

Ms. 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

Re: Comments on Proposed rule “Inadmissibility on Public Charge Grounds,” 83 FR 51114

Dear Ms. Deshommes:

On behalf of the National Asian Pacific American Bar Association (NAPABA), we thank the Department of Homeland Security (Department or DHS) for the opportunity to submit the following comments in response to the Department’s Notice of Proposed Rulemaking (NPRM) for “Inadmissibility on Public Charge Grounds,” published October 10, 2018. NAPABA strongly opposes the proposed changes and urges the Department of Homeland Security to withdraw its NPRM, as these regulations will severely impact the Asian and Pacific Islander communities.

NAPABA is the national bar association representing the interests of over 50,000 Asian Pacific American (APA) attorneys, judges, law professors, and law students and over 80 national, state, and local Asian Pacific American bar associations. Through its national network of affiliates and members, NAPABA is a strong advocate for commonsense immigration reform and seeks to eliminate anti-Asian sentiment and rhetoric.

The proposed rules will affect the livelihoods of Asian Pacific American and immigrant populations in a multitude of ways. First, the rule will likely dramatically increase the number of Asian and Pacific Islander immigrants impacted by redefining “public charge” and “public benefits” and expanding the number of government assistance programs considered when making determinations. Second, lack of information and fear of jeopardizing their status has created a “chilling effect” on immigrants and has already caused immigrants, who would not be subject to the new rule, to disenroll from public benefits programs *they are entitled to receive*.

Finally, NAPABA is seriously concerned about the continued attacks on the immigrant population in the United States, particularly the Asian and Pacific Islander immigrant communities. The use of laws that have discriminatory histories is especially concerning. Public charge determinations and other immigration laws have been used throughout American history to discriminate against immigrant populations, including Asian and Pacific Islander immigrants. The NPRM proposes new factors and thresholds for agents to consider when

making public charge determinations for immigrants seeking admission, legal permanent resident status, or non-immigrant visa renewal.¹

I. The Proposed Rule Will Likely Impact Tens of Thousands of Asian Pacific American (APA) and Immigrant Communities and Continue a Long History of Discrimination

The concept of public charge was introduced in the United States in the late 19th century and reflects a longstanding history of discrimination against Asian and Pacific Islanders, beginning with the Chinese Exclusion Act of 1882 and the Immigration Act of 1882.² The Chinese Exclusion Act of 1882 suspended immigration from China for ten years and declared that the Chinese population was ineligible for naturalization. The Immigration Act of 1882 excluded from admission “any convict, lunatic, idiot, or any person unable to take care of himself or herself *without becoming a public charge*.”³ (emphasis added). NAPABA is concerned that the proposed rule in the NPRM returns to this dark era in United States history and implements a rule that disproportionately discriminates against Asian and Pacific Islander immigrants.

The proposed changes will have a major impact on the APA community, and its large immigrant population. Of the over 22 million Asian and Pacific Islanders living in the United States, nearly two-thirds of APA immigrants are foreign born, and many more Asian Pacific Americans have immigrant parents.⁴ In 2017, a total of 1.1 million persons obtained lawful permanent resident status, including over 400,000 Asian and Pacific Islander immigrants. As Asian and Pacific Islander immigrant community continues to be one of the fastest growing populations in the United States, NAPABA is extremely concerned with the prediction that “Asians would end up being the most disadvantaged group numerically under [the NPRM], with more than 1 million recent legal noncitizens living in families with incomes under 250 percent of poverty.”⁵

The current public charge test impacts only about three percent of applicants seeking admission or adjustment of status. However, under the proposed NPRM, the percentage of impacted Asian and Pacific Islander immigrants will *increase to 47 percent*, a total increase of 44 percentage points. This dramatic increase in impacted immigrants will likely make it

¹ Notice of Proposed Rulemaking, “Inadmissibility on Public Charge Grounds,” *Federal Register* 83, no. 196 (October 10, 2018). <https://www.gpo.gov/fdsys/pkg/FR-2018-10-10/pdf/2018-21106.pdf>.

² Howard Bromberg, *Immigration Act of 1882*, <http://immigrationtounitedstates.org/584-immigration-act-of-1882.html>; see also Roger Daniels, *Guarding the Golden Door: American Immigration Policy and Immigrants Since 1882*. (New York: Hill & Wang, 2004.); Alien Contract Labor Law of 1885; Bureau of Immigration, U.S.; Chinese Exclusion Act of 1882; Congress, U.S.; Immigration Act of 1891; Immigration Act of 1903; Immigration Act of 1917; Immigration Act of 1921; Immigration Act of 1924; Immigration law; Page Law of 1875.

³ Immigration Act of 1882, ch. 376(2), (1882), <https://www.loc.gov/law/help/statutes-at-large/47th-congress/session-1/c47s1ch376.pdf>.

⁴ Meredith Higashi et al., “Interpreting Justice: Progress and Challenges on Language Access,” *National Sian Pacific American Bar Association*, (Washington DC, 2017), 4.

⁵ Jeanne Batalova, Michael Fix, and Mark Greenberg, “Through the Back Door: Remaking the Immigration System via the Expected ‘Public-Charge’ Rule,” *Migration Policy Institute*, August 2018, <https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule>.

significantly more difficult for Asian and Pacific Islander immigrants and families to gain admission to the U.S. under the proposed public charge rule.

II. Expanding Definitions and Standards for Public Charge and Public Benefits Will Harm Asian and Pacific Islander Immigrants and their Families

DHS proposes to include more individuals in the determination by changing the standard from whether the individual is “primarily dependent,” to whether the individual is “self-sufficient.” In addition, the proposed plans to redefine “public benefits” and expand the number of government assistance programs considered when making public charge determinations. With these changes, Asian and Pacific Islander immigrants and families will be more likely to face increased scrutiny with the proposed rule’s expanded parameters. DHS Secretary Kirstjen Nielsen stated that the NPRM would “promote immigrant self-sufficiency and protect finite resources by ensuring that they are not likely to become burdens on American taxpayers.”⁶ NAPA BA strongly disagrees with Secretary Nielsen’s statement and believes that individuals can be self-sufficient while also taking advantage of government assistance they are legally entitled to receive.

Secretary Nielsen’s statements above do not accurately reflect the financial cost and the social burden of the proposed rule change to “public charge.” Should the proposed rule go into effect, it will effectively bar individuals from seeking legally entitled public benefits, create a more lengthy application processes in the immigration system, and increase the use of emergency benefits.⁷ By focusing on cutting costs by preventing immigrants to be “burdens,” the NPRM fails to consider the long-term net benefits immigrants from all socio-economic backgrounds offer the United States economy.⁸

a. The proposed rules and expanded list of public benefits will dramatically impact and disfavor lower-income working Asian and Pacific Islander Immigrants and their families, especially children and elderly.

The NPRM redefines a “public charge” as anyone who uses more than 15 percent of the federal poverty line in public benefits for any period of 12 consecutive months.⁹ Additionally, the NPRM gives broad discretion to authorities to deny applications for immigrants who make less than 250 percent of the federal poverty line, a standard that is double the current income requirements. With this new increase in the income requirement, the proposed rule would also

⁶ Ted Hesson, Nancy Cook, and Helena Bottemiller Evich, “Immigrants May Be Denied Green Cards If They’ve Received Benefits,” *Politico*, (September 9, 2018), <https://www.politico.com/story/2018/09/22/poor-immigrants-green-cards-trump-836456>.

⁷ Tanvi Misra, “Why Blocking Poor Immigrants Could Be Very Costly,” *Citylab*, Sept. 25, 2018, <https://www.citylab.com/equity/2018/09/why-blocking-poor-immigrants-could-be-very-costly/571087/>.

⁸ Pia Orrenius, “Benefits of Immigration Outweigh the Costs,” *The Catalyst*, Issue 2 (Spring 2016), <https://www.bushcenter.org/catalyst/north-american-century/benefits-of-immigration-outweigh-costs.html>.

⁹ “Inadmissibility on Public Charge Grounds,” *Federal Register* 83, no. 196: 51158.

add weight to different income level, weighing negatively an income of less than 125 percent of the Federal Poverty Level, \$31,375 for a family of four, and by weighing as “heavily positive” a household income of 250 percent of the Federal Poverty Level, around \$63,000 for a family of four. NAPABA finds these new thresholds to be unreasonable and disfavors lower-income immigrants, especially families with dependents. The NPRM’s standards creates an environment where “even immigrants who are 95 percent self-sufficient could still be considered public charges.”¹⁰ This new proposal will expand the pool of impacted immigrants,¹¹ and increase the possibility of separating families.

For example, if an immigrant family of four makes \$43,925, or 175 percent of the federal poverty line, and receives \$2.50 per person daily in government assistance, a member of this family may be determined to be a public charge and inadmissible to the United States. This could lead to the family being torn apart, and risk their livelihoods in the United States. A significant number of Asian and Pacific Islanders are either immigrants, or children of immigrants who earn between the 125% and 250% of the federal poverty line. The proposed rule’s use of an extended list of public benefits may risk family unity for many Asian and Pacific Islander families and will put many children and elders at risk.

At DHS’s request for specific comments, NAPABA has evaluated and determined its strong opposition to the inclusion of CHIP in any a public charge inadmissibility determination. Including CHIP will severely impact on public health and the general welfare of all immigrant children. These families may be self-sufficient, but require a little extra support to keep their children healthy and thriving. It is important to note that children will *always* be dependent on someone. It is illogical to use receipt of public benefits by children against someone when making public charge determinations.

Furthermore, in 1999, Immigration and Naturalization Service (INS) specified that it would not consider Medicaid, CHIP, or other non-cash benefits in determining public charge inadmissibility.¹² The INS explained that “confusion about the relationship between the receipt of public benefits and the concept of ‘public charge’ has deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive. *This reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare.*”¹³

¹⁰ David Bier, “New Rule to Deny Status to Immigrants up to 95% Self-Sufficient,” *CATO Institute: CATO at Liberty*, (September 24, 2018), <https://www.cato.org/blog/new-rule-deny-status-immigrants-95-self-sufficient>.

¹¹ Bier, “New Rule to Deny Status.”

¹² “Proposed Changes to ‘Public Charge’ Policies for Immigrants: Implications for Health Coverage,” Henry J. Kaiser Family Foundation, (Sept. 28, 2018), <https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage/#footnote-274689-9>

¹³ Department of Justice, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 1999 <https://www.gpo.gov/fdsys/pkg/FR-1999-05-26/pdf/99-13202.pdf>.

NAPABA strongly rejects the expansion of the list of public benefits DHS seeks to include for inadmissibility on public charge grounds. Many of the programs it seeks to include will likely have a similar consequence as CHIP on immigrant families and communities, and the overall public health of the United States.

b. The Proposed Rule Is Already Causing a “Chilling Effect” in Immigrant Communities across the Country.

The NPRM has already caused confusion amongst legal immigrant families who would not be impacted by the NPRM. Members of the Asian and Pacific Islander community have already started to disenroll in public benefit and government assistance programs. This phenomenon is particularly concerning because of the detrimental impacts that this can have on the young and elderly family members. Cities all across the country report that fewer immigrants are seeking to enroll in healthcare, in fear of triggering the public charge determination and jeopardizing immigration statuses.¹⁴

This chilling effect is detrimental to the overall well-being of immigrants living in the United States. Decreased participation in Medicaid and other government assistance programs will lead to uninsured immigrant families and will have a negative impact on their health and financial stability.¹⁵ The NPRM could potentially restrict children’s access to health care and food. The NPRM is physically harmful, as many immigrants will be forced to choose between life-saving government services or getting a green card.

III. The Proposed Public Charge Test Creates an Uncertain Environment with a “Forward Looking Test”

DHS proposes a public charge rule that is “prospective” in nature, and the “determination [is] predicated on an opinion as to the likelihood of future events.”¹⁶ However, DHS does not specify how the new public charge test will work administratively. The proposed rule will likely create an administrative environment where determinations will be dependent on which agent

¹⁴ See Eduardo Cuevas, “Immigrants avoiding public services after federal proposal sparks fear on Monterey County,” (December 6, 2018), <https://www.thecalifornian.com/story/news/2018/12/06/immigrants-avoiding-public-services-after-proposal-sparks-fear-monterey-county/2196927002/>; see also Christian M. Wade, “Number of uninsured kids rising in Massachusetts,” (December 9, 2018), https://www.salemnews.com/news/local_news/number-of-uninsured-kids-rising-in-massachusetts/article_a3f3fdd9-1d83-5575-b2d0-85de7737f18a.html; “NJPP: New Immigration Rule Will Have Chilling Effect on New Jersey’s Mixed-Status Families,” (November 27, 2018), <https://www.insidernj.com/press-release/njpp-new-immigration-rule-will-chilling-effect-new-jerseys-mixed-status-families/>; Eric Galatas, “Public Charge’ proposal already affecting Northern Plains kids,” (December 6, 2018), <https://kelo.com/news/articles/2018/dec/06/public-charge-proposal-already-affecting-northern-plains-kids/>; Stephanie Innes, “Arizona families are avoiding health care due to proposed public charge rule, groups says,” (November 14, 2018), <https://www.azcentral.com/story/news/politics/immigration/2018/11/14/public-charge-rule-affect-200-000-arizonans-donald-trump-immigration/1989952002/>.

¹⁵ “Proposed Changes to ‘Public Charge’,” Henry J. Kaiser Family Foundation, (Sept. 28, 2018).

¹⁶ “Inadmissibility on Public Charge Grounds,” *Federal Register* 83, no. 196: 51174.

will be reviewing an application and their interpretation of the proposed rule. NAPABA is deeply concerned about how the proposed rules will be administered fairly and equally.

a. Changes to Evaluating “Totality of Circumstances” and Weighing Certain Factors Negatively will Harm Asian and Pacific Islander Immigrants and their families

Existing public charge law includes factors that should be considered: (1) age, (2) health, (3) family status, (4) financial status, (5) English proficiency, (6) education skills (7) affidavit of support. The NPRM proposes stricter guidance for weighing these factors when reviewing visa applications and shifts the burden from petitioning sponsor’s income to the applicant’s earning potential and future use of public benefits.¹⁷

The NPRM regards the following as “heavily weighed negative factors:”¹⁸ being younger than the age of 18, older than the age of 60, having a chronic or pre-existing condition, making 125% of the federal poverty line (FPL) or lower, lacking a high school/secondary school degree, being limited English proficient. NAPABA is greatly concerned by this fact because of its potential to deny children and the elderly of admission or adjustment of status and create a difficult situation for the entire family: whether to stay or not to stay in the United States.

The Henry J. Kaiser Family Foundation reported that around 94% of all noncitizens “who entered the U.S. without LPR status have at least one characteristic that DHS could potentially weigh negatively.”¹⁹ In addition, by considering limited English proficiency a heavily weighed negative factor, this will have a drastic impact on the APA community. The APA population are “collectively the most likely to be LEP, 35 percent of the Asian American population and 14 percent of the Native Hawaiian and Pacific Islander population.”²⁰

DHS states that Public Charge inadmissibility determinations will be prospective, based on the “totality of circumstances,”²¹ where “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.”²²

DHS acknowledges that determinations of public charge will be predicated on an *opinion* as to the likelihood of future events.²³ Determinations based on an *opinion*, are inherently subjective

¹⁷ “DHS Proposes Vast Changes to Public Charge Definition,” *Catholic Legal Immigration Network, Inc.*, (September 23, 2018), <https://cliniclegal.org/resources/uscis-proposes-vast-changes-public-charge-definition>.

¹⁸ “DHS Proposes Vast Changes,” *Catholic Legal Immigration Network, Inc.*

¹⁹ Samantha Artiga, Rachel Garfield, and Anthony Damico, “Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid,” Henry J. Kaiser Family Foundation, (October 2018), <http://files.kff.org/attachment/Issue-Brief-Estimated-Impacts-of-the-Proposed-Public-Charge-Rule-on-Immigrants-and-Medicaid>.

²⁰ Meredith Higashi et al., “Interpreting Justice,” 4.

²¹ “Inadmissibility on Public Charge Grounds,” *Federal Register* 83, no. 196: 51164.

²² “Inadmissibility on Public Charge Grounds,” *Federal Register* 83, no. 196: 51291.

²³ “Inadmissibility on Public Charge Grounds,” *Federal Register* 83, no. 196: 51174.

and will likely place many Asian and Pacific Islander immigrants at risk of a public charge designation. NAPABA rejects the NPRM's proposed system, as it favors persons who are wealthy, healthy, and educated, and penalizes children, the elderly, low-income persons, persons with pre-existing conditions or disabilities, and limited English proficient persons.

Using totality of circumstances in determining public charge inadmissibility is especially harmful to the APA families. Using totality of circumstances for public charge determinates targets family unity, a central value of Asian and Pacific Islander cultures. Asian and Pacific Islander cultures are often referred to as a "collectivist culture with strong family values."²⁴ Asian culture is group-oriented and deeply values intergenerational living. Within APA families, it is very common to house and care of elders. If this public charge rule is in place, age will be a negative weighed factor, which will be especially detrimental to elderly APAs and their families.

b. "Likely at Any Time to Become a Public Charge" Forces Administrators to Predict One's Future Likelihood, Introducing Uncertainty for Asian and Pacific Islander Immigrants and Families

The language of "likely at any time" is concerning; it is extremely vague and unclear as to how this test will actually be implemented. The NPRM's public charge test seeks to predict the probability of the likelihood an individual will use government assistance in the future. DHS and immigrant enforcement officials will be deciding the likelihood on a case-by-case basis, which makes preparation impossible for applicants and the possibility of approval difficult to gauge.

Using the forward-looking test, DHS may determine that a young adult is a public charge because they are likely to utilize government assistance in 20 to 30 years from when they originally submitted an adjustment in status. For example, a healthy 35-year-old may apply for LPR status with the hopes of eventually applying for citizenship and retiring later down the road. After retirement, the individual may potentially take advantage of Medicare Part D, or the Medicare prescription drug benefit; the "likely at any time" test could determine this individual is likely to become a public charge in the future. DHS is unclear on exactly how the public charge's "likely at any time" test would operate in scenarios such as these.

NAPABA rejects the use of a forward-looking test because it gives immigration authorities unrestrained discretion in determining who is legally allowed to live in the U.S. The NPRM's vague language opens the possibility for the DHS to deny everyone an adjustment of status using the "likely at any time to become a public charge" test. The NPRM is unclear on how far in advance the DHS will be considering when making public charge determinations, which makes it difficult for immigrants to plan their best course of action.

²⁴ Marcia Carteret, M. Ed., "Cultural Values of Asian Parents and Families," October 21, 2010.

IV. CONCLUSION: Benefits of Immigration

NAPABA strongly believes that foreign nationals positively contribute to the United States economy and labor force. As stated by the Bush Institute, “immigration fuels the economy. When immigrants enter the labor force, they increase the productive capacity of the economy and raise GDP. Their incomes rise, but so do those of natives. It’s a phenomenon dubbed the “immigration surplus.”²⁵ The benefits of immigration vastly outweigh its costs. “Immigration has net benefits. The fact that it has some costs is not a reason to bar it, but rather to manage it.”²⁶

NAPABA strongly believes that the NPRM would not be in the United States’ best interest, as it will severely decrease legal immigration and the number of immigrants who qualify for LPR status. Having fewer immigrants living permanently in the U.S. will curtail innovation and advancement, both socially and economically. Asian and Pacific Islander immigrants, who may just be starting on the path to economic security, may not obtain basic medical and nutritional assistance, which may be the key for future success in the United States. Furthermore, the proposed regulation is contrary to the principles of our immigration system; based on preserving family unity; powering the economy; and upholding our tradition as a nation of immigrants.

For the reasons discussed above, we strongly oppose the proposed rules for determining an immigrant’s inadmissibility on public charge grounds and urge the Department of Homeland Security to reject all of the changes proposed in its notice of proposed rulemaking.

Sincerely,



Tina Matsuoka
Executive Director

²⁵ Orrenius, “Benefits of Immigration Outweigh the Costs.”

²⁶ Orrenius, “Benefits of Immigration Outweigh the Costs.”