> (last visited Sept. 13, 2018). See also Ctrs. for Disease Control & Prevention, *National Center for Chronic Disease Prevention and Health Promotion, About Chronic Diseases, Health and Economic Costs of Chronic Diseases*, available at <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (last visited Sept. 13, 2018).



Individuals in poor to fair health are more likely to access public benefits to treat their medical condition. Tables 25 and 26 show a relationship between health and receipt of public benefits irrespective of citizenship status, with higher rates of participation in most programs among those who reported their health as fair or poor than those who reported their health as excellent, very good, or good.

DHS also acknowledges that the health of certain individuals may have improved because of their access to these subsidized health insurance and other public benefits. In other cases, individuals may have needed the public benefits because of their compromised health. About 40 percent of U.S. citizens and 50 percent of noncitizens<sup>580</sup> who described their health as poor received some form of cash or non-cash public benefit. Moreover, about 20 percent of U.S. citizens and noncitizens who reported their health as excellent participated in at least one type of cash or non-cash benefit program in 2013. The rate of receipt of cash or non-cash benefits was about 20 percent among U.S. citizens who reported their health as excellent, very good, or good; and the rate was 30 to 40 percent among U.S. citizens who reported their health as fair or poor. Among noncitizens, the rate of receipt of these benefits among those who reported their health as excellent, very good, or good was similarly about 20 percent, while among those who reported their health as fair or poor, the rate was 30 to 50 percent. About 1 to 2 percent of both U.S. citizens and noncitizens who reported their health as excellent or good received at least one of SSI, TANF, or GA, which was a rate much lower than those who reported their health as either good (10.0 percent of U.S. citizens and 7.1 percent of noncitizens) or excellent (17.3 percent of citizens and 12.8 percent of noncitizens).

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<sup>580</sup> The difference in rates between citizens and noncitizens who describe their health as poor is not statistically significant.

<b>Table 25: Public Benefit Participation of U.S. Citizens, by Health Status, 2013 (in thousands)</b>									
	<b>Excellent</b>			<b>Very good</b>			<b>Good</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	99,975	32.2%		85,478	27.5%		66,323	21.3%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	19,702	19.7%	0.4%	13,987	16.4%	0.4%	13,383	20.2%	0.4%
Cash benefits	1,659	1.7%	0.1%	1,577	1.8%	0.1%	2,468	3.7%	0.2%
SSI	584	0.6%	0.1%	921	1.1%	0.1%	1,932	2.9%	0.2%
TANF	927	0.9%	0.1%	542	0.6%	0.1%	460	0.7%	0.1%
GA	201	0.2%	0.0%	130	0.2%	0.0%	185	0.3%	0.1%
Non-cash benefits	19,539	19.5%	0.4%	13,680	16.0%	0.4%	12,980	19.6%	0.4%
Medicaid	16,520	16.5%	0.4%	10,934	12.8%	0.3%	9,700	14.6%	0.4%
SNAP	9,946	9.9%	0.3%	7,405	8.7%	0.3%	7,506	11.3%	0.4%
Housing vouchers	1,347	1.3%	0.1%	1,085	1.3%	0.1%	1,075	1.6%	0.1%
Rent subsidy	3,122	3.1%	0.2%	2,599	3.0%	0.2%	2,658	4.0%	0.2%
	<b>Fair</b>			<b>Poor</b>					
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>				
<b>Total Population</b> 310,867	27,631	8.9%		11,298	3.6%				
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>			
Cash or non-cash	8,795	31.8%	0.8%	4,614	40.8%	1.2%			
Cash benefits	2,770	10.0%	0.5%	1,954	17.3%	1.0%			
SSI	2,467	8.9%	0.5%	1,749	15.5%	0.9%			
TANF	189	0.7%	0.1%	*63	*0.6%	0.2%			
GA	195	0.7%	0.1%	189	1.7%	0.3%			
Non-cash benefits	8,448	30.6%	0.8%	4,382	38.8%	1.2%			
Medicaid	6,058	21.9%	0.7%	3,231	28.6%	1.1%			
SNAP	5,444	19.7%	0.7%	2,784	24.6%	1.1%			
Housing vouchers	749	2.7%	0.3%	389	3.4%	0.5%			
Rent subsidy	2,067	7.5%	0.4%	1,116	9.9%	0.8%			

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP). Medicaid coverage is associated with higher rates of self-reported health status as good, very good, or excellent, which would lead to higher rates of Medicaid enrollment in those categories.<sup>581</sup>

\* Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

<sup>581</sup> See Amy Finkelstein et al., Nat'l Bureau of Econ. Research, Working Paper 17190, *The Oregon Health Insurance Experiment: Evidence from the First Year* (July 2011), available at <http://www.nber.org/papers/w17190.pdf>.

<b>Table 26: Public Benefit Participation of Noncitizens, by Health Status, 2013 (in thousands)</b>									
	<b>Excellent</b>			<b>Very good</b>			<b>Good</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	6,494	2.1%		5,792	1.9%		5,646	1.8%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	1,181	18.2%	1.5%	1,185	20.5%	1.6%	1,349	23.9%	1.7%
Cash benefits	*39	*0.6%	0.3%	*84	*1.4%	0.5%	*59	*1.0%	0.4%
SSI	*14	*0.2%	0.2%	*42	*0.7%	0.3%	*34	*0.6%	0.3%
TANF	*25	*0.4%	0.2%	*32	*0.5%	0.3%	*11	*0.2%	0.2%
GA	*1	*0.0%	0.0%	*11	*0.2%	0.2%	*14	*0.2%	0.2%
Non-cash benefits	1,181	18.2%	1.5%	1,156	20.0%	1.6%	1,337	23.7%	1.7%
Medicaid	815	12.6%	1.2%	794	13.7%	1.4%	949	16.8%	1.5%
SNAP	436	6.7%	0.9%	487	8.4%	1.1%	533	9.4%	1.2%
Housing vouchers	108	1.7%	0.5%	*56	*1.0%	0.4%	*93	*1.7%	0.5%
Rent subsidy	240	3.7%	0.7%	213	3.7%	0.8%	223	4.0%	0.8%
	<b>Fair</b>			<b>Poor</b>					
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>				
<b>Total Population</b> 310,867	1,705	0.5%		526	0.2%				
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>			
Cash or non-cash	584	34.2%	3.4%	259	49.2%	6.5%			
Cash benefits	121	7.1%	1.8%	*67	*12.8%	4.3%			
SSI	108	6.3%	1.7%	*57	*10.8%	4.0%			
TANF	*4	*0.3%	0.4%	*1	*0.2%	0.6%			
GA	*13	*0.8%	0.6%	*9	*1.7%	1.7%			
Non-cash benefits	575	33.7%	3.4%	248	47.2%	6.5%			
Medicaid	383	22.5%	3.0%	189	36.0%	6.2%			
SNAP	257	15.1%	2.6%	115	21.9%	5.4%			
Housing vouchers	*24	*1.4%	0.8%	*6	*1.2%	1.4%			
Rent subsidy	121	7.1%	1.8%	*72	*13.7%	4.5%			

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP). Medicaid coverage is associated with higher rates of self-reported health status as good, very good, or excellent, which would lead to higher rates of Medicaid enrollment in those categories. See Amy Finkelstein et al., Nat'l Bureau of Econ. Research, Working Paper 17190, *The Oregon Health Insurance Experiment: Evidence from the First Year* (July 2011), available at <http://www.nber.org/papers/w17190.pdf>.

\* Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

As noted in the discussion of the health factor above, USCIS would rely on panel physician and civil surgeon medical examination for purposes of whether an individual's circumstances gives rise to this heavily weighted negative factor. USCIS would consider it a

heavily weighed negative factor if the panel physician or civil surgeon reports a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the alien's ability to provide for him- or herself, attend school, or work; and the alien is uninsured or has health insurance that constitutes a public benefit under 212.21(b), or the alien has no prospect of obtaining private health insurance, or other non-governmental means of paying for medical treatment.

**(e) Alien Previously Found Inadmissible or Deportable Based on Public Charge**

DHS is proposing to consider an alien previously found inadmissible or deportable based on public charge grounds to be a high risk of becoming a public charge in the future.<sup>582</sup> Absent countervailing positive factors and evidence to show that current circumstances outweigh the conditions that supported the finding of inadmissibility, the previous finding will carry heavy weight in determining that an alien is likely to be a public charge again.

**2. Heavily Weighed Positive Factors**

Significant income, assets, and resources play a major role in whether an individual is likely to become a public charge. In addition, as described above, Tables 27 and 28 show a relationship between the FPG and welfare participation rates among both U.S. citizens and noncitizens in receipt of non-cash benefits in 2013. The percentage of people receiving these public benefits generally goes down as the income percentage increases. Specifically, 52.0 percent of U.S. citizens living below 125 percent of the FPG received non-cash benefits compared to 42.4 percent of those living between 125 and 250 percent of the FPG, 36.9 percent of those living between 250 and 400 percent of the FPG, and 13.5 percent of those above 400 percent of the FPL. Noncitizen participation rates in non-cash benefit programs among those

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<sup>582</sup> See proposed 8 CFR 212.22(c)(1)(v).

living below 125 percent of the FPG was about 40 percent, compared to about 35 percent of those either between 125 and 250 percent of the FPG or 250 and 400 percent of the FPG.<sup>583</sup> Among noncitizens living above 400 percent of the FPG, the rate of receipt was 17.1 percent. Among U.S. citizens, the rate of receipt of cash benefits among those living below 125 percent of the FPG was 12.9 percent, compared to a rate of 10.3 percent among those living between 125 and 250 percent of the FPG, 5.5 percent among those living between 250 and 400 percent of the FPG, and 1.9 percent of those living above 400 percent of the FPG. Among noncitizens, the rates of receipt were 6.7 percent among those living below 125 percent of the FPG, about 2 to 3 percent among those either living between 125 to 250 percent of the FPG or living between 250 to 400 percent of the FPG, and 1.1 percent among those living above 400 percent of the FPG. Because many public benefit programs determine eligibility based on the FPG, individuals living above 250 percent of the FPG are less likely to receive public benefits.

For these reasons, and based on the data that follows, DHS proposes to consider it a heavily weighed positive factor if the alien has financial assets, resources, support, or annual income of at least 250 percent of the FPG in the totality of the circumstances.<sup>584</sup> However, DHS notes that an alien with an annual income of less than 250 percent of FPG would not automatically be inadmissible based on public charge. Instead, all the factors as discussed above would be considered in the totality of the circumstances, which may be favorable to be person regardless of whether the income is below 250 percent of the FPG.

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<sup>583</sup> The difference in rates between noncitizens living below 125 percent of the FPG and those living either between 125 and 250 percent of the FPG, or 250 and 400 percent of the FPG, was not statistically significant.

<sup>584</sup> Income between 125 and 250 percent of the FPL is considered a positive factor in the public charge inadmissibility analysis.

**Table 27. Public Benefit Participation Among U.S. Citizens by Federal Poverty Guidelines (FPG), 2013 (in thousands)**

	0-125% FPG			>125-250% FPG		
	Population	% of Total Population		Population	% of Total Population	
<b>Total Population</b> 310,867	19,947	6.4%		20,790	6.7%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	10,506	52.7%	1.0%	9,006	43.3%	0.9%
Cash benefits	2,572	12.9%	0.6%	2,138	10.3%	0.6%
SSI	1,909	9.6%	0.6%	1,480	7.1%	0.5%
TANF	463	2.3%	0.3%	561	2.7%	0.3%
GA	240	1.2%	0.2%	178	0.9%	0.2%
Non-cash benefits	10,368	52.0%	1.0%	8,819	42.4%	0.9%
Medicaid	7,844	39.3%	0.9%	6,545	31.5%	0.9%
SNAP	7,596	38.1%	0.9%	6,215	29.9%	0.9%
Housing vouchers	1,455	7.3%	0.5%	956	4.6%	0.4%
Rent subsidy	3,671	18.4%	0.7%	2,558	12.3%	0.6%
	>250-400% FPG			>400% FPG		
	Population	% of Total Population		Population	% of Total Population	
<b>Total Population</b> 310,867	26,101	8.4%		223,865	72.0%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	9,774	37.4%	0.8%	31,194	13.9%	0.2%
Cash benefits	1,439	5.5%	0.4%	4,280	1.9%	0.1%
SSI	1,036	4.0%	0.3%	3,227	1.4%	0.1%
TANF	313	1.2%	0.2%	844	0.4%	0.0%
GA	120	0.5%	0.1%	361	0.2%	0.0%
Non-cash benefits	9,635	36.9%	0.8%	30,207	13.5%	0.2%
Medicaid	7,528	28.8%	0.8%	24,525	11.0%	0.2%
SNAP	6,107	23.4%	0.7%	13,167	5.9%	0.1%
Housing vouchers	995	3.8%	0.3%	1,240	0.6%	0.0%
Rent subsidy	2,103	8.1%	0.5%	3,229	1.4%	0.1%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

<b>Table 28. Public Benefit Participation Among Noncitizens by Federal Poverty Guidelines (FPG), 2013 (in thousands)</b>						
	<b>0-125% FPG</b>			<b>&gt;125-250% FPG</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	1,580	0.5%		1,495	0.5%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	629	39.8%	3.6%	526	35.1%	3.6%
Cash benefits	106	6.7%	1.8%	*42	*2.8%	1.3%
SSI	*67	*4.2%	1.5%	*38	*2.6%	1.2%
TANF	*27	*1.7%	0.9%	*4	*0.3%	0.4%
GA	*13	*0.8%	0.6%	-	-	-
Non-cash benefits	619	39.2%	3.5%	523	34.9%	3.6%
Medicaid	501	31.7%	3.4%	363	24.2%	3.3%
SNAP	274	17.4%	2.8%	317	21.2%	3.1%
Housing vouchers	*65	*4.1%	1.4%	*56	*3.7%	1.4%
Rent subsidy	206	13.0%	2.4%	106	7.1%	1.9%
	<b>&gt;250-400% FPG</b>			<b>&gt;400% FPG</b>		
	<b>Population</b>	<b>% of Total Population</b>		<b>Population</b>	<b>% of Total Population</b>	
<b>Total Population</b> 310,867	2,377	0.8%		14,711	4.7%	
<b>Benefit program</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>	<b>Total</b>	<b>Pct.</b>	<b>S.E.</b>
Cash or non-cash	849	35.7%	2.9%	2,554	17.4%	1.0%
Cash benefits	*55	*2.3%	0.9%	167	1.1%	0.3%
SSI	*45	*1.9%	0.8%	104	0.7%	0.2%
TANF	*5	*0.2%	0.3%	*37	*0.3%	0.1%
GA	*4	*0.2%	0.3%	*30	*0.2%	0.1%
Non-cash benefits	840	35.3%	2.9%	2,516	17.1%	0.9%
Medicaid	516	21.7%	2.5%	1,751	11.9%	0.8%
SNAP	357	15.0%	2.1%	880	6.0%	0.6%
Housing vouchers	*57	*2.4%	0.9%	110	0.7%	0.2%
Rent subsidy	181	7.6%	1.6%	377	2.6%	0.4%

Source: USCIS analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP).

\*Estimate is considered unreliable due to a high relative standard error.

- Estimate of zero

### (f) Previously Excluded Benefits

DHS would not consider public benefits under the proposed 8 CFR 212.21(b) that were previously excluded under the 1999 Interim Field Guidance if received before effective date of the final rule. DHS, however, would continue to consider cash benefits for income maintenance SSI, TANF and benefits for long-term institutionalization (i.e. those previously considered under

the 1999 Interim Field Guidance) that an alien received before the effective date of the final rule.<sup>585</sup>

Public benefits previously considered under the 1999 Interim Field Guidance and received prior to the effective date of this rule would be considered as a negative factor in the totality of the circumstances analysis when determining whether an alien is inadmissible as likely at any time to become a public charge. However, the receipt of such benefits would not be considered as a heavily weighed negative factor.

Table 29 provides a summary of how benefits received prior to and after the effective date of this proposed rule would be considered under the proposed rule.

<b>Table 29. Consideration of Benefits Received Prior to and After the Effective Date of this Rule</b>		
	<b>Benefits received before the</b>	<b>Public Benefits</b>

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<sup>585</sup> Under the 1999 Interim Field Guidance, DHS would consider the current receipt of cash benefits for income maintenance or long-term institutionalization at government expense in the totality of the circumstances. *See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689, 28690 (May 26, 1999) (“If at the time of application for admission or adjustment an alien is receiving a cash public assistance for income maintenance or is institutionalized for long-term care (as discussed in section 6, below), that benefit should be taken into account under the totality of the circumstances test, along with the other statutory factors under section 212(a)(4)(B)(i) and any [adjustment of status].”). DHS would also consider past receipt of cash benefits for income maintenance or long-term institutionalization at government expense in the totality of the circumstances. *See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689, 28690 (May 26, 1999) (“[P]ast receipt of cash income-maintenance benefits does not automatically make an alien inadmissible as likely to become a public charge, nor does past institutionalization for long-term care at government expense. Rather this history would be one of many factors to be considered in applying the totality of the circumstances test.”).



	effective date of this rule	received after the effective date of this rule
<b>Benefits excluded under the 1999 Interim Field Guidance</b> <b>Example: SNAP</b> <sup>586</sup>	Not considered	Considered, as set forth in 8 CFR 212.21(b).
<b>Benefits considered under the 1999 Interim Field Guidance</b> <b>Example: cash assistance for income maintenance, including SSI, TANF, General Assistance programs, programs supporting aliens who are institutionalized for long-term care</b>	Considered. DHS will consider as a negative factor any amount of these benefits received as provided under the 1999 Interim Field Guidance <sup>587</sup>	Considered, as set forth in 8 CFR 212.21(b).

### *Examples*

The following examples illustrate how DHS will consider benefits received prior to the effective date of the rule for the purposes of making public charge inadmissibility determinations. These examples are for illustrative purposes only and assume a closed universe of facts for purposes of simplicity. The examples are not intended to represent actual possible outcomes, as each case is reviewed individually on its own merits. Under the proposed rule, benefits received prior to the effective date of the rule would be excluded from consideration unless such benefits would have been considered under the 1999 Interim Field Guidance.<sup>588</sup>

<sup>586</sup> SNAP benefits received after the effective date of the proposed rule will be valued as set forth in proposed 8 CFR 212.24(a).

<sup>587</sup> The 1999 Interim Field Guidance suggests that any past or current receipt of the type of public benefits included for consideration will be included in the public charge inadmissibility determination. *See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689, 28690 (May 26, 1999) (“If at the time of application for admission or adjustment an alien is receiving a cash public assistance for income maintenance or is institutionalized for long-term care (as discussed in section 6, below), *that benefit* should be taken into account under the totality of the circumstances test, along with the other statutory factors under section 212(a)(4)(B)(i) and any AOS . . . . Past receipt of cash income-maintenance benefits does not automatically make an alien inadmissible as likely to become a public charge, nor does past institutionalization for long-term care at government expense. Rather this history would be one of many factors to be considered in applying the totality of the circumstances test. In the case of an alien who has received cash income-maintenance benefits in the past or who has been institutionalized for long-term care at government expense, a Service officer determining admissibility should assess the totality of the alien’s circumstances at the time of the application for admission or adjustment and make a forward-looking determination regarding the likelihood that the alien will become a public charge after admission or adjustment.” (emphasis added)).

<sup>588</sup> *See* proposed 8 CFR 212.21(c).

However, benefits received after the effective date of the rule would be considered to the extent that they are a public benefit, as defined in 8 CFR 212.21(b).

### **Example 1: Benefits Excluded Under the 1999 Interim Field Guidance**

Example 1 is based on the following scenario: The DHS rule on public charge inadmissibility under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), goes into effect on January 1, 2019. The alien is the only member of the household, has been paroled into the United States pursuant to section 212(d)(5) of the Act for over five years, and is seeking to adjust status based on a visa category subject to public charge inadmissibility. The alien files the adjustment of status application on May 1, 2019, and the application is adjudicated on September 1, 2019. HHS published the new FPG in early January 2019, which contains the same values as the 2018 FPG for purposes of this example. For a household of 1, the FPG is \$12,140. Fifteen percent of the FPG is \$1,821 in a 12-month period. The alien is certified to receive SNAP benefits for 36 months, beginning on January 1, 2018. For the consecutive 12-month period between January 1, 2018 and December 31, 2018, the alien receives \$2,160 in SNAP benefits. For the consecutive twelve-month period between January 1, 2019 and December 31, 2019, the alien receives \$2,160 in SNAP benefits. The alien received no other public benefits. SNAP was previously excluded under the 1999 Interim Field Guidance, but is included in proposed 8 CFR 212.21(b).

Under proposed 8 CFR 212.22(d), the SNAP benefits the alien received before January 1, 2019, the effective date of the public charge rule, would not be considered. However, the SNAP benefits the alien received on or after January 1, 2019 would be considered if the aggregate annual value of SNAP benefits received since the effective date of the rule exceeds \$1,821 (fifteen percent of the FPG for the household of one within any period of consecutive twelve

consecutive months). For the consecutive twelve-month period between January 1, 2019 and September 1, 2019, the date of adjudication, the alien had only received a total of \$1,620 in SNAP benefits, which is less than the threshold amount. However, because the alien is certified to receive \$2,160 in SNAP benefits for a consecutive twelve-month period beginning after the rule's effective date, and such amount exceeds fifteen percent of the FPG, these benefits would be considered as a heavily weighed negative factor in the totality of the circumstances, as illustrated in Table 30. In this case, absent other evidence tending to show that the alien is unlikely to receive the benefits covered by the certification, USCIS would probably find that the alien is likely to become a public charge and is ineligible for adjustment of status.

<b>Table 30. Example 1, Benefits Excluded Under the 1999 Interim Field Guidance</b>			
<b>Consecutive 12 Month Period</b>	<b>Benefit Received</b>	<b>Total Amount Received During Consecutive 12-month Period/Total Amount Certified for Consecutive 12-Month Period</b>	<b>Considered for purposes of the public charge inadmissibility determination under the proposed rule?</b>
Jan. 1, 2018 to Dec. 31, 2018	SNAP <sup>589</sup>	\$2,160/certified for \$2,160	No – SNAP benefits were previously excluded under the 1999 Interim Field Guidance, and therefore, any amount received prior to the effective date of the rule would not be considered.
Jan. 1, 2019 to to December 31, 2020	SNAP	\$1,620 received as of date of adjudication/certified for \$2,160	Yes – although the proportional amount of SNAP benefits received during this consecutive 12-month period does not exceed 15 percent of the 2019 FPG (\$1,821) for a household size at the time of adjudication, because the alien was certified to receive SNAP for this entire period, in an amount that exceeds 15% of the FPG, this certification would be a heavily weighed negative factor in the totality of the circumstances.

### **Example 2: Benefits Excluded Under the 1999 Interim Field Guidance**

<sup>589</sup> Pursuant to proposed 8 CFR 212.24(a), for SNAP benefits, DHS would calculate the value of the benefit attributable to the alien in proportion to the total number of people covered by the benefit, based on the amount(s) deposited as defined in 212.21(b) which the benefits are received in the Electronic Benefits Transfer (EBT) card account.

Example 2 is based on the following scenario: The DHS rule on public charge inadmissibility under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), goes into effect on January 1, 2019. An alien is the only member of the household, has been paroled pursuant to section 212(d)(5) of the Act for over five years, and is seeking to adjust status based on a visa category subject to a public charge inadmissibility determination. The alien files the adjustment of status application on May 1, 2020, and the application is adjudicated on September 1, 2020. HHS publishes the calendar year 2019 FPG in early January 2019 and the 2020 FPG in early January 2020. For the purposes of this example, the FPG for 2019 and 2020 contains the same values as the FPG for 2018, which is \$12,140. Fifteen percent of the FPG for 2018, 2019 and 2020 would be \$1,821 in the relevant consecutive 12-month periods for this example. The alien was certified to receive SNAP for 36 months beginning in January 2018. The alien received no other public benefits. For the consecutive twelve-month period between January 1, 2018 and December 31, 2018, the alien received \$2,160 in SNAP benefits. For the consecutive twelve-month period between January 1, 2019 and December 31, 2019, the alien received \$2,160 in SNAP benefits. Beginning on January 1, 2020, however, the alien no longer receives any SNAP benefits. The alien provided a benefits termination letter as evidence along with the alien's adjustment application.

Under proposed 8 CFR 212.22(d), the SNAP benefits the alien received before January 1, 2019, the effective date of the public charge rule, would not be considered. However, the SNAP benefits the alien received on or after January 1, 2019 would be considered if the aggregate annual value of SNAP benefits received since the effective date of the rule exceeds \$1,821 (fifteen percent of the FPG for the household of one within any period of consecutive twelve consecutive months). For the consecutive twelve-month period between January 1, 2019 and

December 31, 2019, the SNAP benefits the alien received exceeded the fifteen percent threshold, and therefore would be considered. Because the receipt was within the 36 months immediately preceding the application, it is a heavily weighed factor in the totality of the circumstances. The termination letter suggests, however, that the alien is unlikely to receive future public benefits. DHS would weigh the termination letter along with the other evidence, in the totality of the circumstances. The preceding analysis is summarized in Table 31.

<b>Table 31. Example 2 Benefits Excluded Under the 1999 Interim Field Guidance</b>			
<b>Consecutive 12 Month Period</b>	<b>Benefit Received</b>	<b>Total Amount Received During Consecutive 12-month Period/Total Amount Certified for Consecutive 12-Month Period</b>	<b>Receipt of Public Benefits considered for purposes of the public charge determination under the proposed rule?</b>
Jan. 1, 2018 to Dec. 31, 2018	SNAP <sup>590</sup>	\$2,160	No – SNAP benefits were previously excluded under the 1999 Interim Field Guidance, and therefore, would not be considered because received prior to the effective date of this rule.
Jan. 1, 2019 to Dec. 31, 2019	SNAP	\$2,160	Yes – \$2,160 in proportional SNAP benefits received for 12 consecutive months beginning in January 2019 and concluding in December 2019 exceeded 15 percent of the 2019 FPG (\$1,821) for a household size of one.  Also, as the benefit was received within 36 months of the time of filing the application (May 1, 2020), the receipt would be a heavily weighed negative factor in the totality of the circumstances under proposed 8 CFR 212.22(c)(1)(ii).
Jan. 1, 2020 to September 1, 2020	None	None	N/A

### **Example 3: Benefits Previously Excluded and Included Under the 1999 Interim Field Guidance**

<sup>590</sup> Pursuant to proposed 8 CFR 212.24(a), for SNAP benefits, DHS would calculate the value of the benefit attributable to the alien in proportion to the total number of people covered by the benefit, based on the amount(s) deposited as defined in 212.21(b) which the benefits are received in the Electronic Benefits Transfer (EBT) card account.

The example is based on the following scenario: The DHS rule on public charge inadmissibility under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), goes into effect on January 1, 2019. An alien has been paroled into the United States pursuant to section 212(d)(5) of the Act for over five year and is seeking to adjust status based on a visa category subject to the public charge inadmissibility determination. The alien's household of three includes the alien and the alien's two U.S. citizen children. The alien files an adjustment of status application on May 1, 2019, and the application is adjudicated on September 1, 2019. HHS publishes the calendar year 2019 FPG in early January 2019. For the purposes of this example, the FPG for 2019 contains the same values as the FPG for 2018. The relevant FPG based on a household of one in a consecutive twelve-month period is \$12,140. Fifteen percent of the average FPG for the consecutive twelve-month period between January 1, 2018 and FPG for December 31, 2018 is \$1,821. Fifteen percent of the average FPG for the consecutive twelve-month period between January 1, 2019 and FPG for December 31, 2019 is also \$1,821.

For the consecutive twelve-month period between January 1, 2018 and December 31, 2018, the alien's household of 3 receives \$2,400 in SNAP benefits. The proportional value of the \$2,400 SNAP benefit attributable to the alien based on her household size of 3 for this consecutive twelve-month period would be \$800, or one third of \$2,400. Similarly, for the consecutive twelve-month period between January 1, 2019 and December 31, 2019, the alien's household is certified to receives \$1,800 in SNAP benefits for the a household size of 3.

The alien is also receiving TANF. For the consecutive twelve-month period between January 1, 2018 until December 31, 2018, the alien also receives a proportionate share of \$100 per month in TANF benefits or \$1,200 for the twelve-month period. The alien is certified to

continue to receive TANF at this level through December 2019, and there is no evidence that the alien has terminated receipt.

Under proposed 8 CFR 212.22(d), the SNAP benefits the alien received before January 1, 2019, the effective date of the public charge rule, would not be considered. However, the SNAP benefits the alien received on or after January 1, 2019 would be considered if the cumulative value of all monetizable benefits received exceeded \$1,821. TANF was considered under the 1999 Interim Field Guidance and therefore, the total value of the benefit received prior January 1, 2019 would be considered as a negative factor in the totality of the circumstances.<sup>591</sup> TANF benefits received after January 1, 2019 would be considered if the total value of the alien's receipt of one or more public benefits exceeded \$1,821 during the relevant consecutive twelve-month period. At the time the alien's application was adjudicated on September 1, 2019, the alien received \$600 in proportional SNAP benefits and \$900 in TANF benefits during the consecutive 12-month period between January 1, 2019 and September 1, 2019, which, cumulatively, is less than 15 percent of the FPG in the amount of \$1,821. Therefore, the alien's receipt of SNAP and TANF in 2019 would not be considered past receipt of public benefits within the 36-month period immediately preceding the application. However, because the alien was certified to receive both SNAP and TANF for the entire consecutive twelve-month period between January 1, 2019 and December 31, 2019 in a cumulative amount that exceeds the fifteen

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<sup>591</sup> Note that considering the past receipt of previously included benefits as a negative factor in the totality of the circumstances is consistent with how such benefits were treated under the 1999 Interim Field Guidance, under which an "officer determining admissibility should assess the totality of the alien's circumstances at the time of the application for admission or adjustment . . . The longer ago an alien received such cash benefits or was institutionalized, the *less weight* these factors will have as a predictor of future receipt. Also, the 'length of time an applicant has received public cash assistance is a significant factor.' The longer an alien has received cash income-maintenance benefits in the past and the greater the amount of benefits, *the stronger the implication that the alien is likely to become a public charge. The negative implication of past receipt of such benefits or past institutionalization [sic], however, may be overcome by positive factors in the alien's case demonstrating an ability to be self-supporting.*" *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689, 28690 (May 26, 1999).

percent threshold, this would be a heavily weighed factor in the totality of the circumstances, as illustrated in Table 32.

<b>Table 32. Example 3, Benefits Previously Excluded and Included Under the 1999 Interim Field Guidance</b>			
<b>12 Consecutive Months Period</b>	<b>Benefit Type Received</b>	<b>Total Amount Received During Consecutive 12-month Period/Total Amount Certified for Consecutive 12-Month Period</b>	<b>Receipt of Public Benefits considered for purposes of the public charge determination under the proposed rule?</b>
Jan. 1, 2018 to Dec. 31, 2018	SNAP	\$800	No – SNAP benefits were previously excluded under the 1999 Interim Field Guidance, and therefore, any amount received prior to the effective date of the rule would not be considered.
	TANF	\$1,200	Yes – TANF benefits were included for consideration under the 1999 Interim Field Guidance. Considered as a negative factor in the totality of the circumstances.
Jan. 1, 2019 to Sept. 1, 2019 (but certified through Dec. 31, 2019)	SNAP	\$600 received (as of 9/2019)), but certified to receive \$800 for the consecutive 12-month period between January 1 and December 31, 2019	Yes – the alien was certified to receive a cumulative amount of SNAP and TANF for the consecutive 12 month period between January 1 and December 31, 2019 that exceeds 15 percent of FPG based on a household of one, and therefore, is a heavily weighed negative factor in the totality of the circumstances.
	TANF	\$900 received (as of 09/2019) but certified to receive \$1,200 for the consecutive 12-month period between January 1 and December 31, 2019	
	Total	Received \$1,500 but certified to receive a cumulative total of \$2,000 for the consecutive 12-month period between January 1 and December 31, 2019	

DHS notes that the proposed exclusion of certain benefits received before the effective date may provide an opportunity for public benefit granting agencies to communicate the consequences of receiving public benefits, to the extent such agencies deem appropriate. In



addition, the proposed exclusion provides advance notice to aliens that DHS is considering to change which public benefits it will consider for purposes of public charge inadmissibility determinations. If finalized, this provision, coupled with the proposed 60-day effective date, would give aliens an opportunity to stop receiving public benefits and obtain other means of support before filing for immigration benefits.

DHS welcomes comment on whether DHS should consider receipt of public benefits previously considered under the 1999 Interim Field Guidance as described in Table 29 at all, or if DHS should consider the benefit(s) in some other way than as a negative factor in the totality of the circumstances.

### **M. Summary of Review of Factors in the Totality of the Circumstances**

An alien's likelihood of becoming a public charge, as discussed above, is prospective and based on the totality of the alien's circumstances. The Form I-944, Declaration of Self-Sufficiency, would be used by DHS to assess whether the alien is likely to become a public charge based on the totality of the circumstances. Table 33 below, provides a brief summary of the totality of the circumstances framework for public charge inadmissibility determinations.

<b>Table 33. Totality of Circumstances Framework for Public Charge Determinations</b>			
<i><b>Factor</b></i>	<i><b>Considerations</b></i>	<i><b>Examples of Positive or Negative Findings By Factor</b></i>	<i><b>Weight of Factor</b></i>
<b>Age</b>	<ul style="list-style-type: none"> <li>• <math>18 \leq \text{age} \leq 61</math></li> <li>• Age &gt; 61</li> <li>• Age &lt; 18</li> </ul>	<p><u><b>Positive</b></u></p> <ul style="list-style-type: none"> <li>• <math>18 \leq \text{age} \leq 61</math></li> </ul> <p><u><b>Negative</b></u></p> <ul style="list-style-type: none"> <li>• Age &gt; 61 unless alien can demonstrate employment or sufficient household assets and resources</li> <li>• Age &lt; 18 unless alien can demonstrate employment or sufficient household assets and resources</li> </ul>	The degree to which the alien's age affects otherwise makes the alien more or less likely to become a public charge, such as by impacting the alien's ability to work
<b>Health</b>	<ul style="list-style-type: none"> <li>• Evidence of any medical condition(s) that: (1) Is likely to require</li> </ul>	<p><u><b>Positive</b></u></p> <ul style="list-style-type: none"> <li>• Absence of any medical conditions that is likely</li> </ul>	The degree to which the alien's health makes the alien more or less likely to become a public charge, including whether the alien has been

<b>Table 33. Totality of Circumstances Framework for Public Charge Determinations</b>			
<b>Factor</b>	<b>Considerations</b>	<b>Examples of Positive or Negative Findings By Factor</b>	<b>Weight of Factor</b>
	<p>extensive treatment or institutionalization, or</p> <p>(2) Will interfere with the alien's ability to care for him- or herself, to attend school, or to work</p>	<p>to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to care for him- or herself, to attend school, or to work</p> <p><b>Negative</b></p> <ul style="list-style-type: none"> <li>• Presence of any medical condition that is likely to require extensive medical treatment or institutionalization, or that will to interfere with the alien's ability to care for him- or herself, to attend school, or to work</li> </ul>	<p>diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for him- or herself, to attend school, or to work upon admission or adjustment of status</p>
<b>Family Status</b>	<ul style="list-style-type: none"> <li>• Whether alien has a household that he or she supports</li> <li>• Whether another household is supporting the alien</li> </ul>	<p><b>Positive/Negative</b><sup>592</sup></p> <p>Alien's household size in relation to alien's household assets and resources</p>	<p>The degree to which the alien's household size makes the alien more or less likely to become a public charge</p>
<b>Assets, Resources, and Financial Status</b>	<ul style="list-style-type: none"> <li>• Annual gross household income excluding any income from public benefits</li> <li>• Any additional income from individuals not included in the alien's household who physically reside with the alien</li> <li>• Additional income to the alien by or source outside of the household on a continuing monthly or yearly basis for the most recent calendar year excluding any income from public benefits</li> <li>• Household cash assets and resources, including as reflected in checking and savings account statements covering 12 months prior to filing the application</li> <li>• Non-cash assets and resources that can be converted into cash within 12 months, such</li> </ul>	<p><b>Positive</b></p> <ul style="list-style-type: none"> <li>• Annual gross household income <math>\geq</math> 125% of the most recent FPG based on the household size; or Household assets and resources <math>\geq</math> 5 times the difference between the total household income and 125% of the FPG for the household size</li> <li>• Alien has sufficient household assets and resources to cover any reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work</li> <li>• Alien has not applied for</li> </ul>	<p><b>In General</b></p> <p>The degree to which the alien's household's income, assets, and resources make the alien more or less likely to become a public charge</p> <p><b>Heavily Weighed Positive</b></p> <ul style="list-style-type: none"> <li>• Household assets, resources, and support <math>\geq</math> 250% of the FPG for the household size</li> <li>• Alien is authorized to work and currently employed with an annual household income <math>\geq</math> 250% of the FPG for the household size</li> </ul> <p><b>Heavily Weighed Negative</b></p> <ul style="list-style-type: none"> <li>• Alien cannot demonstrate current employment, employment history, or reasonable prospect of future employment</li> <li>• Alien is currently receiving one or more public benefits, as defined 8 CFR 212.21(b).</li> <li>• Alien has received one or more public benefits, as defined in 8 CFR 212.21(b), within 36 months immediately preceding filing his or her application for a visa, admission, or adjustment of status</li> <li>• Alien was diagnosed with a medical condition that is likely to require extensive medical</li> </ul>

<sup>592</sup> The family status factor consideration entails determining the alien's household size and whether the alien has his or her own household or is a part of another individual's household. Among noncitizens in families with 3 or 4 people, about 20 percent received non-cash assistance, while about 30 percent of noncitizens in families of 5 or more received non-cash benefits.

**Table 33. Totality of Circumstances Framework for Public Charge Determinations**

<i>Factor</i>	<i>Considerations</i>	<i>Examples of Positive or Negative Findings By Factor</i>	<i>Weight of Factor</i>
	<p>as net cash value of real estate holdings minus the sum of all loans secured by a mortgage, trust deed, or other lien on the home; annuities; securities; retirement and educational accounts; and any other assets that can be converted into cash easily</p> <ul style="list-style-type: none"> <li>• Financial liabilities</li> <li>• Applied for or received any public benefit as defined in 212.21(b) on or after the effective date</li> <li>• Been certified or approved to receive public benefits, as defined in 8 CFR 212.21(b), on or after the effective date</li> <li>• Applied for or received a fee waiver for an immigration benefit request on or after the effective date</li> <li>• Credit history and credit score</li> <li>• Private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work</li> </ul>	<p>or received any public benefits, as defined in 8 CFR 212.21(b), on or after effective date of the rule</p> <ul style="list-style-type: none"> <li>• Alien was not certified or approved to receive public benefits, as defined in 8 CFR 212.21(b), on or after the effective date of the rule</li> <li>• Alien has not applied for or received an immigration fee waiver on or after the effective date</li> <li>• Alien has good credit and a credit score</li> <li>• Alien has private health insurance or financial resources to pay for reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work</li> </ul> <p><b>Negative</b></p> <ul style="list-style-type: none"> <li>• Alien's assets and resources &lt; than 125% of the most recent FPG based on household size; or Alien's household assets and resources &lt; than 5 times the difference between the household income and 125% of the FPG for the household size</li> <li>• Alien has insufficient assets and resources to cover any reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the alien's ability to provide care for him- or</li> </ul>	<p>treatment or institutionalization or that will interfere with the alien's ability to provide for him- or herself, attend school, or work; and the alien is uninsured and has neither the prospect of obtaining private health insurance, or the financial resources to pay for reasonably foreseeable medical costs related to a the medical condition</p> <ul style="list-style-type: none"> <li>• Alien was previously found inadmissible or deportable on public charge grounds</li> </ul>

<b>Table 33. Totality of Circumstances Framework for Public Charge Determinations</b>			
<b><i>Factor</i></b>	<b><i>Considerations</i></b>	<b><i>Examples of Positive or Negative Findings By Factor</i></b>	<b><i>Weight of Factor</i></b>
		<p>herself-care, to attend school, or to work</p> <ul style="list-style-type: none"> <li>• Financial liabilities</li> <li>• Alien has applied for or received any public benefits, as defined in 8 CFR 212.21(b), on or after effective date of the rule</li> <li>• Alien has been certified or approved to receive public benefits, as defined in 8 CFR 212.21(b), on or after effective date of the rule</li> <li>• Alien has received an immigration benefit fee waiver on or after the effective date</li> <li>• Alien has bad credit and a low credit score</li> </ul> <p>Alien does not have private health insurance or financial resources to pay for reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work</p>	
<b>Education and Skills</b>	<ul style="list-style-type: none"> <li>• Employment history</li> <li>• High school diploma or higher education</li> <li>• Occupational skills, certifications, or licenses</li> <li>• Proficiency in English or in additional languages</li> </ul>	<p><b><u>Positive</u></b></p> <ul style="list-style-type: none"> <li>• Alien has adequate education and skills to obtain or maintain employment sufficient to avoid becoming a public charge in the United States</li> <li>• Alien is sufficiently proficient in English or additional languages to enter the U.S. job market</li> <li>• Alien can obtain skilled or higher paid labor</li> </ul> <p><b><u>Negative</u></b></p> <ul style="list-style-type: none"> <li>• No employment history</li> </ul>	The degree to which the alien has adequate education and skills to either obtain or maintain employment sufficient to avoid becoming a public charge, if authorized for employment.

<b>Table 33. Totality of Circumstances Framework for Public Charge Determinations</b>			
<i><b>Factor</b></i>	<i><b>Considerations</b></i>	<i><b>Examples of Positive or Negative Findings By Factor</b></i>	<i><b>Weight of Factor</b></i>
		<ul style="list-style-type: none"> <li>• Lack of high school diploma or higher education</li> <li>• Alien does not have adequate education and skills to either obtain or maintain employment sufficient to avoid becoming a public charge, if authorized for employment</li> <li>• Not familiar with the English language sufficient to enter the job market</li> </ul>	
<b>Affidavit of Support</b> <sup>593</sup> (if required)	<ul style="list-style-type: none"> <li>• Sponsor's annual income, assets, and resources</li> <li>• Sponsor's relationship to the applicant</li> <li>• Likelihood that the sponsor would actually provide financial support to the alien</li> </ul>	<p><u><b>Positive</b></u></p> <ul style="list-style-type: none"> <li>• <b>Assets and resources ≥ 125%</b> of the most recent <b>Federal Poverty Guidelines</b> based on the sponsor's household size</li> <li>• Likely that sponsor would provide financial support to the alien</li> </ul> <p><u><b>Negative</b></u></p> <ul style="list-style-type: none"> <li>• Unlikely that sponsor would provide financial support to the alien</li> </ul>	<p><u><b>Disqualifying - Inadmissible</b></u></p> <ul style="list-style-type: none"> <li>• Assets and resources &lt; 125% of the most recent FPG based on household size</li> </ul>
<p><u><b>Analysis</b></u></p> <ul style="list-style-type: none"> <li>• Evaluate all factors and circumstances within each factor. The mere presence of any one enumerated circumstance is not, alone, determinative.<sup>594</sup></li> <li>• Assess whether each factor is positive or negative – Any factor or circumstance that decreases the likelihood of an alien becoming a public charge is positive. Any factor or circumstance that increases the likelihood of an alien becoming a public charge is negative.</li> <li>• Assess the degree to which each factor is positive or negative – Other than the heavily weighed factors, the weight given to an individual factor would generally depend on the particular facts and circumstances of each case and the relationship of the factor to other factors in the analysis.</li> <li>• Heavily weighed factors – Certain enumerated factors will generally weigh heavily in favor of finding that an alien is likely to become a public charge or finding that an alien is not likely to become a public charge.</li> <li>• Other than a required but absent or insufficient sponsor's affidavit of support, no one factor alone establishes an alien's admissibility or inadmissibility.</li> </ul>			
<u><b>Admissible or Inadmissible</b></u>			

<sup>593</sup> A sponsor must be able to demonstrate the means to maintain an income of ***at least*** 125 percent of the Federal Poverty Guidelines for the sponsor's household size. See INA section 213A, 8 U.S.C. 1183a. For aliens who are subject to the sponsor requirements, if a sponsor is not able to have a sufficient affidavit of support, the alien is inadmissible based on public charge under INA sections 212(a)(4) and 213A, 8 U.S.C. 1182(a)(4) and 1183a.

<sup>594</sup> Except that the absence of a sufficient affidavit of support, where required, will lead to an inadmissibility finding. See INA 212(a)(4)(C), (D), 8 U.S.C. 1182(a)(4)(C), (D).

<b>Table 33. Totality of Circumstances Framework for Public Charge Determinations</b>			
<i><b>Factor</b></i>	<i><b>Considerations</b></i>	<i><b>Examples of Positive or Negative Findings By Factor</b></i>	<i><b>Weight of Factor</b></i>
<ul style="list-style-type: none"> <li>• <b>Admissible</b> – If DHS finds that the alien’s positive factors and circumstances outweigh the alien’s negative factors and circumstances, such that the alien is not likely to receive one or more public benefits at any time in the future as defined in 8 CFR 212.21(b), then DHS would conclude that the alien is not inadmissible likely to become a public charge.</li> <li>• <b>Inadmissible</b> – If DHS finds that the alien’s negative factors and circumstances outweigh the alien’s positive factors and circumstances, such that the alien is likely to receive public benefits at any time in the future as defined in 8 CFR 212.21(b), then DHS would conclude that the applicant is inadmissible as likely to become a public charge.</li> </ul>			

Below, DHS provides examples of potential public charge inadmissibility determinations. These examples are for illustrative purposes only and assume a closed universe of facts for purposes of simplicity. The examples are not intended to represent actual possible outcomes, as each case is reviewed individually on its own merits.

### **1. Favorable Determination of Admissibility**

The following is an example (Table 34) of a set of facts that would likely result in a favorable determination of admissibility for public charge purposes. An alien would need to meet all other admissibility and eligibility requirements of the immigration benefit the alien is seeking.

<b>Table 34. Example Applicant A</b>			
<b>Factor</b>	<b>Considerations</b>	<i><b>Positive or Negative, Findings By Factor</b></i>	<i><b>Weight of Factor</b></i>
Age	<ul style="list-style-type: none"> <li>• 30</li> </ul>	Positive (within Working age of 18-61)	Neutral
Health	<ul style="list-style-type: none"> <li>• No medical conditions</li> </ul>	Positive	Neutral
Family Status	<ul style="list-style-type: none"> <li>• household of 1</li> </ul>	Positive	Neutral
Education and Skills	<ul style="list-style-type: none"> <li>• Currently working full-time and attending bachelor's degree program</li> </ul>	Positive	Neutral
Assets, Resources and Financial	<ul style="list-style-type: none"> <li>• Employed with income at 120 percent of the FPG</li> </ul>	Negative (income, no health insurance)	Neutral

Status	<ul style="list-style-type: none"> <li>Has not received any public benefits or any immigration fee waivers</li> <li>Has a good credit report and score</li> <li>Has no health insurance</li> </ul>	Positive  Positive  Negative	
Affidavit of Support	Not required, not applicable	Not applicable	Neutral
Prospective Immigration Status and Period of Stay	<ul style="list-style-type: none"> <li>Applying for Adjustment of Status under Employment Category - Unskilled worker (Cook) EW-6</li> <li>LPR/Permanent period of stay</li> </ul>	Positive	Neutral
Analysis in the totality of the circumstances:	The alien does not have any heavily weighed negative factors and the alien is applying for an employment-based immigrant status, which is a positive factor in the prospective immigration status factor. Although the alien has no current health insurance, the alien has no medical conditions that are likely to require extensive medical treatment, institutionalization, or that that will affect her ability to work, go to school, or otherwise care for herself. The applicant is not receiving and has not received public benefits or immigration fee waivers, is young, healthy, employed, attending college, and not responsible for providing financial support for any household members. Based on a consideration of these facts and circumstances in the totality, the alien is not likely to receive public benefits in the future, and therefore, would not be found inadmissible on the public charge ground.		

## 2. Unfavorable Determination of Admissibility

The following is an example (Table 35) of a set of facts that would likely result in an unfavorable determination of admissibility for public charge purposes. The alien may also be subject to other inadmissibility grounds.

Table 35: Example Applicant B			
Factor	Considerations	Positive or Negative Findings By Factor	Weight of Factor
Age	<ul style="list-style-type: none"> <li>68</li> </ul>	Negative	Neutral
Health	<ul style="list-style-type: none"> <li>Arthritis and heart disease (Class B medical conditions) that affect ability to work and require extensive medical treatment, as indicated in the medical examination</li> </ul>	Negative	Neutral
Family Status	<ul style="list-style-type: none"> <li>Widow, adult child is providing alien with over 50% of support. Household of 6 (alien, alien's adult child, and the adult child's spouse, and 3 children)</li> </ul>	Positive - in comparison to assets and resources	Neutral
Assets, Resources and Financial Status	<ul style="list-style-type: none"> <li>Alien has no earned income</li> <li>Annual household gross income is at 125 percent of the FPG for household of 6 (including adult child's income)</li> </ul>	Negative  Positive	Neutral  Neutral

	<ul style="list-style-type: none"> <li>• Alien has no pension and no additional assets or resources</li> <li>• Currently receiving a state cash benefit for income maintenance in excess of 15 percent of FPG consecutively for over the last 12 months</li> <li>• Has not received any immigration fee waivers</li> <li>• No information on credit history or score</li> <li>• The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for herself or work; and the alien is uninsured and has neither the prospect of obtaining private health insurance, or the financial resources to pay for reasonably foreseeable medical costs related to the medical condition.</li> </ul>	Negative  Negative  Positive  Not applicable  Negative	Neutral  Heavily Weighed  Neutral  Neutral  Heavily weighed
Education and Skills	<ul style="list-style-type: none"> <li>• No history of employment</li> <li>• No high school diploma or other education or skills</li> </ul>	Negative	Neutral
Affidavit of Support	<ul style="list-style-type: none"> <li>• Sufficient Affidavit of Support from adult child at 125 percent of the FPG for household of 6</li> </ul>	Positive	Neutral
Prospective Immigration Status and Period of Stay	<ul style="list-style-type: none"> <li>• Applying for Adjustment of Status under Family Category - Parent of a U.S. citizen (IR-0)</li> <li>• LPR/Permanent period of stay</li> </ul>	Neutral	Neutral
Analysis in the totality of the circumstances:	<p>Although the alien's family status, assets, sources, and financial status (household income is at 125 percent of the FPG), and sufficient affidavit of support are positive factors, the alien's negative factors outweigh the alien's positive factors. The alien's health, lack of employment history, and lack of education and skills indicate that the alien is unlikely to work in the future to meet her needs. Moreover, the alien has two heavily weighed negative factors. The alien has Class B medical conditions that are likely to require extensive medical treatment, and the alien has no earned income, personal assets and resources, or prospect of private health insurance to cover the cost of medical care to treat the diagnosed Class B medical conditions. The alien is also current receiving a state cash benefit for income maintenance in excess of the 15 percent threshold.</p> <p>In this example, USCIS issued a RFE or NOID, giving the alien the opportunity to provide evidence of termination of public benefits and evidence of newly acquired assets or resources that would allow her to overcome the negative factors in her case. However, the alien's response did not provide any additional information relevant to the public charge inadmissibility factors. Based on a consideration of these facts and circumstances in the totality, USCIS concluded that the alien is likely to receive public benefits in the future, as defined in 8 CFR 212.21(b), and accordingly found the alien inadmissible based on the public charge ground.</p>		

## N. Valuation of Monetizable Benefits

DHS has consulted with the relevant Federal agencies regarding the inclusion and consideration of certain monetizable public benefits, and is proposing a benefit-specific



methodology to establish a value for certain monetizable benefits in order to determine whether the alien has received in excess of the 15 percent threshold. This methodology ensures that for benefits which are provided on the basis of a household and not the individual, USCIS would only take into consideration the portion of the benefit that is attributable to the alien. However, in circumstances where the alien is not eligible for a given benefit but is part of a household that receives the benefit (such as by living in a household that receives a housing benefit by virtue of other household members' eligibility), such benefit based on the eligibility and receipt of such benefit(s) by his/her household members, USCIS would not consider such use for purpose of a public charge inadmissibility determination.

In valuing the cash monetizable benefits, USCIS would calculate the amount of the benefit attributable to the alien in proportion to the other household members. Thus, for instance, a household cash benefit of \$600, shared among three eligible individuals, would be attributed to the alien in the amount of \$200.

In valuing the non-cash monetizable benefits, DHS would use the same methodology, as follows:

- With respect to the Supplemental Nutrition Assistance Program (SNAP, or formerly called "Food Stamps"), 7 U.S.C. 2011 to 2036c, DHS would calculate the annual aggregate amount of the benefit attributable to the alien alone, based on the amount(s) deposited monthly in the Electronic Benefits Transfer (EBT) card account. This calculation would be performed based on the alien's reporting of the monthly amounts deposited. DHS would divide the amount received by the number of eligible household members enrolled in the benefit.

- With respect to the Section 8 Housing Assistance under the Housing Choice Voucher Program, as administered by HUD under 24 CFR part 984; 42 U.S.C. 1437f and 1437u, DHS would calculate the proportional value of the voucher attributable to the eligible alien alone, based on the amount of the benefit received. In calculating the proportional value of the benefit, DHS would use the same methodology – it would divide the value of the benefit by the number of people receiving it. DHS also welcomes comments on a potential alternative methodology, under which DHS would assign value to the benefit using HUD rules at 24 CFR 5.520.
- With respect to Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under 24 CFR Parts 5, 402, 880-884 and 886, DHS would calculate the proportional value of the rental assistance attributable to the eligible alien alone, based on the amount of the benefit received. In calculating the proportional value of the benefit, DHS would use the same methodology as above – it would divide the value of the benefit by the number of people receiving it. DHS also welcomes comment on a potential alternative methodology, under which DHS would assign value to the benefit using HUD rules at 24 CFR 5.520.

DHS seeks public comments on these proposed approaches described above, including any studies or data that would support an alternative approach.

#### **O. Public Charge Bond for Adjustment of Status Applicants**

DHS has the broad authority to prescribe forms of bonds as is deemed necessary for carrying out the Secretary's authority under the provisions of the Act.<sup>595</sup> Additionally, an alien who DHS has determined to be inadmissible based on public charge grounds may, if otherwise

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<sup>595</sup> See INA section 103(a)(3), 8 U.S.C. 1103(a)(3).

admissible, be admitted at the discretion of the Secretary upon giving a suitable and proper bond.<sup>596</sup> Currently, the regulatory authority for posting a public charge bond can be found in 8 CFR 103.6 and 8 CFR 213.1.

## **1. Overview of Immigration Bonds Generally**

Immigration bonds may generally be secured by cash or cash equivalents, or may be underwritten by a surety company certified by the Department of Treasury under 31 U.S.C. 9304-9308.<sup>597</sup> A bond, including a surety bond, is a contract between the United States (the obligee) and an individual or a company (obligor) who pledges a sum of money to guarantee a set of conditions set by the government concerning an alien.<sup>598</sup> Surety bonds are bonds in which the surety company and its agents serve as co-obligors on the bond. Such company and its agents are jointly and severally liable for the payment of the face amount of the bond if the bond is breached.<sup>599</sup>

## **2. Overview of Public Charge Bonds**

### **(a) Public Charge Bonds**

Public charge bonds are intended to hold the United States and all states, territories, counties, towns, municipalities and districts harmless against aliens becoming a public charge.<sup>600</sup> A public charge bond is issued on the condition that the alien does not become a public charge. If the government permits the alien to submit a public charge bond, the government admits the alien despite having found the alien inadmissible as likely to become a public charge.

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<sup>596</sup> See INA section 213, 8 U.S.C. 1183.

<sup>597</sup> See generally 8 CFR 103.6.

<sup>598</sup> See, e.g., *Matter of Allied Fid. Ins. Co.*, 19 I&N Dec. 124, 125-26 (BIA 1984) (discussing the contractual nature of delivery bonds submitted under 8 CFR 103.6); see Merriam-Webster Online Dictionary, *Definition of Bond*, <https://www.merriam-webster.com/dictionary/bond> (last updated Sept. 3, 2018).

<sup>599</sup> See 8 CFR 103.6(e).

<sup>600</sup> See INA section 213, 8 U.S.C. 1183.

If an alien admitted after submitting a public charge bond becomes a public charge, the bond is breached. The bond is breached regardless of whether a demand for payment of the public expense has been made otherwise, as reflected below.<sup>601</sup>

### **(b) Current and Past Public Charge Bond Procedures**

Regulations governing public charge bonds can be found at 8 CFR 103.6 and 8 CFR 213.1. Agency guidance is provided in the Adjudicator's Field Manual (AFM), Chapter 61.1. According to the AFM, although DHS has the authority to require public charge bonds, the authority has rarely been exercised since the passage of IIRIRA in 1996, which codified the affidavit of support requirements.<sup>602</sup> Consequently, USCIS does not currently have a process in place to regularly accept public charge bonds.

Prior to 1996, INS had issued public charge bond guidance in the Operating Instructions (OI) 103.6 and 213.1,<sup>603</sup> and its predecessor, the Examinations Handbook, at Part VI, VI-88

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<sup>601</sup> See INA section 213, 8 U.S.C. 1183; see also *Matter of Viado*, 19 I&N Dec. 252, 253-54 (BIA 1985).

<sup>602</sup> See AFM, Chapter 61.1 (“(b) Policy. Although USCIS has the authority to require a public charge bond, such authority is rarely exercised in light of the statutory changes contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which created the enforceable affidavit of support (see Chapter 20.5 of this field manual).” IIRIRA section 564(f) amended INA section 213, 8 U.S.C. 1183. In addition to the regular bonding requirements, IIRIRA section 564(a) through (e) also established 3-year pilot programs in 5 district offices of INS to require aliens to post a bond in addition to the affidavit requirements under INA section 213, 8 U.S.C. 1183a, and the deeming requirements under section 421 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1631. Congress provided that any pilot program established pursuant to this subsection shall require an alien to post a bond in an amount sufficient to cover the cost of benefits described in INA section 213A(d)(2)(B), 8 U.S.C. 1183a, and for the alien and the alien's dependents, and shall remain in effect until the departure, naturalization, or death of the alien. See IIRIRA, Pub. L. 104-208, div. C, section 564(a), 110 Stat 3009-546, 3009-683. Suit on that bond was supposed to be brought under the terms and conditions of INA section 213A, 8 U.S.C. 1183a. Within 180 days after the date of IIRIRA, which was on September 30, 1996, the Attorney General was directed to issue regulations establishing the pilot program, including criteria and procedures for certification of bonding companies, debarment of any such company that fails to pay a bond, and criteria for setting the amount of the bond to assure that the bond is in an amount that is not less than the cost of providing benefits under INA section 213A(d)(2)(B) for the alien and the alien's dependents for 6 months. See IIRIRA, Pub. L. 104-208, div. C, section 564(b), 110 Stat 3009-546, 3009-683 to -684. Congress furthermore imposed an annual reporting requirement, starting 9 months after the date of the implementation of the program. See IIRIRA, Pub. L. 104-208, div. C, section 564(d), 110 Stat 3009-546, 3009-684. DHS is unable to locate implementing materials relating to this pilot program.

<sup>603</sup> See INS Operating Instructions (Nov. 1997) [hereinafter OI]. INS removed Operating Instructions in 1998 and transferred the parts relating to the bond to the Inspector's Field Manual, Chapter 45. See Transmittal Memo (TM2),

through VI-98.<sup>604</sup> Although these manuals do not appear to comprehensively address public charge bonds, the following summarizes parameters of past public charge bond practices:

A consular officer would advise an immigrant visa applicant required to post a bond in writing, specifying the amount to be posted with INS. Without such a letter, INS would not accept the posting of a bond.<sup>605</sup> INS informed the DOS of the posting of the bond as soon as an alien-designated obligor in the United States posted the bond.<sup>606</sup> According to 8 CFR 213.1, a public charge bond had to be at least \$1,000. As soon as a bond was posted, INS monitored the bond periodically.<sup>607</sup> Any interested party could request the review and cancellation of the bond at any time.<sup>608</sup> Upon receiving the request, INS would notify the alien of his or her opportunity to present evidence to establish that the bond was not breached and that the alien was not likely to become a public charge in the future; receipt of public assistance was ordinarily sufficient to warrant the continuation of the bond.<sup>609</sup> According to the OIs, if no request to cancel the bond was made, INS would review the bond every 5 years to determine whether INS should cancel the bond. Ordinarily, and in addition to the statutory reasons for cancellation, a bond was cancelled after the initial 5- year period (or earlier, if warranted) if the review showed that the alien had not and would not likely become a public charge.<sup>610</sup> Additionally, and in accordance with 8 CFR 103.6(c)(1), the bond could be cancelled if INS determined that there is no likelihood that the alien would become a public charge.<sup>611</sup>

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M-450 Inspector's Field Manual, Dated March 13, 1998, and Transmittal Memo (TM1), M-450 Inspector's Field Manual, Dated June 24, 1997. No further guidance on public charge bond processing appears to have been issued.

<sup>604</sup> See INS Examinations Handbook, Part VI, VI-88 through VI-98 (Oct. 1, 1988) [hereinafter Examinations Handbook].

<sup>605</sup> See Examinations Handbook, Part VI, at VI-89; see OI 213.1.

<sup>606</sup> See Examinations Handbook, Part VI, at VI-89; see OI 213.1.

<sup>607</sup> See Examinations Handbook, Part VI, at VI-91 and VI-92; see OI 103.6(c)(1).

<sup>608</sup> See Examinations Handbook, Part VI, at VI-94; see OI 103.6(c)(1).

<sup>609</sup> See Examinations Handbook, Part VI, at VI-94; see OI 103.6(c)(1).

<sup>610</sup> See Examinations Handbook, Part VI, at VI-94; see OI 103.6(c)(1).

<sup>611</sup> See Examinations Handbook, Part VI, at VI-94; see OI 103.6(c)(1).

If the alien became a public charge by using public assistance, the bond was breached in the necessary amount with any remainder continued in effect.<sup>612</sup> According to the Examinations Handbook, if the alien had received any public funds, and the agency from which the alien had obtained the funds requested repayment, the obligor was required to pay the actual expenses to INS within thirty days. If no payment was made, the obligor was then required to pay the total amount due plus \$200 to the INS. If the payment was not made, the amount was then extracted from the bond itself.<sup>613</sup>

The 1999 public charge guidance did not detail any procedures on public charge bonds.<sup>614</sup> The current USCIS guidance in the Adjudicator's Field Manual addresses the possibility of a bond in certain circumstances, and outlines that upon termination on account of the statutory reasons, the sums or other security held to secure its performance, except to the extent it is forfeited for violation of its terms, must be returned to the person who posted the bond, or to his legal representatives.<sup>615</sup>

Although the current bond form used by U.S. Immigration and Customs Enforcement (ICE), Immigration Bond (Form I-352), references public charge bonds, ICE does not administer public charge bonds. However, Form I-352 does specify that the obligor shall pay to the United States or to any State, territory, county, town, municipality or district that provided public assistance any and all charges up to the total amount of the bond. In the event that the public authority providing assistance is not authorized to accept reimbursement, the obligor agrees that he or she will pay DHS.

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<sup>612</sup> See Examinations Handbook, Part VI, at VI-95; see OIs 103.6(c)(1).

<sup>613</sup> See Examinations Handbook, Part VI, at VI-95.

<sup>614</sup> *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689 (May 26, 1999).

<sup>615</sup> See AFM Ch. 61.1, *Posting, Cancellation and Breaching of Public Charge Bonds*. As already mentioned, USCIS' bond authority is rarely exercised in light of the statutory changes contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which created the enforceable affidavit of support.

### **(c) Relationship of the Public Charge Bond to the Affidavit of Support**

The Affidavit of Support and the public charge bond are distinct, but complementary, means to recover costs associated with the alien's receipt of public benefits. As discussed above, certain applicants seeking immigrant status must submit an enforceable Affidavit of Support under Section 213A of the INA (Form I-864).<sup>616</sup> The affidavit of support is a contract between the alien's sponsor and the U.S. Government that imposes on the sponsor a legally enforceable obligation to support the alien. The obligation may be enforced against the sponsor by the sponsored alien, the Federal Government, any State or any political subdivision thereof, or by any other entity that provides any means-tested public benefit.<sup>617</sup> According to section 213A(b) of the Act, 8 U.S.C. 1183a(b), a non-governmental entity that provided such benefit(s) or the appropriate entity of the Federal Government, a State, or any political subdivision of the State must request reimbursement by the sponsor in the amount of the unreimbursed costs of the benefits or, after non-payment, bring an action against the sponsor under section 213A of the Act, 8 U.S.C. 1183A, no later than 10 years after the date on which the sponsored alien last received any means-tested benefit to which the affidavit of support applies.<sup>618</sup> Section 213A of the Act, 8 U.S.C. 1183a, does not require a sponsored immigrant to request the sponsor or joint sponsor to comply with the support obligation before bringing an action to compel compliance.<sup>619</sup> Neither USCIS nor DHS are directly involved in enforcing an Affidavit of

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<sup>616</sup> See INA section 213A, 8 U.S.C. 1183a.

<sup>617</sup> See INA section 213A(a)(1)(B), 8 U.S.C. 1183a(a)(1)(B).

<sup>618</sup> See INA section 213A(b), 8 U.S.C. 1183A(b). Implementing regulations on the request for reimbursement and actions to compel reimbursement can be found at 8 CFR 213a.4. Remedies available to enforce an affidavit of support under this section include any or all of the remedies described in 28 U.S.C. 3201 (Judgement liens), 28 U.S.C. 3203 (Execution), 28 U.S.C. 3204 (Installment payment order), or 28 U.S.C. 3205 (Garnishment), as well as an order for specific performance and payment of legal fees and other costs of collection and include corresponding remedies available under State law. See INA section 213A(c), 8 U.S.C. 1183a(c). A Federal agency may seek to collect amounts owed under this section in accordance with the provisions of subchapter II of 31 U.S.C. Chapter 37 (Claims of the United States Government). See INA section 213A(c), 8 U.S.C. 1183a(c).

<sup>619</sup> See 8 CFR 213a.4(a)(2).

Support sponsor's obligation to reimburse an agency. USCIS does, however, make information about the sponsor available to an agency seeking reimbursement.<sup>620</sup>

Under section 213 of the Act, 8 U.S.C. 1183, an alien may be admitted to the United States at the discretion of the Attorney General upon the giving of a suitable and proper bond. In contrast to the affidavit of support, which is a contract between the government and the sponsor, a bond, including a surety bond, is a contract between the United States (the obligee) and an individual or a company (obligor) who pledges a sum of money to guarantee conditions set by the government concerning an alien.<sup>621</sup> Thus, there are distinct differences between the affidavit of support and the bond. For example, unlike the affidavit of support, in which the alien as well as the government entity may have a cause of action to recover expenses, only the government entity being part of the bond contract may pursue recovery from the obligor if the bond is breached and only the obligor may challenge the breach determination.<sup>622</sup>

In section 213 of the Act, 8 U.S.C. 1183, Congress directly addresses the affidavit of support and the deeming requirement imposed in section 213 of the Act when it added a parenthetical to the public charge bond provision stating that the alien may be admitted "(subject to the affidavit of support requirement and attribution of sponsor's income and resources under Section 213A)" upon having posted a suitable bond.<sup>623</sup> In the provision amending section 213 of the Act, section 564(f) of IIRIRA, Congress emphasized that the bond was to be considered in addition to the sponsor and deeming requirements under section 213A of the Act, 8 U.S.C.

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<sup>620</sup> See 8 CFR 213a.4(a)(3). Upon receipt of a duly issued subpoena, USCIS will provide the agency with a certified copy of a sponsor's Form I-864. Additionally, USCIS routinely provides the sponsor's name, address and Social Security number to Federal, state, and local agencies providing means-tested benefits.

<sup>621</sup> See, e.g., *Matter of Allied Fid. Ins. Co.*, 19 I&N Dec. 124, 125-26 (BIA 1984).

<sup>622</sup> Compare INA section 213A(b)(2), 8 U.S.C. 1183a, with INA section 213, 8 U.S.C. 1183. See also *Matter of Ins. Co. of N. Am.*, 17 I&N Dec. 251, 251 (BIA 1978) (finding that only the obligor and the obligee are party to the contract and that only the obligor, but not the alien, may challenge the government breach determination).

<sup>623</sup> See IIRIRA, Pub. L. 104-208, div. C, section 564(f), 110 Stat. 3009-546, 3009-684.



1183A, and not instead of them.<sup>624</sup> The Joint Explanatory Statement in the House Conference Report for IIRIRA confirms that Congress intended that bonds “should be required in addition to, and not in lieu of, the new sponsorship and deeming requirements of section 213A of the Act, 8 U.S.C. 1183a.”<sup>625</sup> Correspondingly, Congress also retained in section 213 of the Act, 8 U.S.C. 1183, the longstanding concept that suit on the bond may be made irrespective of the reasons for the breach and irrespective of whether a demand for payment of public expenses have been made.<sup>626</sup>

#### **(d) Summary of Proposed Changes**

In this rule, DHS proposes to clarify when an alien seeking adjustment of status will be permitted to post a public charge bond under DHS’s authority outlined in sections 103 and 213 of the Act, 8 U.S.C. 1103 and 1183. Additionally, as reflected below, DHS proposes to establish a new minimum bond amount of \$10,000 (adjusted annually for inflation), explain the circumstances under which a public charge bond will be cancelled, as well as establish specific conditions under which a public charge bond will be breached.<sup>627</sup> Finally, DHS proposes processing fees for the initial submission of the Public Charge Bond (Form I-945) and for the Request for Cancellation of Public Charge Bond (Form I-356); both fees would be initially set at \$25. USCIS plans to establish a process to accept and process public charge bonds, which would be available on the effective date of the final rule. DHS welcomes comments on any aspect of

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<sup>624</sup> See IIRIRA, Pub. L. 104-208, div. C, section 564(f), 110 Stat. 3009-546, 3009-684 (“(f) Bonds in addition to sponsorship and deeming requirements -- Section 213 (8 U.S.C. 1183) is amended by inserting ‘(subject to the affidavit of support requirement and attribution of sponsor’s income and resources under section 213A)’ after ‘in the discretion of the Attorney General.’”).

<sup>625</sup> See H.R. Conf. Rep. No. 104-828, at 243 (1996) (Conf. Rep.).

<sup>626</sup> See INA section 213, 8 U.S.C. 1183; see also *Matter of Viado*, 19 I&N Dec. 252, 253 (BIA 1985) (distinguishing inadmissibility under section 212(a)(4) of the Act and a public charge bond from deportability under section 237(a)(5) of the Act); *Matter of B*, 3 I&N Dec. 323, 326 (BIA 1948) (holding that before an alien could be considered deportable on public charge ground, the state authorities must have demanded repayment of charges for services rendered and the charges must thereafter have remained unpaid.).

<sup>627</sup> See proposed 8 CFR 213.1.

the public charge bond or public charge bond process, including whether the minimum public charge bond amount should be higher or lower, and possible ranges for that amount.

### **3. Permission to Post a Public Charge Bond**

First, the proposed regulation clarifies that permitting an alien who is found inadmissible as a public charge but is otherwise admissible to submit a public charge bond is within DHS's discretion.<sup>628</sup> Section 213 of the Act gives DHS discretion to allow an alien to post a "suitable and proper" public charge bond if the alien is otherwise admissible. Therefore, DHS proposes that in circumstances under which USCIS determines, after a finding of inadmissibility on the public charge ground that a favorable exercise of discretion is warranted, USCIS will notify the alien of the possibility to submit a bond and USCIS will specify the bond amount and bond conditions. The alien would then be permitted to submit the appropriate form for the public charge bond in accordance with the form instructions and with the appropriate fee. DHS proposes that a public charge bond could only be submitted on the alien's behalf after USCIS makes this option available to the alien, and that USCIS would reject any unsolicited attempt to submit a bond.

The same factors that weighed positively when making the public charge inadmissibility determinations will generally indicate that offering the option of a public charge bond to an alien is warranted. Ultimately, the purpose of the public charge bond is to allow DHS to admit an alien who is inadmissible as likely to become a public charge, but who warrants a favorable exercise of discretion. DHS believes that offering a public charge bond in the adjustment of status context would generally only be warranted in limited circumstances in which the alien has no heavily weighed negative factors, but the presence of such factors would not automatically

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<sup>628</sup> See proposed 8 CFR 213.1.

preclude DHS from offering a public charge bond. As explained above, DHS would consider the heavily weighed negative factors particularly indicative of the likelihood that an alien would become a public charge. However, as is the case with any discretionary determination, DHS may also consider any of a range of positive and negative factors applicable to the alien's case when determining whether the alien should be offered the option to post a public charge bond and be admitted to the United States on bond. For example, an officer could consider whether allowing the alien to become a lawful permanent resident would offer benefits to national security, or would be justified for exceptional humanitarian reasons. Another example in which USCIS may offer an alien the possibility to post a bond would be if an alien had a weak financial status, had received public benefits 40 months prior to applying for immigration status, and had a medical condition, but the alien's prospect of obtaining medical insurance (that does not meet the definition of a public benefit under proposed 8 CFR 212.21(b)) is good and the grant of admission upon public bond would be in the interest of family unity.

#### **4. Bond Amount and Submission of a Public Charge Bond**

DHS proposes that, in cases in which USCIS has determined that offering a public charge bond to an alien is warranted, the public charge bond be set at no less than \$10,000, annually adjusted for inflation based on the Consumer Price Index for All Urban Consumers (CPI-U),<sup>629</sup> and rounded up to the nearest dollar. This would raise the amount that is currently stated in 8 CFR 213.1 from no less than \$1,000 to no less than \$10,000.

Proposing a base amount sufficient for a public charge bond based on historical public benefit data is difficult, because the amount of average public benefit being considered under the proposed rule depends on the public benefit the person receives and how long the person

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<sup>629</sup> U.S. Bureau of Labor Statistics, *Consumer Price Index for All Urban Consumers*, <https://data.bls.gov/cgi-bin/surveymost?cu> (select "U.S. All items, 1982-84=100 - CUUR0000SA0") (last visited Sept. 5, 2018).

receives the benefit. The broad range of public benefits available to individuals on the Federal, State, and local level, but not necessarily to immigrants, renders such a determination even more complex.

As indicated above, DHS proposes to set the base amount of the public charge bond at \$10,000. The current 8 CFR 213.1 refers to a bond amount of at least \$1,000. 8 CFR 213.1 was promulgated in July of 1964.<sup>630</sup> This provision has not been updated and inflation has never been accounted to represent present dollar values. Simply adjusting the amount for inflation using CPI-U would bring the bond floor in June 2018 to about \$8,100.<sup>631</sup> DHS notes that bond amounts could be \$1,000 or more (in 1964 dollars) and once adjusted for inflation, these amounts are equivalent to \$8,100 or more in present dollar values. Additionally, when examining previous public charge bonds granted by legacy immigration agencies, DHS has found that the minimum amount of approved public charge bonds remained relatively stable in inflation-adjusted dollars and fluctuated around or above \$10,000.<sup>632</sup> Accordingly, DHS proposes that \$10,000 would be an amount that would provide USCIS with an appropriate starting point when determining the public charge bond amount that is minimally necessary to ensure that United States can recoup cost of public benefits received by the alien. Additionally, as with determining whether to offer an alien the option of posting a public charge bond, USCIS

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<sup>630</sup> *Miscellaneous Amendments to Chapter*, 29 FR 10579 (July 30, 1964).

<sup>631</sup> DHS uses the semi-annual average for the first half of 2018 and the annual average from 1964 from the historical CPI-U for U.S. City Average, All Items. See <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-201806.pdf>.

Calculation: Annual average for 1st half of 2018 (250.089) / annual average for 1964 (31) = 8.1; CPI-U adjusted present dollar amount = \$1,000 \* 8.1 = \$8,100.

<sup>632</sup> See, e.g., *Wallis v. U.S. ex rel. Mannara*, 273 F. 509, 511 (2d Cir. 1921) (\$1000 public charge bond posted in September 1920, which would amount to about \$12,600.30 in July 2018); *Matter of Viado*, 19 I&N Dec. 252, 252 (BIA 1985) (\$5000 bond posted in February 1979, which would amount to about \$18,234.88 in July 2018); *In re Obligor*, 2007 WL 5326596, at \*1 (AAO June 6, 2007) (adjustment upon \$10,000 bond in June 1999, which would amount to about \$15,162.82 in July 2018). For purposes of these calculations, DHS used the CPI Inflation Calculator from the Bureau of Labor Statistics at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Aug. 20th, 2018).

will consider the alien's individual circumstances when determining the exact amount of the bond the alien is required to post.

If USCIS determines that the alien seeking an adjustment of status may submit a public charge bond, neither the alien nor an obligor, including a surety company, would be able to appeal the amount of the bond required.<sup>633</sup> As discussed more fully in this preamble, DHS has discretion to allow an alien to post a public charge bond "in such amount and containing such conditions" as DHS may prescribe. Given the discretionary nature of DHS's authority under section 213 of the Act, 8 U.S.C. 1183, DHS has determined that the bond amount would not be appealable administratively either to the AAO or the BIA, because neither administrative body has jurisdiction over this discretionary determination.<sup>634</sup>

As indicated above, under this proposed rule, USCIS would notify the alien of the bond amount and conditions, including the type of bond the alien may submit. Each submission would be on the form designated and in accordance with the applicable instructions and fees prescribed in 8 CFR 103.7. While the proposed rule retains the options for a surety bond or a cash or cash equivalent such as a cashier's check or money order deposit and agreement to secure a bond, due to operational feasibility considerations USCIS plans to initially allow for only surety bonds.<sup>635</sup> For example, surety bonds do not involve the actual exchange of money until the bond is breached, while the undertaking of cash bonds involves additional accounting mechanisms, including the management of interest. DHS proposes to use new USCIS Form I-

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<sup>633</sup> See proposed 8 CFR 213.1(b).

<sup>634</sup> See *United States ex rel. Chanin v. Williams*, 177 F. 689, 690 (2d Cir. 1910) ("The matter of admission under bond of a person once found to be likely to become a public charge is by the statute confided to the Secretary, and we do not see why his refusal to admit is not an adverse exercise of such discretion in any particular case. His reasons for refusal may or may not seem persuasive to a court; but it is to him, not to the court, that Congress has confided the discretion."); see also *In re Obligor*, 2007 WL 5326596, at \*1 (AAO June 6, 2007) (sustained appeal that public charge bond was not breached). The BIA does not have jurisdiction. 8 CFR 1003.1(b)

<sup>635</sup> See proposed 8 CFR 213.1(b)(1).

945, Public Charge Bond for this purpose. As discussed in greater detail below, DHS is proposing a \$25 public charge bond processing fee to be submitted with the Form I-945.

For all public charge surety bonds, an acceptable surety company is generally one that appears on the current Treasury Department Circular 570 as a company holding the requisite certificate of authority to act as a surety on Federal bonds.<sup>636</sup> Treasury-certified sureties have agents throughout the United States from whom aliens could seek assistance in procuring an appropriate bond.<sup>637</sup> The Department of the Treasury certifies companies only after having evaluated a surety company's qualifications to underwrite Federal bonds, including whether those sureties meet the specified corporate and financial standards. Under 31 U.S.C. 9305(b)(3), a surety (or the obligor) must carry out its contracts and comply with statutory requirements, including prompt payment of demands arising from an administratively final determination that the bond had been breached.

If an alien successfully posts a public charge bond in the amount and under the conditions specified in the form instructions and USCIS notice, USCIS will continue to adjudicate the alien's application for adjustment of status and will grant such application if all eligibility criteria are met. Additionally, if the bond has been successfully posted, USCIS must ensure that the bond is maintained during the effective period of the bond. To achieve this goal, DHS proposes that an obligor would need to notify DHS within 30 days of any change in the obligor's or the alien's physical and mailing address. Given the contractual nature of the public charge bond, the change of address requirement imposed is similar to the one imposed on a sponsor's change of address requirement for purposes of the affidavit of support under 8 CFR 213a.3, except that the obligor would also need to notify USCIS of the bonded alien's change of address. An alien

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<sup>636</sup> See 8 CFR 103.6(b); see also proposed 8 CFR 103.6, as published in 83 FR 25951 (June 5, 2018).

<sup>637</sup> See Dep't of Treasury Circular 570, *Listing of Approved Sureties* (July 1, 2018).

would still need to comply with the change of address requirements under section 265 of the Act, 8 U.S.C. 1305, and 8 CFR 265.1 to notify USCIS of his or her change of address.

If the alien does not respond to the notice soliciting a public charge bond, or the bond submitted does not comply with the bond amount and conditions set by USCIS, USCIS will deny the alien's application. Given the complexity of a bond process, DHS plans to issue separate guidance addressing the specifics of public charge bond submission.

### **5. Public Charge Bond Substitution**

DHS proposes that if USCIS accepts a bond of limited duration, the bond on file must be substituted with a new bond 180 days before the bond on file with USCIS expires.<sup>638</sup> A bond of limited duration is a bond that expires on a date certain regardless of whether the statutory terms for cancellation of such a bond have been met (i.e., naturalization, permanent departure, or death of the alien). A bond of unlimited duration is a bond that does not have a specific end date but ends upon USCIS canceling the bond. Bonds of limited duration are sometimes easier and cheaper to obtain and DHS is proposing to allow for this option so long as a substitute bond is valid and effective before the expiration date of the bond on file. Because a bond has to be maintained until cancelled by USCIS, substitution ensures continuous indemnification of the United States against the alien receiving public benefits until the conditions for the cancellation of the bond have been met. Additionally, requiring that the substitute bond for a bond of limited duration is submitted to DHS at least 180 days before the expiration of the bond previously submitted expires permits USCIS to allow for some time to adjudicate the sufficiency of any substitute bonds, which further ensures continuous indemnification of the United States against the alien receiving public benefits.

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<sup>638</sup> See proposed 8 CFR 213.1.

Either the obligor, a substitute obligor, or the alien would be able to submit the substitute bond at any time and regardless of the reasons. The substitute bond would need to be valid, properly submitted with the appropriate fee, and effective on the day the previously submitted bond on file with USCIS expires. The substitute bond would need to meet all of the requirements applicable to the bond on file with USCIS, as required by 8 CFR 103.6 and 8 CFR 213.1. To ensure continued bond coverage of the alien as required under section 213 of the Act, the substitute bond would also need to cover a bond breach that occurred before USCIS accepted the substitute bond, in the event USCIS does not have knowledge of the breach until after the expiration or cancellation of the bond on file with USCIS. If USCIS determined that the substitute bond proffered is sufficient, it would accept the bond and the bond would become effective on the day the bond currently on file expires or when the new bond takes effect, if prior to the expiration of the bond on file.<sup>639</sup> Additionally, the bond previously on file would be cancelled, if needed.<sup>640</sup> If the substitute bond was insufficient, USCIS would notify the obligor of the substitute bond so that the obligor could correct the deficiency within the timeframe stipulated in the notice. USCIS may also send a copy of the notification to the alien, the alien's representative (if any), and the initial obligor. If the deficiency is not corrected within the timeframe stipulated in the notice, the substitute would be rejected.

## **6. Public Charge Bond Cancellation**

### **(a) Conditions**

A public charge bond must remain in effect until the alien naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, or dies, until the bond is

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<sup>639</sup> See proposed 8 CFR 213.1.

<sup>640</sup> For purposes of this type of cancellation, neither the obligor nor the alien must submit Form I-356. Form I-356 is submitted to assess whether the alien has received any public benefits, as defined in 8 CFR 212.21(b), or otherwise breached a condition of the bond. At the time for substitution, USCIS does not engage in a breach assessment as the bond is substituted with another, not actually cancelled according to the terms of proposed 8 CFR 213.1(g).



substituted with another bond, or until the bond is otherwise cancelled by DHS.<sup>641</sup> During this period, as a condition of the bond, an alien on whose behalf a public charge bond has been accepted agrees to not receive public benefits, as defined in 8 CFR 212.21(b), after the alien's adjustment of status to that of a legal permanent resident and until the bond is cancelled according to proposed 8 CFR 212.21(g). The alien also has to comply with any other conditions imposed as part of the bond. That means that a bond is considered breached if the alien receives public benefits, as defined in proposed 8 CFR 212.21(b), after the alien's adjustment of status to that of a lawful permanent resident and until the bond is cancelled under proposed 8 CFR 213.1(g). A bond is also considered breached if the alien fails to comply with any other condition of the bond. In these situations, USCIS cannot cancel the bond. Public benefits, as defined in proposed 8 CFR 212.21(b), received by an alien present in the United States in an immigration status that is exempt from the public charge ground of inadmissibility under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and public benefits received after the alien obtained U.S. citizenship are not counted towards any breach determination, and therefore, also for purposes of the cancellation determination.<sup>642</sup> Additionally, consistent with the public benefits definition proposed in this rule, DHS would not consider as part of a public charge bond cancellation determination any public benefits received by an alien enlisted in the U.S. armed forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or if received by such an individual's spouse or child as defined in section 101(b) of the Act, 8 U.S.C. 1101(b), regardless of whether such receipt occurred prior to the alien enlisting into the U.S. Armed Forces.

#### **(b) Definition of Permanent Departure**

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<sup>641</sup> See INA section 213, 8 U.S.C. 1183; *see also* proposed 8 CFR 213.1.

<sup>642</sup> See proposed 8 CFR 213.1(h).

According to section 213 of the Act, a public charge bond must be cancelled when the alien naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, or dies. When codifying section 213 of the Act, Congress did not define “permanent” and the concept of permanent departure does not exist in other areas of immigration law. However, “permanent” is defined in section 101(a)(31) of the Act, 8 U.S.C. 1101(31), as “a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.” “Departing” or “departure” is not defined in the INA, but DHS believes that it is reasonable to conclude that permanent departure for the purposes of canceling a public charge bond means that the alien has left the United States on a lasting, non-temporary basis after losing the lawful permanent resident status either voluntarily or involuntarily, and is physically outside the United States. Losing lawful permanent resident status either voluntarily or involuntary coupled with physically leaving the United States is consistent with the INA’s definition for permanent. The proposed rule will clarify that an alien has permanently departed for bond cancellation when he or she has 1) lost or abandoned lawful permanent resident status, whether involuntary by operation of law or voluntarily, and 2) physically left the United States.<sup>643</sup> An alien must establish that both elements, as described above, have been met before USCIS may cancel the bond.

DHS further proposes that an alien is only deemed to have involuntarily lost lawful permanent resident status in removal proceedings with the entry of a final order of removal<sup>644</sup> or through rescission of adjustment of status.<sup>645</sup> An alien may be found to have abandoned LPR

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<sup>643</sup> See proposed 8 CFR 213.1.

<sup>644</sup> See 8 CFR 1.2; see also *Matter of Lok*, 18 I&N Dec. 101, 105-06 (BIA 1981).

<sup>645</sup> See INA section 246, 8 U.S.C. 1256.

status, even if the assessment is made outside of removal proceedings and if the alien's actions were unintentional.<sup>646</sup> If an alien loses his or her LPR status through operation of law, the alien would be required to provide evidence of the loss of status by submitting evidence of the official determination of loss of LPR status before USCIS will cancel the bond.<sup>647</sup>

Generally, determining whether an alien has abandoned his or her status is highly fact specific and courts consider factors such as the length of an alien's absence from the United States, family and employment ties, property holdings, residence, and the alien's intent or actions.<sup>648</sup> An alien may intentionally relinquish lawful permanent resident status through his or her voluntary actions, such as by submitting a declaration of intent to abandon LPR status. Neither the INA nor DHS regulations direct how aliens may formally inform the U.S.

Government of their abandoning their lawful permanent resident status. To simplify the process, USCIS had developed, in the past, Form I-407, Record of Abandonment of Lawful Permanent

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<sup>646</sup> Abandonment is not directly addressed in the INA. The question typically arises in the context of LPRs returning to the United States. INA section 101(a)(20), 8 U.S.C. 1101(a)(20), defines the term "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, *such status not having changed*" (emphasis added). INA section 211(b), 8 U.S.C. 1181, provides for a waiver of the documentary requirements for admission for one who can qualify as a "returning resident immigrant" as defined in INA section 101(a)(27)(A), 8 U.S.C. 1101(a)(27)(A), that is as "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." Finally, according to INA section 101(a)(13)(C)(i), 8 U.S.C. 1101(a)(13)(C)(i), an alien lawfully admitted for permanent residence in the United States is not regarded as seeking admission into the United States, unless the alien has abandoned or relinquished that status. *See also* INA section 223, 8 U.S.C. 1203.

<sup>647</sup> For example, if the alien has his or her lawful permanent resident status in removal proceedings, the alien must present a copy of the removal order.

<sup>648</sup> *See, e.g., Matter of Huang*, 19 I&N Dec. 749, 755-57 (BIA 1988) (considering the alien's absence from the United States because of her husband's work and study abroad, as well as her own employment abroad, to find that her absence was not temporary in nature and that she had abandoned her LPR status); *Matter of Kane*, 15 I&N Dec. 258, 265 (BIA 1975) (alien who spent 11 months per year living in her native country operating a lodging house abandoned her LPR status; her desire to retain her status, without more, was not sufficient); *Matter of Quijencio*, 15 I&N Dec. 95, 97-98 (BIA 1974) (alien's lawful permanent resident status considered abandoned after 12 year absence); *Matter of Castro*, 14 I&N Dec. 492, 494 (BIA 1973) (alien who severed his ties to the United States for six years, moved abroad, acquired land, built a house and obtained steady employment, but made brief business trips to the United States was not a returning resident and had abandoned his status); *Matter of Montero*, 14 I&N Dec. 399, 400-01 (BIA 1973) (alien who returned to her native country to join her husband, children, home, employment and financial resources without fixed intent to return within a fixed period had abandoned her lawful permanent resident status); *cf. Khoshfahm v. Holder*, 655 F.3d 1147, 1154 (9th Cir. 2011) (alien child who was out of the country for 6 years and prevented from returning due to the father's heart condition and the events of September 11 did not abandon his lawful permanent resident status).

Resident Status as a means by which an alien may formally record that they have abandoned LPR status. The purpose of the form is to create a record and to ensure that the alien acts voluntarily and willingly, and is informed of the right to a hearing before an Immigration Judge and has knowingly, willingly, and affirmatively waived that right.<sup>649</sup>

Given that it is difficult to assess whether an alien voluntarily abandoned his or her lawful permanent resident status, DHS proposes that an alien may demonstrate voluntarily relinquishment of the lawful permanent resident status for purposes of bond cancellation only by showing proof that he or she has submitted Form I-407 to the U.S. Government.<sup>650</sup> In addition to the advantages of the Form I-407 enumerated above, requiring evidence of a Form I-407 filing would ensure consistent adjudication of bond cancellation requests because officers have the necessary information and would not have to otherwise determine the alien's intent in regards to the voluntary abandonment of the lawful permanent resident status and the permanent departure. Requesting the filing of a declaration would also be consistent with evidence required in the BIA precedent *Matter of De Los Santos*, in which the bond was cancelled after the alien was required, among other things, to submit a formal statement attesting to the desire to abandon permanent resident status.<sup>651</sup> Form I-407 would not have a fee.

**(c) Bond Cancellation for Lawful Permanent Residents After 5 Years and  
Cancellation if the Alien Obtains an Immigration Status Exempt From Public Charge  
Ground of Inadmissibility Following the Initial Grant of Lawful Permanent Resident  
Status**

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<sup>649</sup> See Purpose of Form I-407 and its instructions at [www.uscis.gov/i-407](http://www.uscis.gov/i-407). Even though an alien completed and submitted Form I-407, the alien may still challenge the declaration of abandonment as part of removal proceedings because a declaration is not dispositive.

<sup>650</sup> See proposed 8 CFR 213.1.

<sup>651</sup> *Matter of De Los Santos*, 11 I&N Dec. 121, 121 (BIA 1965).

Currently, 8 CFR 103.6(c)(1) requires that DHS cancel a public charge bond submitted for an alien after the fifth anniversary of admission of the immigrant, provided that the alien has filed a request to cancel the bond and provided that the alien did not become a public charge prior to the fifth anniversary.<sup>652</sup> The provision was added in 1984 based on INS's belief that the public would be adequately protected even with such a limitation on the bond liability.<sup>653</sup> INS reasoned that if an alien is self-sustaining for a five-year period, it would not be probable that the alien becomes a public charge after five years because the reason for the becoming a public charge is based on factors in existence prior to admission as an immigrant.<sup>654</sup> Additionally, INS explained that limiting the bond liability in this manner parallels the deportation liability.<sup>655</sup>

DHS proposes to continue to cancel the public charge bond after the fifth anniversary of the alien's adjustment of status to that of a lawful permanent resident, provided that the alien files a request to cancel the bond and the alien has not received any public benefits as defined in 8 CFR 212.21(b) after obtaining lawful permanent resident status or otherwise violated the conditions of the public charge bond. Retaining the possibility for this type of cancellation of the public charge bond is not just consistent with the current period of time in which an alien may become removable for receiving public benefits after entry for causes that existed prior to entry,<sup>656</sup> but is also consistent with the 5-year ineligibility period for certain public benefits under PRWORA.<sup>657</sup> Finally, as noted previously, the public charge bond statutory provision requires DHS to cancel the bond upon the alien's death, naturalization, or permanent departure from the

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<sup>652</sup> See 8 CFR 103.6(c)(1).

<sup>653</sup> See *Powers and Duties of Service Officers, Availability of Service Records; Public Charge Bonds*, 49 FR 24010, 24011 (June 11, 1984).

<sup>654</sup> See 49 FR 24010, 24011.

<sup>655</sup> See 49 FR 24010, 24011 ("The Service believes that the public will be adequately protected by limiting the duration of liability of public charge bonds to a five-year period which parallels the deportation liability.")

<sup>656</sup> See INA section 237(a)(5), 8 U.S.C. 1227(a)(5).

<sup>657</sup> See 8 U.S.C. 1611 – 1646.

United States.<sup>658</sup> However, DHS believes that section 213 of the Act sets forth the situations when DHS must cancel the public charge bond, but leaves to DHS the discretion of canceling the bond for other reasons.<sup>659</sup> Therefore, retaining the cancellation provision is consistent with the statutory text and the purpose of this rule.

In addition, DHS is proposing to not retain the discretion to cancel a public charge bond at any time if it subsequently determines that the alien is not likely to become a public charge.<sup>660</sup> First, for many aliens who adjust status in the United States, DHS is unlikely to make a second public charge determination under section 212(a)(4) of the Act.<sup>661</sup> Second, given that Congress selected a 5-year timeframe in related contexts (in the parallel deportation statute under section 237(a)(5) of the Act, 8 U.S.C. 1227(a)(5), under PRWORA at 8 U.S.C. 1613, and as part of

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<sup>658</sup> See INA section 213, 8 U.S.C. 1183 (“Such bond or undertaking *shall* terminate upon the permanent departure from the United States, the naturalization, or the death of such alien, and any sums or other security held to secure performance thereof, except to the extent forfeited for violation of the terms thereof, shall be returned to the person by whom furnished, or to his legal representatives.” (emphasis added)).

<sup>659</sup> See 8 CFR 103.6(c)(1) (“The district director may cancel a public charge bond at any time if he/she finds that the immigrant is not likely to become a public charge. A bond may also be cancelled in order to allow substitution of another bond. A public charge bond shall be cancelled by the district director upon review following the fifth anniversary of the admission of the immigrant, provided that the alien has filed Form I-356, Request for Cancellation of Public Charge Bond, and the district director finds that the immigrant did not become a public charge prior to the fifth anniversary. If Form I-356 is not filed, the bond shall remain in effect until the form is filed and the district director reviews the evidence supporting the form and renders a decision to breach or cancel the bond.”).

<sup>660</sup> See 8 CFR 103.6(c)(1).

<sup>661</sup> See INA section 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C), under which an LPR would be considered an applicant for admission only under specifically outlined circumstances (e.g., if he or she has abandoned LPR status, was absent from the United States continuously longer than 180 days, has engaged in illegal activity after departing the United States, etc.).

naturalization requirements under INA section 316, 8 U.S.C. 1427), DHS believes that retaining a bond for at least 5 years is a reasonable timeframe that will ensure the ability of U.S. government to recoup the costs of public benefits that may be received by aliens before most of them are generally eligible to naturalize.

Finally, DHS proposes that USCIS would cancel the public charge bond if an alien subject to a public charge bond obtains an immigration status while present in the United States that is exempt from public charge grounds of inadmissibility, as listed in 8 CFR 212.23, following the initial grant of status as a lawful permanent resident, provided that the alien or the obligor has filed a request for cancellation of public charge bond, on the form designated by DHS, in accordance with form instructions, and provided that the alien has not breached the bond conditions as described in paragraphs (h) of proposed 8 CFR 213.1. An example of when this ground of cancellation may apply is if an alien loses or abandons his or her LPR status but nonetheless qualifies for another status not subject to public charge inadmissibility, e.g. asylum. DHS believes that maintaining the bond in this situation no longer serves the intended purpose of the bond if the population is exempt from public charge grounds of inadmissibility, as the purpose of the public charge bond is to ensure that the alien does not become a public charge.<sup>662</sup> As discussed in the section on exemptions, most of these aliens are, at that time, members of a vulnerable population, and the status provided to these aliens serves distinct policy goals separate from the general immigration system.

As with other bases for bond cancellation, however, if a request for cancellation of a public charge bond is not filed, the bond shall remain in effect until the form is filed, reviewed, and a decision is rendered. Additionally, if these aliens adjust status in the future on a basis that

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<sup>662</sup> See INA section 213, 8 U.S.C. 1183.

is subject to section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), they may again be subject to public charge grounds of inadmissibility and DHS may assess whether a bond is appropriate at that time.

**(d) Request to Cancel the Bond, and Adjudication of the Cancellation Request**

DHS proposes that USCIS would cancel the bond upon request by the alien, following a determination that the conditions of a bond have been met and the bond has not been breached, as outlined in proposed 8 CFR 213.1. Return of the bond amount is “to the extent [the bond] has been forfeited for violation of the terms thereof.”<sup>663</sup> DHS proposes to interpret this authority to allow DHS to impose, as a condition of the bond, forfeiture of the entire amount in the event of a breach. Once USCIS determines that the alien has violated the bond conditions by receiving public benefits, USCIS would declare the bond breached and collect. The request to cancel the bond would be submitted on the form designated by DHS, according to its instructions, and with any mandatory fee. USCIS proposes to designate Form I-356, Request for Cancellation of Public Charge Bond, to be used to request cancellation of a public charge bond. As discussed in more detail below, DHS is also proposing an initial processing fee of \$25 to be submitted with the Form I-356. Given the obligor’s and the alien’s interest in having the bond cancelled, the alien, or the obligor or co-obligor, would be able to submit a request to cancel the public charge bond to USCIS.

A request to cancel the bond is necessary because typically, after an alien obtains an immigration benefit from USCIS or enters as an immigrant, USCIS has little interaction with the alien until he or she seeks another immigration benefit. In addition, USCIS is typically not notified if an alien has permanently departed or died. Information currently collected by DHS is

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<sup>663</sup> See INA section 213, 8 U.S.C. 1183.



insufficient for USCIS to determine on its own whether the alien intended a departure to be permanent. Therefore, as part of the cancellation request, the alien would need to submit evidence of naturalization or otherwise having obtained U.S. citizenship, permanent departure, or if the person is deceased, the alien's executor would submit a death certificate. Additionally, the alien or the alien's executor must also submit the information requested in Form I-356 regarding receipt of public benefits as defined in 8 CFR 212.21(b).<sup>664</sup> Any information collected would be in accordance with relevant privacy laws.

The obligor and the alien would have the burden to establish, by a preponderance of the evidence, that the conditions for cancellation of the public charge bond have been met.<sup>665</sup> If USCIS finds that the information included in the request is insufficient to determine whether cancellation is appropriate, USCIS may request additional information in accordance with 8 CFR part 103.

#### **(e) Decision and Appeal**

If USCIS determines that the request warrants a cancellation of a bond, USCIS would notify the obligor, and return the full value of any cash or cash equivalent, such as a cashier's check or money order deposited by the obligor to secure the bond plus interest, similar to current practice.<sup>666</sup> When the bond is cancelled, the obligor would be released from liability.<sup>667</sup>

If USCIS denies the request to cancel the bond, it will notify the obligor of the reasons why and of the right to appeal in accordance with the requirements of 8 CFR part 103, subpart A.<sup>668</sup> A bond obligor could appeal the denial to cancel the bond to the Administrative Appeals Office (AAO) of USCIS by filing Notice of Appeal or Motion (Form I-290B) together with the

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<sup>664</sup> See proposed 8 CFR 213.1.

<sup>665</sup> See proposed 8 CFR 213.1.

<sup>666</sup> See 8 CFR 103.6(c) and proposed 8 CFR 213.1.

<sup>667</sup> See proposed 8 CFR 213.1.

<sup>668</sup> See proposed 8 CFR 213.1.

appropriate fee and required evidence. *See* 8 CFR 103.1; 103.3. For operational efficiency, DHS proposes that an obligor may only file a motion after an unfavorable decision by the Administrative Appeals Office (AAO) on appeal. As part of an appeal, the regulations at 8 CFR 103.3(a)(2) require the officer rendering the initial decision to review the initial decision; if the reviewing officer agrees that the decision is incorrect, he or she may treat the appeal as a motion and may enter a favorable decision.<sup>669</sup> USCIS would also inform the alien and the alien's representative (if any) of the denial. The alien would not be able to appeal a denial because the bond contract is between the obligor and the U.S. government; the alien is not party to the contract.<sup>670</sup>

## **7. Breach of a Public Charge Bond and Appeal**

### **(a) Breach Conditions and Adjudication**

A bond would be considered breached if the alien has received public benefits, as defined in proposed 8 CFR 212.21(b), after the alien's adjustment of status to that of a lawful permanent resident and until the public charge bond is cancelled under 8 CFR 213.1(g). Consistent with other proposed regulatory provisions contained in this NPRM, public benefits received during periods while an alien is present in the United States in a status exempt from the public charge ground of inadmissibility, as listed in 8 CFR 212.23, following the initial grant of lawful permanent resident status, would not be considered when determining whether the conditions of the bond have been breached. Additionally, consistent with the public benefits definition proposed in this rule, DHS would not consider as part of a public charge bond breach determination any public benefits received by an alien enlisted in the U.S. armed forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), serving in active duty or in the

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<sup>669</sup> *See* 8 CFR 103.3(a)(2)(ii) – (v).

<sup>670</sup> *See* proposed 8 CFR 213.1.

Ready Reserve component of the U.S. Armed Forces, or if received by such an individual's spouse or child as defined in section 101(b) of the Act, 8 U.S.C. 1101(b), regardless of whether such receipt occurred prior to the alien enlisting into the U.S. Armed Forces. Finally, DHS would not consider public benefits received after the alien who is the subject of the public charge bond obtains U.S. citizenship, as U.S. citizens are no longer subject to public charge grounds of inadmissibility, and therefore, the term of the public charge bond.

A bond would be considered breached if any other condition imposed by USCIS as part of the public charge bond is breached.<sup>671</sup>

Under current 8 CFR 103.6, an immigration bond is considered breached when there has been a substantial violation of the stipulated conditions. The term "substantial violation" is generally interpreted according to contractual principles.<sup>672</sup> However, public charge bonds have been distinguished from other immigration bonds in this regard, given that the public charge bond's condition is that the alien will not become a public charge.<sup>673</sup> Therefore, DHS proposes to not retain the phrase "substantial violation" in the proposed public charge bond provision at 8 CFR 213.1. Instead, DHS proposes to incorporate the substantial violation standard via incorporating principles that govern the public charge and public benefits definitions at proposed 8 CFR 212.21(a) and (b) (defining public charge and public benefits). Under the proposed approach, the bond would be considered breached if the alien receives public benefits after the alien's adjustment of status to that of a lawful permanent resident and until the bond is cancelled

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<sup>671</sup> See proposed 8 CFR 213.1(d) and 8 CFR 213.1(h)

<sup>672</sup> See, e.g., *Aguilar v. United States*, 124 Fed. Cl. 9, 16 (2015) (substantial violation under 8 CFR 103.6(e) of a delivery immigration bond is a matter of contract interpretation, in which courts have looked to four factors: 1) the extent of the breach; 2) whether the breach was intentional or accidental; 3) whether the breach was in good faith; and 4) whether the obligor took steps to make amends or place himself in compliance).

<sup>673</sup> See *Matter of Viado*, 19 I&N Dec. 252, 253 (BIA 1985) (each of the other types of immigration bonds provided in the regulation has its own specific conditions; the public charge bond's condition is that the alien will not become a public charge, and the lack of knowledge or good faith of the alien did not render the breach insubstantial).

pursuant to 8 CFR 213.1(g), or if the alien breaches any other condition imposed as part of the bond.<sup>674</sup>

If USCIS learns of the breach, and declares a bond breached based on information that is not otherwise protected from the disclosure to the obligor, USCIS would disclose such information to the obligor to the extent permitted by law. For example, USCIS may learn of an alien's having received public benefits, as defined in 8 CFR 212.21(b), if the public benefit-granting agency notifies USCIS that it provided a public benefit(s) to the alien who was admitted on bond.<sup>675</sup> Or, USCIS may learn from the alien, as part of a bond cancellation request that he or she received public benefits, as defined in 8 CFR 212.21(b).

If USCIS found that it has insufficient information to determine whether a breach occurred, USCIS would request additional information from the benefits granting agency, or USCIS would request additional information from alien or the obligor as outlined in 8 CFR part 103. USCIS would also provide the obligor with the opportunity to respond and submit rebuttal evidence, including specifying a deadline for a response. DHS furthermore proposes that it would send a copy of any notification to the obligor or co-obligor regarding the breach also to the alien and the alien's representative (if any).<sup>676</sup>

#### **(b) Decision and Appeal**

After the obligor's response or after the deadline for a response has passed, USCIS would make a breach determination, and inform the obligor of the right to appeal in accordance with the requirements of 8 CFR 103, subpart A. *See* proposed 8 CFR 213.1(h). A bond obligor would have the possibility to appeal a breach determination to the Administrative Appeals Office

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<sup>674</sup> *See* proposed 8 CFR 213.1(h).

<sup>675</sup> *See* INA section 213, 8 U.S.C. 1183. Receipt of public benefits, however, is sufficient to cause a breach of the public charge bond, even in the absence of a demand for repayment. *See Matter of Viado*, 19 I&N Dec. 252, 253 (BIA 1985).

<sup>676</sup> *See* proposed 8 CFR 213.1.

(AAO) of USCIS by filing a Notice of Appeal or Motion (Form I-290B) together with the appropriate fee and required evidence. *See* 8 CFR 103.1; 103.3. Under this rule, DHS proposes that the obligor would only be able to file a motion under 8 CFR 103.5 as part of the unfavorable decision on appeal. DHS believes that such an approach reasonable and operationally efficient; additionally, it provides clarity as to when a breach determination becomes administratively final, as defined in 8 CFR 213.1(h). First, as part of an appeal, pursuant to 8 CFR 103.3(a)(2), a USCIS officer who made the initial breach determination must review the decision before the appeal can be forwarded to the AAO.<sup>677</sup> If the USCIS agrees with the appealing party that favorable action may be warranted, he or she may treat the appeal as a motion and then take favorable action, which would resolve the appeal.<sup>678</sup> However, the official is also not precluded from reopening a proceeding or reconsidering a decision on his or her own motion under 8 CFR 103.5(a)(5)(i). If the reviewing official is not inclined to take a favorable action, the reviewing official will forward the appeal to the AAO. Once the AAO issues the decision, however, an obligor may file a motion of the AAO's decision in accordance with 8 CFR 103.5.<sup>679</sup> Thus, limiting when a motion can be filed is efficient for both the obligor and USCIS. Additionally, a breach determination would be administratively final, among other instances, if the appeals period to the AAO expires; filing a motion does not toll the appeals period stated in 8 CFR 103.3, and if the obligor fails to appeal, the breach determination would become administratively final unless the motion is granted. The denial of a motion can then be appealed to the AAO, and the AAO decision itself, if unfavorable, may be motioned in accordance with 8 CFR 103.5. Additionally, USCIS may reopen a breach determination at any time pursuant to 8 CFR 103.5,

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<sup>677</sup> *See* 8 CFR 103.3(a)(2); *see also* Adjudicator's Field Manual, Chapter 10.8.

<sup>678</sup> *See* 8 CFR 103.3(a)(2); *see also* Adjudicator's Field Manual, Chapter 10.8.

<sup>679</sup> *See* 8 CFR 103.5; *see* Administrative Appeal's Office Practice Manual, Chapter 4, Motions to Reopen and Reconsider.

even if an appeal is pending. For these reasons, it appears to be more efficient for all parties if the obligor simply appeals a breach determination in the first instance, if review of the initial breach determination is desired.

If the appeal is dismissed or rejected, or the obligor fails to appeal, the breach determination becomes the final agency determination, and USCIS would issue a demand for payment, if the bond was a surety bond, pursuant to 31 CFR 901.2.<sup>680</sup> The alien may not appeal the breach determination or file a motion because the bond contract is between the obligor and the U.S. government; the alien is not party to the contract.<sup>681</sup>

### **(c) Consequences of Breach**

If USCIS determines that the bond has been breached, DHS proposes that USCIS would collect on the bond in full, meaning the total monetary amount of the bond as liquidated damages. This practice appears to differ from the practice described in legacy INS' Operating Instructions, which contemplate forfeiture only of the amount of public benefits received.<sup>682</sup> The total damages to the government go beyond the simple amount of the benefits received, and are difficult if not impossible to calculate with precision. Liquidated damages are an appropriate remedy in such situations, and were an accepted practice in prior immigration bond cases.<sup>683</sup>

## **8. Exhaustion of Administrative Remedies**

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<sup>680</sup> See 8 CFR 103.6(e); see proposed 8 CFR 213.1; see generally *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.* 728 F. Supp. 2d 1077, 1089-91 (N.D. Cal. 2010); *Safety Nat'l Cas. Corp. v. DHS*, 711 F. Supp. 2d 697, 703-04 (S.D. Tex. 2008).

<sup>681</sup> See proposed 8 CFR 213.1. See also, e.g., *Matter of Ins. Co. of N. Am.*, 17 I&N Dec. 251, 251 (BIA 1978) (An immigration bond is a contract between the Service and the obligor; the obligor and his or her attorney-in-fact is the proper party to appeal the service's decision).

<sup>682</sup> See OI 103.6(c) (If it is found that the alien has become a public charge, the bond shall be breached in the necessary amount with any remainder continued in effect).

<sup>683</sup> See *United States v. Goldberg*, 40 F.2d 406 (2d Cir. 1930); *Matta v. Tillinghast*, 33 F.2d 64 (1st Cir. 1929); *Ill. Surety Co. v. United States*, 229 F. 527 (2d Cir. 1916); *United States v. Andreano*, 36 F. Supp. 821 (D.R.I. 1941); *United States v. Rubin*, 227 F. 938 (E.D. Pa. 1915); *Matter of B-*, 1 I&N Dec. 121 (BIA 1941).

A final determination that a bond has been breached would create a claim in favor of the United States. The claim in favor of the United States may not be released or discharged by an immigration officer.<sup>684</sup>

Under the proposed rule, a party must first exhaust all administrative remedies and obtain a final decision from USCIS in accordance with 8 CFR part 103, before being able to bring suit challenging USCIS cancellation or bond breach determination in Federal district court.<sup>685</sup>

Although enforcement and suits may be based on various causes of action, courts have determined that bond breach determinations are always reviewed under the Administrative Procedure Act (APA) framework.<sup>686</sup> DHS invites public comments on the proposed public charge bond and its procedures, including the public charge bond type, bond amount, duration, substitution, cancellation and any other aspects of a public charge bond.

## **9. Public Charge Bond Processing Fees**

DHS is proposing to charge for the processing of public charge bonds and cancellation requests. In this rule, DHS proposes to charge \$25 for the posting of a public charge bond, \$25 for the posting of a substitute public charge bond, and \$25 when the alien, obligor or co-obligor requests to cancel the public charge bond (i.e. when the Form I-356 is filed). INA section 286(m), 8 U.S.C. 1356(m), authorizes DHS to set fees for providing adjudication and naturalization services at a level that will ensure recovery of the full costs of providing all such services. USCIS must expend resources to process public charge bonds and bond cancellation

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<sup>684</sup> See proposed 8 CFR 213.1.

<sup>685</sup> See proposed 8 CFR 213.1(j).

<sup>686</sup> See *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 728 F. Supp. 2d 1077, 1089-90 (N.D. Cal. 2010); *Bahramizadeh v. INS*, 717 F.2d 1170, 1173 (7th Cir. 1983) (reviewing bond-breach determinations under the APA framework); *Castaneda v. Dep't of Justice*, 828 F.2d 501, 502 (8th Cir. 1987) (immigration bond-breach determination reviewed under the APA framework); *Ruiz-Rivera v. Moyer*, 70 F.3d 498, 500-01 (7th Cir. 1995) (determining whether "INS' decision that the bond conditions were substantially violated was plainly erroneous or inconsistent with 8 CFR § 103.6(e)"); *Ahmed v. United States*, 480 F.2d 531, 534 (2d Cir. 1973) (analyzing substantial breach, as required by 8 CFR 103.6).

requests, including start-up costs to operationalize a public charge bond process. USCIS is primarily funded by immigration and naturalization benefit request fees charged to applicants and petitioners. Fees collected from individuals and entities filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (IEFA) and used to fund the cost of processing immigration benefit requests and providing related services (i.e. biometric collections).<sup>687</sup> In addition, DHS complies with the requirements and principles of the Chief Financial Officers Act of 1990, 31 U.S.C. 901–03, (CFO Act), and Office of Management and Budget (OMB) Circular A–25. USCIS reviews the fees deposited into the IEFA biennially and, if necessary, proposes adjustments to ensure recovery of costs necessary to meet national security, customer service, and adjudicative processing goals. USCIS typically uses projected volume data and completion rates (the average time for adjudication of an immigration benefit request) to set the fees for specific immigration benefit requests, and related services.

The proposed \$25 fees will not result in recovery of the full cost of intake and adjudication the proposed Forms I-945 and I-356. However, at this time, DHS is not able to estimate the start-up costs for establishing a public charge bond process, nor the number of public charge bonds or cancellation requests that it will receive during any period of time because both the form and process are new to USCIS, and USCIS does not have a reasonable proxy on which to rely for an estimate. In addition, public charge bonds are very fact-specific; USCIS will make a case-by-case determination on whether to offer the submission of a bond to an applicant. Similarly, whether a cancellation request is submitted will be driven by the particular circumstances of each alien by whom or on whose behalf a bond is posted, depending on whether conditions for cancellation have been met. Nevertheless, to recover at least some of

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<sup>687</sup> See *U.S. Citizenship and Immigration Services Fee Schedule*, 81 FR 26904, 26940 (May 4, 2016).



the costs of adjudicating Forms I-945 and I-356, and avoid other fee payers having to fund the public charge bond process entirely, DHS is proposing a \$25 fee for the initial public charge bond submission, and a \$25 fee for the bond cancellation request, with no option to request a fee waiver. Once USCIS implements a public charge bond process, it will be able to obtain data on the volume and burden of public charge bonds and cancellation requests and adjust these fees to amounts necessary to recover the relative costs of these adjudications next time that USCIS reviews the fees deposited into the IEFA.

#### **10. Other Technical Changes**

In addition to amending 8 CFR 103.6 and 213.1 to update and establish requirements specific to public charge bonds, this proposed rule would make technical changes to 8 CFR 103.6 to update references to offices and form names.

#### **11. Concurrent Surety Bond Rulemaking**

On June 5, 2018, DHS published a proposed rule that would set forth procedures and standards under which DHS would decline surety immigration bonds from Treasury-certified companies.<sup>688</sup> The June 5 proposed rule would also create administrative exhaustion requirements applicable to sureties. This public charge proposed rule is not intended to displace or otherwise affect the proposed changes to 8 CFR 103.6 in the June 5, 2018 proposed rule, although a final public charge rule may depart from the June 5 rule with respect to surety bonds breach determinations, as described above. DHS plans to conduct the two rulemakings concurrently.

### **VI. Statutory and Regulatory Requirements**

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<sup>688</sup> See *Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches*, 83 FR 25951 (June 5, 2018).

**A. Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)**

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs.

This proposed rule is designated a “significant regulatory action” that is economically significant since it is estimated that the proposed rule would have an annual effect on the economy of \$100 million or more, under section 3(f)(1) of Executive Order 12866. Accordingly, OMB has reviewed this proposed regulation.

**1. Summary**

As previously discussed, DHS is proposing to modify its regulations to add new regulatory provisions for inadmissibility determinations based on public charge grounds under the INA. DHS is proposing to prescribe how it determines whether an alien is inadmissible because he or she is likely at any time to become a public charge and identify the types of public benefits that are considered in the public charge determinations. An alien applying for a visa, admission at the port of entry, or adjustment of status generally must establish that he or she is not likely at any time to become a public charge. DHS proposes that certain factors may be weighed positively or negatively, depending on how the factor impacts the immigrant’s

likelihood to become a public charge. DHS is also proposing to revise existing regulations to clarify when and how it considers public charge when adjudicating change of status and extension of stay applications. Finally, DHS is proposing to revise its regulations governing the Secretary's discretion to accept a public charge bond or similar undertaking under section 213 of the Act, 8 U.S.C. 1183. Similar to a waiver, a public charge bond permits an alien deemed inadmissible on the public charge ground to obtain adjustment of status, if otherwise admissible.<sup>689</sup>

This proposed rule would impose new costs on the population applying to adjust status using Form I-485 that are subject to the public charge grounds on inadmissibility who would now be required to file the new Form I-944 as part of the public charge inadmissibility determination. DHS would require any adjustment applicants subject to the public charge inadmissibility ground to submit Forms I-944 with their Form I-485 to demonstrate they are not likely to become a public charge. In addition, Form I-129 and Form I-129CW beneficiaries, and Form I-539 filers may also incur additional costs should they receive a RFE to file Form I-944 to determine inadmissibility based on public charge grounds under the provisions of this proposed rule. The proposed rule would also impose additional costs for completing Forms I-485, I-129, I-129CW, and I-539 as the associated time burden estimate for completing each of these forms would increase. Moreover, the proposed rule would impose new costs associated with the proposed public charge bond process, including new costs for completing and filing Form I-945, Public Charge Bond, and Form I-356, Request for Cancellation of Public Charge Bond. DHS estimates that the additional total cost of the proposed rule would range from approximately

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<sup>689</sup> There is no mention of "waiver" or "waive" in INA section 213, 8 U.S.C. 1183. However, the BIA has viewed that provision as functioning as a waiver of the public charge ground of inadmissibility. *See Matter of Ulloa*, 22 I&N Dec. 725, 726 (BIA 1999).

\$45,313,422 to \$129,596,845 annually to the population applying to adjust status who also would be required to file Form I-944, for the opportunity cost of time associated with the increased time burden estimates for Forms I-485, I-129, I-129CW, and I-539, and for requesting or cancelling a public charge bond using Form I-944 and Form I-356, respectively.

Over the first 10 years of implementation, DHS estimates the total quantified new direct costs of the proposed rule would range from about \$453,134,220 to \$1,295,968,450 (undiscounted). In addition, DHS estimates that the 10-year discounted total direct costs of this proposed rule would range from about \$386,532,679 to \$1,105,487,375 at a 3 percent discount rate and about \$318,262,513 to \$910,234,008 at a 7 percent discount rate.

The proposed rule would impose new costs on the population seeking extension of stay or change of status using Form I-129, Form I-129CW, or Form I-539 since, for any of these forms, USCIS adjudication officers would then be able to exercise discretion in determining whether it would be necessary to issue a RFE whereby a Form I-129 or I-129CW beneficiary or a Form I-539 applicant may then have to submit Form I-944. DHS conducted a sensitivity analysis estimating the potential cost of filing Form I-129, Form I-129CW, or Form I-539 for a range of 10 to 100 percent of beneficiaries or filers, respectively, receiving a RFE to submit Form I-944. The costs to Form I-129 beneficiaries who may receive a RFE to file Form I-944 range from \$6,086,318 to \$60,863,181 annually and the costs to Form I-129CW beneficiaries who may receive such a RFE from \$114,132 to \$1,141,315 annually. The costs to Form I-539 applicants who may receive a RFE to file Form I-944 range from \$3,164,375 to \$31,643,752 annually.

The proposed rule would also potentially impose new costs on individuals or companies (obligors) if an alien has been found to be a public charge, but has been given the opportunity to

submit a public charge bond, for which USCIS intends to use the new Form I-945. DHS estimates the total cost to file Form I-945 would be at minimum about \$34,234 annually.<sup>690</sup>

Moreover, the proposed rule would potentially impose new costs on aliens or obligors (individuals or entities) who would submit Form I-356 as part of a request to cancel the public charge bond. DHS estimates the total cost to file Form I-356 would be approximately \$825 annually.<sup>691</sup>

The proposed rule would also result in a reduction in transfer payments from the federal government to individuals who may choose to disenroll from or forego enrollment in a public benefits program. Individuals who might choose to disenroll from or forego future enrollment in a public benefits program include foreign-born non-citizens as well as U.S. citizens who are members of mixed-status households.<sup>692</sup> DHS estimates that the total reduction in transfer payments from the federal and state governments would be approximately \$2.27 billion annually due to disenrollment or foregone enrollment in public benefits programs by foreign-born non-citizens who may be receiving public benefits. DHS estimates that the 10-year discounted federal and state transfer payments reduction of this proposed rule would be approximately \$19.3 billion at a 3 percent discount rate and about \$15.9 billion at a 7 percent discount rate. However, DHS notes there may be additional reductions in transfer payments that we are unable to quantify. There may also be additional reductions in transfer payments from states to individuals who may choose to disenroll from or forego enrollment in a public benefits program. Because state participation in these programs may vary depending on the type of benefit provided, DHS

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<sup>690</sup> Calculation: \$35.66 (cost per obligor to file Form I-945) \* 960 (estimated annual population who would file Form I-945) = \$34,233.60 = \$34,234 (rounded) annual total cost to file Form I-945.

<sup>691</sup> Calculation: \$33.00 (cost per obligor to file Form I-356) \* 25 (estimated annual population who would file Form I-356) = \$825.00 annual total cost to file Form I-356.

<sup>692</sup> DHS uses the term “foreign-born non-citizens” because it is the term used by the Census Bureau for which much of the data in this analysis is based on. DHS generally interprets this term to mean alien in this analysis.

was only able to estimate the impact of state transfers. For example, the federal government funds all SNAP food expenses, but only 50 percent of allowable administrative costs for regular operating expenses.<sup>693</sup> 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.<sup>694</sup> However, assuming that the state share of federal financial participation (FFP) is 50 percent, the 10-year discounted amount of state transfer payments of this proposed policy would be approximately \$9.65 billion at a 3 percent discount rate and about \$7.95 billion at a 7 percent discount rate. Finally, DHS recognizes that reductions in federal and state transfers under federal benefit programs may have downstream and upstream 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, pharmacies that provide prescriptions to participants in the Medicare Part D low-income subsidy (LIS) program, 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.

Additionally, the proposed rule would add new direct and indirect impacts on various entities and individuals associated with regulatory familiarization with the provisions of the rule. Familiarization costs involve the time spent reading the details of a rule to understand its changes. A foreign-born non-citizen (such as those contemplating disenrollment or foregoing enrollment in a public benefits program) might review the rule to determine whether they are

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<sup>693</sup> 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](https://fns-prod.azureedge.net/sites/default/files/apd/FNS_HB901_v2.2_Internet_Ready_Format.pdf)

<sup>694</sup> *See* Dept. of Health and Human Services, “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.” ASPE FMAP 2017 Report. Dec. 29, 2015. Available at <https://aspe.hhs.gov/basic-report/fy2017-federal-medical-assistance-percentages>. Accessed Sept. 13, 2018.

subject to the provisions of the proposed rule and may incur familiarization costs. To the extent that an individual or entity directly regulated by the rule incurs familiarization costs, those familiarization costs are a direct cost of the rule. In addition to those individuals or entities the rule directly regulates, a wide variety of other entities would likely choose to read the rule and, therefore, would incur familiarization costs. For example, immigration lawyers, immigration advocacy groups, health care providers of all types, non-profit organizations, non-governmental organizations, and religious organizations, among others, may need or want to become familiar with the provisions of this proposed rule. DHS believes such non-profit organizations and other advocacy groups might choose to read the rule in order to provide information to those foreign-born non-citizens that might be affected by a reduction in federal and state transfer payments. Familiarization costs incurred by those not directly regulated are indirect costs.

DHS estimates the time that would be necessary to read this proposed rule would be approximately 8 to 10 hours per person, resulting in opportunity costs of time. An entity, such as a non-profit or advocacy group, may have more than one person that reads the rule.

The primary benefit of the proposed rule would be to help ensure that aliens who are admitted to the United States, seek extension of stay or change of status, or apply for adjustment of status are not likely to receive public benefits and will be self-sufficient, i.e., individuals will rely on their own financial resources, as well as the financial resources of the family, sponsors, and private organizations.<sup>695</sup> DHS also anticipates that the proposed rule would produce some benefits from the elimination of Form I-864W. The elimination of this form would potentially reduce the number of forms USCIS would have to process. DHS estimates the amount of cost

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<sup>695</sup> 8 U.S.C. 1601(2).

savings that would accrue from eliminating Form I-864W would be \$35.78 per petitioner.<sup>696</sup>

However, DHS notes that we are unable to determine the annual number of filings of Form I-864W and, therefore, we are currently unable to estimate the total annual cost savings of this change. Additionally, a public charge bond process would also provide benefits to applicants as they potentially would be given the opportunity to be adjusted if otherwise admissible, at the discretion of DHS, after a determination that he or she is likely to become a public charge.

Table 36 provides a more detailed summary of the proposed provisions and their impacts.

Table 36 Summary of Major Provisions and Economic Impacts of the Proposed Rule		
Provisions	Purpose	Expected Impact of Proposed Rule
Adding 8 CFR 212.20. Purpose and applicability of public charge inadmissibility.	To define the categories of aliens that are subject to the public charge determination.	<b>Quantitative:</b>  <u>Benefits</u> <ul style="list-style-type: none"><li>• Cost savings of \$35.78 per petitioner from no longer having to complete and file Form I-864W.</li></ul> <u>Costs</u> <ul style="list-style-type: none"><li>• DHS anticipates a likely increase in the number of denials for adjustment of status applicants based on public charge inadmissibility determinations due to</li></ul>
Adding 8 CFR 212.21. Definitions.	To establish key definitions, including public charge, public benefit, likely to become a public charge, and household.	

<sup>696</sup> Calculation of savings from opportunity cost of time for no longer having to complete and submit Form I-864W: (\$35.78 per hour \* 1.0 hours) = \$35.78.



Adding 8 CFR 212.22. Public charge determination.	<p>Clarifies that evaluating public charge is a prospective determination based on the totality of the circumstances.</p> <p>Outlines minimum and additional factors considered when evaluating whether an alien immigrant is inadmissible based on the public charge ground. Positive and negative factors are weighed to determine an individual's likelihood of becoming a public charge at any time in the future.</p>	<p>formalizing and standardizing the criteria and process for public charge determinations.</p> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>Better ensure that aliens who are admitted to the United States or apply for adjustment of status are self-sufficient through an improved review process of the mandatory statutory factors.</li> </ul>
Adding 8 CFR 212.23. Exemptions and waivers for public charge ground of inadmissibility.	Outlines exemptions and waivers for inadmissibility based on public charge grounds.	
Adding 212.24. Valuation of monetizable benefits.	Provides the methodology for calculating the annual aggregate amount of the portion attributable to the alien for the monetizable non-cash benefits and considered in the public charge inadmissibility determination.	
Adding 8 CFR 214.1(a)(3)(iv) and amending 8 CFR 214.1(c)(4). Nonimmigrant general requirements; and amending 8 CFR 248.1(a) and adding 8 CFR 248.1(c)(4). Change of nonimmigrant classification eligibility.	To provide, with limited exceptions, that an application for extension of stay or change of nonimmigrant status will be denied unless the applicant demonstrates that he or she has not received, is not currently receiving, nor is likely to receive, public benefits as defined in proposed 8 CFR 212.21(b).	<p><b>Quantitative:</b></p> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>Potential annual costs for those Form I-129 beneficiaries range from \$6.09 million to \$60.9 million depending on how many beneficiaries are sent a RFE by USCIS to complete Form I-944.</li> <li>Potential annual costs for those Form I-129CW beneficiaries range from \$0.11 million to \$1.14 million depending on how many beneficiaries are sent a RFE by USCIS to complete Form I-944.</li> <li>Potential annual costs for those Form I-539 applicants range from \$3.16 million to \$31.6 million depending on how many applicants are sent a RFE by USCIS to</li> </ul>

		<p>complete Form I-944.</p> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Better assurance that aliens who are not exempt from the section 212(a)(4) inadmissibility ground who apply for extension of stay or change of status continue to be self-sufficient during the duration of their stay.</li> <li>• Reduce the likelihood that an alien will receive a covered public benefit at any time in the future.</li> </ul>
Amending 8 CFR 245. Adjustment of status to that of a person admitted for permanent residence.	To outline requirements that aliens submit a declaration of self-sufficiency on the form designated by DHS and any other evidence requested by DHS in the public charge inadmissibility determination.	<p><b>Quantitative:</b></p> <p><u>Direct Costs</u></p> <ul style="list-style-type: none"> <li>• Total annual direct costs of the proposed rule would range from about \$45.3 to \$129.6 million, including: <ul style="list-style-type: none"> <li>• \$26.0 million to applicants who must file Form I-944;</li> <li>• \$0.69 million to applicants applying to adjust status using Form I-485 with an increased time burden;</li> <li>• \$12.1 to \$66.9 million for an increased time burden for completing and filing Form I-129 and potential RFE to complete Form I-944;</li> <li>• \$0.23 to \$1.25 million for an increased time burden for completing and filing Form I-129CW and potential RFE to complete Form I-944;</li> <li>• \$6.29 to \$34.8 million for an increased time burden for completing and filing Form I-539 and potential RFE to complete Form I-944;</li> <li>• \$0.34 million to obligors for filing Form I-945; and</li> <li>• \$825 to filers for filing Form I-356.</li> </ul> </li> <li>• Total costs over a 10-year period would range from: <ul style="list-style-type: none"> <li>• \$453.1 million to \$1.30 billion for undiscounted costs;</li> <li>• \$386.5 million to \$1.11 billion at a 3 percent discount rate; and</li> <li>• \$318.3 to \$910.2 million at a 7 percent discount rate.</li> </ul> </li> </ul> <p><u>Transfer Payments</u></p> <ul style="list-style-type: none"> <li>• Total annual transfer payments of the proposed rule would be about \$2.27</li> </ul>

		<p>billion from foreign-born non-citizens and their households who disenroll from or forego enrollment in public benefits programs. The federal-level share of annual transfer payments would be about \$1.51 billion and the state-level share of annual transfer payments would be about \$756 million.</p> <ul style="list-style-type: none"> <li>• Total transfer payments over a 10-year period, including the combined federal- and state-level shares, would be: <ul style="list-style-type: none"> <li>• \$22.7 billion for undiscounted costs;</li> <li>• \$19.3 billion at a 3 percent discount rate; and</li> <li>• \$15.9 billion at a 7 percent discount rate.</li> </ul> </li> </ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"> <li>• Potential to improve the efficiency for USCIS in the review process for public charge inadmissibility.</li> </ul> <p><u>Costs</u></p> <ul style="list-style-type: none"> <li>• DHS anticipates a likely increase in the number of denials for adjustment of status applicants based on public charge inadmissibility determinations due to formalizing and standardizing the criteria and process for public charge determination.</li> <li>• Costs to various entities and individuals associated with regulatory familiarization with the provisions of 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 8 to 10 hours per individual.</li> </ul>
<b>Public Charge Bond Provisions</b>		

Amending 8 CFR 103.6. Public charge bonds.	To set forth the Secretary’s discretion to approve bonds, cancellation, bond schedules, and breach of bond, and to move principles governing public charge bonds to proposed 8 CFR 213.1.	<p><b>Quantitative:</b></p> <p><u>Costs</u></p> <ul style="list-style-type: none"><li>• \$0.34 million annually to obligors for submitting Public Charge Bond (Form I-945); and</li><li>• \$825 to annually filers for submitting Request for Cancellation of Public Charge Bond (Form I-356).</li><li>• Fees paid to surety bond companies to secure public charge bond. Fees could range from 1 – 15 percent of the public charge bond amount based on an individual’s credit score.</li></ul> <p><b>Qualitative:</b></p> <p><u>Benefits</u></p> <ul style="list-style-type: none"><li>• Potentially enable an alien who was found inadmissible on public charge grounds to be admitted by posting a public charge bond with DHS.</li></ul>
Amending 8 CFR 103.7. Fees.	To add fees for new Form I-945, Public Charge Bond, and Form I-356, Request for Cancellation of Public Charge Bond.	
Amending 8 CFR 213.1. Admission or adjustment of status of aliens on giving of a public charge bond.	In 8 CFR 213.1, to add specifics to the public charge bond provision for aliens who are seeking adjustment of status, including the discretionary availability and the minimum amount required for a public charge bond.	
Source: USCIS analysis.		

In addition to the impacts summarized above and as required by OMB Circular A-4, Table 37 presents the prepared accounting statement showing the costs associated with this proposed regulation.<sup>697</sup>

Table 37. OMB A-4 Accounting Statement (\$, 2018)				
Category	Primary Estimate	Minimum Estimate	Maximum Estimate	Source Citation

<sup>697</sup> OMB Circular A-4 is available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

BENEFITS				
Monetized Benefits	Form I-485 applicants would no longer have to file Form I-864W. Applicants would save approximately \$35.78 per petition based on the opportunity cost of time.			Preamble
Annualized quantified, but un-monetized, benefits	0	0	0	Preamble
Unquantified Benefits	The primary benefit of the proposed rule would be to ensure that aliens who are admitted to the United States or apply for adjustment of status would not use or receive one or more public benefits which they are entitled to receive, and instead, would rely on their financial resources, and those of family members, sponsors, and private organizations.  Potential to improve the efficiency for USCIS in the review process for public charge inadmissibility.			Preamble
COSTS				
Annualized monetized costs (discount rate in parenthesis)	(3%)			Preamble
	\$82,772,721	\$45,313,422	\$129,596,845	
	(7%)			Preamble
	\$82,772,721	\$45,313,422	\$129,596,845	
Annualized quantified, but un-monetized, costs	N/A			Preamble
Qualitative (unquantified) costs	DHS anticipates a likely increase in the number of denials for adjustment of status applicants based on public charge inadmissibility determinations due to formalizing and standardizing the criteria and process for public charge determination.  Costs to various entities and individuals associated with regulatory familiarization with the provisions of the 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 assumes that the time to read this proposed rule in its entirety would be 8 to 10 hours per individual.  Fees paid by aliens to obligors to secure public charge bond.  Other qualitative, unquantified effects of the proposed rule could include: <ul style="list-style-type: none"><li>• Potential lost productivity,</li><li>• adverse health effects,</li><li>• additional medical expenses due to delayed health care treatment, and</li><li>• increased disability insurance claims</li></ul>			Preamble
TRANSFERS				

Annualized monetized transfers: “on budget”	(\$2,267,842,067)	N/A	N/A	Preamble
From whom to whom?	Reduction in transfer payments from the federal government and state governments to public benefits recipients who are members of households that include foreign-born non-citizens. This amount includes the estimated federal- and state-level shares of transfer payments to foreign-born non-citizens. DHS estimates that the state-level share of transfer payments is 50 percent of the estimated amount of federal transfer payments. DHS estimates the annual federal-level share would be about \$1.51 billion and the annual state-level share of transfer payments would be about \$756 million.			Preamble
Annualized monetized transfers: “off-budget”	N/A	N/A	N/A	Preamble
From whom to whom?	N/A	N/A	N/A	Preamble
<b><i>Miscellaneous Analyses/Category</i></b>	<b><i>Effects</i></b>			<b><i>Source Citation</i></b>
Effects on state, local, and/or tribal governments	None			Preamble
Effects on small businesses	DHS believes there may be some impacts to those small entities that file Form I-129 or Form I-129CW for beneficiaries that extend stay or change status. These petitioners would have an increase in time burden for completing and filing Form I-129 or Form I-129CW and possibly have labor turnover costs if the Form I-129 or Form I-129CW EOS/COS request was denied and the beneficiary had to leave the U.S. or the Commonwealth of the Northern Mariana Islands (CNMI), respectively. DHS also believes that some surety companies that are small entities may be impacted by filing Form I-356. DHS estimates the total annual cost to file Form I-356 would be about \$825.			Preamble
Effects on wages	None			None
Effects on growth	None			None

## 2. Background and Purpose of the Rule

As discussed in the preamble, DHS seeks to ensure appropriate application of the public charge ground of inadmissibility. Under the INA, an alien 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 inadmissible to the United States.<sup>698</sup>

While the INA does not define public charge, Congress has specified that when determining if an alien is likely at any time to become a public charge, consular and immigration

<sup>698</sup> See INA section 212(a)(4); 8 U.S.C. 1182(a)(4).

officers must, at a minimum, consider certain factors including the alien's age, health, and family status; assets, resources, and financial status; and education and skills.<sup>699</sup> Additionally, DHS may consider any affidavit of support submitted under section 213A of the Act, 8 U.S.C. 1183a, on behalf of the applicant when determining whether the applicant may become a public charge.<sup>700</sup> 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.<sup>701</sup>

However, in general, there is a lack of academic literature and economic research examining the link between immigration and public benefits (i.e., welfare), and the strength of that connection.<sup>702</sup> It is also difficult to determine whether immigrants are net contributors or net users of government-supported public assistance programs since much of the answer depends on the data source, how the data are used, and what assumptions are made for analysis.<sup>703</sup> Moreover, DHS also was not able to estimate potential lost productivity, health effects, additional medical expenses due to delayed health care treatment, or increased disability insurance claims as a result of this proposed rule.

Currently, the public charge inadmissibility ground does not apply to all applicants seeking a visa, admission, or adjustment of status. Several immigrant and nonimmigrant

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<sup>699</sup> See INA section 212(a)(4)(B)(i); 8 U.S.C. 1182(a)(4)(B)(i).

<sup>700</sup> See INA section 212(a)(4)(B)(ii). When required, the applicant must submit Form I-864, Affidavit of Support Under Section 213A of the INA.

<sup>701</sup> See INA section 212(a)(4)(C) and (D), 8 U.S.C. 1182(a)(4)(C) and (D).

<sup>702</sup> See Borjas, G.J. (2016) *We wanted workers: Unraveling the immigration narrative*. Chapter 9, pp. 175-176, 190-191. W.W. Norton & Company, New York.

<sup>703</sup> See Borjas, G.J. (2016) *We wanted workers: Unraveling the immigration narrative*. Chapter 9, p. 175. W.W. Norton & Company, New York.

categories, by law or regulation, are exempt from the public charge ground of inadmissibility grounds.<sup>704</sup>

The costs and benefits for this proposed rule focus on individuals applying for adjustment of status 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. In addition, the impact of this proposed rule on nonimmigrants who are seeking an extension of stay or a change of status are also examined in this analysis.

The new process DHS is proposing for making a determination of inadmissibility based on public charge incorporates a new form—Form I-944—in the current process to apply for adjustment of status. Currently, as part of the requirements for filing Form I-485, applicants submit biometrics collection for fingerprints and signature, and also file Form I-693 which is to be completed by a designated civil surgeon. Form I-693 is used to report results of a medical examination to USCIS.

Form I-864 (Affidavit of Support Under Section 213A of the INA) is also filed to satisfy the requirements of section 213A of the Act 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. When a sponsor completes and signs Form I-864 in support of an intending immigrant, the sponsor agrees to use his or her resources, financial or otherwise, to support the intending immigrant named in the affidavit, if it becomes necessary.

Immigrants required to submit Form I-864 completed by a sponsor to obtain an immigrant visa overseas or to adjust status to that of lawful permanent resident in the United States, include 1) immediate relatives of U.S. citizens (spouses, unmarried children under 21

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<sup>704</sup> See proposed 8 CFR 212.23(a).



years of age, and parents of U.S. citizens 21 years of age and older); 2) family-based preference immigrants (unmarried sons and daughters of U.S. citizens, spouses and unmarried sons and daughters of lawful permanent residents, married sons and daughters of U.S. citizens, and brothers and sisters of U.S. citizens 21 years of age and older); and 3) employment-based preference immigrants in cases only when a U.S. citizen, lawful permanent resident, or U.S. national relative filed the immigrant visa petition or such relative has a significant ownership interest (5 percent or more) in the entity that filed the petition. However, immigrants seeking certain visa classifications are exempt from the requirement to submit a Form I-864 as are intending immigrants who have earned or can receive credit for 40 qualifying quarters (credits) of work in the United States.

Additionally, some sponsors for intending immigrants may be able to file an Affidavit of Support Under Section 213A of the INA (Form I-864EZ). Form I-864EZ is a shorter version of Form I-864 and is designed for cases that meet certain criteria. A sponsor may file Form I-864EZ only if: 1) the sponsor is the person who filed or is filing a Petition for Alien Relative (Form I-130) for a relative being sponsored; 2) the relative being sponsored is the only person listed on Form I-130; and 3) the income the sponsor is using for qualification is based entirely on salary or pension and is shown on one or more Internal Revenue Service (IRS) Form W-2s provided by employers or former employers.

Form I-864 includes attachment, Contract Between Sponsor and Household Member (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 his or her resources with the income and/or assets of a sponsor to meet those requirements. A sponsor must file a separate Form I-864A for each household member whose income and/or assets the

sponsor is using to meet the affidavit of support income requirements. The Form I-864A contract must be submitted with Form I-864. The Form I-864A serves as a contractual agreement between the sponsor and household member that, along with the sponsor, the household member is responsible for providing financial and material support to the sponsored immigrant.

In cases where the petitioning sponsor cannot meet the income requirements by him or herself, an individual seeking an immigrant visa or adjustment of status may also meet the affidavit of support requirement by obtaining a joint sponsor who is willing to accept joint and several liability with the petitioning sponsor as to the obligation to provide support to the sponsored alien. The joint sponsor must demonstrate income or assets that independently meet the requirements to support the sponsored immigrant(s) as required under section 213A(f)(2) and (f)(5)(A) of the Act, 8 U.S.C. 1883a(f)(2) and (f)(5)(A). The joint sponsor's income and assets may not be combined with the income/assets of the petitioning sponsor or the sponsored immigrant. Both the petitioning sponsor and the joint sponsor must each complete a Form I-864.

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. DHS proposes to eliminate Form I-864W and instead individuals would now be required to provide the information previously requested on the Form I-864W using Form I-485. Based on the information provided in the Form I-485, an officer can verify whether an alien is statutorily required to file an affidavit of support.

Some applicants seeking 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 obtain a fee waiver by filing a Request for Fee Waiver (Form I-912). If an applicant's Form I-912 is approved, the agency will waive both the filing fee and biometric services fee. Therefore, DHS assumes for the purposes of this economic analysis that the filing fees and biometric services fees required for Form I-485 are waived if an approved Form I-912 accompanies the application.

When filing Form I-485, a fee waiver is only available if the applicant is applying for adjustment of status based on:

- Special Immigrant Status based on an approved Form I-360 as an Afghan or Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government; or
- An adjustment provision that is exempt from the public charge grounds of inadmissibility under section 212(a)(4) of the INA, including but not limited to the Cuban Adjustment Act, the Haitian Refugee Immigration Fairness Act (HRIFA), and the Nicaraguan Adjustment and Central American Relief Act (NACARA), or similar provisions; continuous residence in the United States since before January 1, 1972, "Registry," Asylum Status under section 209(b) of the INA, Special Immigrant Juvenile Status, and Lautenberg parolees.

Additionally, the following individuals seeking adjustment of status may apply for a fee waiver for Form I-485:

- Battered spouses of A, G, E-3, or H nonimmigrants;
- Battered spouses or children of a lawful permanent resident or U.S. citizen under INA section 240A(b)(2);
- T nonimmigrants;
- U nonimmigrants; or
- VAWA self-petitioners.

DHS is proposing to facilitate the current Form I-485 application process by creating a new form—Form I-944—which would collect information to the extent allowed by relevant laws based on factors such as age; health; family status; assets, resources, and financial status; education and skills; and any additional financial support through an affidavit of support, so that DHS could determine whether an applicant applying for adjustment of status who is subject to public charge review would be inadmissible to the United States based on public charge grounds. For the analysis of this proposed rule, DHS assumes that all individuals who apply for an adjustment of status using Form I-485 are required to submit Form I-944, unless he or she is in a class of applicants that is exempt from review for determination of inadmissibility based on public charge at the time of adjustment of status according to statute or regulation.

In addition to those applying for an adjustment of status, any alien applying for an extension of stay or change of status as a nonimmigrant in the United States would now be required to demonstrate that he or she is neither using nor receiving, nor likely to receive, public benefits as defined in this proposed rule unless the applicant is in a class of admission or is seeking to change to a class of admission that is exempt from inadmissibility on public charge grounds.

For applicants seeking adjustment of status or an immigrant visa who are likely to become a public charge after the review for determination of inadmissibility based on public charge, DHS is proposing to establish a bond process for such aliens. DHS currently does not have a specific process or procedure in place to accept public charge bonds, though it has the authority to do so. The proposed public charge bond process would include DHS acceptance of a public charge bond posted on an adjustment of status applicant's behalf if the adjustment of status applicant was deemed inadmissible based on public charge. The process would also

include the possibility to substitute an existing bond, the requirement to substitute a bond before the bond on file with DHS expires, the DHS determination of breach of a public charge bond, the possibility to file an appeal upon a breach determination, cancellation of a public charge bond, and the possibility to submit an appeal upon denial of the cancellation request.

### **3. Population**

This proposed rule would affect individuals who are present in the United States who are seeking an adjustment of status to that of a lawful permanent resident. According to statute, an individual who is seeking adjustment of status and is at any time likely to become a public charge is ineligible for such adjustment.<sup>705</sup> The grounds of inadmissibility set forth in section 212 of the Act also apply when certain aliens seek admission to the United States, whether for a temporary purpose or permanently. However, the grounds of public charge inadmissibility (including ineligibility for adjustment of status) do not apply to all applicants since there are various classes of admission that Congress expressly exempted from the public charge inadmissibility ground. Within USCIS, this proposed rule would affect individuals who apply for adjustment of status since 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 class of admission that is exempt from review for public charge. In addition, the proposed rule would affect individuals applying for an extension of stay or change of status because these individuals would have to demonstrate that they have not received, are not currently receiving, and are not likely to receive public benefits in the future, as defined in the proposed rule. This analysis estimates the populations from each of these groups that would be subject to review for receipt of public benefits. DHS notes that the population estimates are based on aliens present in

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<sup>705</sup> See INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

the United States who are applying for adjustment of status or extension of stay or change of status, rather than individuals outside the United States who must apply for an immigrant visa through consular processing at a DOS consulate abroad.

**(a) Population Seeking Adjustment of Status**

With this proposed rule, DHS intends to ensure that aliens who apply for adjustment of status are self-sufficient and will rely on their own financial resources, as well as those of their families, sponsors, and private organizations. Therefore, DHS estimates the population of individuals who are applying for adjustment of status using Form I-485.<sup>706</sup> Under the proposed rule, these individuals would undergo review for determination of inadmissibility based on public charge grounds, unless an individual is in a class of admission that is exempt from review for public charge determination.

Table 38 shows the total population in fiscal years 2012 to 2016 that applied for adjustment of status. In general, the annual population of individuals who applied to adjust status was consistent. Over the 5-year period, the population of individuals applying for adjustment of status ranged from a low of 530,802 in fiscal year 2013 to a high of 565,427 in fiscal year 2016. In addition, the average population of individuals over 5 fiscal years who applied for adjustment of status over this period was 544,246.

Table 38. Total Population that Applied for Adjustment of Status, Fiscal Year 2012 to 2016.	
Fiscal Year	Total Population Applying for Adjustment of Status

<sup>706</sup> Data on the population of individuals who are applying for adjustment of status and the class of admission come from U.S. Department of Homeland Security, Yearbook of Immigration Statistics for years 2012 to 2016. See U.S. Department of Homeland Security. Yearbook of Immigration Statistics. Office of Immigration Statistics. Available at <https://www.dhs.gov/immigration-statistics/yearbook/> (accessed Jan. 24, 2018).

2012	547,559
2013	530,802
2014	535,126
2015	542,315
2016	565,427
<b>Total</b>	<b>2,721,229</b>
<b>5-year average</b>	<b>544,246</b>
Source: USCIS analysis of United States Department of Homeland Security, Yearbook of Immigration Statistics for years 2012 to 2016. Available at <a href="https://www.dhs.gov/immigration-statistics/yearbook">https://www.dhs.gov/immigration-statistics/yearbook</a> . Accessed Jan. 24, 2018. For example, see United States Department of Homeland Security, Yearbook of Immigration Statistics: 2016, Table 7. Washington, D.C., U.S. Department of Homeland Security, Office of Immigration Statistics, 2017. Note: The most recent data available are from fiscal year 2016, hence data from fiscal year 2017 are not yet available.	

DHS welcomes any public comments on our estimates of the total number of individuals applying for adjustment of status in the United States as the primary basis for developing population estimates of those who would be subject to review for determination of inadmissibility based on public charge grounds.

*i. Exemptions from Determination of Inadmissibility Based on Public Charge Grounds*

There are exemptions and waivers for certain classes of admission that are not subject to review for determination of inadmissibility based on public charge grounds. Table 39 shows the classes of applicants for admission, adjustment of status, or registry according to statute or regulation that are exempt from inadmissibility based on public charge grounds.

<b>Table 39. Classes of Applicants for Admission, Adjustment of Status, or Registry Exempt from Inadmissibility Based on Public Charge According To Statute or Regulation.</b>	
<ul style="list-style-type: none"> <li>Refugees and asylees as follows: at the time admission under section 207 of the Act (refugees) or grant under section 208 of the Act (asylees adjustment of status to lawful permanent resident under sections 207(c)(3) and 209(c) of the Act;</li> </ul>	<ul style="list-style-type: none"> <li>Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100-202, 101 Stat. 1329-183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;</li> </ul>
<ul style="list-style-type: none"> <li>Afghan and Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government as described in</li> </ul>	<ul style="list-style-type: none"> <li>Cuban and Haitian entrants applying for adjustment of status under in section 202 of the Immigration Reform and Control</li> </ul>

<p>section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109-163 (Jan. 6, 2006), as amended, 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);</p>	<p>Act of 1986 (IRCA), Public Law 99-603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;</p>
<ul style="list-style-type: none"> <li>• Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89-732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;</li> </ul>	<ul style="list-style-type: none"> <li>• Nicaraguans and other Central Americans applying for adjustment of status under sections 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105-100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;</li> </ul>
<ul style="list-style-type: none"> <li>• Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;</li> </ul>	<ul style="list-style-type: none"> <li>• Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101-167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;</li> </ul>
<ul style="list-style-type: none"> <li>• Special immigrant juveniles as described in section 245(h) of the Act;</li> </ul>	<ul style="list-style-type: none"> <li>• Aliens who entered the United States prior to January 1, 1972 and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);</li> </ul>
<ul style="list-style-type: none"> <li>• Aliens applying for or re-registering for Temporary Protected Status as described in section 244 of the Act in accordance with section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);</li> </ul>	<ul style="list-style-type: none"> <li>• A nonimmigrant classified under section 101(a)(15)(T) of the Act, in accordance with section 212(d)(13)(A) of the Act;</li> </ul>
<ul style="list-style-type: none"> <li>• An applicant for, or individual who is granted, nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act;</li> </ul>	<ul style="list-style-type: none"> <li>• Nonimmigrants classified under section 101(a)(15)(U) of the Act applying for adjustment of status under section 245(m) of the Act and 8 CFR 245.24;</li> </ul>
<ul style="list-style-type: none"> <li>• An alien who is a VAWA self-petitioner under section 212(a)(4)(E)(i) of the Act;</li> </ul>	<ul style="list-style-type: none"> <li>• A qualified alien described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), in accordance with section 212(a)(4)(E)(iii) of the Act;</li> </ul>
<ul style="list-style-type: none"> <li>• Applicants adjusting status who qualify for a benefit under section 1703 of the National Defense Authorization Act, Public Law 108-136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses,</li> </ul>	<ul style="list-style-type: none"> <li>• American Indians Born in Canada as described in section 289 of the Act;</li> </ul>



children, and parents);	
<ul style="list-style-type: none"> <li>Nationals of Vietnam, Cambodia, and Laos applying for adjustment of status under section 586 of Public Law 106-429 under 8 CFR 245.21; and</li> </ul>	<ul style="list-style-type: none"> <li>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 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note.</li> </ul>
Source: USCIS.	

To estimate the annual total population of individuals seeking to adjust status who would be subject to review for inadmissibility based on public charge grounds, DHS examined the annual total population of individuals who applied for adjustment of status for fiscal years 2012 to 2016. For each fiscal year, DHS removed individuals from the population whose classes of admission are exempt from public charge review for inadmissibility, as shown in table 39, leaving the total population that would be subject to such review. Further discussion of these exempt classes of admission can be found in the preamble.

Table 40 shows the total estimated population of individuals seeking to adjust status under a class of admission that is exempt from review for inadmissibility based on public charge grounds for fiscal years 2012 to 2016 as well as the total estimated population that would be subject to public charge review.<sup>707</sup> In fiscal year 2016, for example, the total number of persons who applied for an adjustment of status across various classes of admission was 565,427 (see table 38). After removing individuals from this population whose classes of admission are exempt from examination for public charge, DHS estimates the total population of adjustment

<sup>707</sup> Calculation of total estimated population that would be subject to public charge review: (Total Population Applying for Adjustment of Status) – (Total Population Seeking Adjustment of Status that is Exempt from Public Charge Review for Inadmissibility) = Total Population Subject to Public Charge Review for Inadmissibility.

applicants in fiscal year 2016 that would be subject to public charge review for inadmissibility is 382,769.<sup>708</sup>

<b>Table 40. Total Estimated Population of Individuals Seeking Adjustment of Status Who Were Exempt from Public Charge Adjudication.</b>		
<b>Fiscal Year</b>	<b>Total Population Seeking Adjustment of Status that is Exempt from Public Charge Review for Inadmissibility</b>	<b>Total Population Subject to Public Charge Review for Inadmissibility</b>
<b>2012</b>	163,333	384,226
<b>2013</b>	132,814	397,988
<b>2014</b>	154,912	380,214
<b>2015</b>	176,190	366,125
<b>2016</b>	182,658	382,769
<b>Total</b>	<b>809,907</b>	<b>1,911,322</b>
<b>5-year average</b>	<b>161,981</b>	<b>382,264</b>
Source: USCIS analysis of United States Department of Homeland Security, Yearbook of Immigration Statistics for years 2012 to 2016. Available at <a href="https://www.dhs.gov/immigration-statistics/yearbook">https://www.dhs.gov/immigration-statistics/yearbook</a> . Accessed Jan. 24, 2018. For example, see United States Department of Homeland Security. Yearbook of Immigration Statistics: 2016, Table 7. Washington, D.C., U.S. Department of Homeland Security, Office of Immigration Statistics, 2017.		

DHS estimates the projected annual average total population of adjustment applicants that would be subject to public charge review for inadmissibility by DHS is 382,264. This estimate is based on the 5-year average of the annual estimated total population subject to public charge review for inadmissibility from fiscal year 2012 to fiscal year 2016. Over this 5-year period, the estimated population of individuals applying for adjustment of status subject to public charge review ranged from a low of 366,125 in fiscal year 2015 to a high of 397,988 in fiscal year 2013.

<sup>708</sup> Calculation of total population subject to public charge review for inadmissibility for fiscal year 2016: 565,427 – 182,658 = 382,769.

DHS welcomes any public comments on our estimates of the total population of individuals seeking to adjust status under a class of admission that is exempt from review for inadmissibility based on public charge grounds as well as the total population that would be subject to public charge review. DHS notes that the population estimates are based on immigrants present in the United States who are applying for adjustment of status, rather than immigrants outside the United States who must apply for an immigrant visa through consular processing at DOS consulate abroad.

*ii. Exemptions from the Requirement to Submit an Affidavit of Support*

In addition to the exemptions from inadmissibility based on public charge, certain classes of admission are exempt from the requirement to submit an affidavit of support for applicants for admission, adjustment of status, or registry. Certain applicants applying for adjustment of status are required to submit an affidavit of support from a sponsor or otherwise be found inadmissible as likely to become a public charge. When an affidavit of support is submitted, a contract is established between the sponsor and the U.S. Government to establish a legally enforceable obligation to support the applicant financially.

Table 41 shows the estimated total population of individuals seeking adjustment of status who were exempt from the requirement to submit an affidavit of support from a sponsor over the period fiscal year 2012 to fiscal year 2016.<sup>709</sup> The table also shows the total estimated population that was required to submit an affidavit of support showing evidence of having adequate means of financial support so that an applicant would not be found inadmissible as likely to become a public charge for failure to submit a sufficient affidavit of support. Further

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<sup>709</sup> Data on the population of individuals who are applying for adjustment of status and the class of admission come from U.S. Department of Homeland Security, Yearbook of Immigration Statistics for years 2012 to 2016. See U.S. Department of Homeland Security. Yearbook of Immigration Statistics. Office of Immigration Statistics. Available at <https://www.dhs.gov/immigration-statistics/yearbook/> (accessed Jan. 24, 2018).

discussion of these exempt classes of admission can be found in the preamble. The estimated annual average population of individuals seeking to adjust status who were required to submit a public charge affidavit of support from a sponsor over the 5-year period was 257,610. Over this 5-year period, the estimated population of individuals required to submit a public charge affidavit of support from a sponsor ranged from a low of 247,011 in fiscal year 2015 to a high of 272,451 in fiscal year 2016.

<b>Table 41. Total Estimated Population of Individuals Seeking Adjustment of Status Who Are Exempt from the Requirement to Submit Public Charge Affidavit of Support.</b>		
<b>Fiscal Year</b>	<b>Total Population Exempt from Submitting Affidavit of Support</b>	<b>Total Population Required to Submit a Public Charge Affidavit of Support</b>
<b>2012</b>	288,951	258,608
<b>2013</b>	272,222	258,580
<b>2014</b>	283,726	251,400
<b>2015</b>	295,304	247,011
<b>2016</b>	292,976	272,451
<b>Total</b>	<b>1,433,179</b>	<b>1,288,050</b>
<b>5-year average</b>	<b>286,636</b>	<b>257,610</b>
Source: USCIS analysis of United States Department of Homeland Security, Yearbook of Immigration Statistics for years 2012 to 2016. Available at <a href="https://www.dhs.gov/immigration-statistics/yearbook">https://www.dhs.gov/immigration-statistics/yearbook</a> . Accessed Jan. 24, 2018. For example, see United States Department of Homeland Security, Yearbook of Immigration Statistics: 2016, Table 7. Washington, D.C., U.S. Department of Homeland Security, Office of Immigration Statistics, 2017.		

DHS estimates the projected annual average total population that would be subject to the requirement to submit an affidavit of support from a sponsor is 257,610. This estimate is based on the 5-year average of the annual estimated total population of applicants applying for adjustment of status that would be subject to the requirement to submit an affidavit of support from a sponsor from fiscal year 2012 to fiscal year 2016. Over this 5-year period, the estimated

population of such individuals applying for adjustment of status ranged from a low of 247,011 in fiscal year 2015 to a high of 272,451 in fiscal year 2016.

DHS welcomes any public comments on our estimates of the total population of individuals seeking adjustment of status who were exempt from the requirement to submit an affidavit of support as well as the total population that was required to submit an affidavit of support showing evidence of having adequate means of financial support so that an applicant would not be found inadmissible as likely become a public charge for failure to submit a sufficient affidavit of support. DHS notes that the population estimates are based on immigrants present in the United States who are applying for adjustment of status, rather than immigrants outside the United States who must apply for an immigrant visa through consular processing at a U.S. Department of State consulate abroad.

#### **(b) Population Seeking Extension of Stay or Change of Status**

Nonimmigrants in the United States may apply for an extension of stay or change of status by having Form I-129 filed by an employer on his or her behalf. An employer uses Form I-129 to petition USCIS for a beneficiary to enter the United States temporarily as a nonimmigrant to perform services or labor, or to receive training. The Form I-129 can also be used to request an extension or change in status. In addition, an employer may use Form I-129CW to petition USCIS for a foreign national who is ineligible for another employment-based nonimmigrant classification to work as a nonimmigrant in the Commonwealth of the Northern Mariana Islands (CNMI) temporarily as a CW-1, CNMI-Only Transitional Worker. Moreover, an employer may also use Form I-129CW to request an extension of stay or change of status for a CNMI-Only Transitional Worker.

A nonimmigrant may file Form I-539 so long as the nonimmigrant is currently in an eligible nonimmigrant category. A nonimmigrant generally must submit an application for extension of stay or change of status before his or her current authorized stay expires. In addition to determining inadmissibility based on public charge for individuals seeking adjustment of status, DHS is proposing to conduct reviews of nonimmigrants who apply for extension of stay or change of status to determine whether the applicant has demonstrated that he or she has not received, is not receiving, nor is likely to receive, public benefits, as defined in the proposed rule.<sup>710</sup> However, DHS proposes that such determinations would not require applicants seeking extension of stay or change of status to file Form I-944. Instead, USCIS officers would be able to exercise discretion regarding whether it would be necessary to issue a RFE whereby an applicant would then have to submit Form I-944.

Table 42 shows the total estimated population of beneficiaries seeking extension of stay or change of status through an employer petition using Form I-129 for fiscal years 2012 to 2016. DHS estimated this population based on receipts of Form I-129 in each fiscal year. Over this 5-year period, the estimated population of individuals who would be subject to a determination of inadmissibility on public charge grounds ranged from a low of 282,225 in fiscal year 2013 to a high of 377,221 in fiscal year 2012. The estimated average population of individuals seeking extension of stay or change of status over the five-year period fiscal year 2012 to 2016 was 336,335. DHS estimates that 336,335 is the average annual projected population of beneficiaries seeking extension of stay or change of status through an employer petition using Form I-129 and therefore subject to the discretionary RFEs for public charge determination.

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<sup>710</sup> Past or current receipt of public benefits, alone, would not justify a finding of inadmissibility on public charge grounds.

<b>Table 42. Total Estimated Population of Beneficiaries Seeking Extension of Stay or Change of Status through an Employer Petition Using Form I-129, Fiscal Year 2012 – 2016.</b>			
<b>Fiscal Year</b>	<b>Receipts</b>	<b>Approvals</b>	<b>Denials</b>
2012	377,221	249,172	127,555
2013	282,225	221,229	60,413
2014	306,159	242,513	63,087
2015	340,338	277,010	62,175
2016	375,733	321,783	52,430
<b>Total</b>	<b>1,681,676</b>	<b>1,311,707</b>	<b>365,660</b>
<b>5-year average</b>	<b>336,335</b>	<b>262,341</b>	<b>73,132</b>
Source: USCIS analysis of data provided by USCIS, Office of Performance & Quality. Notes: Denials include the number of applications that were denied, terminated, revoked, or withdrawn during the reporting period. Cases may have been adjudicated in a later year than the one in which they were received.			

Table 43 shows the total estimated population of beneficiaries seeking extension of stay or change of status through an employer petition using Form I-129CW for fiscal years 2012 to 2016. DHS estimated this population based on receipts of Form I-129CW in each fiscal year. Over this 5-year period, the estimated population of individuals who would be subject to a determination of inadmissibility on public charge grounds ranged from a low of 5,249 in fiscal year 2013 to a high of 8,273 in fiscal year 2016. The estimated average population of individuals seeking extension of stay or change of status through Form I-129CW over the five-year period fiscal year 2012 to 2016 was 6,307. DHS estimates that 6,307 is the average annual projected population of beneficiaries seeking extension of stay or change of status through an employer petition using Form I-129CW and therefore subject to discretionary RFEs for public charge determination.

<b>Table 43. Total Estimated Population of Beneficiaries Seeking Extension of Stay or Change of Status through an Employer Petition Using Form I-129CW, Fiscal Year 2012 – 2016.</b>			
<b>Fiscal Year</b>	<b>Receipts</b>	<b>Approvals</b>	<b>Denials</b>
2012	5,973	4,083	238
2013	5,249	5,053	521
2014	6,700	5,554	535
2015	5,339	4,906	340
2016	8,273	7,580	540
<b>Total</b>	<b>31,534</b>	<b>27,176</b>	<b>2,174</b>
<b>5-year average</b>	<b>6,307</b>	<b>5,435</b>	<b>435</b>
Source: USCIS analysis of data provided by USCIS, Office of Performance & Quality. Notes: Denials include the number of applications that were denied, terminated, revoked, or withdrawn during the reporting period. Cases may have been adjudicated in a later year than the one in which they were received.			

Table 44 shows the total estimated population of individuals seeking extension of stay or change of status using Form I-539 for fiscal years 2012 to 2016. DHS estimated this population based on receipts of Form I-539 in each fiscal year. Over this 5-year period, the estimated population of individuals who would be subject to a determination of inadmissibility on public charge grounds ranged from a low of 149,583 in fiscal year 2013 to a high of 203,695 in fiscal year 2016. The estimated average population of individuals seeking extension of stay or change of status over the 5-year period from fiscal year 2012 to 2016 was 174,866. DHS estimates that 174,866 is the average annual projected population of individuals who would seek an extension of stay and change of status using Form I-539 and therefore would be subject to the discretionary RFEs for public charge determination.



<b>Table 44. Total Estimated Population of Individuals Seeking Extension of Stay or Change of Status Using Form I-539, Fiscal Year 2012 – 2016.</b>			
<b>Fiscal Year</b>	<b>Receipts</b>	<b>Approvals</b>	<b>Denials</b>
2012	154,309	135,379	18,781
2013	149,583	130,600	18,826
2014	185,515	136,298	22,053
2015	181,226	154,184	26,162
2016	203,695	138,870	17,492
<b>Total</b>	<b>874,328</b>	<b>695,331</b>	<b>103,314</b>
<b>5-year average</b>	<b>174,866</b>	<b>139,066</b>	<b>20,663</b>
Source: USCIS analysis of data provided by USCIS, Office of Performance & Quality. Notes: Denials include the number of applications that were denied, terminated, revoked, or withdrawn during the reporting period. Cases may have been adjudicated in a later year than the one in which they were received.			

DHS welcomes any public comments on our estimates of the total population of employers filing on behalf of individuals seeking extension of stay or change of status using Form I-129 or Form I-129CW as well as the total of individuals seeking extension of stay or change of status using Form I-539, where DHS proposes that the total population using each of these forms would be subject to review on a discretionary basis for determination of inadmissibility based on public charge grounds. DHS notes that the population estimates are based on nonimmigrants present in the United States who are applying for extension of stay or a change of status, rather than individuals outside the United States who must apply for a nonimmigrant visa through consular processing at a DOS consulate abroad.

#### **4. Cost-Benefit Analysis**

DHS expects this proposed rule to produce costs and benefits associated with the procedures for examining individuals seeking entry into the United States for inadmissibility based on public charge.

For this proposed rule, DHS generally uses the federal minimum wage plus weighted average benefits of \$10.66 per hour (\$7.25 federal minimum wage base plus \$3.41 weighted average benefits) as a reasonable proxy of time valuation to estimate the opportunity costs of time for individuals who are applying for adjustment of status and must be reviewed for determination of inadmissibility based on public charge grounds.<sup>711</sup> DHS also uses \$10.66 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 and/or assign valuation in deciding how to allocate their time. This analysis uses the federal minimum wage rate since approximately 80 percent of the total number of individuals who obtained lawful permanent resident status were in a class of admission under family-sponsored preferences and other non-employment-based classifications such as diversity, refugees and asylees, and parolees.<sup>712</sup> Therefore, DHS assumes many of these applicants hold positions in occupations that are likely to pay around the federal minimum wage.

The federal minimum wage of \$7.25 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, 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 1.47 and, therefore, is able to estimate the full opportunity cost per applicant, including employee wages and salaries and the full cost of benefits such as paid leave, insurance,

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<sup>711</sup> See 29 U.S.C. section 206 - Minimum wage, *available at* <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title29/html/USCODE-2011-title29-chap8-sec206.htm> (accessed Jan. 24, 2018).

<sup>712</sup> See United States Department of Homeland Security. Yearbook of Immigration Statistics: 2016, Table 7. Washington, D.C., U.S. Department of Homeland Security, Office of Immigration Statistics, 2017. Available at <https://www.dhs.gov/immigration-statistics/yearbook/2016> (accessed Jan. 24, 2018).

and retirement.<sup>713</sup> DHS notes that there is no requirement that an individual be employed in order to file Form I-485 and many applicants may not be employed. Therefore, in this proposed rule, DHS calculates the total rate of compensation for individuals applying for adjustment of status as \$10.66 per hour in this proposed rule using the benefits-to-wage multiplier, where the mean hourly wage is \$7.25 per hour worked and average benefits are \$3.41 per hour.<sup>714</sup>

However, DHS uses the unweighted mean hourly wage of \$24.34 per hour for all occupations to estimate the opportunity cost of time for some populations in this economic analysis, such as those submitting an affidavit of support for an immigrant seeking to adjust status and those requesting extension of stay or change of status. For populations such as this, DHS assumes that individuals are dispersed throughout the various occupational groups and industry sectors of the U.S. economy. For the population submitting an affidavit of support, therefore, DHS calculates the average total rate of compensation as \$35.78 per hour, where the mean hourly wage is \$24.34 per hour worked and average benefits are \$11.46 per hour.<sup>715,716</sup>

DHS welcomes public comments on its use of \$10.66 per hour as the opportunity cost of time for most populations of this analysis (individuals in a class of admission under family-sponsored preferences and other non-employment-based preferences) and \$35.78 per hour as the

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<sup>713</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour) =  $\$36.32 / \$24.77 = 1.466 = 1.47$  (rounded). See Economic News Release, *Employer Cost for Employee Compensation (March 2018)*, 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. June 8, 2018, available at [https://www.bls.gov/news.release/archives/ecec\\_06082018.pdf](https://www.bls.gov/news.release/archives/ecec_06082018.pdf) (viewed June 20, 2018).

<sup>714</sup> The calculation of the weighted federal minimum hourly wage for applicants:  $\$7.25 \text{ per hour} * 1.47 \text{ benefits-to-wage multiplier} = \$10.658 = \$10.66$  (rounded) per hour.

<sup>715</sup> The national mean hourly wage across all occupations is reported to be \$24.34. See Occupational Employment and Wage Estimates United States, May 2017. Department of Labor, BLS, Occupational Employment Statistics program; available at [https://www.bls.gov/oes/2017/may/oes\\_nat.htm](https://www.bls.gov/oes/2017/may/oes_nat.htm).

<sup>716</sup> The calculation of the weighted mean hourly wage for applicants:  $\$24.34 \text{ per hour} * 1.47 = \$35.779 = \$35.78$  (rounded) per hour.

opportunity cost of time for other populations, such as those submitting an affidavit of support for an immigrant seeking to adjust status.

**(a) Baseline Estimate of Current Costs**

The baseline estimate of current costs is the best assessment of costs and benefits absent the proposed action. For this proposed rule, DHS estimates the baseline according to current operations and requirements and to that compares the estimated costs and benefits of the provisions set forth in the proposed rule. Therefore, DHS defines the baseline by assuming “no change” to DHS regulations to establish an appropriate basis for evaluating the provisions of the proposed rule. DHS notes that costs detailed as part of the baseline include all current costs associated with completing and filing Form I-485, including required biometrics collection and medical examination (Form I-693) as well as any affidavits of support (Forms I-864, I-864A, I-864EZ, and I-864W) or requested fee waivers (Form I-912). As noted previously in the background section, the source of additional costs imposed by this proposed rule would come from the proposed requirements to submit Form I-944 detailing information about an applicant regarding factors such as age, health, family status, finances, and education and skills. These costs are analyzed later in this economic analysis.

Table 45 shows the estimated population and annual costs of filing for adjustment of status and requesting an extension of stay or change 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, if necessary, an affidavit of support and/or Form I-912. The costs are derived from the process of applying for extension of stay or change of status, including filing Form I-129, Form I-129CW, or Form I-539.

<b>Table 45. Total Average Annual Baseline (Current) Costs.</b>		
<b>Form</b>	<b>Estimated Average Annual Population</b>	<b>Total Annual Cost</b>
<b>I-485, Application to Register Permanent Residence or Adjust Status</b>	<b>382,264</b>	<b>\$519,114,512</b>
Filing Fee		\$435,780,960
Opportunity Cost of Time (OCT)		\$25,470,250
Biometrics Services Fee		\$32,492,440
Biometrics Services OCT		\$14,954,168
Biometrics Services Travel Costs		\$10,416,694
<b>I-693, Report of Medical Examination and Vaccination Record</b>	<b>382,264</b>	<b>\$198,930,186</b>
Medical Exam Cost		\$187,309,360
Opportunity Cost of Time (OCT)		\$10,187,336
Postage Costs		\$1,433,490
<b>I-912, Request for Fee Waiver</b>	<b>58,558</b>	<b>\$949,811</b>
Opportunity Cost of Time (OCT)		\$730,218
Postage Costs		\$219,593
<b>Affidavit of Support Forms (I-864, I-864A, I-864EZ, I-864W)</b>	<b>257,610</b>	<b>\$55,303,715</b>
Opportunity Cost of Time (OCT)		\$55,303,715
<b>I-129, Petition for a Nonimmigrant Worker</b>	<b>336,335</b>	<b>\$184,136,686</b>
Filing Fee		\$154,714,100
Opportunity Cost of Time (OCT)		\$28,161,330
Postage Costs		\$1,261,256
<b>I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker</b>	<b>6,307</b>	<b>\$5,154,963</b>
Filing Fee		\$4,477,970
Opportunity Cost of Time (OCT)		\$676,993
<b>I-539, Application to Extend/Change Nonimmigrant Status</b>	<b>174,866</b>	<b>\$76,463,656</b>
Filing Fee		\$64,700,420
Opportunity Cost of Time (OCT)		\$11,763,236
<b>Total Baseline Costs</b>		<b>\$1,040,053,529</b>
Source: USCIS analysis.		

*i. Determination of Inadmissibility Based on Public Charge Grounds*

*a. 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 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 would be imposed by the proposed rule, but costs that applicants currently incur as part of the 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 382,264. Therefore, DHS estimates that the annual filing cost associated for Form I-485 is approximately \$435,780,960.<sup>717</sup>

DHS estimates the time burden of completing Form I-485 is 6.25 hours per response, including the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.<sup>718</sup> Using the total rate of compensation for minimum wage of \$10.66 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-485 would be \$66.63 per applicant.<sup>719</sup> Therefore, using the total population estimate of 382,264 annual filings for Form I-485, DHS estimates the total

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<sup>717</sup> Calculation: Form I-485 filing fee (\$1,140) \* Estimated annual population filing Form I-485 (382,264) = \$435,780,960 annual cost for filing Form I-485.

<sup>718</sup> Source: Paperwork Reduction Act (PRA) Supporting Statement for Form I-485 (OMB control number 1615-0023). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201706-1615-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201706-1615-001).

<sup>719</sup> Calculation for opportunity cost of time for filing Form I-485: (\$10.66 per hour \* 6.25 hours) = \$66.625 = \$66.63 (rounded) per applicant.

opportunity cost of time associated with completing Form I-485 is approximately \$25,470,250 annually.<sup>720</sup>

USCIS requires applicants who file Form I-485 to submit biometric information (fingerprints and signature) by attending a biometrics services appointment at a designated USCIS Application Support Center (ASC). The biometrics services processing fee is \$85.00 per applicant. Therefore, DHS estimates that the annual cost associated with biometrics services processing for the estimated average annual population of 382,264 individuals applying for adjustment of status is approximately \$32,492,440.<sup>721</sup>

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 his or her biometrics. While travel times and distances vary, DHS estimates that an applicant's average roundtrip distance to an ASC is 50 miles and takes 2.5 hours on average to complete the trip.<sup>722</sup> Furthermore, DHS estimates that an applicant waits an average of 1.17 hours for service and to have his or her biometrics collected at an ASC, adding up to a total biometrics-related time burden of 3.67 hours.<sup>723</sup> Using the total rate of compensation of minimum wage of \$10.66 per hour, DHS estimates the opportunity cost of time for completing

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<sup>720</sup> Calculation: Form I-485 estimated opportunity cost of time (\$66.63) \* Estimated annual population filing Form I-485 (382,264) = \$25,470,250.13 = \$25,470,250 (rounded) annual opportunity cost of time for filing Form I-485.

<sup>721</sup> Calculation: Biometrics services processing fee (\$85) \* Estimated annual population filing Form I-485 (382,264) = \$32,492,440 annual cost for associated with Form I-485 biometrics services processing.

<sup>722</sup> See "Employment Authorization for Certain H-4 Dependent Spouses; Final rule," 80 FR 10284 (25 Feb. 2015); and "Provisional and Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives; Final Rule," 78 FR 536, 572 (3 Jan. 2013).

<sup>723</sup> Source for biometric time burden estimate: Paperwork Reduction Act (PRA) Supporting Statement for Form I-485 (OMB control number 1615-0023). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201706-1615-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201706-1615-001).

the biometrics collection requirements for Form I-485 is \$39.12 per applicant.<sup>724</sup> Therefore, using the total population estimate of 382,264 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 \$14,954,168 annually.<sup>725</sup>

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 \$27.25 per trip, based on the 50-mile roundtrip distance to an ASC and the General Services Administration's (GSA) travel rate of \$0.545 per mile.<sup>726</sup> DHS assumes that each applicant would travel independently to an ASC to submit his or her 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 382,264 individuals applying for adjustment of status is approximately \$10,416,694.<sup>727</sup>

In sum, DHS estimates the total current annual cost for filing Form I-485 is \$519,114,512. The total current annual costs include Form I-485 filing fees, biometrics services fees, opportunity cost of time for completing Form I-485 and submitting biometrics information, and travel cost associated with biometrics collection.<sup>728</sup> DHS notes that a medical examination is

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<sup>724</sup> Calculation for opportunity cost of time to comply with biometrics submission for Form I-485: (\$10.66 per hour \* 3.67 hours) = \$39.12 (rounded) per applicant.

<sup>725</sup> Calculation: Estimated opportunity cost of time to comply with biometrics submission for Form I-485 (\$39.12) \* Estimated annual population filing Form I-485 (382,264) = \$14,954,167.68 = \$14,954,168 (rounded) annual opportunity cost of time for filing Form I-485.

<sup>726</sup> 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 January 7, 2018).

<sup>727</sup> Calculation: (Biometrics collection travel costs) \* (Estimated annual population filing Form I-485) = \$27.25 \* 382,264 = \$10,416,694 annual travel costs related to biometrics collection for Form I-485.

<sup>728</sup> Calculation: \$435,780,960 (Annual filing fees for Form I-485) + \$25,470,250 (Opportunity cost of time for filing Form I-485) + \$32,492,440 (Biometrics services fees) + \$14,954,168 (Opportunity cost of time for biometrics



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.

*b. 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 completed by a designated civil surgeon. Form I-693 is used to report results of a medical examination to USCIS. For this analysis, DHS assumes that all individuals who apply for adjustment of status using Form I-485 are required to submit Form I-693. DHS reiterates that costs examined in this section are not additional costs that would be imposed by the proposed rule, but costs that applicants currently incur as part of the application process to adjust status. The medical examination is required to establish that an applicant is 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 medical examination, including the cost of any follow-up tests or treatment that is required, and must make payments directly to the civil surgeon or other health care provider. In addition, applicants bear the opportunity cost of time for completing the medical exam form as well as sitting for the medical exam and the time waiting to be examined.

USCIS does not regulate the fees charged by civil surgeons for the completion of a medical examination. In addition, medical examination fees vary by physician. DHS notes that the cost of the medical examinations may vary widely, from as little as \$20 to as much as \$1,000 per respondent (including vaccinations to additional medical evaluations and testing that may be

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collection requirements) + \$10,416,694 (Travel costs for biometrics collection) = \$519,114,512 total current annual cost for filing Form I-485.

required based on the medical conditions of the applicant).<sup>729</sup> DHS estimates that the average cost for these activities is \$490 and that all applicants would incur this cost.<sup>730</sup> Since DHS assumes that all applicants who apply for adjustment of status using Form I-485 must also submit Form I-693, DHS estimates that based on the estimated average annual population of 382,264 the annual cost associated with filing Form I-693 is \$187,309,360.<sup>731</sup>

DHS estimates the time burden associated with filing Form I-693 is 2.5 hours per applicant, which includes understanding and completing the form, setting an appointment with a civil surgeon for a medical exam, sitting for the medical exam, learning about and understanding the results of medical tests, allowing the civil surgeon to report the results of the medical exam on the form, and submitting the medical exam report to USCIS.<sup>732</sup> DHS estimates the opportunity cost of time for completing and submitting Form I-693 is \$26.65 per applicant based on the total rate of compensation of minimum wage of \$10.66 per hour.<sup>733</sup> Therefore, using the total population estimate of 382,264 annual filings for Form I-485, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-693 is approximately \$10,187,336 annually.<sup>734</sup>

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<sup>729</sup> Source for medical exam 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=201609-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201609-1615-004).

<sup>730</sup> Source for medical exam 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=201609-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201609-1615-004).

<sup>731</sup> Calculation: (Estimated medical exam cost for Form I-693) \* (Estimated annual population filing Form I-485) = \$490 \* 382,264 = \$187,309,360 annual estimated medical exam costs for Form I-693.

<sup>732</sup> Source for medical exam time burden 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 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201609-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201609-1615-004).

<sup>733</sup> Calculation for medical exam opportunity cost of time: (\$10.66 per hour \* 2.5 hours) = \$26.65 per applicant.

<sup>734</sup> Calculation: (Estimated medical exam opportunity cost of time for Form I-693) \* (Estimated annual population filing Form I-485) = \$26.65 \* 382,264 = \$10,187,335.60 = \$10,187,336 (rounded) annual opportunity cost of time for filing Form I-485.

In addition to the cost of a medical exam and the opportunity cost of time associated with completing and submitted Form I-693, applicants must bear the cost of postage for sending the Form I-693 package to USCIS. DHS estimates that each applicant will incur an estimated average cost of \$3.75 in postage to submit the completed package to USCIS.<sup>735</sup> DHS estimates the total annual cost in postage based on the total population estimate of 382,264 annual filings for Form I-693 is \$1,433,490.<sup>736</sup>

In sum, DHS estimates the total current annual cost for filing Form I-693 is \$198,930,186. The total current annual costs include medical exam costs, the opportunity cost of time for completing Form I-693, and cost of postage to mail the Form I-693 package to USCIS.<sup>737</sup>

*c. Form I-912, Request for Fee Waiver*

Some applicants seeking an adjustment of status may be eligible for a fee waiver when filing Form I-485. An applicant who is unable to pay the filing fees or biometric services fees for an application or petition may be eligible for a fee waiver by filing Form I-912. If an applicant's Form I-912 is approved, USCIS, as a component of DHS, will waive both the filing fee and biometric services fee. Therefore, DHS assumes for the purposes of this economic analysis that the filing fees and biometric services fees required for Form I-485 are waived if an approved Form I-912 accompanies the application. Filing Form I-912 is not required for applications and petitions that do not have a filing fee. DHS also notes that costs examined in

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<sup>735</sup> Source for medical exam form package postage 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=201609-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201609-1615-004).

<sup>736</sup> Calculation: (Form I-693 estimated cost of postage) \* (Estimated annual population filing Form I-693) = \$3.75 \* 382,264 = \$1,433,490 annual cost in postage for filing Form I-693.

<sup>737</sup> Calculation: \$187,309,360 (Medical exam costs) + \$10,187,336 (Opportunity cost of time for Form I-693) + \$1,433,490 (Postage costs for biometrics collection) = \$198,930,186 total current annual cost for filing Form I-693.

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 46 shows the estimated population of individuals that requested a fee waiver (Form I-912), based on receipts, when applying for adjustment of status in fiscal years 2012 to 2016, 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 42,126 in fiscal year 2012 to a high of 76,616 in fiscal year 2016. 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 fiscal year 2012 to 2016 was 58,558. DHS estimates that 58,558 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.<sup>738</sup>

<b>Table 46. Total Population Requesting A Fee Waiver (Form I-912) when Filing Form I-485, Adjustment of Status.</b>			
<b>Fiscal Year</b>	<b>Receipts</b>	<b>Approvals</b>	<b>Denials</b>
2012	42,126	34,890	7,236
2013	52,453	41,615	10,838
2014	58,534	47,629	10,905
2015	63,059	53,615	9,444
2016	76,616	68,641	7,975
<b>Total</b>	<b>292,788</b>	<b>246,390</b>	<b>46,398</b>
<b>5-yr average</b>	<b>58,558</b>	<b>49,278</b>	<b>9,280</b>
Source: USCIS analysis.			

<sup>738</sup> DHS notes that the estimated population of individuals who would request a fee waiver for filing Form I-485 includes all visa classifications for those applying for adjustment of status. 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.

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 \$10.66 per hour, where the value of \$10.66 per hour represents the federal minimum wage with an upward adjustment for benefits. The analysis uses this wage rate because DHS expects that applicants who request a fee waiver are asserting that they are unable to afford to pay the USCIS filing fee. As a result, DHS expects such applicants to hold positions in occupations that have a wage below the mean hourly wage across all occupations. DHS also notes that this proposed rule may reduce the number of fee waiver requests received, but, at this time, we cannot determine the extent to which this will occur.

DHS estimates the time burden associated with filing Form I-912 is 1 hour and 10 minutes per applicant (1.17 hours), including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.<sup>739</sup> Therefore, using \$10.66 per hour as the total rate of compensation, DHS estimates the opportunity cost of time for completing and submitting Form I-912 is \$12.47 per applicant.<sup>740</sup> Using the total population estimate of 58,558 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 \$730,218 annually.<sup>741</sup>

In addition to the opportunity cost of time associated with completing and submitting Form I-912, applicants must bear the cost of postage for sending the Form I-912 package to

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<sup>739</sup> Source for fee waiver time burden estimate: Paperwork Reduction Act (PRA) Request for Fee Waiver (Form I-912) (OMB control number 1615-0116). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201506-1615-006](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201506-1615-006).

<sup>740</sup> Calculation for fee waiver opportunity cost of time: (\$10.66 per hour \* 1.17 hours) = \$12.47.

<sup>741</sup> Calculation: (Estimated opportunity cost of time for Form I-912) \* (Estimated annual population of approved Form I-912) = \$12.47 \* 58,558 = \$730,218.26 = \$730,218 (rounded) annual opportunity cost of time for filing Form I-912 that are approved.

USCIS. DHS estimates that each applicant will incur an estimated average cost of \$3.75 in postage to submit the completed package to USCIS.<sup>742</sup> DHS estimates the annual cost in postage based on the total population estimate of 58,558 annual approved requests for a fee waiver for Form I-485 is \$219,593.<sup>743</sup>

In sum, DHS estimates the total current annual cost for filing a fee waiver request (Form I-912) for Form I-485 is \$949,811. The total current annual costs include the opportunity cost of time for completing Form I-912 and cost of postage to mail the Form I-912 package to USCIS.<sup>744</sup>

*d. Affidavit of Support Forms*

As previously discussed, submitting an affidavit of support using 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 includes attachment 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 his or her resources with the income and/or assets of a sponsor to meet those requirements. Some sponsors for intending immigrants may be able to file an affidavit of support using Form I-864EZ, 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. However, DHS proposes to eliminate Form I-864W, and instead individuals would be required to provide the information previously

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<sup>742</sup> Source for fee waiver postage cost estimate: Paperwork Reduction Act (PRA) Request for Fee Waiver (Form I-912) (OMB control number 1615-0116). The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201506-1615-006](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201506-1615-006).

<sup>743</sup> Calculation: (Form I-912 estimated cost of postage) \* (Estimated annual population of approved Form I-912) = \$3.75 \* 58,558 = \$219,592.50 = \$219,593 (rounded) annual cost in postage for filing Form I-912 that is approved.

<sup>744</sup> Calculation: \$730,218 (Opportunity cost of time for Form I-912) + \$219,593 (Postage costs for biometrics collection) = \$949,811 total current annual cost for filing Form I-912.

requested on the Form I-864W using Form I-485. Based on the information provided in the Form I-485, an officer can verify whether an immigrant is statutorily required to file an 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 filing Form I-864 is 6 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.<sup>745</sup> Therefore, using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864 would be \$214.68 per petitioner.<sup>746</sup> DHS assumes that the average rate of total compensation used to calculate the opportunity cost of time for Form I-864 is appropriate since the sponsor of an immigrant, who is agreeing to provide financial and material support, is instructed to complete and submit the form. Using the estimated annual total population of 257,610 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 is \$55,303,715 annually.<sup>747</sup> DHS estimates this amount as the total current annual cost for filing Form I-864, as required when applying to adjust status.

There is also no filing fee associated with filing Form I-864A with USCIS. However, DHS estimates the time burden associated with filing Form I-864A is 1 hour and 45 minutes

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<sup>745</sup> Source for I-864 time burden estimate: Paperwork Reduction Act (PRA) Affidavit of Support Under Section 213A of the INA (Forms I-864, I-864A, I-864EZ, I-864W) (OMB control number 1615-0075). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201705-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1615-004).

<sup>746</sup> Calculation opportunity cost of time for completing and submitting Form I-864, Affidavit of Support Under Section 213A of the INA: (\$35.78 per hour \* 6.0 hours) = \$214.68 per applicant.

<sup>747</sup> Calculation: (Form I-864 estimated opportunity cost of time) \* (Estimated annual population filing Form I-864) = \$214.68 \* 257,610 = \$55,303,714.80 = \$55,303,715 (rounded) total annual opportunity cost of time for filing Form I-864.

(1.75 hours) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the contract, preparing statements, attaching necessary documentation, and submitting the contract.<sup>748</sup> Therefore, using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864A will be \$62.62 per petitioner.<sup>749</sup> DHS assumes the average total rate of compensation used for calculating the opportunity cost of time for Form I-864 since both the sponsor and another household member agree to provide financial support to an immigrant seeking to adjust status. However, the household member also may be the intending immigrant. While Form I-864A must be filed with Form I-864, DHS notes that we are unable to determine the number 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.<sup>750</sup> Therefore, using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of

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<sup>748</sup> Source for I-864A time burden estimate: Paperwork Reduction Act (PRA) Affidavit of Support Under Section 213A of the INA (Forms I-864, I-864A, I-864EZ, I-864W) (OMB control number 1615-0075). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201705-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1615-004).

<sup>749</sup> Calculation opportunity cost of time for completing and submitting Form I-864A, Contract Between Sponsor and Household Member: (\$35.78 per hour \* 1.75 hours) = \$62.615 = \$62.62 (rounded) per petitioner.

<sup>750</sup> Source for I-864EZ time burden estimate: Paperwork Reduction Act (PRA) Affidavit of Support Under Section 213A of the INA (Forms I-864, I-864A, I-864EZ, I-864W) (OMB control number 1615-0075). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201705-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1615-004).



time for completing and submitting Form I-864EZ will be \$89.45 per petitioner.<sup>751</sup> However, DHS notes that we are unable to determine the number filings of Form I-864EZ and, therefore, rely on the annual cost estimate developed for Form I-864.

There is also no filing fee associated with filing Form I-864W with USCIS. However, DHS estimates the time burden associated with filing this form is 60 minutes (1 hour) per petitioner, including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.<sup>752</sup> Therefore, using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-864EZ will be \$35.78 per petitioner.<sup>753</sup> However, DHS notes that we are unable to determine the number filings of Form I-864W and, therefore, rely on the annual cost estimate developed for Form I-864. Moreover, the proposed rule would eliminate Form I-864W as a form for use in filing an affidavit of support. Filers who would have been required to file Form I-864W instead would be instructed to provide the information previously requested on the Form I-864W using Form I-485, as amended by this proposed rule. Based on the information provided in the Form I-485, an officer could verify whether an immigrant is statutorily required to file an affidavit of support.

DHS is also proposing to amend the HHS Poverty Guidelines for Affidavit of Support (Form I-864P), by removing certain language describing means-tested public benefits. Form I-

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<sup>751</sup> Calculation opportunity cost of time for completing and submitting Form I-864EZ, Affidavit of Support Under Section 213A of the INA: (\$35.78 per hour \* 2.5 hours) = \$89.45.

<sup>752</sup> Source for I-864W time burden estimate: Paperwork Reduction Act (PRA) Affidavit of Support Under Section 213A of the INA (Forms I-864, I-864A, I-864EZ, I-864W) (OMB control number 1615-0075). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201705-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1615-004).

<sup>753</sup> Calculation opportunity cost of time for completing and submitting Form I-864W: (\$35.78 per hour \* 1.0 hours) = \$35.78.

864P is used to determine the minimum level of income required to sponsor most family-based immigrants and some employment-based immigrants. These income requirements are to show that a sponsor has adequate means of financial support and is not likely to rely on the government for financial support. Form I-864P is for informational purposes and used for completing Form I-864. DHS does not anticipate additional costs or benefits as a result of any proposed changes to Form I-864P.

*ii. Consideration of Receipt, or Likelihood of Receipt of Public Benefits Defined in Proposed 212.21(b) for Applicants Requesting Extension of Stay or Change of Status*

Nonimmigrants in the United States may apply for extension of stay or change of status by either having an employer file Form I-129 or Form I-129CW, as applicable, on his or her behalf, or by filing Form I-539, so long as the nonimmigrant is currently in an eligible nonimmigrant category. This proposed rule seeks to require nonimmigrants who are seeking extension of stay or change of status to demonstrate that they have not previously received, are not currently receiving, nor are likely to receive public benefits in the future, as defined in this rule in 8 CFR 212.21(b). DHS also notes that costs examined in this section are not additional costs that would be imposed by the proposed rule, but costs that petitioners and applicants currently would incur as part of the application process to request an extension of stay or change of status.

*a. Form I-129, Petition for a Nonimmigrant Worker*

The current filing fee for Form I-129 is \$460.00. The fee is set at a level to recover the processing costs to DHS. As previously discussed, the estimated average annual population of employers filing on behalf of nonimmigrant workers seeking EOS/COS using Form I-129 is

336,335. Therefore, DHS estimates that the annual cost associated with filing Form I-129 is approximately \$154,714,100.<sup>754</sup>

DHS estimates the time burden for completing Form I-129 is 2 hours and 20 minutes (2.34 hours), including the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.<sup>755</sup> Using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-129 will be \$83.73 per petitioner.<sup>756</sup> Therefore, using the total population estimate of 336,335 annual filings for Form I-129, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-129 is approximately \$28,161,330 annually.<sup>757</sup>

In addition to the filing fee and the opportunity cost of time associated with completing and submitting Form I-129, applicants must bear the cost of postage for sending the Form I-129 package to USCIS. DHS estimates that each applicant will incur an estimated average cost of \$3.75 in postage to submit the completed package to USCIS.<sup>758</sup> DHS estimates the total annual

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<sup>754</sup> Calculation: (Form I-129 filing fee) \* (Estimated annual population filing Form I-129) = \$460 \* 336,335 = \$154,714,100 annual estimated cost for filing Form I-129 seeking an extension of stay or change of status.

<sup>755</sup> Source for petition for nonimmigrant workers time burden estimate: Paperwork Reduction Act (PRA) Petition for Nonimmigrant Worker (Form I-129) (OMB control number 1615-0009). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201610-1615-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201610-1615-001).

<sup>756</sup> Calculation for estimated opportunity cost of time for completing Form I-129: (\$35.78 per hour \* 2.34 hours) = \$83.725 = \$83.73 (rounded) per applicant.

<sup>757</sup> Calculation: (Form I-129 estimated opportunity cost of time) \* (Estimated annual population filing Form I-129) = \$83.73 \* 336,335 = \$28,161,329.55 = \$28,161,330 (rounded) annual estimated opportunity cost of time for filing Form I-129.

<sup>758</sup> Source for petition for nonimmigrant workers form package postage cost estimate: Paperwork Reduction Act (PRA) Petition for Nonimmigrant Worker (Form I-129) (OMB control number 1615-0009). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201610-1615-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201610-1615-001).

cost in postage based on the total population estimate of 336,335 annual filings for Form I-129 is approximately \$1,261,256.<sup>759</sup>

In sum, DHS estimates the total current annual cost for filing Form I-129 is \$184,136,686. The total current annual costs include Form I-129 filing fees, opportunity cost of time for completing Form I-129, and cost of postage to mail the Form I-129 package to USCIS.<sup>760</sup>

*b. Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker*

The current filing fee for Form I-129CW is \$460.00. The fee is set at a level to recover the processing costs to DHS. In addition, an employer filing Form I-129CW for a CNMI-Only Nonimmigrant Transitional Worker must submit an additional \$200 for a supplemental CNMI education fee per beneficiary, per year and a \$50 fee for fraud prevention and detection with each petition. Thus, the total fees associated with filing Form I-129CW is \$710 per beneficiary.<sup>761</sup> As previously discussed, the estimated average annual population of employers filing on behalf of nonimmigrant workers seeking EOS/COS using Form I-129CW is 6,307. Therefore, DHS estimates that the annual cost associated with filing Form I-129 is approximately \$4,477,970.<sup>762</sup>

DHS estimates the time burden for completing Form I-129CW is 3 hours (3.0 hours), including the time for reviewing instructions, gathering the required documentation and information, completing the petition, preparing statements, attaching necessary documentation,

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<sup>759</sup> Calculation: (Form I-129 estimated cost of postage) \* (Estimated annual population filing Form I-129) = \$3.75 \* 336,335 = \$1,261,256.25 = \$1,261,256 (rounded) annual cost in postage for filing Form I-129.

<sup>760</sup> Calculation: \$154,714,100 (Filing fees for Form I-129) + \$28,161,330 (Opportunity cost of time for Form I-129) + \$1,261,256 (Postage costs for Form I-129) = \$184,136,686 total current estimated annual cost for filing Form I-129.

<sup>761</sup> This economic analysis assumes that each Form I-129CW filed will also be required to include the additional \$200 supplemental CNMI education fee and the \$50 fraud prevention and detection fee.

<sup>762</sup> Calculation: (Form I-129CW filing fee) \* (Estimated annual population filing Form I-129CW) = \$710 \* 6,307 = \$4,477,970 annual estimated cost for filing Form I-129 seeking an extension of stay or change of status.

and submitting the request.<sup>763</sup> Using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-129CW will be \$107.34 per petitioner.<sup>764</sup> Therefore, using the total population estimate of 6,307 annual filings for Form I-129CW, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-129CW is approximately \$676,993 annually.<sup>765</sup>

In sum, DHS estimates the total current annual cost for filing Form I-129CW is \$5,154,963. The total current annual costs include Form I-129CW filing fees and opportunity cost of time for completing Form I-129.<sup>766</sup>

*c. Form I-539, Application to Extend/Change Nonimmigrant Status*

The current filing fee for Form I-539 is \$370 per application.<sup>767</sup> The fee is set at a level to recover the processing costs to DHS. As previously discussed, the estimated average annual population seeking EOS/COS using Form I-539 is 174,866. Therefore, DHS estimates that the annual cost associated with filing Form I-539 is approximately \$64,700,420.<sup>768</sup>

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<sup>763</sup> Source for petition for nonimmigrant workers time burden estimate: Paperwork Reduction Act (PRA) Petition for CNMI-Only Nonimmigrant Transition Worker (Form I-129CW) (OMB control number 1615-0111). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201803-1615-006](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201803-1615-006).

<sup>764</sup> Calculation for estimated opportunity cost of time for completing Form I-129: (\$35.78 per hour \* 3.0 hours) = \$107.34 per petitioner.

<sup>765</sup> Calculation: (Form I-129CW estimated opportunity cost of time) \* (Estimated annual population filing Form I-129CW) = \$107.34 \* 6,307 = \$676,993.38 = \$676,993 (rounded) annual estimated opportunity cost of time for filing Form I-129CW.

<sup>766</sup> Calculation: \$4,477,970 (Filing fees for Form I-129CW) + \$676,993 (Opportunity cost of time for Form I-129CW) = \$5,154,963 total current estimated annual cost for filing Form I-129CW.

<sup>767</sup> Source for petition for nonimmigrant workers time burden estimate: Paperwork Reduction Act (PRA) Application to Extend/Change Nonimmigrant Status (Form I-539) (OMB control number 1615-0003). The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201610-1615-006](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201610-1615-006). DHS notes that certain A and G nonimmigrants are not required to pay a filing fee for Form I-539. In addition, a biometrics services fee of \$85 is required for V nonimmigrants and for certain applicants in the CNMI applying for an initial grant of nonimmigrant status.

<sup>768</sup> Calculation: (Form I-539 filing fee) \* (Estimated annual population filing Form I-539) = \$370 \* 176,866 = \$64,700,420 annual cost for filing Form I-539.

DHS estimates the time burden for completing Form I-539 is 1 hour and 53 minutes (1.88 hours), including the time necessary to read all instructions for the form, gather all documents required to complete the collection of information, obtain translated documents if necessary, obtain the services of a preparer if necessary, and complete the form.<sup>769</sup> Using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-539 will be \$67.27 per applicant.<sup>770</sup> Therefore, using the total population estimate of 174,866 annual filings for Form I-539, DHS estimates the total opportunity cost of time associated with completing and submitting Form I-539 is approximately \$11,763,236 annually.<sup>771</sup>

In sum, DHS estimates the total current annual cost for filing Form I-539 is \$76,463,656. The total current annual costs include Form I-539 filing fees and the opportunity cost of time for completing Form I-539.<sup>772</sup>

### **(b) Costs of Proposed Regulatory Changes**

The primary source of quantified new costs for the proposed rule would be from the creation of Form I-944. This form would be used to collect information based on factors such as age; health; family status; assets, resources and financial status; and education and skills, so that USCIS could determine whether an applicant would be inadmissible to the United States based on public charge grounds. The proposed rule would require individuals who are applying for

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<sup>769</sup> Source for petition for nonimmigrant workers time burden estimate: Paperwork Reduction Act (PRA) Application to Extend/Change Nonimmigrant Status (Form I-539) (OMB control number 1615-0003). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201610-1615-006](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201610-1615-006).

<sup>770</sup> Calculation for the opportunity cost of time for completing Form I-539: (\$35.78 per hour \* 1.88 hours) = \$67.266 = \$67.27 (rounded) per applicant.

<sup>771</sup> Calculation: (Form I-539 estimated opportunity cost of time) \* (Estimated annual population filing Form I-539) = \$67.27 \* 174,866 = \$11,763,235.82 = \$11,763,236 (rounded) annual estimated opportunity cost of time for filing Form I-539.

<sup>772</sup> Calculation: \$64,700,420 (Filing fees for Form I-539) + \$11,763,236 (Opportunity cost of time for Form I-539) = \$76,463,656 total current annual cost for filing Form I-539.

adjustment of status to complete and submit the form to establish that they are not likely to become a public charge. At the agency's discretion, Form I-129 and Form I-129CW beneficiaries, and Form I-539 applicants seeking an extension of stay or change of status may be required to submit Form I-944 to be reviewed for public charge determination.

The proposed rule would also add costs from an additional 10-minute increase in the time burden estimate to complete Form I-485. Additionally, the proposed rule would add costs from an additional time burden increase of 30 minutes for completing and filing Form I-129, Form I-129CW, and Form I-539.

The proposed rule would also impose new costs by establishing a public charge bond process. At the agency's discretion, certain aliens who are found likely to become a public charge may be provided the opportunity to post a public charge bond. As part of the proposed public charge bond process, an individual would have an obligor submit a public charge bond using a new Form I-945, Public Charge Bond, on the alien's behalf, and the alien or an acceptable surety (individual or a company) would use Form I-356, Request for Cancellation of Public Charge Bond, as part of a request to cancel a public charge bond. DHS notes that if the alien permanently departed the United States, as defined in proposed 8 CFR 213.1, and the loss of LPR status was voluntarily, we would also require a Form I-407 submission. If the request for cancellation is denied, DHS would notify the obligor and inform the obligor of the possibility to appeal the determination to the USCIS Administrative Appeals Office (AAO) using Form I-290B, Notice of Appeal or Motion.<sup>773</sup> In addition, upon learning of a breach of public charge bond, DHS would notify the obligor that the bond has been declared breached and inform the

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<sup>773</sup> See proposed 8 CFR 213.1(g).

obligor of the possibility to appeal the determination to the USCIS Administrative Appeals Office (AAO) using Form I-290B, Notice of Appeal or Motion.<sup>774</sup>

The following costs are new costs that would be imposed on the population applying to adjust status using Form I-485 or on the population that would be seeking extension of stay or change of status using Forms I-129, I-129CW, or I-539. However, individuals seeking extension of stay or change of status would only be required to submit Form I-944 at the discretion of adjudication officers. Table 47 shows the estimated annual costs that the proposed rule would impose on individuals seeking to adjust status using Form I-485 who also would be required to file Form I-944. The table also presents the estimated new costs the proposed rule would impose associated with a 10-minute increase in the time burden estimate for completing Form I-485, from additional time burden increases of 30 minutes each for completing and filing Form I-129, Form I-129CW, and Form I-539. The table also shows the range of costs that Form I-129 and Form I-129CW beneficiaries, and Form I-539 filers would incur should they receive a RFE to file Form I-944 to determine inadmissibility based on public charge grounds under the provisions of this proposed rule. Finally, the table includes the estimated new cost associated with the proposed public charge bond process.

<b>Table 47. Total New Quantified Direct Costs of the Proposed Rule.</b>		
<b>Form</b>	<b>Estimated Annual Population</b>	<b>Total Annual Cost<sup>1</sup></b>
<b>Form I-944, Declaration of Self-Sufficiency</b>	<b>382,264</b>	<b>\$25,963,371</b>
Opportunity Cost of Time (OCT)		\$18,337,204
Credit Report/Credit Score Costs		\$7,626,167
<b>Form I-485, Application to Register Permanent Residence or Adjust Status</b>	<b>382,264</b>	<b>\$691,898</b>

<sup>774</sup> See proposed 8 CFR 213.1(h).



OCT – Additional to Baseline (Current) Costs		\$691,898
<b>Form I-129, Petition for a Nonimmigrant Worker – To Request Extension of Stay/Change of Status</b>	<b>336,335</b>	<b>\$12,103,351 to \$66,880,214</b>
OCT – Additional to Baseline (Current) Costs		\$6,017,033
Costs to beneficiaries who receive a RFE to complete and submit Form I-944, including OCT and credit report/credit score costs.		\$6,086,318 to \$60,863,181
<b>Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker – To Request Extension of Stay/Change of Status</b>	<b>6,307</b>	<b>\$227,015 to \$1,254,198</b>
OCT – Additional to Baseline (Current) Costs		\$112,883
Costs to beneficiaries who receive a RFE to complete and submit Form I-944, including OCT and credit report/credit score costs.		\$114,132 to \$1,141,315
<b>Form I-539, Application to Extend/Change Nonimmigrant Status</b>	<b>174,866</b>	<b>\$6,292,728 to \$34,772,105</b>
OCT – Additional to Baseline (Current) Costs		\$3,128,353
Costs to beneficiaries who receive a RFE to complete and submit Form I-944, including OCT and credit report/credit score costs.		\$3,164,375 to \$31,643,752
<b>Form I-945, Public Charge Bond</b>	<b>960</b>	<b>\$34,234</b>
Filing Fee		\$24,000
OCT		\$10,234
<b>Form I-356, Request for Cancellation of Public Charge Bond</b>	<b>25</b>	<b>\$825</b>
Filing Fee		\$625
OCT		\$200
<b>Total New Quantified Costs of the Proposed Rule</b>		<b>\$45,313,422 to \$129,596,845</b>
Source: USCIS analysis.		
Notes: <sup>1</sup> Not all nonimmigrants who apply for extension of stay or change of status would be required to file Form I-944 to detail their financial, health, and education status. Instead, USCIS officers would be able to exercise discretion regarding whether it would be necessary to issue a RFE for the submission of Form I-944. DHS is unable to estimate the actual number of RFEs that adjudication officers may issue to Form I-129 and Form I-129CW beneficiaries, and Form I-539 filers to submit Form I-944 since such RFEs would be issued on a discretionary basis. However, DHS is able to present a range of RFEs that could be issued based on total population estimates and the estimated annual cost associated with such RFE. Therefore, the total annual cost for Form I-129, Form I-129CW, and Form I-539 is shown in the table as a range based on a RFE rate of 10 to 100 percent.		

*i. Form I-944, Declaration of Self-Sufficiency and Form I-485, Application to Register Permanent Residence or Adjust Status*

In this proposed rule, DHS is proposing to create a new form for collecting information from those applying for immigration benefits with USCIS, such as adjustment of status or extension of stay or change in status, to demonstrate that the applicant is not likely to become a public charge under section 212(a)(4) of the Act. Form I-944 would collect information based on factors such as age; health; family status; assets, resources, and financial status; and education and skills, so that USCIS could determine whether an applicant would be inadmissible to the United States based on public charge grounds. For the analysis of this proposed rule, DHS assumes that all individuals who apply for adjustment of status using Form I-485 are required to submit Form I-944, unless the individual is in a class of applicants that is exempt from review for determination of inadmissibility based on public charge at the time of adjustment of status according to statute or regulation.

There is currently no filing fee associated with Form I-944. However, DHS estimates the time burden associated with filing Form I-944 is 4 hours and 30 minutes (4.5 hours) per applicant, including the time for reviewing instructions, gathering the required documentation and information, completing the declaration, preparing statements, attaching necessary documentation, and submitting the declaration. Therefore, using the total rate of compensation of minimum wage of \$10.66 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-944 would be \$47.97 per applicant.<sup>775</sup> Using the total population estimate of 382,264 annual filings for Form I-485, DHS estimates the total

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<sup>775</sup> Calculation for declaration of self-sufficiency opportunity cost of time: (\$10.66 per hour \* 4.5 hours) = \$47.97 per applicant.

opportunity cost of time associated with completing and submitting Form I-944 is approximately \$18,337,204 annually.<sup>776</sup>

In addition to the opportunity cost of time associated with completing and filing Form I-944, applicants must bear the cost of obtaining a credit report and credit score from any one of the three major credit bureaus in the United States to be submitted with the application.<sup>777</sup>

Consumers may obtain a free credit report once a year from each of the three major consumer reporting agencies (i.e., credit bureaus) under the Fair Credit Reporting Act (FCRA).<sup>778</sup>

However, consumers are not necessarily entitled to a free credit score, for which consumer reporting agencies may charge a fair and reasonable fee.<sup>779</sup> DHS does not assume that all applicants are able to obtain a free credit report under FCRA specifically for fulfilling the requirements of filing Form I-944 and acknowledges that obtaining a credit score would be an additional cost. Therefore, DHS assumes that each applicant would bear the cost of obtaining a credit report and credit score from at least one of the three major credit bureaus. DHS estimates the cost of obtaining a credit report and credit score would be \$19.95 per applicant, as this is the amount that two of the three major credit bureaus charge.<sup>780</sup> DHS notes that it would be required

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<sup>776</sup> Calculation: (Estimated opportunity cost of time for Form I-944) \* (Estimated annual population filing Form I-485) = \$47.97 \* 382,264 = \$18,337,204.08 = \$18,337,204 (rounded) annual opportunity cost of time for filing Form I-944.

<sup>777</sup> The three major credit bureaus are Equifax, Experian, and TransUnion. Each of these bureaus is a publicly-traded, for-profit company that is not owned by the Federal Government. DHS notes that there may be differences in the information contained in the credit reports from each of the three major credit bureaus since one credit bureau may have unique information on a consumer that is not captured by the other credit bureaus.

<sup>778</sup> See FCRA, Section 612, *Charges for Certain Disclosures*. 15 U.S.C. 1681j. Available at <https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf> (accessed Jan. 26, 2018).

<sup>779</sup> See FCRA, Section 609(f), *Disclosures to Consumers, Disclosure of Credit Scores*. 15 U.S.C. 1681g. Available at <https://www.consumer.ftc.gov/articles/pdf-0111-fair-credit-reporting-act.pdf> (accessed Jan. 26, 2018).

<sup>780</sup> Each of the three major credit charge the following prices for a credit report, including a credit score:

Experian - \$19.95, available at <https://www.experian.com/consumer-products/compare-credit-report-and-score-products.html> (accessed Jan. 26, 2018);

Equifax - \$19.95, available at <https://www.equifax.com/personal/products/credit/report-and-score> (accessed Jan. 26, 2018); and

TransUnion - \$11.50, available at <https://disclosure.transunion.com/dc/disclosure/disclosure.jsp> (accessed Jan. 26, 2018).

that all applicants who apply for adjustment of status using Form I-485 must also submit Form I-944 and comply with its requirements. Therefore, DHS estimates that based on the estimated average annual population of 382,264 the total annual cost associated with obtaining a credit report and credit score as part of the requirements for filing Form I-944 would be \$7,626,167.<sup>781</sup>

In sum, DHS estimates that the total cost to complete and file Form I-944 would be \$25,963,371. The total estimated annual costs include the opportunity cost of time to complete the form and the cost to obtain a credit report and credit score as required for the total population estimate of 382,264 annual filings for Form I-485.<sup>782</sup>

The proposed rule would include additional instructions for filing Form I-485 and, as a result, 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 15 minutes (6.25 hours). For the proposed rule, DHS estimates that the time burden for completing Form I-485 would increase by 10 minutes. Therefore, in the proposed rule, the time burden to complete Form I-485 would be 6 hours and 25 minutes (6.42 hours).

The time burden includes the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.<sup>783</sup> Using the total rate of compensation for minimum wage of \$10.66 per hour, DHS currently estimates the opportunity cost of time for

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<sup>781</sup> Calculation: (Estimated cost for credit score and credit report) \* (Estimated annual population filing Form I-485) = \$19.95 \* 382,264 = \$7,626,166.80 = \$7,626,167 (rounded) annual estimated costs for obtaining a credit report and credit score as part of the requirements for filing Form I-944.

<sup>782</sup> Calculation: \$18,337,204 (Opportunity cost of time to complete Form I-944) + \$7,626,167 (Cost of credit report and credit score) = \$25,963,371 total estimated cost to complete Form I-944.

<sup>783</sup> Source: Paperwork Reduction Act (PRA) Supporting Statement for Form I-485 (OMB control number 1615-0023). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201706-1615-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201706-1615-001).

completing and filing Form I-485 would be \$66.63 per applicant.<sup>784</sup> Therefore, using the total population estimate of 382,264 annual filings for Form I-485, DHS estimates the current total opportunity cost of time associated with completing Form I-485 is approximately \$25,470,250 annually.<sup>785</sup>

For the proposed rule, DHS estimates that the time burden for completing Form I-485 is 6.42 hours per response. Using the total rate of compensation for minimum wage of \$10.66 per hour, DHS estimates the opportunity cost of time for completing and filing Form I-485 would be \$68.44 per applicant.<sup>786</sup> Therefore, using the total population estimate of 382,264 annual filings for Form I-485, DHS estimates the proposed total opportunity cost of time associated with completing Form I-485 is approximately \$26,162,148 annually.<sup>787</sup>

The new costs imposed by this proposed rule would be the difference between the current estimated opportunity cost of time to complete Form I-485 and the proposed estimated opportunity cost of time due to the increased Form I-485 time burden estimate. As a result, DHS estimates that the proposed rule would impose additional new costs in the amount of \$691,898 to Form I-485 applicants.<sup>788</sup>

*ii. Extension of Stay/Change of Status Using Form I-129, Petition for a Nonimmigrant Worker; Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker; or Form I-539, Application to Extend/Change Nonimmigrant Status*

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<sup>784</sup> Calculation for opportunity cost of time for filing Form I-485: (\$10.66 per hour \* 6.25 hours) = \$66.625 = \$66.63 (rounded) per applicant.

<sup>785</sup> Calculation: Form I-485 estimated opportunity cost of time (\$66.63) \* Estimated annual population filing Form I-485 (382,264) = \$25,470,250.32 = \$25,470,250 (rounded) annual opportunity cost of time for filing Form I-485.

<sup>786</sup> Calculation for opportunity cost of time for filing Form I-485: (\$10.66 per hour \* 6.42 hours) = \$68.437 = \$68.44 (rounded) per applicant.

<sup>787</sup> Calculation: Form I-485 estimated opportunity cost of time (\$68.44) \* Estimated annual population filing Form I-485 (382,264) = \$26,162,148.16 = \$26,162,148 (rounded) annual opportunity cost of time for filing Form I-485.

<sup>788</sup> Calculation of estimated new costs for completing Form I-485: Proposed estimate of opportunity cost of time to complete Form I-485 (\$26,162,148) – Current estimate of opportunity cost of time to complete Form I-485 (\$25,470,250) = \$691,898 estimated new costs of the proposed rule.

The proposed rule would require petitioners to read additional instructions and provide additional information on Form I-129, which would increase the estimated time to complete the form. The current estimated time to complete Form I-129 is 2 hours and 20 minutes (2.34 hours). For the proposed rule, DHS estimates that the time burden for completing Form I-129 would increase by 30 minutes to account for the additional time petitioners would spend reading the form and providing additional information. Therefore, DHS proposes the time burden to complete Form I-129 to petitioners would be 2 hours and 50 minutes (2.84 hours).

The time burden for Form I-129 includes the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.<sup>789</sup> Using the average total rate of compensation of \$35.78 per hour, DHS estimates the current opportunity cost of time for completing and filing Form I-129 is currently \$83.73 per petitioner.<sup>790</sup> Therefore, using the total population estimate of 336,335 annual filings for Form I-129, DHS estimates the current total opportunity cost of time associated with completing and filing Form I-129 is approximately \$28,161,330 annually.<sup>791</sup>

For the proposed rule, DHS estimates that the opportunity cost of time for completing and filing Form I-129 would be \$101.62 per petitioner based on the 30-minute increase in the time burden estimate.<sup>792</sup> Therefore, using the total population estimate of 336,335 annual filings

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<sup>789</sup> Source for petition for nonimmigrant workers time burden estimate: Paperwork Reduction Act (PRA) Petition for Nonimmigrant Worker (Form I-129) (OMB control number 1615-0009). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201610-1615-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201610-1615-001).

<sup>790</sup> Calculation of estimated opportunity cost of time for completing Form I-129: (\$35.78 per hour \* 2.34 hours) = \$83.725 = \$83.73 (rounded) per applicant.

<sup>791</sup> Calculation: (Form I-129 estimated opportunity cost of time) \* (Estimated annual population filing Form I-129) = \$83.73 \* 336,335 = \$28,161,329.55 = \$28,161,330 (rounded) annual estimated opportunity cost of time for completing Form I-129.

<sup>792</sup> Calculation of proposed opportunity cost of time for completing Form I-129: (\$35.78 per hour \* 2.84 hours) = \$101.615 = \$101.62 (rounded) per applicant.

for Form I-129, DHS estimates the proposed total opportunity cost of time associated with completing and filing Form I-129 is approximately \$34,178,363 annually.<sup>793</sup>

The new costs imposed by this proposed rule would be the difference between the current estimated opportunity cost of time to complete Form I-129 and the proposed estimated opportunity cost of time to complete the form due to the increased time burden estimate. As a result, DHS estimates that the proposed rule would impose additional new costs of \$6,017,033 to Form I-129 applicants.<sup>794</sup>

The proposed rule would require petitioners to read additional instructions and provide additional information on Form I-129CW, which would increase the estimated time to complete the form. The current estimated time to complete Form I-129CW is 3 hours (3.0 hours). For the proposed rule, DHS estimates that the time burden for completing Form I-129CW would increase by 30 minutes to account for the additional time petitioners would spend reading the form and providing additional information. Therefore, DHS proposes the time burden to complete Form I-129CW to petitioners would be 3 hours and 30 minutes (3.5 hours).

The time burden for Form I-129CW includes the time for reviewing instructions, gathering the required documentation and information, completing the request, preparing statements, attaching necessary documentation, and submitting the request.<sup>795</sup> Using the average total rate of compensation of \$35.78 per hour, DHS estimates the current opportunity cost of

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<sup>793</sup> Calculation: (Proposed Form I-129 estimated opportunity cost of time) \* (Estimated annual population filing Form I-129) =  $\$101.62 * 336,335 = \$34,178,362.70 = \$34,178,363$  (rounded) proposed annual estimated opportunity cost of time for filing Form I-129.

<sup>794</sup> Calculation of estimated new costs for completing Form I-129: Proposed estimate of opportunity cost of time to complete Form I-129 (\$34,178,363) – Current estimate of opportunity cost of time to complete Form I-129 (\$28,161,330) = \$6,017,033 estimated new costs of the proposed rule.

<sup>795</sup> Source for petition for nonimmigrant workers time burden estimate: Paperwork Reduction Act (PRA) Petition for CNMI-Only Nonimmigrant Transition Worker (Form I-129CW) (OMB control number 1615-0111). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201803-1615-006](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201803-1615-006).

time for completing and filing Form I-129CW is currently \$107.34 per petitioner.<sup>796</sup> Therefore, using the total population estimate of 6,307 annual filings for Form I-129CW, DHS estimates the current total opportunity cost of time associated with completing and filing Form I-129CW is approximately \$676,993 annually.<sup>797</sup>

For the proposed rule, DHS estimates that the opportunity cost of time for completing and filing Form I-129CW would be \$125.23 per petitioner based on the 30-minute increase in the time burden estimate.<sup>798</sup> Therefore, using the total population estimate of 6,307 annual filings for Form I-129CW, DHS estimates the proposed total opportunity cost of time associated with completing and filing Form I-129CW is approximately \$789,826 annually.<sup>799</sup>

The new costs imposed by this proposed rule would be the difference between the current estimated opportunity cost of time to complete Form I-129CW and the proposed estimated opportunity cost of time to complete the form due to the increased time burden estimate. As a result, DHS estimates that the proposed rule would impose additional new costs of \$112,883 to Form I-129CW applicants.<sup>800</sup>

The proposed rule would also include additional instructions and collection of information for filing Form I-539, which would increase the estimated time to complete the form. Applicants, therefore, would spend additional time reading the form instructions and

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<sup>796</sup> Calculation for estimated opportunity cost of time for completing Form I-129: (\$35.78 per hour \* 3.0 hours) = \$107.34 per petitioner.

<sup>797</sup> Calculation: (Form I-129CW estimated opportunity cost of time) \* (Estimated annual population filing Form I-129CW) = \$107.34 \* 6,307 = \$676,993.38 = \$676,993 (rounded) annual estimated opportunity cost of time for completing Form I-129.

<sup>798</sup> Calculation of proposed opportunity cost of time for completing Form I-129: (\$35.78 per hour \* 3.5 hours) = \$125.23 per applicant.

<sup>799</sup> Calculation: (Proposed Form I-129 estimated opportunity cost of time) \* (Estimated annual population filing Form I-129) = \$125.23 \* 6,307 = \$789,825.61 = \$789,826 (rounded) proposed annual estimated opportunity cost of time for filing Form I-129.

<sup>800</sup> Calculation of estimated new costs for completing Form I-129CW: Proposed estimate of opportunity cost of time to complete Form I-129CW (\$789,826) – Current estimate of opportunity cost of time to complete Form I-129CW (\$676,993) = \$112,883 estimated new costs of the proposed rule.



providing additional information about the request, use, or receipt of public benefits. The current estimated time to completing Form I-539 is 1 hour and 53 minutes (1.88 hours).<sup>801</sup> For the proposed rule, DHS estimates that the time burden for completing Form I-539 would increase by 30 minutes. Therefore, in the proposed rule, DHS proposes the time burden for completing Form I-539 would be 2 hours and 23 minutes (2.38 hours).

The time burden for Form I-539 includes the time necessary to read all instructions for the form, gather all documents required to complete the collection of information, obtain translated documents if necessary, obtain the services of a preparer if necessary, and complete the form.<sup>802</sup> Using the average total rate of compensation of \$35.78 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-539 is currently \$67.27 per applicant.<sup>803</sup> Therefore, using the total population estimate of 174,866 annual filings for Form I-539, DHS estimates the current total opportunity cost of time associated with completing and filing Form I-539 is approximately \$11,763,236 annually.<sup>804</sup>

For the proposed rule, DHS estimates that the opportunity cost of time for completing and filing Form I-539 would be \$85.16 per applicant based on the 30-minute increase in the time burden estimate.<sup>805</sup> Therefore, using the total population estimate of 174,866 annual filings for

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<sup>801</sup> Source for petition for nonimmigrant workers time burden estimate: Paperwork Reduction Act (PRA) Application to Extend/Change Nonimmigrant Status (Form I-539) (OMB control number 1615-0003). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201610-1615-006](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201610-1615-006).

<sup>802</sup> See *id.*

<sup>803</sup> Calculation of opportunity cost of time for completing Form I-539: (\$35.78 per hour \* 1.88 hours) = \$67.266 = \$67.27 (rounded) per applicant.

<sup>804</sup> Calculation: (Form I-539 estimated opportunity cost of time) \* (Estimated annual population filing Form I-539) = \$67.27 \* 174,866 = \$11,763,235.82 = \$11,763,236 (rounded) annual estimated opportunity cost of time for filing Form I-539.

<sup>805</sup> Calculation of proposed opportunity cost of time for completing Form I-539: (\$35.78 per hour \* 2.38 hours) = \$85.156 = \$85.16 (rounded) per applicant.

Form I-539, DHS estimates the proposed total opportunity cost of time associated with completing and filing Form I-539 is approximately \$14,891,589.<sup>806</sup>

The new costs imposed by this proposed rule would be the difference between the current estimated opportunity cost of time to complete Form I-539 and the proposed estimated opportunity cost of time to complete the form due to the increased time burden estimate. As a result, DHS estimates that the proposed rule would impose additional new costs in the amount of \$3,128,353 to Form I-539 applicants.<sup>807</sup>

While individuals seeking adjustment of status would be reviewed to determine inadmissibility based on public charge grounds under the provisions of this proposed rule, DHS proposes to conduct reviews of nonimmigrants who apply for extension of stay or change of status to determine whether they have demonstrated that they have not received, are not receiving, or likely to receive public benefits. Not all nonimmigrants who apply for extension of stay or change of status would be required to file Form I-944 to detail their financial, health, and education status. Instead, USCIS officers would be able to exercise discretion regarding whether it would be necessary to issue a RFE for the submission of Form I-944.

As previously noted, there is currently no fee associated with filing Form I-944, but DHS estimates the costs for filing Form I-944 would include the opportunity cost of time (4.5 hours) and the cost to obtain credit report and credit score (\$19.95 per beneficiary). In addition, DHS estimated that the average annual population that would request EOS/COS by filing Form I-129 is 336,335, Form I-129CW is 6,307, and Form I-539 is 174,866.

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<sup>806</sup> Calculation: (Proposed Form I-539 estimated opportunity cost of time per applicant) \* (Estimated annual population filing Form I-539) =  $\$85.16 * 174,866 = \$14,891,588.56 = \$14,891,589$  (rounded) proposed annual estimated opportunity cost of time for filing Form I-539.

<sup>807</sup> Calculation of estimated new costs for completing Form I-539: Proposed estimate of opportunity cost of time to complete Form I-539 (\$14,891,589) – Current estimate of opportunity cost of time to complete Form I-539 (\$11,763,236) = \$3,128,353 estimated new costs of the proposed rule.

For Form I-129 petitioners who receive a RFE for a beneficiary to complete and submit Form I-944, DHS estimates the opportunity cost of time for completing Form I-129 would be \$161.01 per beneficiary using the average total rate of compensation of \$35.78 per hour.<sup>808</sup> In addition, DHS estimates the cost to obtain a credit report and credit score is \$19.95 per beneficiary. DHS assumes that while a petitioner would receive the RFE to file Form I-944, the beneficiary would be the individual to complete the form and provide all required information. Therefore, based on the total population estimate of 336,335 annual filings for Form I-129, DHS estimates the total annual opportunity cost of time associated with completing Form I-944 would be approximately \$54,153,298 annually and the total cost to obtain a credit report and credit score would be about \$6,709,883.<sup>809</sup> In sum, DHS estimates that total cost for Form I-129 beneficiaries who receive a RFE to complete and submit Form I-944 would be approximately \$60,863,181 annually.<sup>810</sup>

Similarly, for Form I-129CW petitioners who receive a RFE for a beneficiary to complete and submit Form I-944, DHS estimates the opportunity cost of time for completing Form I-129CW would be \$161.01 per beneficiary using the average total rate of compensation of \$35.78 per hour.<sup>811</sup> In addition, DHS estimates the cost to obtain a credit report and credit score is \$19.95 per beneficiary. DHS assumes that while a petitioner would receive the RFE to file Form I-944, the beneficiary would be the individual to complete the form and provide all required

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<sup>808</sup> Calculation for Form I-129 petition opportunity cost of time to complete Form I-944: (\$35.78 per hour \* 4.5 hours) = \$161.01.

<sup>809</sup> Calculation: (Form I-944 estimated opportunity cost of time) \* (Estimated annual population filing Form I-129) = \$161.01 \* 336,335 = \$54,153,298.35 = \$54,153,298 (rounded) annual opportunity cost of time for filing Form I-944. Calculation: (Cost to obtain a credit report and credit score) \* (Estimated annual population filing Form I-129) = \$19.95 \* 336,335 = \$6,709,883.25 = \$6,709,883 (rounded) annual cost to obtain a credit report and credit score.

<sup>810</sup> Calculation: (Annual opportunity cost of time for filing Form I-944) + (Annual cost to obtain a credit report and credit score for Form I-944) = \$54,153,298 + \$6,709,883 = \$60,863,181 annual total cost for Form I-129 beneficiaries who must file Form I-944.

<sup>811</sup> Calculation for Form I-129CW petition opportunity cost of time to complete Form I-944: (\$35.78 per hour \* 4.5 hours) = \$161.01.

information. Therefore, based on the total population estimate of 6,307 annual filings for Form I-129CW, DHS estimates the total annual opportunity cost of time associated with completing Form I-944 would be approximately \$1,015,490 annually and the total cost to obtain a credit report and credit score would be about \$125,825.<sup>812</sup> In sum, DHS estimates that total cost for Form I-129CW beneficiaries who receive a RFE to complete and submit Form I-944 would be approximately \$1,141,315 annually.<sup>813</sup>

For filers of form I-539 who are required to complete and submit Form I-944, DHS estimates the opportunity cost of time for completing Form I-539 would also be \$161.01 per filer using the average total rate of compensation of \$35.78 per hour. In addition, DHS estimates the cost to obtain a credit report and credit score is \$19.95 per applicant. DHS estimates the total opportunity cost of time associated with completing Form I-944 would be approximately \$28,155,175 annually based on the total population estimate of 174,866 annual filings for Form I-539 and the total cost to obtain a credit report and credit score would be about \$3,488,577.<sup>814</sup> In sum, DHS estimates that total cost for Form I-539 applicants who receive a RFE to complete and submit Form I-944 would be approximately \$31,643,752 annually.<sup>815</sup>

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<sup>812</sup> Calculation: (Form I-944 estimated opportunity cost of time) \* (Estimated annual population filing Form I-129CW) = \$161.01 \* 6,307 = \$1,015,490.07 = \$1,015,490 (rounded) annual opportunity cost of time for filing Form I-944. Calculation: (Cost to obtain a credit report and credit score) \* (Estimated annual population filing Form I-129CW) = \$19.95 \* 6,307 = \$125,824.65 = \$125,825 (rounded) annual cost to obtain a credit report and credit score.

<sup>813</sup> Calculation: (Annual opportunity cost of time for filing Form I-944) + (Annual cost to obtain a credit report and credit score for Form I-944) = \$1,015,490 + \$125,825 = \$1,141,315 annual total cost for Form I-129CW beneficiaries who must file Form I-944.

<sup>814</sup> Calculation: (Form I-944 estimated opportunity cost of time) \* (Estimated annual population filing Form I-539) = \$161.01 \* 174,866 = \$28,155,174.66 = \$28,155,175 (rounded) annual opportunity cost of time for filing Form I-944. Calculation: (Cost to obtain a credit report and credit score) \* (Estimated annual population filing Form I-539) = \$19.95 \* 174,866 = \$3,488,576.70 = \$3,488,577 (rounded) annual cost to obtain a credit report and credit score.

<sup>815</sup> Calculation: (Annual opportunity cost of time for filing Form I-944) + (Annual cost to obtain a credit report and credit score for Form I-944) = \$28,155,175 + \$3,488,577 = \$31,643,752 annual total cost for Form I-539 applicants who must file Form I-944.

DHS is unable to estimate the actual number of RFEs that adjudication officers may issue to Form I-129 beneficiaries, Form I-129CW beneficiaries, and Form I-539 filers to submit Form I-944 since such RFEs would be issued on a discretionary basis. However, we are able to present a range of RFEs that could be issued based on total population estimates and the estimated annual cost associated with such RFE. Table 48 presents a range of potential annual costs related to submission of Form I-944 based on the percentage of the maximum number of Form I-129 beneficiaries, Form I-129CW beneficiaries, and Form I-539 applicants who could be issued a RFE. DHS estimates the annual cost if all beneficiaries were issued a RFE for 100 percent of the total population estimate of 336,335 annual filings for Form I-129 would be about \$60.1 million. For the total population estimate of 6,307 annual filings for Form I-129CW, DHS estimates the annual cost would be approximately \$1.1 million if all beneficiaries were issued a RFE. Moreover, DHS estimates the annual cost if all applicants were issued a RFE for 100 percent of the total population estimate of 336,335 annual filings for Form I-539 would be about \$31.6 million.

<b>Table 48. Estimated Annual Costs for Requests for Evidence (RFE) Issued to Submit Form I-944 with Form I-129 and Form I-539.</b>			
	<b>Percentage of Applicants Issued Request for Evidence (RFE) to Submit Form I-944</b>	<b>Estimated Annual Population</b>	<b>Estimated Annual Cost</b>
<b>Form I-129</b>	100%	336,335	\$60,863,181
	90%	302,702	\$54,776,863
	75%	252,251	\$45,647,386
	50%	168,168	\$30,431,591
	25%	84,084	\$15,215,795
	10%	33,634	\$6,086,318
<b>Form I-129CW</b>	100%	6,307	\$1,141,315
	90%	5,676	\$1,027,184

	75%	4,730	\$855,986
	50%	3,154	\$570,658
	25%	1,577	\$285,329
	10%	631	\$114,132
<b>Form I-539</b>	100%	174,866	\$31,643,752
	90%	157,379	\$28,479,377
	75%	131,149	\$23,732,814
	50%	87,433	\$15,821,876
	25%	43,716	\$7,910,938
	10%	17,487	\$3,164,375
Source: USCIS analysis. Notes: The analysis assumes the average total rate of compensation of \$35.78 per hour for filers of Forms I-129, I-129CW, and I-539.			

### *iii. Public Charge Bond*

DHS does not currently have a process or procedure in place to accept public charge bonds, though it has the authority to do so. DHS is proposing to amend its regulations and establish a bond process for those seeking adjustment of status to that of a permanent resident who have been deemed likely to become a public charge. A public charge bond may generally be secured by cash or cash equivalents such as cashier's checks or money orders in the full amount of the bond, or may be underwritten by a surety company certified by the Department of Treasury under 31 U.S.C. 9304-9308.<sup>816</sup> DHS approval of the public charge bond and DHS determination of whether the bond has been breached would be based on whether the alien has received public benefits as defined in the proposed rule or whether the alien has breached any other condition imposed as part of the public charge bond.

As discussed elsewhere in the preamble, DHS has the broad authority to prescribe forms of bonds as is deemed necessary for carrying out the Secretary's authority under the provisions

<sup>816</sup> See generally 8 CFR 103.6. However, USCIS plans to initially allow for only surety bonds only.

of the Act.<sup>817</sup> Additionally, an alien whom DHS has determined to be inadmissible based on public charge grounds may, if otherwise admissible, be admitted at the discretion of the Secretary upon giving a suitable and proper bond.<sup>818</sup> The purpose of issuing a public charge bond is to better ensure that the alien will not become a public charge in the future. If an alien receives public benefits, as defined in proposed 8 CFR 212.21(b), after the alien's adjustment of status to that of a lawful permanent resident, DHS would declare the bond breached. A bond may also be breached if the conditions that are otherwise imposed as part of the public charge bond are breached.<sup>819</sup>

DHS is proposing that public charge bonds would be issued at the Secretary's discretion when an alien seeking adjustment of status has been found to be inadmissible based on public charge grounds. DHS may require an alien to submit a surety bond or cash or cash equivalent, such as a cashier's check or money order, to secure a bond.<sup>820</sup> DHS would notify the alien if he or she is permitted to post a public charge bond and of the type of bond that may be submitted. If DHS accepts a surety bond as a public charge bond, DHS would accept only a bond underwritten by surety companies certified by the Department of the Treasury, as outlined in proposed 8 CFR 103.6(b).<sup>821</sup> DHS proposes that the amount of a public charge bond cannot be less than \$10,000 annually adjusted for inflation and rounded up to the nearest dollar, but the amount of the bond required would otherwise be determined at the discretion of the adjudication officer. After reviewing an alien's circumstances and finding of inadmissibility based on public

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<sup>817</sup> See INA section 103(a)(3), 8 U.S.C. 1103(a)(3).

<sup>818</sup> See INA section 213, 8 U.S.C. 1183.

<sup>819</sup> See 8 CFR 213.1(h).

<sup>820</sup> USCIS plans to initially allow surety bonds.

<sup>821</sup> See 31 U.S.C. 9304-9308. See also Bureau of the Fiscal Service, U.S. Department of Treasury, available at [https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/surety\\_home.htm](https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/surety_home.htm). See also proposed 8 CFR 103.6(b)(1) as proposed by ICE, *Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches*, 83 FR 25951 (June 5, 2018).

charge grounds, an adjudication officer would notify the alien through the issuance of a RFE or a Notice of Intent to Deny (NOID) that a surety bond may be submitted to USCIS.

An individual or entity would submit a public charge bond on behalf of the alien by using the new Public Charge Bond form (Form I-945), and related forms. DHS proposes that it would use Form I-356, Request for Cancellation of Public Charge Bond, as part of a request to cancel a public charge bond.

The proposed rule would require that an alien must complete and submit Form I-407 when the alien or obligor/co-obligor seeks to cancel the public charge bond on account of the alien's permanent departure from the United States. Form I-407 records an alien's abandonment of status as a LPR. When filing Form I-407, an alien abandoning their LPR status is informed of the right to a hearing before an immigration judge who would decide whether the alien lost his or her lawful permanent resident status due to abandonment and that the alien has knowingly, willingly, and affirmatively waived that right. Form I-407 is used by lawful permanent resident aliens who are outside the United States or at a Port of Entry who want to abandon LPR status.

A public charge bond would be considered breached if the alien receives any public benefits, as defined in proposed 8 CFR 212.21, after DHS accepts a public charge bond submitted on that alien's behalf. The bond would also be breached if the alien does not comply with the conditions that are otherwise imposed with the public charge bond.<sup>822</sup> Upon learning of a breach of public charge bond, DHS would notify the obligor that the bond has been declared breached and inform the obligor of the possibility to appeal the determination to the USCIS

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<sup>822</sup> See proposed 8 CFR 213.1(h)



Administrative Appeals Office (AAO).<sup>823</sup> Notice of Appeal or Motion (Form I-290B) is used to file an appeal or motion to reopen or reconsider certain decisions.

Finally, a public charge bond must be canceled when an alien with a bond dies, departs the United States permanently, or is naturalized or otherwise obtains U.S. citizenship, provided the individual has not received public benefits, as defined in proposed 8 CFR 212.21(c) prior to death, departure, or naturalization (or otherwise obtaining U.S. citizenship), and a request for cancellation has been filed.<sup>824</sup> DHS must also cancel the bond following the fifth anniversary of the admission of the lawful permanent resident provided that he or she files a request for cancellation of the public charge bond and provided that the alien has not received any public benefits, as defined in 8 CFR 212.21, after the alien's adjustment of status to that of a lawful permanent resident. Additionally, the public charge bond must be cancelled if the alien obtains an immigration status that is exempt from public charge inadmissibility after the initial grant of lawful permanent resident status, provided that a request for cancellation of the public charge bond has been filed and provided that the alien did not breach the bond conditions.<sup>825</sup> To have the public charge bond cancelled, an obligor (individual or entity) would request the cancellation of the public charge and as part of the request, submit Form I-356. If DHS determines that the bond cannot be cancelled, the bond remains in place; the obligor may appeal the denial to the AAO by filing Form I-290B.<sup>826</sup> Additionally, a public charge bond may be cancelled by DHS after a suitable substitute has been submitted for an unlimited bond or a bond of limited duration

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<sup>823</sup> See proposed 8 CFR 213.1(h).

<sup>824</sup> See INA section 213, 8 U.S.C. 1183; see 8 CFR 103.6(c).

<sup>825</sup> See proposed 8 CFR 213.1(d)[Conditions of the bond] and proposed 8 CFR 213.1(h)[Breach].

<sup>826</sup> See proposed 8 CFR 213.1(g).

that bears an expiration date. For this type of cancellation, no request to cancel the bond must be filed to allow substitution of another bond, as outlined in proposed 8 CFR 213.<sup>827</sup>

When posting a surety bond, an individual generally pays between 1 percent to 15 percent of the bond amount for a surety company to post a bond.<sup>828</sup> The percentage that an individual must pay may be dependent on the individual's credit score where those with higher credit scores would be required to pay a lower percentage of the bond to be posted. DHS notes that an individual as another possible option for securing a public charge bond may be allowed to submit cash or cash equivalent, such as a cashier's check or money order and agreement.

With the creation of Form I-945, DHS proposes to charge a filing fee of \$25.00 to submit a public charge surety bond, which would cover administrative costs of processing the form. DHS estimates the time burden associated with filing Form I-945 is 60 minutes (1.0 hour) per obligor, including the time for reviewing instructions, gathering the required documentation and information, completing the form, preparing statements, attaching necessary documentation, and submitting the form.<sup>829</sup> Therefore, using the total rate of compensation of minimum wage of \$10.66 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-945 would be \$10.66 per applicant.<sup>830</sup>

In addition to the opportunity cost of time associated with completing Form I-945, aliens who may be permitted to have a public charge bond posted on their behalf, must secure a surety bond through a surety bond company that is certified by the Department of Treasury, Bureau of

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<sup>827</sup> See proposed 8 CFR 213.1(f)[Substitution]. Because USCIS does not examine whether the bond could be breached, the substitution does not have to be accompanied with a filing of Form I-356.

<sup>828</sup> For example, see <https://suretybondauthority.com/frequently-asked-questions/> and <https://suretybondauthority.com/learn-more/>. DHS notes that the company cited is for informational purposes only.

<sup>829</sup> Source for immigration bond time burden estimate: Supporting Statement, Immigration Bond, ICE Form I-352, (OMB control number 1653-0022). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201705-1653-001](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1653-001).

<sup>830</sup> Calculation for public charge surety bond opportunity cost of time: (\$10.66 per hour \* 1.0 hour) = \$10.66 per applicant.

Fiscal Service. DHS notes that the public charge bond amount required would be determined at the discretion of an adjudication officer, so long as it is over the minimum amount. However, DHS estimates the cost per obligor would be \$35.66 per obligor at minimum, including \$25.00 to file Form I-945 and \$10.66 per obligor for the opportunity cost of time for completing the form. In addition, each alien posting a public charge bond through a surety company would be required to pay any fees required by the surety company to secure a public charge bond. While the proposed public charge bond process would be new and historical data are not available, DHS estimates that approximately 960 aliens would be eligible to file for a public charge bond annually. Therefore, in sum, DHS estimates the total cost to file Form I-945 would be at minimum about \$34,234 annually.<sup>831</sup>

As noted previously, an obligor (individual or a company) or the alien would file Form I-356 as part of a request to cancel a public charge bond. With the creation of Form I-356, DHS proposes to charge a filing fee of \$25.00 to request cancellation of a public charge bond, which would cover administrative costs of processing the form. DHS estimates the time burden associated with filing Form I-356 is 45 minutes (0.75 hours) per obligor or alien requesting cancellation of a public charge bond, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the required information. Using the total rate of compensation of minimum wage of \$10.66 per hour, DHS estimates the opportunity cost of time for completing and submitting Form I-356 would be \$8.00 per filer.<sup>832</sup> Therefore, DHS estimates the cost per filer would be \$33.00, including \$25.00 to file Form I-356 and \$8.00 per obligor or alien for the opportunity cost of

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<sup>831</sup> Calculation: \$35.66 (cost per obligor to file Form I-945) \* 960 (estimated annual population who would file Form I-945) = \$34,233.60 = \$34,234 (rounded) annual total cost to file Form I-945.

<sup>832</sup> Calculation for opportunity cost of time for completing Form I-356: (\$10.66 per hour \* 0.75 hours) = \$7.995 = \$8.00 (rounded) per applicant.

time for completing the form. While the proposed public charge bond process would be new and historical data are not available, DHS estimates that approximately 25 aliens would request to cancel a public charge bond annually. Therefore, in sum, DHS estimates the total cost to file Form I-356 would be approximately \$825 annually.<sup>833</sup>

The filing fee for Form I-290B is \$675 per obligor wishing to file an appeal to challenge the denial of a request to cancel the public charge bond or the breach determination. The fee is set at a level to recover the processing costs to DHS. However, the fee for Form I-290B may be waived using Form I-912 if the party appealing the adverse decision can provide evidence of an inability to pay.<sup>834</sup> In addition, DHS estimates the time burden associated with filing Form I-290B is 1 hour and 30 minutes (1.5 hours) per obligor, including the time for reviewing instructions, gathering the required documentation and information, completing the form, preparing statements, attaching necessary documentation, and submitting the form.<sup>835</sup> Therefore, using the total rate of compensation of minimum wage of \$10.66 per hour, DHS estimates the opportunity cost of time for completing Form I-290B would be \$15.99 per obligor.<sup>836</sup>

In addition to the filing fee and the opportunity cost of time associated with completing Form I-290B, obligors must bear the cost of postage for sending the Form I-290B package to USCIS. DHS estimates that each obligor will incur an estimated average cost of \$3.75 in postage to submit the completed package to USCIS.<sup>837</sup>

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<sup>833</sup> Calculation: \$33.00 (cost per obligor to file Form I-356) \* 25 (estimated annual population who would file Form I-356) = \$825.00 annual total cost to file Form I-356.

<sup>834</sup> See 8 CFR 103.7(c).

<sup>835</sup> Source for notice for appeal or motion time burden estimate: Supporting Statement for Notice of Appeal or Motion (Form I-290B) (OMB control number 1615-0095). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201609-1615-002](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201609-1615-002).

<sup>836</sup> Calculation for appeal or motion opportunity cost of time: (\$10.66 per hour \* 1.5 hours) = \$15.99 per applicant.

<sup>837</sup> Source for notice for appeal or motion time burden estimate: Supporting Statement for Notice of Appeal or Motion (Form I-290B) (OMB control number 1615-0095). The PRA Supporting Statement can be found at Question 13 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201609-1615-002](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201609-1615-002).

Additionally, the proposed public charge bond process would be new and historical data are not available to predict future estimates. Therefore, DHS also is not able to estimate the total annual cost of the proposed public charge bond process. However, DHS estimates the total cost per applicant submitting a bond would be \$693.74 for completing and filing Form I-290B, excluding the cost of obtaining a bond.<sup>838</sup>

Finally, the new DHS requirement in this proposed rule that an alien must complete and submit Form I-407 when seeking to cancel the public charge bond upon permanent departure from the United States. However, this proposed rule would not impose additional new costs to Form I-407 filers.

### **(c) Transfer Payments and Indirect Impacts of Proposed Regulatory Changes**

DHS estimates the direct costs of the proposed rule, but also estimates the reduction in transfer payments from the federal and state government to certain individuals who receive public benefits and also discusses certain indirect impacts that would likely occur as a result of the proposed regulatory changes. These indirect impacts are borne by entities that are not specifically regulated by this rule, but may incur costs due to changes in behavior caused by this rule. The primary sources of the reduction in transfer payments from the federal government of this proposed rule would be the disenrollment or foregone enrollment of individuals in public benefits programs. The primary sources of the consequences and indirect impacts of the proposed rule would be costs to various entities that the rule does not directly regulate, such as hospital systems, state agencies, and other organizations that provide public assistance to aliens and their households. Indirect costs associated with this rule include familiarization with the rule

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<sup>838</sup> Calculation: \$674 filing fee + \$15.99 opportunity cost of time + \$3.75 postage cost = \$693.74 per applicant

for those entities that are not directly regulated but still want to understand the changes in federal and state transfer payments due to this rule.

Moreover, this rule, if finalized, could lead to an additional reduction in transfer payments because some aliens outside the United States who are likely to become a public charge in the United States would not be admitted and therefore would not receive public benefits in the United States. For example, CBP could find that an alien 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, is likely to become a public charge if he or she is admitted. However, DHS is not able to quantify the number of aliens who would possibly be denied admission based on a public charge determination pursuant to this proposed rule, but is qualitatively acknowledging this potential impact.

Under the proposed rule, DHS would consider past or current receipt of public benefits, defined in 212.21(b), as identified a heavily weighed factor for purposes of public charge determination. Earlier in the preamble, DHS provides a list and description of public benefits programs the proposed rule identifies for consideration of public charge inadmissibility. Should an individual be found to have received or is currently receiving certain public benefits identified in the proposed rule, he or she may be found likely to become a public charge. Individuals who might choose to disenroll from or forego future enrollment in a public benefits program include foreign-born non-citizens as well as U.S. citizens who are members of mixed-status households.

Table 49 shows the estimated population of public benefits recipients who are members of households that include foreign-born non-citizens. The table also shows estimates of the number of households with at least 1 foreign-born non-citizen family member that may have

received public benefits.<sup>839,840</sup> Based on the number of households with foreign-born non-citizen family members, DHS estimated the number of public benefits recipients who are members of households that include foreign-born non-citizens that may have received benefits using the U.S. Census Bureau's estimated average household size for foreign-born households.<sup>841,842</sup>

<b>Table 49. Estimated Population of Public Benefits Recipients Who Are Members of Households that Include Foreign-Born Non-Citizens.</b>				
<b>Public Benefits Program</b>	<b>Average Annual Total Number of Recipients<sup>1</sup></b>	<b>Households that May Be Receiving Benefits<sup>2</sup></b>	<b>Households with at Least 1 Foreign-Born Non-Citizen Who May Be Receiving Benefits<sup>3</sup></b>	<b>Public Benefits Recipients Who Are Members of Households Including Foreign-Born Non-Citizens<sup>4</sup></b>
<b>Medicaid<sup>5</sup></b>	64,281,954	24,349,225	1,697,141	5,685,422
<b>Low Income Subsidy (LIS) for Medicare</b>	12,100,000	4,583,333	319,458	1,070,185

<sup>839</sup> See U.S. Census Bureau. *American Community Survey 2016 Subject Definitions*. Available at [https://www2.census.gov/programs-surveys/acs/tech\\_docs/subject\\_definitions/2016\\_ACSSubjectDefinitions.pdf](https://www2.census.gov/programs-surveys/acs/tech_docs/subject_definitions/2016_ACSSubjectDefinitions.pdf). Accessed June 18, 2018. 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 (i.e. immigrants), temporary migrants (e.g., foreign students), humanitarian migrants (e.g., refugees), and unauthorized migrants (i.e. people illegally present in the United States).

<sup>840</sup> To estimate the number of households with at least 1 foreign-born non-citizen family member that have received public benefits, DHS calculated the overall percentage of total U.S. households that are foreign-born non-citizen as 6.97 percent. Calculation: [22,214,947 (Foreign-born non-citizens) / 318,558,162 (Total U.S. population)] \* 100 = 6.97 percent. See U.S. Census Bureau American FactFinder Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2012 – 2016 American Community Survey (ACS) 5-year Estimates." Available at <https://factfinder.census.gov/>. Accessed June 16, 2018.

<sup>841</sup> See U.S. Census Bureau American FactFinder Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2012 – 2016 American Community Survey (ACS) 5-year Estimates." Available at <https://factfinder.census.gov/>. Accessed June 16, 2018. The average foreign-born household size is reported as 3.35 persons. DHS multiplied this figure by the estimated number of households with at least 1 foreign-born non-citizen receiving benefits to estimate the population of foreign-born non-citizen receiving benefits.

<sup>842</sup> In this analysis, DHS uses the American Community Survey (ACS) to develop population estimates along with beneficiary data from each of the benefits program. DHS recognizes that in other places in this preamble, the SIPP data is used rather than the ACS data, which may cause differences in estimates. DHS notes that the ACS data was 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 substantial reliance by aliens on the public benefits included in the proposed rule.

<b>Part D Prescription Drug Coverage<sup>6</sup></b>				
<b>Supplemental Nutrition Assistance Program (SNAP)<sup>7</sup></b>	45,294,831	22,195,369	1,547,017	5,182,508
<b>Temporary Assistance for Needy Families (TANF)<sup>8</sup></b>	3,449,124	1,306,486	91,062	305,058
<b>Supplemental Security Income (SSI)<sup>9</sup></b>	8,302,356	3,144,832	219,195	734,303
<b>Federal Rental Assistance<sup>10</sup></b>	N/A	5,051,000	352,055	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.

<sup>1</sup> Figures for the average annual total number of recipients are based on 5-year averages, whenever possible, for the most recent 5-year period for which data are available. 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.

<sup>2</sup> DHS estimated the number of households by dividing the number of people that received public benefits by the U.S. Census Bureau’s estimated average household size of 2.64 for the U.S. total population. *See* U.S. Census Bureau American FactFinder Database. “S0501: Selected Characteristics of the Native and Foreign-born Populations 2012 – 2016 American Community Survey (ACS) 5-year Estimates.” Available at <https://factfinder.census.gov/>. Accessed June 16, 2018. Note that HUD Rental Assistance and HUD Housing Choice Vouchers programs report data on the household level. Therefore, DHS did not use this calculation to estimate the average household size and instead used the data as reported.

<sup>3</sup> To estimate the number of households with at least 1 foreign-born non-citizen receiving benefits, DHS multiplied the estimated number of households receiving benefits in the United States by 6.97 percent, the foreign-born non-citizen population as a percentage of the U.S. total population using U.S. Census Bureau population estimates. *See* Ibid.

<sup>4</sup> To estimate the population of public benefits recipients who are members of households that include foreign-born non-citizens, DHS multiplied the estimated number of households with at least 1 foreign-born non-citizen receiving benefits by the average household size of 3.35 for those who are foreign-born using the U.S. Census Bureau’s estimate. *See* Ibid.

<sup>5</sup> Medicaid – *See* U.S. Department of Health and Human Services (HHS), Centers for Medicare & Medicaid (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 May 31, 2018. 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.” Also, note that per enrollee Medicaid costs vary by eligibility group and State.

<sup>6</sup> LIS – *See* U.S. Department of Health and Human Services (HHS), Centers for Medicare & Medicaid (CMS). *2018 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds*. Table IV.B9.—Incurred Reimbursement Amounts per Enrollee for Part D Expenditures, p.145. Available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2018.pdf>. Accessed July 31, 2018. The LIS number of recipients receiving benefits includes LIS in Medicare Advantage Prescription Drug (MAPD-LIS) and LIS in stand-alone Medicare Part D prescription drug plans (PDP-LIS). Note that spending on LIS beneficiaries varies by individual.

<sup>7</sup> SNAP – *See* U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program.

“Persons, Households, Benefits, and Average Monthly Benefit per Person & Household.” Available at <https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap>. Accessed May 31, 2018.

<sup>8</sup> TANF – *See* U.S. HHS, Office of Family Assistance. “TANF Caseload Data.” Available at <https://www.acf.hhs.gov/ofa/resource/tanf-caseload-data-2016>. Accessed June 11, 2018. Note: The number of participants are listed for the fiscal year, not calendar year since the dollar amount of assistance received is only presented for fiscal years.

<sup>9</sup> SSI – *See* U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. *Annual Report of the Supplemental Security Income Program, 2017*. Table IV.B9, p. 46. Available at: <https://www.ssa.gov/oact/ssir/SSI17/ssi2017.pdf>. Accessed July 31, 2018.; *See also* U.S. Social Security Administration, Office



of Research, Statistics, & Policy Analysis. “SSI Monthly Statistics, January 2018.” Available at [https://www.ssa.gov/policy/docs/statcomps/ssi\\_monthly/2018-01/table01.html](https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2018-01/table01.html). Accessed July 31, 2018.

<sup>10</sup> Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total recipient households: *See* Center on Budget and Policy Priorities. National and State Housing Fact Sheets & Data. *See* Federal Rental Assistance, “Download the Data” and Housing Choice Voucher Program, “Download the Data.” Available at <https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data>. Accessed Aug. 15, 2018. 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.

Consistent data are not available on the number of individuals receiving public benefits who are members of households that include foreign-born non-citizens. In order to estimate the economic impact of the proposed rule, it is necessary to estimate the size of this population. To arrive at the population estimates as shown in table 49, DHS first calculated the average annual number of people who received benefits over a 5-year period whenever possible as reported by the benefits granting agencies.<sup>843</sup> However, data for public benefits programs do not identify the nativity status of benefits recipients, i.e., foreign-born or U.S. native. Therefore, DHS estimated the foreign-born non-citizen population by converting the average annual number of benefits recipients using the U.S. Census Bureau’s American Community Survey (ACS) estimates. First, DHS estimated the number of households receiving benefits. Then, DHS estimated the number of households with at least one foreign-born non-citizen receiving benefits based on the percentage of foreign-born non-citizens compared to the total U.S. population. Finally, the number of public benefits recipients who are members of households that include foreign-born non-citizens receiving benefits was estimated based on the average household size of households with at least one foreign-born individual.

For each of the public benefits programs analyzed, DHS estimated the number of households by dividing the number of people that received public benefits by the U.S. Census

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<sup>843</sup> DHS estimated the annual average number of people who receive public benefits based on 5-year averages generally over the period fiscal year 2013 – 2017, including LIS, SNAP, and SSI. DHS calculated 5-year averages over the period fiscal year 2012 – 2016 for Medicaid and TANF.

Bureau's estimated average household size of 2.64 for the U.S. total population.<sup>844</sup> According to the U.S. Census Bureau population estimates, the foreign-born non-citizen population is 6.97 percent of the U.S. total population.<sup>845</sup> While there may be some variation in the percentage of foreign-born non-citizens 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 foreign-born non-citizen who receives public benefits, DHS multiplied the estimated number of households for each public benefits program by 6.97 percent. This step may introduce uncertainty into the estimate because the percentage of households with at least one foreign-born non-citizen may be greater or less than the percentage of foreign-born non-citizens in the population. However, if foreign-born non-citizens tend to be grouped together in households, then an overestimation of households that include at least one FBNC is more likely. DHS then estimated the number of foreign-born non-citizens who received benefits by multiplying the estimated number of households with at least one foreign-born non-citizen who receives public benefits by the U.S. Census Bureau's estimated average household size of 3.35 for those who are foreign-born.<sup>846</sup>

In this analysis, DHS uses the American Community Survey (ACS) to develop population estimates along with beneficiary data from each of the benefits program. DHS recognizes that in other places in this preamble, the SIPP data is used rather than the ACS data,

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<sup>844</sup> U.S. Census Bureau American FactFinder Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2012 – 2016 American Community Survey (ACS) 5-year Estimates." Available at <https://factfinder.census.gov/>. Accessed June 16, 2018.

<sup>845</sup> Ibid. Calculation:  $[22,214,947 \text{ (Foreign-born non-citizens)} / 318,558,162 \text{ (Total U.S. population)}] * 100 = 6.97$  percent.

<sup>846</sup> U.S. Census Bureau American FactFinder Database. "S0501: Selected Characteristics of the Native and Foreign-born Populations 2012 – 2016 American Community Survey (ACS) 5-year Estimates." Available at <https://factfinder.census.gov/>. Accessed June 16, 2018.

which may cause differences in estimates. DHS notes that the ACS data was 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 substantial reliance by aliens on the public benefits included in the proposed rule. DHS welcomes comments on the use of data from the American Community Survey (ACS) to develop our estimates, and comments on whether other data sources would be useful in these calculations.

In the following analysis, the population estimate will be adjusted to reflect the percentage of aliens intending to apply for adjustment of status, but not to reflect the possibility that less than 100 percent of their household members 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 a tendency toward overestimation. DHS welcomes comment, especially concerning data or other evidence, that would allow for refinement of the estimate of the percentage of household members who would be dissuaded from public benefits participation.

DHS anticipates that a number of individuals would be likely to disenroll or forego enrollment in a public benefits program as a result of the proposed rule, which would result in a reduction of transfer payments from the federal government to such individuals. However, to estimate the economic impact of disenrollment or foregone enrollment from public benefits programs, it is necessary to estimate the average annual amount of public benefits a person receives for each public benefits program included in this economic analysis. Therefore, DHS estimated the average annual benefit received per person for each public benefit program in table 50. The average benefit per person is calculated for each public benefit program by dividing the

average annual program payments for on public benefits by the average annual total number of recipients.<sup>847</sup> To the extent that data are available, these estimates are based on 5-year averages.

<b>Table 50. Estimated Average Annual Benefit per Person, by Public Benefit Program</b>			
<b>Public Benefits Program</b>	<b>Average Annual Total Number of Recipients</b>	<b>Average Annual Public Benefits Payments</b>	<b>Average Annual Benefit per Person or Household<sup>1</sup></b>
<b>Medicaid<sup>2</sup></b>	64,281,954	\$477,395,691,240	\$7,426.59
<b>Low Income Subsidy (LIS) for Medicare Part D Prescription Drug Coverage<sup>3</sup></b>	12,100,000	\$25,400,000,000	\$2,099.17
<b>Supplemental Nutrition Assistance Program (SNAP)<sup>4</sup></b>	45,294,831	\$69,192,042,274	\$1,527.59
<b>Temporary Assistance for Needy Families (TANF)<sup>5</sup></b>	3,449,124	\$4,389,219,525	\$1,272.56
<b>Supplemental Security Income (SSI)<sup>6</sup></b>	8,302,356	\$54,743,370,400	\$6,593.72
<b>Federal Rental Assistance<sup>7</sup></b>	5,051,000	\$41,020,000,000	\$8,121.16
<p>Sources and notes: USCIS analysis of data provided by the federal agencies that administer each of the listed public benefits program or research organizations.</p> <p>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. 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.</p> <p><sup>1</sup> Calculation: Average Annual Benefit per Person = (Average Annual Public Benefits Payments) / (Average Annual Total Number of Recipients). Note: Calculations may not be exact due to rounding.</p> <p><sup>2</sup> Medicaid – Data on annual program expenditure on public benefits: See U.S. Department of Health and Human Services (HHS), Centers for Medicare &amp; Medicaid (CMS). <i>Expenditure Reports From MBES/CBES</i>. Available at <a href="https://www.medicare.gov/medicaid/finance/state-expenditure-reporting/expenditure-reports/index.html">https://www.medicare.gov/medicaid/finance/state-expenditure-reporting/expenditure-reports/index.html</a>. Accessed Aug. 2, 2018. Note that per enrollee Medicaid costs vary by eligibility group and State.</p> <p><sup>3</sup> LIS – Data on annual program expenditure on public benefits: See Ibid. Table IV.B10— Aggregate Part D Reimbursement Amounts on an Incurred Basis, p.145. Available at <a href="https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2018.pdf">https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads/TR2018.pdf</a>. Accessed July 31, 2018. Note that spending on LIS beneficiaries varies by individual.</p> <p><sup>4</sup> SNAP – Data on the annual program expenditure on public benefits: See U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program. “Persons, Households, Benefits, and Average Monthly Benefit per Person &amp; Household.” Available at <a href="https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap">https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap</a>. Accessed May 31, 2018.</p>			

<sup>847</sup> DHS notes that the amounts presented may not account for overhead costs associated with administering each of these public benefits programs. The costs presented are based on amounts recipients have received in benefits as reported by benefits-granting agencies.

<sup>5</sup> TANF—Data on annual program expenditure on public benefits: See U.S. HHS, Office of Family Assistance. “TANF Financial Data- FY 2016.” 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/resource/tanf-financial-data-fy-2016>. Accessed June 11, 2018. Note that the link shows fiscal year 2016 TANF financial data, but links to financial data for other fiscal years can also be accessed.

<sup>6</sup> 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, 2017*. Table IV.B9—SSI Recipients with Federally Administered Payments in Current-Payment Status, p. 46 (recipients) and Table IV.C1.—SSI Federal Payments, p. 47. Available at: <https://www.ssa.gov/oact/ssir/SSI17/ssi2017.pdf>. Accessed July 31, 2018.; See also U.S. Social Security Administration, Office of Research, Statistics, & Policy Analysis. “SSI Monthly Statistics, January 2018.” Available at [https://www.ssa.gov/policy/docs/statcomps/ssi\\_monthly/2018-01/table01.html](https://www.ssa.gov/policy/docs/statcomps/ssi_monthly/2018-01/table01.html). Accessed July 31, 2018.

<sup>7</sup> Federal Rental Assistance and HUD Housing Choice Vouchers – Data on annual total expenditure on public benefits: See Center on Budget and Policy Priorities. *National and State Housing Fact Sheets & Data*. Federal Rental Assistance, “Download the Data” and Housing Choice Voucher Program, “Download the Data.” Available at <https://www.cbpp.org/research/housing/national-and-state-housing-fact-sheets-data>. Accessed Aug. 15, 2018.

Research shows that when eligibility rules change for public benefits programs there is evidence of a “chilling effect” that discourages immigrants from using public benefits programs for which they are still eligible. For example, the U.S. Department of Agriculture (USDA) published a study shortly after the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA) took effect and found that the number of people receiving food stamps fell by over 5.9 million between summer 1994 and summer 1997.<sup>848</sup> The study notes that enrollment in the food stamps program was falling during this period, possibly due to strong economic growth, but the decline in enrollment was steepest among legal immigrants. Under PRWORA, legal immigrants were facing significantly stronger restrictions through which most would become ineligible to receive food stamps. The study also found that enrollment of legal immigrants in the food stamps program fell by 54 percent. Moreover, another study found evidence of a “chilling effect” due to enactment of PRWORA where non-citizen enrollment in public benefits

<sup>848</sup> 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 June 17, 2018).

programs declined more steeply than U.S. citizen enrollment over the period 1994 to 1997.<sup>849</sup>

Overall, the study found that welfare enrollment in households headed by foreign-born individuals fell by about 21 percent.

To estimate the total transfer payments, DHS calculated the number of individuals who are likely to disenroll from or forego enrollment in a public benefit program equal to 2.5 percent of the number of foreign-born non-citizens previously estimated. While previous studies examining the effect of PRWORA in 1996 showed a reduction in enrollment from 21 to 54 percent, it is unclear how many individuals would actually disenroll from or forego enrollment in public benefits programs due to the proposed rule. The previous studies had the benefit of retrospectively analyzing the chilling effect of PRWORA using actual enrollment data, instead of being limited to prospectively estimating the number of individuals who may disenroll or forego enrollment in the affected public benefits programs. This economic analysis must rely on the latter. Moreover, PRWORA was directly changing eligibility requirements, whereas this proposed rule, if finalized, would change enrollment incentives. Therefore, DHS estimates this annual rate based on the number of foreign-born immigrants seeking to adjust status as a percentage of the foreign-born non-citizen population in the United States, under the assumption that the population likely to disenroll from or forego enrollment in public benefits programs would be individuals intending to apply for adjustment of status or individuals who have adjusted status within the past five years. DHS notes that this is likely an overestimate since it is unknown how many foreign-born non-citizens adjusting status are actually using public benefits. For the 5-fiscal year period 2012 – 2016, the foreign-born non-citizen population was estimated

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<sup>849</sup> 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 June 17, 2018).

to be 22,214,947.<sup>850</sup> During the same 5-fiscal year period, 544,246 immigrants adjusted status annually in the United States on average.<sup>851,852</sup> Therefore, DHS assumes a 2.5 percent rate of disenrollment or foregone enrollment across each of the public benefits programs since the individuals intending to adjust status are most likely to disenroll from or forego enrollment in public benefits programs in order to preserve their chances of adjusting status.<sup>853</sup> Table 51 shows the estimated population that would be likely to disenroll or forego enrollment in a public benefits program as a result of this proposed rule.

<b>Table 51. Estimated Population of Members of Households Including Foreign-Born Non-Citizens that May Be Receiving Public Benefits and Likely to Disenroll or Forego Enrollment in a Public Benefits Program.</b>				
<b>Public Benefits Program</b>	<b>Public Benefits Recipients Who Are Members of Households Including Foreign-Born Non-Citizens</b>	<b>Households with At Least 1 Foreign-Born Non-Citizen Receiving Benefits</b>	<b>Members of Households Including Foreign-Born Non-Citizens Who May Be Receiving Benefits Based On A 2.5% Rate of Disenrollment or Foregone Enrollment<sup>1</sup></b>	<b>Households with At Least 1 Foreign-Born Non-Citizen Who May Be Receiving Benefits Based On A 2.5% Rate of Disenrollment or Foregone Enrollment<sup>1</sup></b>
<b>Medicaid<sup>2</sup></b>	5,685,422		142,136	
<b>Low Income Subsidy (LIS) for Medicare Part D Prescription Drug Coverage<sup>3</sup></b>	1,070,185		26,755	

<sup>850</sup> U.S. Census Bureau American FactFinder Database. “S0501: Selected Characteristics of the Native and Foreign-born Populations 2012 – 2016 American Community Survey (ACS) 5-year Estimates. Available at <https://factfinder.census.gov/>. Accessed June 16, 2018.

<sup>851</sup> See United States Department of Homeland Security. Yearbook of Immigration Statistics: 2016, Table 7. Washington, D.C., U.S. Department of Homeland Security, Office of Immigration Statistics, 2017. Available at <https://www.dhs.gov/immigration-statistics/yearbook/2016> (accessed Jan. 24, 2018).

<sup>852</sup> Note that the population seeking extension of stay or change of status were not included in the calculation due to the nature of the populations involved, namely people employed in jobs and their dependents. DHS assumes that these individuals generally do not receive public benefits and have means of supporting themselves and their dependents.

<sup>853</sup> Calculation, based on 5-year averages over the period fiscal year 2012 – 2016: (544,246 adjustments of status / 22,214,947 estimated foreign-born non-citizen population) \* 100 = 2.45 = 2.5 % (rounded)

<b>Supplemental Nutrition Assistance Program (SNAP)</b>	5,182,508		129,563	
<b>Temporary Assistance for Needy Families (TANF)</b>	305,058		7,626	
<b>Supplemental Security Income (SSI)</b>	734,303		18,358	
<b>Federal Rental Assistance</b>		352,055		8,801
<b>Totals</b>	<b>12,977,476</b>	<b>352,055</b>	<b>324,438</b>	<b>8,801</b>
Source : USCIS analysis.				
Notes:				
<sup>1</sup> DHS estimates the rate of disenrollment/foregone enrollment based on the number of foreign-born immigrants seeking to adjust status as a percentage of the foreign-born non-citizen population in the United States. Calculation: (Individuals adjusting status / Estimated foreign-born non-citizen population) * 100 = Rate of disenrollment/foregone enrollment. To estimate the population that could choose to disenroll/forego enrollment, DHS multiplied the population of public benefits recipients who are members of households including foreign-born non-citizens receiving benefits or the number of households with at least 1 foreign-born non-citizen by 2.5 percent.				
<sup>2</sup> Per enrollee Medicaid costs vary by eligibility group and State.				
<sup>3</sup> Spending on LIS beneficiaries varies by individual.				

Table 52 shows the estimated population that would be likely to disenroll from or forego enrollment in public benefits programs due to the provisions of the proposed rule and the total reduction in transfer payments paid by the federal government to this population. The table also presents the previously estimated average annual benefit per person who received benefits for each of the public benefits programs.<sup>854</sup> This proposed rule would result in a reduction of transfer payments from the federal government to those foreign-born non-citizens and associated household members who choose to disenroll from or forego future enrollment in a public benefits program. Transfer payments are payments from one group to another that do not directly affect total resources available to society.<sup>855</sup> DHS estimates the total annual reduction in transfer payments paid by the federal government to individuals who may choose to disenroll

<sup>854</sup> As previously noted, the average annual benefits per person amounts presented may not account for overhead costs associated with administering each of these public benefits programs since they are based on amounts recipients have received in benefits as reported by benefits-granting agencies. Therefore, the costs presented may underestimate the total amount of transfer payments to the federal government.

<sup>855</sup> See Office of Management and Budget (OMB). *Circular A-4*. September 17, 2003. Available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.



from or forego enrollment in public benefits programs is approximately \$1.51 billion for an estimated 324,438 individuals and 14,532 households across the public benefits programs examined.

<b>Table 52. Total Estimated Reduction in Transfer Payments Paid By the Federal Government Due to Disenrollment or Foregone Enrollment in Public Benefits Programs.</b>				
<b>Public Benefits Program</b>	<b>Public Benefits Recipients Who Are Members of Households Including Foreign-Born Non-Citizens Based On A 2.5% Rate of Disenrollment or Foregone Enrollment</b>	<b>Households Receiving Benefits with At Least 1 Foreign-Born Non-Citizen Based On A 2.5% Rate of Disenrollment or Foregone Enrollment</b>	<b>Average Annual Benefit per Person or Household</b>	<b>Estimated Reduction in Transfer Payments Based On A 2.5% Rate of Disenrollment or Foregone Enrollment</b>
<b>Medicaid<sup>1</sup></b>	142,136		\$7,426.59	\$1,055,585,796
<b>Low Income Subsidy (LIS) for Medicare Part D Prescription Drug Coverage<sup>2</sup></b>	26,755		\$2,099.17	\$56,163,388
<b>Supplemental Nutrition Assistance Program (SNAP)</b>	129,563		\$1,527.59	\$197,919,143
<b>Temporary Assistance for Needy Families (TANF)</b>	7,626		\$1,272.56	\$9,704,543
<b>Supplemental Security Income (SSI)</b>	18,358		\$6,593.72	\$121,047,512
<b>Federal Rental Assistance</b>		8,801	\$8,121.16	\$1,055,585,796
<b>Totals</b>	<b>324,438</b>	<b>8,801</b>	<b>N/A</b>	<b>\$1,511,894,711</b>
Source: USCIS analysis.				
Notes:				
<sup>1</sup> Neither HHS nor DHS are able to disaggregate emergency and non-emergency Medicaid expenditures. Therefore, this rule considers overall Medicaid expenditures. Note that per enrollee Medicaid costs vary by eligibility group and State.				
<sup>2</sup> Note that spending on LIS beneficiaries varies by individual.				

Based on the rate of disenrollment or foregone enrollment calculated, DHS estimated the annual reduction in the amount of transfer payments paid by the federal government to foreign-

born non-citizens and members of their households by multiplying the average annual benefits per person by the population of foreign-born non-citizens who are likely to disenroll from or forego enrollment in a public benefit program.<sup>856</sup>

However, DHS notes there may be additional reductions in transfer payments that we are unable to quantify. As these estimates reflect only federal financial participation in programs where states may share costs, there may also be additional reductions in transfer payments from states to individuals who may choose to disenroll from or forego enrollment in a public benefits program. Because state participation in these programs may vary depending on the type of benefit provided, DHS was unable to quantify the impact of state transfers. For example, the federal government funds all SNAP food expenses, but only 50 percent of allowable administrative costs for regular operating expenses.<sup>857</sup> 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. However, assuming that the state share of federal financial participation (FFP) is 50 percent, then the 10-year discounted amount of state transfer payments of this proposed policy would be approximately \$9.95 billion at a 3 percent discount rate and about \$8.2 billion at a 7 percent discount rate. Finally, DHS recognizes that reductions in federal and state transfers under federal benefit programs may have downstream and upstream 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, pharmacies that provide prescriptions to participants in the Medicare Part D low-income subsidy (LIS) program, companies that manufacture medical supplies or pharmaceuticals, grocery

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<sup>856</sup> DHS analyzes federal funds only as we are not readily able to track down and identify the state funds.

<sup>857</sup> 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](https://fns-prod.azureedge.net/sites/default/files/apd/FNS_HB901_v2.2_Internet_Ready_Format.pdf)

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, the rate of disenrollment or foregone enrollment may result in an underestimate, to the extent that covered aliens may choose to disenroll from or forego enrollment in public benefits programs sooner than in the same year that the alien applies for adjustment of status. For instance, because DHS would consider past receipt of public benefits within at least 36 months as a heavily weighed factor under the proposed rule, prospective adjustment applicants may choose to disenroll or forego enrollment at least 36 months in advance of such application. Some aliens 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. In addition, because the proposed rule also affects inadmissibility determinations in contexts aside from adjustment of status, some percentage of the alien population is likely to disenroll from or forego enrollment in covered programs, for such non-adjustment-related purposes as well.

On the other hand, the 2.5 percent rate of disenrollment or foregone enrollment estimate may result in an overestimate, insofar as it does not correct for those categories of aliens (such as asylees and refugees) that are exempt from the public charge ground of inadmissibility and assumes 100% are using public benefits which may not be true. DHS expects that the rule's effects on public benefit program enrollment and disenrollment by such categories of aliens and their households would be less pronounced. Additionally, some prospective adjustment applicants and associated household members may not choose to disenroll or forego public benefits because they may have other factors that counterbalance acceptance of public benefits when looked at in the totality of circumstances. DHS welcomes comments on the appropriate

methodology for estimating the rate of disenrollment or foregone enrollment, including ways to improve upon the DHS methodology. DHS welcomes public comments on the estimation of the disenrollment or foregone enrollment rate used in this analysis.

However, in order to examine the impact if prospective adjustment applicants chose to disenroll or forego enrollment in public benefits at least 36 months in advance, DHS conducted a sensitivity analysis based on this issue of the proximity of time to a review of public charge inadmissibility. In such cases, DHS would consider past receipt of public benefits within at least 36 months (3 years) as a heavily weighed negative factor under the proposed rule and that a prospective adjustment applicant may choose to disenroll or forego enrollment for at least 36 months in advance of such application. Table 53 presents the potential range of the population who may disenroll from or forego enrollment in public benefits programs as well as the potential total reduction in transfer payments paid by the federal government to this population. DHS estimates that the population range of foreign-born non-citizens who may disenroll from or forego enrollment in public benefits programs would range from approximately 333,239 to 999,717. In addition, the estimated reduction in transfer payments paid by the federal government to this population ranges from about \$1.51 billion to \$4.53 billion. For this economic analysis, the primary estimate upon which DHS bases its analysis is the 1-year estimate, as shown below in the table. However, DHS welcomes the public to comment on DHS's use of the 1-year estimate as its primary estimate as well as whether using the 3-years estimate is a more appropriate estimate to use as the primary estimate. .

<p><b>Table 53. Estimated Annual Range of the Foreign-born Non-citizen Population Who May Disenroll from or Forego Enrollment in Public Benefits Programs and the Reduction in Transfer Payments.</b></p>
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<b>Years Prior to Application</b>	<b>Households or Public Benefits-Receiving Members of Households with At Least 1 Foreign-Born Non-Citizen Based On A 2.5% Rate of Disenrollment or Foregone Enrollment</b>	<b>Estimated Reduction in Transfer Payments to Based On A 2.5% Rate of Disenrollment or Foregone Enrollment</b>
<b>1 Year</b>	333,239	\$1,511,894,711
<b>2 Years</b>	666,478	\$3,023,789,422
<b>3 Years</b>	999,717	\$4,535,684,133
Source: USCIS analysis.		

DHS presents this range since it is possible that the number of people who may disenroll from or forego enrollment in public benefits programs in one year could be as many as the combined three-year total of people who may disenroll or forego enrollment. Because DHS plans to heavily weigh the receipt of public benefits within the past 36 months as a negative factor, individuals may begin to disenroll or forego enrollment in public benefits programs as early as three years prior to applying for adjustment of status. As a result, the annual reduction in transfer payments could range between the three estimates presented in table 53.

Another source of impacts of the proposed rule would be costs to various individuals and other entities associated with familiarization with the provisions of the rule. Familiarization costs involve the time spent reading the details of a rule to understand its changes. A foreign-born non-citizen (such as those contemplating disenrollment or foregoing enrollment in a public benefits program) might review the rule to determine whether they are subject to the provisions of the proposed rule. To the extent an individual or entity that 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 also incur familiarization costs. For example, immigration lawyers, immigration advocacy groups, health care providers of all types, non-profit organizations, non-

governmental organizations, and religious organizations, among others, may want to become familiar with the provisions of this proposed rule. DHS believes such non-profit organizations and other advocacy groups might choose to read the rule in order to provide information to those foreign-born non-citizens and associated households that might be impacted by a reduction in federal transfer payments. Familiarization costs incurred by those not directly regulated are indirect costs. DHS estimates the time that would be necessary to read the rule would be approximately 8 to 10 hours per person, resulting in opportunity costs of time. An entity, such as a non-profit or advocacy group, may have more than one person who reads the rule.

In addition, the proposed rule may impose costs that DHS is unable to quantify. Many federal agencies, such as USDA in administering the SNAP program, may need to update and re-write guidance documents or would need to update forms used. Moreover, there may be additional unquantified costs that state and local government may incur associated with similar activities. At each level of government, it will also be necessary to prepare training materials and retrain staff. Such changes will require staff time and have associated costs.

There are a number of consequences that could occur because of follow-on effects of the reduction in transfer payments identified in the proposed rule. DHS is providing a listing of the primary non-monetized potential consequences of the proposed rule below. Disenrollment or foregoing enrollment in public benefits program by aliens otherwise eligible for these programs could lead to:

- 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; and
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment.

DHS notes that the proposed rule is likely to produce various other unanticipated consequences and indirect costs. For example, community based organizations, including small organizations, may provide charitable assistance, such as food or housing assistance, for individuals who forego enrollment in public benefit programs. DHS requests comments on other possible consequences of the rule and appropriate methodologies for quantifying these non-monetized potential impacts.

#### **(d) Discounted Direct Costs and Reduced Transfer Payments**

To compare costs over time, DHS applied a 3 percent and a 7 percent discount rate to the total estimated costs associated with the proposed rule. Table 54 presents a summary of the quantified direct costs and reduced transfer payments from the federal government included in the proposed rule. The summary table presents costs in undiscounted dollars as well as dollars discounted at 3 percent and 7 percent rates over a 10-year period.

<b>Table 54. Summary of Estimated Direct Costs and Reduced Transfer Payments of the Proposed Rule.</b>		
	<b>Direct Costs</b>	<b>Reduced Transfer Payments<sup>1</sup></b>

	<b>Annual Cost</b>	<b>Costs over 10-year Period</b>	<b>Annual Transfers</b>	<b>Transfers over 10-year Period</b>
Total Undiscounted Costs	\$45,313,422 to \$129,596,845	\$453,134,220 to \$1,295,968,450	\$2,267,842,067	\$22,678,420,670
Total Costs at 3 Percent Discount Rate		\$386,532,679 to \$1,105,487,375		\$19,345,152,833
Total Costs at 7 Percent Discount Rate		\$318,262,513 to \$910,234,008		\$15,928,373,680
Source: USCIS analysis.				
Note: <sup>1</sup> The amount of transfer payments presented includes the estimated amounts of transfer payments to the federal government and to state governments from foreign-born non-citizens and their households who may disenroll or forego enrollment in public benefits programs. DHS assumes that the state governments' share of the total amount of transfer payments is 50 percent of the estimated total transfer payments to the federal government. For a breakout of the estimated total federal and state transfer payment amounts, see the summary table above at the beginning of this economic analysis (Table 36, Summary of Major Provisions and Economic Impacts of the Proposed Rule).				

*i. Discounted Direct Costs*

DHS presents the total estimated costs for filing Form I-944 as part of the review for determination of inadmissibility based on public charge when applying for adjustment of status and the opportunity cost of time associated with the increased time burden estimate for completing Forms I-485, I-129, I-129CW, and I-539. See table 55. The total estimated costs are presented in undiscounted dollars, at a 3 percent discount rate, and at a 7 percent discount rate.

**Table 55. Total Estimated Direct Costs of the Proposed Rule with Total Estimated Direct Costs Discounted at 3 Percent and 7 Percent.**

<b>Form</b>	<b>Source of Cost</b>	<b>Total Estimated Annual Cost (Undiscounted)</b>	<b>Total Estimated Costs Over 10-year Period</b>
Form I-944, Declaration of Self-Sufficiency	Opportunity cost of time (OCT) for completing form	\$25,963,371	\$259,633,710
Form I-485, Application to Register Permanent Residence or Adjust Status	OCT associated with the increased time burden for completing form	\$691,898	\$6,918,980



Form I-129, Petition for a Nonimmigrant Worker	OCT associated with the increased time burden for completing form  Costs to beneficiaries who receive a RFE to complete and submit Form I-944, including OCT and credit report/credit score costs.	\$12,103,351 to \$66,880,214	\$121,033,510 to \$668,802,140
Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker	OCT associated with the increased time burden for completing form  Costs to beneficiaries who receive a RFE to complete and submit Form I-944, including OCT and credit report/credit score costs.	\$227,015 to \$1,254,198	\$2,270,150 to \$12,541,980
Form I-539, Application To Extend/Change Nonimmigrant Status	OCT associated with the increased time burden for completing form  Costs to beneficiaries who receive a RFE to complete and submit Form I-944, including OCT and credit report/credit score costs.	\$6,292,728 to \$34,772,105	\$62,927,280 to \$347,721,050
Form I-945, Public Charge Bond	Filing fee  OCT for completing form	\$34,234	\$342,340
Form I-356, Request for Cancellation of Public Charge Bond	Filing fee  OCT for completing form	\$825	\$8,250
<b>Total Undiscounted Costs</b>		<b>\$45,313,422 to \$129,596,845</b>	<b>\$453,134,220 to \$1,295,968,450</b>
<b>Total Costs at 3 Percent Discount Rate</b>			<b>\$386,532,679 to \$1,105,487,375</b>
<b>Total Costs at 7 Percent Discount Rate</b>			<b>\$318,262,513 to \$910,234,008</b>
Source: USCIS analysis.			

Over the first 10 years of implementation, DHS estimates the quantified direct costs of the proposed rule would range from about \$453,134,220 to \$1,295,968,450 (undiscounted). In addition, DHS estimates that the 10-year discounted 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 range from about \$386,532,679 to \$1,105,487,375 at a 3 percent discount rate and about \$318,262,513 to \$910,234,008 at a 7 percent discount rate.

This economic analysis presents the quantified costs of this proposed rule based on the estimated population applying to adjust status subject to review for public charge determination and the opportunity cost of time associated with the increased time burden estimates for completing Forms I-485, I-129, I-129CW, and I-539. The economic analysis also presents the quantified costs associated with the proposed public charge bond process, including costs associated with completing and filing Forms I-945 and I-356. DHS reiterates we are unable to estimate the actual number of Form I-129 or Form I-129CW petitioners and Form I-539 filers that adjudication officers would require through a RFE to submit Form I-944 since such RFE would be issued on a discretionary basis as outlined in the proposed rule. However, previously in this economic analysis, DHS presented a more detailed range of RFEs that could be issued based on total population estimates and the estimated annual cost associated with such RFEs. DHS welcomes any public comments on the discounted costs presented in this proposed rule.

#### *ii. Discounted Reduction in Transfer Payments*

DHS presents the total estimated quantified reduction in transfer payments from the federal government of the proposed rule in table 56. The total estimated costs are presented in undiscounted dollars, at a 3 percent discount rate, and at a 7 percent discount rate.

<b>Table 56. Total Estimated Reduction in Transfer Payments from the Federal Government to Foreign-Born Non-Citizens Who May Be Receiving of Public Benefits (Estimates Discounted at 3 Percent and 7 Percent).</b>		
<b>Source of Costs</b>	<b>Total Estimated Annual Reduction in Transfer Payments (Undiscounted)<sup>1</sup></b>	<b>Total Estimated Reduction in Transfer Payments Over 10-year Period</b>
Estimated reduced transfer payments due to disenrollment / foregone enrollment from public benefits programs	\$2,267,842,067	\$22,678,420,670
<b>Total Undiscounted Transfer Reductions</b>	<b>\$2,267,842,067</b>	<b>\$22,678,420,670</b>
<b>Total Transfers Reductions at 3 Percent Discount Rate</b>		<b>\$19,345,152,833</b>
<b>Total Transfer reductions at 7 Percent Discount Rate</b>		<b>\$15,928,373,680</b>
Source: USCIS analysis.		
Note: <sup>1</sup> The amount of transfer payments presented includes the estimated amounts of transfer payments to the federal government and to state governments from foreign-born non-citizens and their households who may disenroll or forego enrollment in public benefits programs. DHS assumes that the state governments' share of the total amount of transfer payments is 50 percent of the estimated total transfer payments to the federal government. For a breakout of the estimated total federal and state transfer payment amounts, see the summary table above at the beginning of this economic analysis (Table 36, Summary of Major Provisions and Economic Impacts of the Proposed Rule).		

Over the first 10 years of implementation, DHS estimates the total quantified reduction in transfer payments from the federal government to foreign-born non-citizens and their households would be about \$22.7 billion (undiscounted). In addition, DHS estimates that the 10-year discounted costs of this proposed rule would be approximately \$19.3 billion at a 3 percent discount rate and about \$15.9 billion at a 7 percent discount rate due to disenrollment or foregone enrollment in various federal public benefits programs. In addition, DHS assumes that the state share of federal financial participation (FFP) is 50 percent and therefore the 10-year discounted amount of the state-level share of transfer payments of this proposed rule would be approximately \$9.65 billion at a 3 percent discount rate and about \$7.95 billion at a 7 percent discount rate. Disenrollment or foregone enrollment in public benefits programs could occur whether or not such immigrants are directly affected by the provisions of the proposed rule, however, USCIS was unable to determine the exact percentage of individuals who would

disenroll or forego enrollment. DHS notes that there may be a number of additional sources of transfer payments that could result from the proposed rule that DHS is not able to estimate and quantify at this time. Therefore, DHS welcomes public comments on additional sources of transfer payments that could result from the proposed rule.

**(e) 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* INA section 286(m), 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 clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (e.g., facility rent, IT equipment and systems among other expenses) and immigration benefits provided without a fee charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the benefit 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; Form I-129, Petition for a Nonimmigrant Worker; Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker; and Form I-539, Application to Extend/Change Nonimmigrant Status in accordance with this requirement. 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. DHS notes that the time necessary for USCIS to review the information submitted with each of these forms includes the time to adjudicate the underlying benefit request. While each of these forms does not charge a fee, the cost to USCIS is captured in the fee for the underlying benefit request form. DHS welcomes public comments on costs to the government from this proposed rule.

**(f) Benefits of Proposed Regulatory Changes**

The primary benefit of the proposed rule would be to better ensure that aliens who are admitted to the United States or apply for adjustment of status would not receive one or more public benefits as defined in the proposed 212.21(b) and instead, will rely on their financial resource, and those of family members, sponsors, and private organizations. As a result, DHS is establishing a more formal review process and improving the current review process to standardize the determination of inadmissibility based on public charge grounds. The proposed process would also help clarify to applicants the specific criteria that would be considered as inadmissible under public charge determinations.

DHS anticipates that the proposed rule would produce some benefits from the elimination of Form I-864W for use in filing an affidavit of support. The information previously requested on the Form I-864W would now be captured using Form I-485. Applicants, therefore, would not be required to file a form separate from the Form I-485. As noted previously, there is no filing fee associated with filing Form I-864W, but DHS estimates the time burden associated with filing this form is 60 minutes (1 hour) per petitioner.<sup>858</sup> Therefore, using the average total rate of compensation of \$35.78 per hour, DHS estimates the amount of benefits that would accrue from

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<sup>858</sup> Source for I-864W time burden estimate: Paperwork Reduction Act (PRA) Affidavit of Support Under Section 213A of the INA (Forms I-864, I-864A, I-864EZ, I-864W) (OMB control number 1615-0075). The PRA Supporting Statement can be found at Question 12 on Reginfo.gov at [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201705-1615-004](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201705-1615-004).

eliminating Form I-864W would be \$35.78 per petitioner, which equals the opportunity cost of time for completing Form I-864W.<sup>859</sup> However, DHS notes that we are unable to determine the annual number filings of Form I-864W since we do not currently have information of how many of these filings are based on public charge determinations.

In addition, a benefit of establishing and modifying the public charge bond process, despite the costs associated with this process, would potentially allow an immigrant the opportunity to be admitted although he or she was deemed likely to become a public charge. DHS welcomes any public comments on the benefits of this proposed rule.

## **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), 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, or governmental jurisdictions with populations of less than 50,000.<sup>860</sup> This proposed rule would require an individual applying for a visa, seeking admission at the port of entry, or adjusting status to establish that he or she is not likely at any time to become a public charge. Most of this rule’s proposed changes do not fall under the RFA because they directly regulate individuals who are not, for purposes of the RFA, within the definition of small entities established by 5 U.S.C. 601(6). However, DHS recognizes that there may be some provisions of this proposed rule that

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<sup>859</sup> Calculation opportunity cost of time for completing and submitting Form I-864W: (\$35.78 per hour \* 1.0 hours) = \$35.78.

<sup>860</sup> A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

would directly regulate small entities, and, therefore, DHS has examined the impact of this proposed rule on small entities.

This proposed rule would increase the time burden by an additional 30 minutes on petitioners who file Form I-129 or Form I-129CW on behalf of a beneficiary requesting an extension of stay or change of status, which would impose direct costs on these petitioners. Additionally, the proposed provisions to establish a public charge bond process included in this proposed rule would allow for either an alien or an obligor (individual or an entity) to request a cancellation of a public bond. As a result, this proposed rule could have direct impacts on small entities that are obligors. DHS also recognizes that a Form I-129 or Form I-129CW beneficiary, for whom a Form I-129 or Form I-129CW petitioner (i.e., the employer) sought either an extension of stay or a change of status, may have to leave the U.S. if the employer's request was denied. In these cases, the petitioner may lose the beneficiary as an employee and may incur labor turnover costs. DHS presents this Initial Regulatory Flexibility Analysis (IRFA) to examine these impacts.

### **Initial Regulatory Flexibility Analysis**

The small entities that could be impacted by this proposed rule are petitioners who file Form I-129 or Form I-129CW on behalf of beneficiaries requesting an extension of stay or change of status as well as obligors that would request a cancellation of a public bond.

#### **1. A description of the reasons why the action by the agency is being considered.**

DHS seeks to better ensure that applicants for admission to the United States and applicants for adjustment of status to lawful permanent resident who are subject to the public charge ground of inadmissibility are self-sufficient, i.e., they will rely on their own financial resources as well as the financial resources of their family, sponsors, and private organizations as

necessary.<sup>861</sup> Under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4), an alien is inadmissible if, at the time of an application for a visa, admission, or adjustment of status, he or she is likely at any time to become a public charge. The statute requires DHS to consider the following minimum factors that reflect the likelihood that an alien will become a public charge: the alien's age; health; family status; assets, resources, and financial status; and education and skills. In addition, DHS may consider any affidavit of support submitted by the alien's sponsor and any other factors relevant to the likelihood of the alien becoming a public charge.

**2. A succinct statement of the objectives of, and legal basis for, the proposed rule.**

DHS objectives and legal authority for this proposed rule are discussed in the preamble of the proposed rule.

**3. A description and, where feasible, an estimate of the number of small entities to which the proposed changes would apply.**

This proposed rule would increase the time burden by an additional 30 minutes on petitioners who file Form I-129 or Form I-129CW on behalf of a beneficiary requesting an extension of stay or change of status, which would impose direct costs on these petitioners and entities.<sup>862</sup> As previously discussed in the E.O. 12866 section of this NPRM, DHS estimates an annual population of 336,335 beneficiaries seeking extension of stay or change of status through a petitioning employer using Form I-129. In addition, DHS estimates an annual population of 6,307 beneficiaries seeking extension of stay or change of status through a petitioning employer using Form I-129CW. DHS estimates that the 30-minute increase in the estimated time burden for these populations would increase the opportunity cost of time for completing and filing Form

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<sup>861</sup> See 8 U.S.C. 1601(2).

<sup>862</sup> In the context of Form I-129, a petitioner is typically an employer or the representative of an employer who files on behalf of a nonimmigrant worker (or beneficiary) to come to the United States temporarily to perform services or labor, or to receive training. See <https://www.uscis.gov/i-129>.



I-129 and Form I-129CW and would result in about \$184 million and about \$5 million in costs, respectively. For this population, DHS is unable to estimate the actual number of requests for evidence (RFEs) that adjudication officers may issue to Form I-129 beneficiaries to complete Form I-944 to provide evidence that they are not likely to become a public charge when they are extending stay or changing status. Therefore, DHS cannot determine the number of small entities that might be impacted by potential requests to complete the Form I-944 as part of an RFE.

The proposed provisions on the bond process included in this rule would allow a surety company to become an obligor on a public charge bond (proposed Form I-945) and, later, to request a cancellation of such a bond (proposed Form I-356). Therefore, this proposed rule could have some impacts to surety companies, some of which are small entities. A request for cancellation of a public bond using Form I-356 includes a time burden of 15 minutes per request and a fee to DHS of \$25.00. It is not known the number of surety bond companies that might complete and file Forms I-945 and I-356 due to a lack of historical data and uncertainty in the number individuals that may be granted the opportunity to post for public charge bond. However, DHS estimates that the filing volume for Form I-945 might be about 960 and the filing volume for Form I-356 might be approximately 25. While DHS cannot predict the exact number of surety companies that might be impacted by this proposed rule, nine out of 273 Treasury-certified surety companies in fiscal year 2015 posted new immigration bonds with DHS ICE.<sup>863</sup> DHS found that of the nine surety companies, four entities were considered “small” based on the number of employees or revenue being less than their respective Small Business Administration

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<sup>863</sup> See DHS, Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches NPRM, 83 FR 25951, 25962-25965 (June 5, 2018).

size standard.<sup>864</sup> Assuming these nine surety companies post public charge bonds with USCIS, we can assume that four surety companies may be considered as small entities. However, USCIS cannot predict the exact impact to these small entities at this time. We expect that obligors would be able to pass along the costs of this rulemaking to the aliens. DHS welcomes any public comments or data on the number of small entities that would be surety companies likely to post public charge bonds and any direct impacts on those small surety companies.

**4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.**

In addition to time burden costs discussed in Section C of this IFRA, DHS recognizes that a Form I-129 or Form I-129CW beneficiary, for whom a Form I-129 or Form I-129CW petitioner (i.e., the employer) sought either an extension of stay or a change of status, may have to leave the U.S. if the employer's request was denied. In these cases, the petitioner may lose the beneficiary as an employee and may incur labor turnover costs. A 2012 report published by the Center for American Progress surveyed several dozen studies that considered both direct and indirect costs and determined that turnover costs per employee ranged from 10 to 30 percent of the salary for most salaried workers.<sup>865</sup> An employer paid an average of about 20 percent of the worker's salary in total labor turnover costs. Specifically, for workers earning \$50,000 or less, and for workers earning \$75,000 or less, the average turnover cost was about 20 percent for both

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<sup>864</sup> U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System (NAICS) Codes, February 26, 2016.  
[https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>865</sup> See "There Are Significant Business Costs to Replacing Employees," by Heather Boushey and Sarah Jane Glynn (2012), Center for American Progress, *available*:  
<https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/>.

earning levels. According to the study, these earning levels corresponded to the 75th and 90th percentiles of typical earnings, respectively. Assuming Form I-129 and Form I-129CW beneficiaries are employed, DHS believes it is reasonable to assume an annual mean wage of \$50,620 across all occupations.<sup>866</sup> Assuming an average labor turnover cost of 20 percent of \$50,620, on average, an employer could incur costs of approximately \$10,124 per beneficiary that would be separated from employment as a result of a denied request for an extension of stay or change of status. However, DHS does not know the number of small entities within this population of petitioners that might incur labor turnover costs.

Additionally, DHS also recognizes that a Form I-129 or Form I-129CW beneficiary, for whom a Form I-129 or Form I-129CW petitioner (i.e., the employer) sought either an extension of stay or a change of status and the request was denied, may still be able to get a visa and return to the U.S., including pursuant to other means. DHS welcomes any public comments or data on the impact to the petitioners or employers of Form I-129 or Form I-129CW beneficiaries who are denied an extension of stay or change of status due to public charge inadmissibility.

DHS does not believe that it would be necessary for Form I-129 or Form I-129CW petitioners, or for surety bond companies (obligors) to acquire additional types of professional skills as a result of this proposed rule. These petitioners and obligors should already possess the expertise to fill out the associated forms for this proposed rule. Additionally, these petitioners and obligors would be familiar with the proposed rule and such familiarization costs are accounted for in the E.O. 12866 sections.

**5. An identification of all relevant Federal rules, to the extent practical, that may duplicate, overlap, or conflict with the proposed rule.**

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<sup>866</sup> Bureau of Labor Statistics, May 2017 National Occupational Employment and Wage Estimates, All Occupations [https://www.bls.gov/oes/2017/may/oes\\_nat.htm](https://www.bls.gov/oes/2017/may/oes_nat.htm).

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any public comment and information regarding any such rules. Elsewhere in the preamble to the proposed rule, DHS addresses the relationship between this proposed rule and the standards governing alien eligibility for public benefits, as outlined in PRWORA.

**6. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.**

DHS considered a range of potential alternatives to the proposed rule. First, under a “no action” alternative, DHS would continue administering the public charge ground of inadmissibility under the 1999 Guidance. For reasons explained more fully elsewhere in the preamble to the proposed rule, DHS determined that this alternative would not adequately ensure the self-sufficiency of aliens subject to the public charge ground of inadmissibility. Second, DHS considered including a more expansive definition of “public benefit,” potentially to include a range of non-cash benefit programs falling in specific categories (such as programs that provide assistance for basic food and nutrition, housing, and medical care). For reasons explained more fully elsewhere in the preamble to the proposed rule, DHS chose the approach contained in this proposed rule – a more limited list of high-expenditure non-cash benefits. DHS expects that, as compared to the broader alternative, the proposed approach may reduce the overall effect of the rule on transfers, but enhance its administrability and predictability. Employers filing Form I-129 and surety companies would have a better understanding of the types of non-cash benefits that may be covered under this proposed rule than they would under the broader alternative, and may realize cost savings as a result. In addition, certain indirect effects of the rule may be different as a result of the decision to reject this alternative.

### **C. Congressional Review Act**

This proposed rule is a major rule as defined by 5 U.S.C. 804, also known as the “Congressional Review Act,” as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, 110 Stat. 847, 868 et seq. Accordingly, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the Congressional Review Act, or 60 days after the final rule’s publication, whichever is later.

### **D. Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal 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 \$161 million in 2017 based on the Consumer Price Index for All Urban Consumers.<sup>867</sup>

This proposed rule does not contain such a mandate. The requirements of Title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

### **E. Executive Order 13132 (Federalism)**

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities

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<sup>867</sup> U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, available at <https://www.bls.gov/cpi/tables/historical-cpi-u-201712.pdf> (last visited Jan. 31, 2018).

among the various levels of government. DHS does not expect that this proposed rule would impose substantial direct compliance costs on State and local governments, or preempt State law. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### **F. Executive Order 12988 (Civil Justice Reform)**

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **G. Executive Order 13175 Consultation and Coordination With Indian Tribal Governments**

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect 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.

#### **H. Family Assessment**

DHS has reviewed this proposed rule in line with the requirements of section 654 of the Treasury General Appropriations Act, 1999, Public Law 105-277. With respect to the criteria specified in section 654(c)(1), DHS has determined that the proposed rule may decrease disposable income and increase the poverty of certain families and children, including U.S. citizen children. For the reasons stated elsewhere in this preamble, however, DHS has determined that the benefits of the action justify the financial impact on the family. Further, the proposed action would expand the list of public benefits that DHS may consider for purposes of

inadmissibility under section 212(a)(4) of the Act. As a result, the proposed regulatory action, if finalized, may increase the number of aliens found inadmissible under section 212(a)(4) of the Act. As described under the Supplementary Information section of this rule, DHS has compelling legal and policy reasons for the proposed regulatory action, including, but not limited to, better ensuring the self-sufficiency of aliens admitted or immigrating to the United States, and minimizing the financial burden of aliens on the U.S. social safety net.

### **I. National Environmental Policy Act**

DHS analyzes actions to determine whether NEPA applies to them and if so what degree of analysis is required. DHS Directive (Dir) 023–01 Rev. 01 and Instruction (Inst.) 023-01-001 rev. 01 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”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023–01-001 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Inst. 023–01-001 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Inst. 023–01-001 Rev. 01 requires the action to 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. Inst. 023–01-001 Rev. 01 section V.B (1)–(3).

DHS analyzed this action and has concluded that NEPA does not apply due to the excessively speculative nature of any effort to conduct an impact analysis. Nevertheless, if NEPA did apply to this action, the action clearly would come within our categorical exclusion A.3(d) as set forth in DHS Inst. 023-01-001 Rev. 01, Appendix A, Table 1.

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. In addition, the proposed rule would potentially affect individuals applying for an extension of stay or change of status because these individuals would have to demonstrate that they are neither receiving, nor likely to receive, public benefits as defined in the proposed rule. As discussed in detail above, this rule proposes to establish a definition of public charge and expand the types of public benefits that DHS would consider as part of its public charge inadmissibility determinations. The rule also proposes to establish a regulatory framework based on the statutory factors that must be considered in public charge determinations, including enhanced evidentiary requirements for public charge inadmissibility determinations by USCIS. Finally, the rule proposes to revise the public charge bond process. Overall, the proposed regulatory changes, if finalized, would require a more in-depth adjudication of public charge issues and have the potential to result in more findings of inadmissibility, ineligibility for adjustment of status, or denials of requests for extension of stay or change of status, on public charge grounds.

Historically, there is a high demand for both immigrant and nonimmigrant visas. Even if larger numbers of aliens were now found to be inadmissible on public charge grounds as a result of this rule, there may be some replacement effect from others who would, in turn, be considered for the existing visas. Therefore, DHS cannot estimate with any degree of certainty to what



extent the potential for increased findings of inadmissibility on public charge grounds would result in fewer individuals being admitted to the United States. DHS is also unable to estimate with any degree of certainty whether the proposed rule would result in increased denial of applications for extension of stay or change of status. DHS does not, however, anticipate that this proposed rule will cause an increase in the number of individuals found to be admissible, or eligible for an extension of stay, or adjustment or change of status. Even if DHS could estimate these numerical effects, any assessment of derivative environmental effect at the national level would remain unduly speculative.

This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

#### **J. Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. Table 57 shows the summary of forms that are part of this rulemaking.

<b>Table 57. Summary of Forms</b>					
<b>Form</b>	<b>Form Name</b>	<b>New or Updated Form</b>	<b>General Purpose of Form</b>	<b>General Categories Filing</b>	<b>Applicability to Public Charge</b>

**Table 57. Summary of Forms**

Form	Form Name	New or Updated Form	General Purpose of Form	General Categories Filing	Applicability to Public Charge
I-129	Petition for Nonimmigrant Worker	Update – adds questions and instructions about receipt of public benefits	This form is used by an employer to petition USCIS for an alien beneficiary to come temporarily to the United States as a nonimmigrant to perform services or labor, or to receive training. This form is also used by certain nonimmigrants to apply for EOS or COS.	<p>E-2 CNMI -- treaty investor exclusively in the Commonwealth of the Northern Mariana Islands (CNMI).</p> <p>H-1B -- specialty occupation worker; an alien coming to perform services of an exceptional nature that relate to a U.S. Department of Defense-administered project; or a fashion model of distinguished merit and ability.</p> <p>H-2A -- temporary agricultural worker.</p> <p>H-2B -- temporary nonagricultural worker.</p> <p>H-3 -- trainee.</p> <p>L-1 -- intracompany transferee.</p> <p>O-1 -- alien of extraordinary ability in arts, science, education, business, or athletics.</p> <p>O-2 -- accompanying alien who is coming to the United States to assist in the artistic or athletic performance of an O-1 artist or athlete.</p> <p>P-1 -- major league sports.</p> <p>P-1 -- internationally recognized athlete/entertainment group.</p> <p>P-1S -- essential support personnel for a P-1.</p> <p>P-2 -- artist/entertainer in reciprocal exchange program.</p> <p>P-2S -- essential support personnel for a P-2.</p> <p>P-3 -- artist/entertainer coming to the United States to perform, teach, or coach under a program that is culturally unique.</p> <p>P-3S -- essential support personnel for a P-3.</p> <p>Q-1 -- alien coming temporarily to participate in an international cultural</p>	Non-receipt of public benefits and being unlikely to receive public benefits in the future is a condition of USCIS, at its discretion may request the applicant to file a Form I-944 to determine likelihood of receipt of public benefits in the future.

<b>Table 57. Summary of Forms</b>					
<b>Form</b>	<b>Form Name</b>	<b>New or Updated Form</b>	<b>General Purpose of Form</b>	<b>General Categories Filing</b>	<b>Applicability to Public Charge</b>
				<p>exchange program.</p> <p>Extension of Status</p> <p>E-1 -- treaty trader.</p> <p>E-2 -- treaty investor(not including E-2 CNMI treaty investors).</p> <p>E-3 -- Free Trade Agreement professionals from Australia.</p> <p>Free Trade Nonimmigrants --</p> <p>H-1B1 specialty occupation workers from Chile or Singapore and TN professionals from Canada or Mexico.</p> <p>R-1 -- religious worker.</p>	

**Table 57. Summary of Forms**

<b>Form</b>	<b>Form Name</b>	<b>New or Updated Form</b>	<b>General Purpose of Form</b>	<b>General Categories Filing</b>	<b>Applicability to Public Charge</b>
I-129CW	Petition for a CNMI-Only Nonimmigrant Transitional Worker	Update – adds questions and instructions about receipt of public benefits		This form is used by an employer to request an extension of stay or change of status for a Commonwealth of the Northern Mariana Islands (CNMI) temporarily to perform services or labor as a CW-1, CNMI-Only Transitional Worker.	Non-receipt of public benefits and being unlikely to receive public benefits in the future is a condition of EOS/COS. EOS/COS applicants will be required to USCIS, at its discretion may request the applicant to file a Form I-944 to determine likelihood of receipt of public benefits in the future.
I-356	Request for Cancellation of a Public Charge Bond	Update – Previously discontinued	This form is used to request cancellation of the bond that was submitted on Form I-945, Public Charge Bond, on behalf of an alien.	An obligor who had posted an I-945 of the alien's behalf or an alien has had a Form I-945 posted on his or her behalf, and who seeks to cancel the bond (Form I-945) because the alien has either permanently departed the United States, naturalized, or died, or the obligor or the alien seeks cancellation of the bond following the alien's fifth anniversary of admission to the United	After an obligor has posted an I-945 on behalf of the alien, or an alien on whose behalf the I-945 was posted, may request that a bond to be cancelled because the alien either has

**Table 57. Summary of Forms**

<b>Form</b>	<b>Form Name</b>	<b>New or Updated Form</b>	<b>General Purpose of Form</b>	<b>General Categories Filing</b>	<b>Applicability to Public Charge</b>
				States as a lawful permanent resident, or the alien, following the initial grant of lawful permanent resident status, obtains an immigration status that it exempt from the public charge ground of inadmissibility.	permanently departed the United States, naturalized or died, or the obligor or the alien request cancellation following the fifth anniversary of the alien's admission as a lawful permanent resident in the United States.; or or the alien, following the initial grant of lawful permanent resident status, obtains an immigration status that it exempt from the public charge ground of inadmissibility. .
I-407	I-407, Record of Abandonment of Lawful Permanent Resident Status	No Changes	This form is used to record an alien's abandonment of status as a lawful permanent resident in of the United States.	A lawful permanent resident who voluntarily abandons his lawful permanent resident status in the United States.	If a bond has been posted on the alien's behalf, the obligor or the alien may request that the bond be cancelled because the alien permanently departed the United States. The alien shows this by filing Form I-407 and

**Table 57. Summary of Forms**

Form	Form Name	New or Updated Form	General Purpose of Form	General Categories Filing	Applicability to Public Charge
					physically departing.
I-485	Application to Register Permanent Residence or Adjustment of Status	Update – clarifies what categories need to file Form I-944 and Form I-864	Foreign nationals present in the United States to obtain LPR status	<ul style="list-style-type: none"> <li>o Immediate relatives (spouses, children and parents of U.S. citizens)</li> <li>o Family-based immigrants (principal beneficiaries and their dependents)</li> <li>o Employment-based immigrants (principal beneficiaries and their dependents)</li> <li>o Those who entered as Ks (Fiancé(e)s or certain spouses of U.S. citizens, and their children) who are seeking LPR status based on the primary beneficiary's marriage to the U.S. citizen petitioner.</li> </ul>	Adjustment of status applicants generally must be admissible, including with regard to the public charge inadmissibility ground
I-539	Application To Extend/ Change Nonimmigrant Status	Update – adds questions and instructions about receipt of public benefits	This form is used by certain nonimmigrants to apply for an extension of stay or change of status. In certain circumstances this form may be used as an initial nonimmigrant status, or reinstatement of F1 or M1 status (students).	<ul style="list-style-type: none"> <li>• CNMI residents applying for an initial grant of status;</li> <li>• Student (F) and vocational students (M) applying for reinstatement; and</li> <li>• Persons seeking V nonimmigrant status or an extension of stay as a V nonimmigrant (spouse or child of an LPR who filed a petition on or before December 21, 2000)</li> </ul>	Non-receipt of public benefits and being unlikely to receive public benefits in the future is a condition of EOS/COS. USCIS, at its discretion may request the applicant to file a Form I-944 to determine likelihood of receipt of public benefits in the future.

**Table 57. Summary of Forms**

Form	Form Name	New or Updated Form	General Purpose of Form	General Categories Filing	Applicability to Public Charge
I-693	Report of Medical Examination and Vaccination Record	No Changes	Form I-693 is used to report results of a medical examination to USCIS.	Generally, adjustment of status applicants are required to submit an I-693. Nonimmigrants seeking a change or extension of status are generally not required to submit an I-693, Nonimmigrants seeking a change of status to spouse of a legal permanent resident (V) status. See table in <a href="https://www.uscis.gov/policy-manual/HTML/PolicyManual-Volume8-PartB-Chapter3.html">https://www.uscis.gov/policy-manual/HTML/PolicyManual-Volume8-PartB-Chapter3.html</a>	The I-693 is used as part of the Health Factor to identify medical conditions.
I-864	Affidavit of Support Under Section 213A of the INA	Update – reference to Form I-864W, which is being discontinued, was removed	Statement/ contract provided by a sponsor to show that the sponsor has adequate financial resources to support the alien.	Generally most family-based immigrants and some employment-based immigrants. See additional tables for full list.	The Affidavit of Support when required is a factor in the public charge determination.
I-864EZ	Affidavit of Support Under Section 213A of the Act	Update – reference for Form I-864W, which is being discontinued, was removed	Statement/ contract provided by a sponsor to show that the sponsor has adequate financial resources to support the alien. This is a simpler version of Form I-864.	1. The sponsor is the person who filed or is filing Form I-130, Petition for Alien Relative, for a relative being sponsored; 2. The relative the sponsor is sponsoring is the only person listed on Form I-130; and 3. The income the sponsor is using to qualify is based entirely on your salary or pension and is shown on one or more Internal Revenue Service (IRS) Form W-2s provided by your employers or former employers.	The Affidavit of Support when required is a factor in the public charge determination.
I-864W	Request for Exemption for Intending Immigrant's Affidavit of Support	Discontinued – information incorporated into Form I-485	Certain classes of immigrants are exempt from the Form I-864 or Form I-864EZ requirement and therefore must file Form I-864W instead.	Aliens who have earned 40 quarters of SSA coverage. Children who will become U.S. citizens upon entry or adjustment into the United States under INA 320. Self-Petitioning Widow(er) Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant; Self-Petitioning battered spouse or	Although some people may be exempt from the affidavit of support requirement, the person may still be subject to public charge.

**Table 57. Summary of Forms**

Form	Form Name	New or Updated Form	General Purpose of Form	General Categories Filing	Applicability to Public Charge
				child.	
I-912	Requests for Fee Waiver	Update – provides warning that a request for a fee waiver may be a factor in the public charge determination.	This form may be filed with any USCIS immigrant benefit form in order to request a fee waiver.	Adjustment of Status (I-485) - may be filed for eligible applicants, generally for those not subject to public charge and humanitarian programs. Petition for Nonimmigrant Worker (I-129) may be filed for an applicant for E-2 CNMI investor nonimmigrant status under 8 CFR 214.2(e)(23) is eligible to request. Application for Extension/Change of Status (I-539) INA section 245(l)(7) or an applicant for E-2 Commonwealth of the Northern Mariana Islands is eligible for a fee waiver.	Request of a Fee Waiver is a factor in the determination of Public Charge.
I-944	Declaration of Self-Sufficiency	New	This form is used to demonstrate that an alien is not likely to become a public charge.	Anyone who is subject to public charge. See additional tables for full list.	This form is the primary basis of the public charge determination and asks questions about each one of the factors considered.
I-945	Public Charge Bond	New	This form is the bond contract between USCIS and the obligor	For aliens inadmissible solely based on public charge and who are permitted to have a bond posted on his or her behalf. The form is completed by the obligor who posts the bond on the alien's behalf.	If an alien is found inadmissible solely based on public charge, he or she may be admitted to the United States upon the posting of a suitable and



<b>Table 57. Summary of Forms</b>					
<b>Form</b>	<b>Form Name</b>	<b>New or Updated Form</b>	<b>General Purpose of Form</b>	<b>General Categories Filing</b>	<b>Applicability to Public Charge</b>
					proper a bond at the discretion of USCIS.

### **USCIS Form I-944**

DHS invites 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-NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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: New Collection.

2. Title of the Form/Collection: Declaration of Self-Sufficiency and Public Benefits Worksheet.

3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Form I-944; USCIS.

4. Affected public who will be asked or required to respond, as well as a brief abstract:  
Primary: Individuals or households. USCIS will require an individual applying to adjust status to lawful permanent residence (Form I-485) and who is subject to the public charge ground of inadmissibility to file Form I-944. On a case by case basis, USCIS may request that a nonimmigrant seeking to extend stay or change status (Form I-539 or Form I-129) and persons filing USCIS Form I-129CW to file Form I-944. The data collected on these forms will be used by USCIS to determine the likelihood of a declarant becoming a public charge based on the factors regarding health; family status; assets, resource, and financial status; and education and skills. The forms serve the purpose of standardizing public charge evaluation metrics and ensure that declarants provide all essential information required for USCIS to assess self-sufficiency and adjudicate the declaration. If USCIS determines that a declarant is likely to become a public charge, the declarant may need to provide additional resources or evidence to overcome this determination.

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 Form I-944 is 382,264 and the estimated hour burden per response is 4 hours.

6. An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 1,720,188 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 \$59,931,350.

### **USCIS Form I-485**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

DHS invites 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. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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 the DHS sponsoring the collection: Form I-485 and Supplements A and 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 collected is used to determine eligibility to adjust status under section 245 of the Immigration and Nationality Act.
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 Form I-485 is 382,264 and the estimated hour burden per response is 6.42 hours; the estimated total number of respondents for information collection Supplement A is 36,000 respondents and the estimated hour burden per response is 1.25 hours; the estimated total number of respondents for information collection Supplement J is 28,309 respondents and the

estimated hour burden per response is 1 hour; the estimated total number of respondents for information collection biometrics processing is 305,811 respondents and estimated hour burden is 1.17 hours.

6. An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 2,885,242 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 \$131,116,650.

### **USCIS Forms I-864; I-864A; I-864EZ**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

DHS invites 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 discontinuation of the USCIS Form I-864W information collection instrument. The instructions for Form I-864 and I-864EZ were modified to remove references to Form I-864W. There are no changes to the Form I-864A.

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 1615-0075 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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: Affidavit of Support Under Section 213A of the INA; Contract Between Sponsor and Household Member; Affidavit of Support under Section 213 of the Act.

3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-864; I-864A; I-864EZ; USCIS.

4. Affected public who will be asked or required to respond, as well as a brief abstract:  
Primary: Individuals or households. **Form I-864:** USCIS uses the data collected on Form I-864 to determine whether the sponsor has the ability to support the sponsored alien under section 213A of the Immigration and Nationality Act. This form standardizes evaluation of a sponsor's ability to support the sponsored alien and ensures that basic information required to assess eligibility is provided by petitioners.

**Form I-864A:** Form I-864A is a contract between the sponsor and the sponsor's

household members. It is only required if the sponsor used income of his or her household members to reach the required 125 percent of the FPG. The contract holds these household members jointly and severally liable for the support of the sponsored immigrant. The information collection required on Form I-864A is necessary for public benefit agencies to enforce the Affidavit of Support in the event the sponsor used income of his or her household members to reach the required income level and the public benefit agencies are requesting reimbursement from the sponsor.

**Form I-864EZ:** USCIS uses Form I-864EZ in exactly the same way as Form I-864; however, USCIS collects less information from the sponsors as less information is needed from those who qualify in order to make a thorough adjudication.

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-864 is 453,345 and the estimated hour burden per response is 6 hours; the estimated total number of respondents for the information collection I-864A is 215,800 and the estimated hour burden per response is 1.75 hours; the estimated total number of respondents for the information collection I-864EZ is 100,000 and the estimated hour burden per response is 2.5 hours.

6. An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 3,347,720 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 \$135,569,525.

## **USCIS Form I-912**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. Although this rule does not impose any new reporting or recordkeeping requirements under the PRA, this rule will require non-substantive edits to USCIS Form I-912, Request for Fee Waiver. These edits make clear to those who request fee waivers that an approved fee waiver can negatively impact eligibility for an immigration benefit that is subject to the public charge inadmissibility determination. Accordingly, USCIS has submitted a Paperwork Reduction Act Change Worksheet, Form OMB 83-C, and amended information collection instruments to OMB for review and approval in accordance with the PRA.

#### **USCIS Form I-945**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

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-NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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: New Collection; Revision of a Currently Approved Collection.

2. Title of the Form/Collection: Public Charge Bond.

3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-945; USCIS.

4. Affected public who will be asked or required to respond, as well as a brief abstract:  
Primary: Business or other for-profit. In certain instances, a bond can be posted on behalf of the alien to guarantee a set of conditions set by the government concerning an alien, i.e. that the alien will not become a public charge as defined in proposed 8 CFR 212.21(a) because he or she will not receive public benefits, as defined in 8 CFR 213.21(b) after the alien's adjustment of status to that of a lawful permanent resident.. An acceptable surety is generally any company listed on the Department of the Treasury's Listing of Approved Sureties (Department Circular 570) in effect

on the date the bond is requested or an individual or an entity that deposits cash or a cash equivalent, such as a cashier's check or money order for the full value of the bond.<sup>868</sup>

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 (Enter form number) is 960 and the estimated hour burden per response is 1 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 960 hours. (Multiply the burden for each submission by the number of respondents.)

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 \$0 as the company performing the bond service receives a fee.

### **USCIS Form I-356**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

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-NEW

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<sup>868</sup> See 8 CFR 103.6(b).

in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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: New Collection.
2. Title of the Form/Collection: Request for Cancellation of Public Charge Bond.
3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-356; USCIS.
4. Affected public who will be asked or required to respond, as well as a brief abstract:  
Primary: Aliens (on whose behalf a public charge bond has been posted) or the obligor (surety) (who is the obligor who posted a bond on the alien's behalf). The form is used to request cancellation of the public charge bond because of the alien's naturalization, permanent departure,

or death. The form is also used by the alien or the obligor to request cancellation of the public charge bond upon the fifth anniversary of the alien's admission to the United States as a lawful permanent resident.

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 (Enter form number) is 25 and the estimated hour burden per response is .75 hours.

6. An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 18.75 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 \$6,250.

### **USCIS Form I-129**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

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 1615-0009 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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: Petition for Nonimmigrant Worker.
3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-129; USCIS.
4. Affected public who will be asked or required to respond, as well as a brief abstract:  
Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for an alien to temporarily enter as a nonimmigrant. An employer (or agent, where applicable) also uses this form to request an extension of stay or change of status on behalf of the alien

worker. The form serves the purpose of standardizing requests for nonimmigrant workers, and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

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 Form I-129 is 552,000 and the estimated hour burden per response is 2.84 hours; the estimated total number of respondents for the information collection E-1/E-2 Classification Supplement to Form I-129 is 4,760 and the estimated hour burden per response is 0.67; the estimated total number of respondents for the information collection Trade Agreement Supplement to Form I-129 is 3,057 and the estimated hour burden per response is 0.67; the estimated total number of respondents for the information collection H Classification Supplement to Form I-129 is 255,872 and the estimated hour burden per response is 2; the estimated total number of respondents for the information collection H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement is 243,965 and the estimated hour burden per response is 1; the estimated total number of respondents for the information collection L Classification Supplement to Form I-129 is 37,831 and the estimated hour burden per response is 1.34; the estimated total number of respondents for the information collection O and P Classifications Supplement to Form I-129 is 22,710 and the estimated hour burden per response is 1; the estimated total number of respondents for the information collection Q-1 Classification Supplement to Form I-129 is 155 and the estimated hour burden per response is 0.34; the

estimated total number of respondents for the information collection R-1 Classification Supplement to Form I-129 is 6,635 and the estimated hour burden per response is 2.34.

(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 2,417,609 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 \$132,368,220.

### **USCIS Form I-129CW**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

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 1615-0009 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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: Form I-129CW, Petition for a CNMI-Only

Nonimmigrant Transitional Worker.

3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: I-129CW; USCIS.

4. Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Business or other for-profit. USCIS uses the data collected on this form to determine eligibility for the requested immigration benefits. An employer uses this form to petition USCIS for an alien to temporarily enter as a nonimmigrant into the CNMI to perform services or labor as a CNMI-Only Transitional Worker (CW-1). An employer also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for these benefits, and ensuring that the basic information required to determine eligibility, is provided by the petitioners.

USCIS collects biometrics from aliens present in the CNMI at the time of requesting initial grant of CW-1 status. The information is used to verify the alien's identity, background



information and ultimately adjudicate their request for CW-1 status.

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 Form I-129CW is 3,749 and the estimated hour burden per response is 3.5 hours.

6. An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 13,121.5 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 \$459,253.

### **USCIS Form I-539**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule.

DHS invites 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 1615-0003 in the body of the letter and the agency name. To avoid duplicate submissions, please use only one of the methods under the **ADDRESSES** and **I. 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 Extend/Change Nonimmigrant Status.

3. Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Form I-539 and Supplement A; USCIS.

4. Affected public who will be asked or required to respond, as well as a brief abstract:  
Primary: Individuals or households. This form will be used for nonimmigrants to apply for an extension of stay, for a change to another nonimmigrant classification, or for obtaining V nonimmigrant classification.

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 Form I-539 is 248,985 and the estimated hour burden per response is 2.38 hours; the estimated total number of respondents for the information collection Supplement A is 54,375 respondents and the estimated hour burden per response is .50 hours; the estimated total

number of respondents for the information collection biometrics processing is 373,477 and the estimated hour burden is 1.17 hours.

6. An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 1,056,740 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 \$42,701,050.

### **USCIS Form I-407**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. This rule requires the use of USCIS Form I-407 but does not require any changes to the form or instructions and does not impact the number of respondents, time or cost burden. This form has previously been approved by OMB under the Paperwork Reduction Act. The OMB control number(s) for this information collection is 1615-0130.

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

### **List of Subjects**

#### **8 CFR Part 103**

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

#### **8 CFR Part 212**

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

## **8 CFR Part 213**

Immigration, Surety bonds.

## **8 CFR Part 214**

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

## **8 CFR Part 245**

Aliens, Immigration, Reporting and recordkeeping requirements.

## **8 CFR Part 248**

Aliens, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

## **PART 103 – IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS**

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

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p.166; 8 CFR part 2; Pub. L. 112-54.

2. Section 103.6 is amended by:

- a. Revising paragraphs (a)(1), (a)(2)(i), and (c)(1);
- b. Adding paragraph (d)(3); and
- c. Revising paragraph (e)

The revisions and additions read as follows:

**§ 103.6 Surety bonds.**

(a) \*\*\*

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

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

\* \* \* \* \*

(c) \*\*\*

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

\* \* \* \* \*

(d) \* \* \*

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

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

\* \* \* \* \*

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

**§ 103.7 Fees.**

\*\*\*\*\*

(b) \* \* \*

(1) \* \* \*

(i) \* \* \*

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

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

**PART 212 – DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS;  
ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

4. The authority citation for part 212 continues to read as follows:

**Authority:** 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note (section 7209 of Pub. L. 108-458), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2.

5. Add §§212.20 through 212.24 to read as follows:

**§ 212.20 Applicability of public charge inadmissibility.**

8 CFR 212.20 through 212.24 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 212.24 of this part apply to an applicant for admission or adjustment of status to lawful permanent resident.

**§ 212.21 Definitions for public charge.**

For the purposes of 8 CFR 212.20 through 212.24, the following definitions apply:

(a) *Public Charge*. Public charge means an alien who receives one or more public benefit, as defined in paragraph (b) of this section.

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

(1) Any of the following monetizable benefits, where the cumulative value of one or more of the listed benefits exceeds 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any period of 12 consecutive months, based on the per-month FPG for the months during which the benefits are received.

(i) Any Federal, State, local, or tribal cash assistance for income maintenance, including:

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

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

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

(ii) Non-cash benefits, monetized as set forth in 8 CFR 212.24:

(A) Supplemental Nutrition Assistance Program (SNAP, formerly called “Food Stamps”), 7 U.S.C. 2011 to 2036c;

(B) Section 8 Housing Assistance under the Housing Choice Voucher Program, as administered by HUD under 24 CFR part 984; 42 U.S.C. 1437f and 1437u;

(C) Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under 24 CFR parts 5, 402, 880 through 884 and 886; and

(2) Any of one or more of the following non-monetizable benefits if received for more than 12 months in the aggregate within a 36 month period (such that, for instance, receipt of two non-monetizable benefits in one month counts as two months):

(i) Medicaid, 42 U.S.C. 1396 et seq., except for:

(A) Benefits paid for an emergency medical condition as described in section 1903(v) of Title XIX of the Social Security Act, 42 U.S.C. 1396b(v), 42 CFR 440.255(c);

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

(C) School-based benefits provided to children who are at or below the oldest age of children eligible for secondary education as determined under State law;

(D) Medicaid benefits received by children of U.S. citizens whose lawful admission for permanent residence and subsequent residence in the legal and physical custody of their U.S. citizen parent will result automatically in the child's acquisition of citizenship or whose lawful admission for permanent residence will result automatically in the child's acquisition of



citizenship upon finalization of adoption in the United States by the U.S. citizen parent(s) or, once meeting other eligibility criteria as required by the Child Citizenship Act of 2000, Pub. L. 106-395 (section 320(a)-(b) of the Act, 8 U.S.C. 1431(a)-(b)), in accordance with 8 CFR part 320;

(E) Medicaid benefits received by the children of U.S. citizens who are entering the United States for the primary purpose of attending an interview under the Child Citizenship Act of 2000, Pub. L. 106-395 (section 322 of the Act, 8 U.S.C. 1433), in accordance with 8 CFR part 322.

(ii) Any benefit provided for institutionalization for long-term care at government expense;

(iii) Premium and Cost Sharing Subsidies for Medicare Part D, 42 U.S.C. 1395w-114;

(iv) Subsidized Housing under the Housing Act of 1937, 42 U.S.C. 1437 et seq.

(3) The receipt of a combination of monetizable benefits under paragraph (b)(1) of this section where the cumulative value of such benefits is equal to or less than 15 percent of the Federal Poverty Guidelines for a household size of one within any period of 12 consecutive based on the per-month FPG for the months during which the benefits are received , together with one or more non-monetizable benefits under paragraph (b)(2) of this section if such non-monetizable benefits are received for more than 9 months in the aggregate within a 36 month period (such that, for instance, receipt of two non-monetizable benefits in one month counts as two months);

(4) DHS will not consider any benefits, as defined in paragraphs (b)(1) through (b)(3) of this section, received by an alien who, at the time of receipt, filing, or adjudication, is enlisted in the U.S. armed forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2),

serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or if received by such an individual's spouse or child as defined in section 101(b) of the Act, in the public charge inadmissibility determination.

(c) *Likely at any time to become a public charge.* Likely at any time to become a public charge means likely at any time in the future to receive one or more public benefit as defined in paragraph (b) of this section based on the totality of the alien's circumstances.

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

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

- (i) The alien;
- (ii) The alien's spouse, if physically residing with the alien;
- (iii) The alien's children, as defined in 101(b)(1) of the Act, physically residing with the alien;
- (iv) The alien's other children, as defined in section 101(b)(1) of the Act, not physically residing with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
- (v) Any other individuals (including a spouse not physically residing with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's federal income tax return; and

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

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

(i) The alien;

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

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

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

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

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

agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and

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

#### **§ 212.22 Public Charge inadmissibility determination.**

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

(a) *Prospective determination based on the totality of circumstances.* The determination of an alien's likelihood of becoming a public charge must be based on the totality of the alien's circumstances by weighing all factors that make the alien more or less likely at any time in the future to become a public charge, as outlined in this section.

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

(1) *The alien's age--(i) Standard.* When considering an alien's age, DHS will consider whether the alien is between the age of 18 and the minimum "early retirement age" for Social Security set forth in 42 U.S.C. 416(l)(2), and whether the alien's age otherwise makes the alien more or less likely to become a public charge, such as by impacting the alien's ability to work.

(ii) [Reserved]

(2) *The alien's health--(i) Standard.* DHS will consider whether the alien's health makes the alien more or less likely to become a public charge, including whether the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or

institutionalization or that will interfere with the alien's ability to provide and care for him- or herself, to attend school, or to work upon admission or adjustment of status.

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

(A) A report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required; or

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

(3) *The alien's family status--(i) Standard.* When considering an alien's family status, DHS will consider the alien's household size, as defined in 8 CFR 212.21(d), and whether the alien's household size makes the alien more or less likely to become a public charge.

(ii) [Reserved]

(4) *The alien's assets, resources and financial status--(i) Standard.* When considering an alien's assets, resources, and financial status, DHS will consider whether:

(A) The alien's household's annual gross income is at least 125 percent of the most recent Federal Poverty Guidelines based on the alien's household size as defined by §212.21(d), or if the alien's household's annual gross income is under 125 percent of the recent Federal Poverty Guidelines, whether the total value of the alien's household assets and resources is at least 5 times the difference between the alien's household's gross annual income and the Federal Poverty Guideline for the alien's household size;

(B) The alien has sufficient household assets and resources to cover any reasonably foreseeable medical costs related to a medical condition that is likely to require extensive

medical treatment or institutionalization or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work; and

(C) The alien has any financial liabilities or past receipt of public benefits as defined in 8 CFR 212.21(b) that make the alien more or less likely to become a public charge.

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

(A) The alien's annual gross household income excluding any income from public benefits as defined in 8 CFR 212.21(b);

(B) Any additional income from individuals not included in the alien's household who physically reside with the alien and whose income will be relied on by the alien to meet the standard at 8 CFR 212.22(b)(4)(i);

(C) Any additional income provided to the alien by another person or source not included in the alien's household on a continuing monthly or yearly basis for the most recent calendar year excluding any income from public benefits as defined in 8 CFR 212.21(b);

(D) The household's cash assets and resources, including as reflected in checking and savings account statements covering 12 months prior to filing the application;

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

(F) Whether the alien has:

(1) Applied for or received any public benefit, as defined in 8 CFR 212.21(b), on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE]; or

(2) Been certified or approved to receive public benefits, as defined in 8 CFR 212.21(b), on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE];

(G) Whether the alien has applied for or has received a fee waiver for an immigration benefit request on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE];

(H) The alien's credit history and credit score; and

(I) Whether the alien has private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work;

(5) *The alien's education and skills.* (i) *Standard.* When considering an alien's education and skills, DHS will consider whether the alien has adequate education and skills to either obtain or maintain employment sufficient to avoid becoming a public charge, if authorized for employment.

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

(A) The alien's history of employment;

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

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

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

(6) *The alien's prospective immigration status and expected period of admission.* (i) *Standard.* The immigration status that the alien seeks and the expected period of admission as it

relates to the alien's ability to financially support for himself or herself during the duration of their stay, including:

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

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

(ii) [Reserved];

(7) *An affidavit of support, when required under section 212(a)(4) of the Act, that meets the requirements of section 213A of the Act and 8 CFR 213a--(i) Standard.* A sufficient affidavit of support must meet the sponsorship and income requirements of section 213A of the Act and comply with 8 CFR 213a.

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

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

(2) The sponsor's relationship to the applicant; and

(3) The likelihood that the sponsor would actually provide the statutorily-required amount of financial support to the alien, and any other related considerations.

(c) *Heavily weighed factors.* The factors below will generally weigh heavily in a public charge inadmissibility determination. The mere presence of any one enumerated circumstance is not, alone, determinative.

(1) *Heavily weighed negative factors.* The following factors will generally weigh heavily in favor of a finding that an alien is likely to become a public charge:

(i) The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history or no reasonable prospect of future



employment;

(ii) The alien is currently receiving or is currently certified or approved to receive one or more public benefit, as defined in 212.21(b);

(iii) The alien has received one or more public benefit, as defined in 212.21(b), within the 36 months immediately preceding the alien's application for a visa, admission, or adjustment of status;

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

(B) The alien is uninsured and has neither the prospect of obtaining private health insurance, or the financial resources to pay for reasonably foreseeable medical costs related to a the medical condition; or

(v) The alien had previously been found inadmissible or deportable on public charge grounds.

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

(i) The alien's household has financial assets, resources, and support of at least 250 percent of the Federal Poverty Guidelines for a household of the alien's household size; or

(ii) The alien is authorized to work and is currently employed with an annual income of at least 250 percent of the Federal Poverty Guidelines for a household of the alien's household size.

(d) *Benefits received before [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE].* For purposes of this regulation, DHS will consider as a negative factor any amount of cash assistance for income maintenance, including Supplemental Security Income

(SSI), Temporary Assistance for Needy Families (TANF), State and local cash assistance programs that provide benefits for income maintenance (often called "General Assistance" programs), and programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received, or certified for receipt, before [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE], [as provided under the 1999 Interim Field Guidance, also known as the 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds](#). DHS does not consider any other public benefits received, or certified for receipt, before such date.

**§ 212.23 Exemptions and waivers for public charge ground of inadmissibility.**

(a) *Exemptions.* The public charge ground of inadmissibility does not apply, based on statutory or regulatory authority, to the following categories of aliens:

(1) Refugees at the time of admission under section 207 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(2) Asylees at the time of grant under section 208 of the Act and at the time of adjustment of status to lawful permanent resident under section 209 of the Act;

(3) Amerasian immigrants at the time of application for admission as described in sections 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, Public Law 100-202, 101 Stat. 1329-183, section 101(e) (Dec. 22, 1987), as amended, 8 U.S.C. 1101 note;

(4) Afghan and Iraqi Interpreter, or Afghan or Iraqi national employed by or on behalf of the U.S. Government as described in section 1059(a)(2) of the National Defense Authorization Act for Fiscal Year 2006 Public Law 109-163 (Jan. 6, 2006), as amended, and section 602(b) of the Afghan Allies Protection Act of 2009, Public Law 111-8, title VI (Mar. 11, 2009), as

amended, 8 U.S.C. 1101 note, and section 1244(g) of the National Defense Authorization Act for Fiscal Year 2008, as amended Public Law 110-181 (Jan. 28, 2008);

(5) Cuban and Haitian entrants applying for adjustment of status under in section 202 of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, 100 Stat. 3359 (Nov. 6, 1986), as amended, 8 U.S.C. 1255a note;

(6) Aliens applying for adjustment of status under the Cuban Adjustment Act, Public Law 89-732 (Nov. 2, 1966), as amended, 8 U.S.C. 1255 note;

(7) Nicaraguans and other Central Americans applying for adjustment of status under sections 202(a) and section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105-100, 111 Stat. 2193 (Nov. 19, 1997), as amended, 8 U.S.C. 1255 note;

(8) Haitians applying for adjustment of status under section 902 of the Haitian Refugee Immigration Fairness Act of 1998, Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998), as amended, 8 U.S.C. 1255 note;

(9) Lautenberg parolees as described in section 599E of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Public Law 101-167, 103 Stat. 1195, title V (Nov. 21, 1989), as amended, 8 U.S.C. 1255 note;

(10) Special immigrant juveniles as described in section 245(h) of the Act;

(11) Aliens who entered the United States prior to January 1, 1972 and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249 (Registry);

(12) Aliens applying for or re-registering for Temporary Protected Status as described in section 244 of the Act under section 244(c)(2)(A)(ii) of the Act and 8 CFR 244.3(a);

(13) A nonimmigrant described in section 101(a)(15)(A)(i) and (A)(ii) of the Act (Ambassador, Public Minister, Career Diplomat or Consular Officer, or Immediate Family or Other Foreign Government Official or Employee, or Immediate Family), pursuant to section 102 of the Act, and 22 CFR 41.21(d);

(14) A nonimmigrant classifiable as C-2 (alien in transit to U.N. Headquarters) or C-3 (foreign government official), 22 CFR 41.21(d);

(15) A nonimmigrant described in section 101(a)(15)(G)(i), (G)(ii), (G)(iii), and (G)(iv), of the Act (Principal Resident Representative of Recognized Foreign Government to International Organization, and related categories), pursuant to section 102 of the Act pursuant to 22 CFR 41.21(d);

(16) A nonimmigrant classifiable as NATO-1, NATO-2, NATO-3, NATO-4 (NATO representatives), and NATO-6 pursuant to 22 CFR 41.21(d);

(17) A nonimmigrant classified under section 101(a)(15)(T) of the Act, in accordance with section 212(d)(13)(A) of the Act;

(18) An applicant for, or individual who is granted, nonimmigrant status under section 101(a)(15)(U) of the Act in accordance with section 212(a)(4)(E)(ii) of the Act;

(19) Nonimmigrants classified under section 101(a)(15)(U) of the Act applying for adjustment of status under section 245(m) of the Act and 8 CFR 245.24;

(20) An alien who is a VAWA self-petitioner under section 212(a)(4)(E)(i) of the Act;

(21) A qualified alien described in section 431(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. 1641(c), under section 212(a)(4)(E)(iii) of the Act;

(22) Applicants adjusting status who qualify for a benefit under section 1703 of the

National Defense Authorization Act, Public Law 108-136, 117 Stat. 1392 (Nov. 24, 2003), 8 U.S.C. 1151 note (posthumous benefits to surviving spouses, children, and parents);

(23) American Indians born in Canada determined to fall under section 289 of the Act;

(24) Texas Band of Kickapoo Indians of the Kickapoo Tribe of Oklahoma, Pub. L. 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 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104-208, Div. C, Title VI, Subtitle D (Sept. 30, 1996), 8 U.S.C. 1255 note; and

(27) Any other categories of aliens exempt under any other law from the public charge ground of inadmissibility provisions under section 212(a)(4) of the Act.

(b) *Waiver*. 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) Nonimmigrants who were admitted under section 101(a)(15)(T) of the Act applying for adjustment of status under section 245(l)(2)(A) of the Act;

(2) Applicants for admission as nonimmigrants under 101(a)(15)(S) of the Act;

(3) 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

(4) Any waiver of public charge inadmissibility that is authorized under law or regulation.

**§ 212.24 Valuation of monetizable benefits.**

In determining the cumulative value of one or more monetizable benefits listed in 8 CFR 212.21(b)(1)(ii) for purposes of a public charge inadmissibility determination under 8 CFR 212.22, DHS will rely on benefit-specific methodology as follows:

(a) With respect to the Supplemental Nutrition Assistance Program (SNAP, formerly called “Food Stamps”), 7 U.S.C. 2011 to 2036c, DHS will calculate the value of the benefit attributable to the alien in proportion to the total number of people covered by the benefit, based on the amount(s) deposited within the applicable period of 12 consecutive months in which the benefits are received in the Electronic Benefits Transfer (EBT) card account;

(b) With respect to the Section 8 Housing Assistance under the Housing Choice Voucher Program, as administered by HUD under 24 CFR part 984; 42 U.S.C. 1437f and 1437u, DHS will calculate value of the voucher attributable to the alien in proportion to the total number of people covered by the benefit, based on the amount(s) within the applicable period of 12 consecutive months in which the benefits are received;

(c) With respect to Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under 24 CFR Parts 5, 402, 880-884 and 886, DHS will calculate the value of the rental assistance attributable to the alien in proportion to the total number of people covered by the benefit, based on the amount(s) received within the applicable period of 12 consecutive months in which the benefits are received; and

(d) With respect to any cash benefit received by the alien on a household (rather than individual) basis, DHS will calculate the value of the benefit attributable to the alien in proportion to the total number of people covered by the benefit, based on the amount(s) received within the applicable period of 12 consecutive months in which the benefit is received.

## **PART 213 – PUBLIC CHARGE BONDS**

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

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

7. Revise the part heading to read as set forth above.

8. Revise §213.1 to read as follows:

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

(a) *Inadmissible aliens.* In accordance with section 213 of the Act, after an alien seeking adjustment of status has been found inadmissible as likely to become a public charge under section 212(a)(4) of the Act, DHS may allow the alien to submit a public charge bond, if the alien is otherwise admissible, in accordance with the requirements of 8 CFR 103.6 and this section. The public charge bond submitted on the alien's behalf must meet the conditions set forth in 8 CFR 103.6 and this section.

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

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

secure a bond, DHS must issue a receipt on a form designated by DHS.

(2) *Amount.* Any public charge bond, or agreements to secure a public charge bond on cash or cash equivalents, as listed in 8 CFR 103.6, must be in an amount decided by DHS, not less than \$10,000, annually adjusted for inflation based on the Consumer Price Index for All Urban Consumers (CPI-U), and rounded up to the nearest dollar. The bond amount may not be appealed by the alien or the obligor.

(d) *Conditions of the bond.* A public charge bond must remain in effect until the alien naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, or dies, the alien requests cancellation after 5 years of being a lawful permanent resident, the alien changes immigration status to one not subject to public charge ground of inadmissibility, and the bond is cancelled in accordance with paragraph (g) of this section. An alien on whose behalf a public charge bond has been submitted may not receive any public benefits, as defined in 8 CFR 212.21(b), after the alien's adjustment of status to that of a lawful permanent resident, until the bond is cancelled in accordance with paragraph (g) of this section. An alien must also comply with any other conditions imposed as part of the bond.

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



communication between the obligor and the U.S. government. An obligor must notify DHS within 30 days of any change in the obligor's or the alien's physical and mailing address.

(f) *Substitution.* A bond not eligible for cancellation under paragraph (g) of this section must be substituted prior to the expiration of the validity of the bond previously submitted to DHS.

(1) *Substitution Process.* Either the obligor of the bond previously submitted to DHS or a new obligor may submit a substitute bond on the alien's behalf. If the bond previously submitted to DHS is a limited duration bond because it expires on a date certain, the substitute bond must be submitted no later than 180 days before the bond previously submitted to USCIS expires and the substitute bond must be valid and effective on or before the day the bond previously submitted to DHS expires. If the bond previously submitted to DHS is a bond of unlimited duration because it does not bear a specific end date, the substitute bond must specify an effective date. The substitute bond must meet all of the requirements applicable to the initial bond as required by this section and 8 CFR 103.6, and if the obligor is different from the original obligor, the new obligor must assume all liabilities of the initial obligor. The substitute bond must also cover any breach of the bond conditions which occurred before DHS accepted the substitute bond, in the event DHS did not learn of the breach until after the expiration or cancellation of the bond previously submitted to DHS.

(2) *Acceptance.* Upon submission of the substitute bond, DHS will review the substitute bond for sufficiency. If the bond on file has not yet expired, DHS will cancel the bond previously submitted to DHS, and replace it with the substitute bond, provided the substitute bond is sufficient. If the substitute bond was submitted before the previously submitted bond expired, but is insufficient, DHS will notify the obligor of the substitute bond to correct the

deficiency within the timeframe specified in the notice. If the deficiency is not corrected within the timeframe specified, and the previously submitted bond has not yet expired, the previously submitted bond will remain in effect.

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

- (i) Naturalized or otherwise obtained United States citizenship;
- (ii) Permanently departed the United States;
- (iii) Died;
- (iv) Reached his or her 5-year anniversary since becoming a lawful permanent resident;

or

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

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

(3) *Cancellation Request.* An alien must request that a public charge bond be cancelled by submitting a form designated by DHS, in accordance with that form's instructions and the fee prescribed in 8 CFR 103.7(b). If a request for cancellation of a public charge bond is not filed, the bond shall remain in effect until the form is filed, reviewed, and a decision is rendered.

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

(5) *Decision.* DHS will notify the obligor, the alien, and the alien's representative, if any, of its decision regarding the request to cancel the public charge bond. When the public charge bond is cancelled, the obligor is released from liability. If the public charge bond has been secured by a cash deposit or a cash equivalent, DHS will refund the cash deposit to the obligor. If DHS denies the request to cancel the bond, DHS will notify the obligor and the alien, and the alien's representative, if any, of the reasons why, and of the right of the obligor to appeal in accordance with the requirements of 8 CFR part 103, subpart A. An obligor may file a motion pursuant to 8 CFR 103.5 after an unfavorable decision on appeal. Neither the alien nor the alien's representative may appeal a denial to cancel the public charge bond or file a motion.

(h) *Breach--(1) Breach and Claim in Favor of the United States.* An administratively final determination that a bond has been breached creates a claim in favor of the United States. Such claim may not be released or discharged by an immigration officer. A breach determination is administratively final when the time to file an appeal with the Administrative

Appeals Office (AAO) pursuant to 8 CFR part 103, subpart A, has expired or when the appeal is dismissed or rejected.

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

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

(3) *Adjudication.* DHS will determine whether the conditions of the bond have been breached. If DHS determines that it has insufficient information from the benefit granting agency to determine whether a breach occurred, DHS may request additional information from the benefit granting agency. If DHS determines that it has insufficient information from the alien or the obligor, it may request additional information as outlined in 8 CFR part 103 before making

a breach determination. If DHS intends to declare a bond breached based on information that is not otherwise protected from disclosure to the obligor, DHS will disclose such information to the obligor to the extent permitted by law, and provide the obligor with an opportunity to respond and submit rebuttal evidence, including specifying a deadline for a response. DHS will send a copy of this notification to the alien and the alien's representative, if any. After the obligor's response, or after the specified deadline has passed, DHS will make a breach determination.

(4) *Decision.* DHS will notify the obligor and the alien, and the alien's representative, if any, of the breach determination. If DHS determines that a bond has been breached, DHS will inform the obligor of the right to appeal in accordance with the requirements of 8 CFR part 103, subpart A. The obligor may only file a motion in accordance with 8 CFR 103.5 of an unfavorable decision on appeal. The alien or the alien's representative, if any, may not appeal the breach determination or file a motion.

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

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

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

(ii) [Reserved]

## **PART 214 – NONIMMIGRANT CLASSES**

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

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

10. Section 214.1 is amended by:

- a. Adding paragraph (a)(3)(iv),
- b. Removing the term, “and” in paragraph (c)(4)(iii);
- c. Redesignating paragraph (c)(4)(iv) as paragraph (c)(4)(v); and
- d. Adding a new paragraph (c)(4)(iv).

The additions read as follows:

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

(a) \* \* \*

(3) \* \* \*

(iv) Except where the nonimmigrant classification for which the alien applies, or seeks to extend, is exempt from section 212(a)(4) of the Act or that section has been waived, as a condition for approval of extension of status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status he or she seeks to extend, is not receiving, nor is likely to receive, a public benefit as defined in 8 CFR 212.21(b). For the purposes of this determination, DHS will consider such public benefits received on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE]. In assessing whether the alien has

met his or her burden, DHS will consider the nonimmigrant classification the alien is seeking to extend, the reasons for seeking the extension of stay and the expected period of stay. For purposes of this determination, DHS may require the submission of a declaration of self-sufficiency on a form designated by DHS, in accordance with form instructions.

\* \* \* \* \*

(c) \* \* \*

(4) \* \* \*

(iv) As set forth in 8 CFR 214.1(a)(3)(iv), except where the alien's nonimmigrant classification is exempted by law from section 212(a)(4) of the Act, the alien has not received since obtaining the nonimmigrant status for which he or she seeks to extend, is not currently receiving, nor is likely to receive, public benefits as described in in 8 CFR 212.21(b). For the purposes of this determination, DHS will consider public benefits received on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE]; and

\* \* \* \* \*

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

11. 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.

12. Section 245.4 is amended by redesignating the undesignated text as paragraph (a) and adding paragraph (b) to read as follows:

### **§ 245.4 Documentary requirements.**

\* \* \* \* \*

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

## **PART 248 – CHANGE OF NONIMMIGRANT CLASSIFICATION**

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

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

14. Section 248.1 is amended by:

- a. Revising paragraph (a);
- b. Redesignating paragraphs (b) through (e) as paragraphs (c) through (f), respectively;

and

- c. Adding a new paragraph (b); and
- d. Revising newly redesignated paragraph (c)(4).

The revisions and additions read as follows:

### **§ 248.1 Eligibility.**

(a) *General.* Except for those classes enumerated in § 248.2 of this part, any alien lawfully admitted to the United States as a nonimmigrant, including an alien who acquired such status in accordance with section 247 of the Act, 8 U.S.C. 1257, who is continuing to maintain his or her nonimmigrant status, may apply to have his or her nonimmigrant classification changed to any nonimmigrant classification other than that of a spouse or fiancé(e), or the child of such alien, under section 101(a)(15)(K) of the Act, 8 U.S.C. 1101(a)(15)(K), or as an alien in transit under section 101(a)(15)(C) of the Act, 8 U.S.C. 1101(a)(15)(C). Except where the



nonimmigrant classification to which the alien seeks to change is exempted by law from section 212(a)(4) of the Act, as a condition for approval of a change of nonimmigrant status, the alien must demonstrate that he or she has not received since obtaining the nonimmigrant status from which he or she seeks to change, is not currently receiving, nor is likely to receive, public benefits as described in 8 CFR 212.21(b). DHS will consider public benefits received on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE]. An alien defined by section 101(a)(15)(V), or 101(a)(15)(U) of the Act, 8 U.S.C. 1101(a)(15)(V) or 8 U.S.C. 1101(a)(15)(U), may be accorded nonimmigrant status in the United States by following the procedures set forth in 8 CFR 214.15(f) and 214.14, respectively.

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

(c) \*\*\*

(4) As a condition for approval, an alien seeking to change nonimmigrant classification must demonstrate that he or she has not received since obtaining the nonimmigrant status from which he or she seeks to change, is not receiving, nor is likely to receive, a public benefit as defined in 8 CFR 212.21(b). For purposes of this determination, DHS will consider such benefits received on or after [DATE 60 DAYS FROM DATE OF PUBLICATION OF THE FINAL RULE]. In assessing whether the alien has met his or her burden, DHS will consider the prospective nonimmigrant classification, the reasons for seeking the change of status, and the expected period of stay. DHS may require the submission of a declaration of self-sufficiency on a form designated by DHS, in accordance with form instructions. This provision does not apply to classes of nonimmigrants who are explicitly exempt by law from section 212(a)(4) of the Act.

\* \* \* \* \*

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**Kirstjen M. Nielsen,**  
**Secretary**

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