

**Congress of the United States**  
**Washington, DC 20515**

April 25, 2022

Andrew Parker  
Branch Chief, Residence and Admissibility Branch, Residence and Naturalization Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
5900 Capital Gateway Drive, Camp Springs, MD 20746

**Re: DHS Docket No. USCIS-2021-0013, RIN 1615-AC74, Comments in Response to  
Proposed Rulemaking: Public Charge Ground of Inadmissibility**

Dear Mr. Parker:

We, the 26 undersigned Members of Congress, submit this comment in support of the Department of Homeland Security (DHS or Department) proposed rule, “Public Charge Ground of Inadmissibility,” published February 24, 2022 (DHS Docket No. USCIS-2021-0013).<sup>1</sup> As Members of Congress, we have a strong interest in ensuring that DHS and other executive agencies appropriately apply the law that Congress has enacted. The proposed rule applies the public charge ground of inadmissibility as intended by Congress, in a manner consistent with 140 years of precedent. For this reason, we support this proposed rule.

Since the term was first codified as an immigration restriction in 1882, “public charge” has been consistently interpreted to mean an individual who is, or is likely to become, *primarily* dependent on the government for his or her care (*i.e.*, someone who is effectively a “charge” or ward of the state). Over the years, the method for determining such “primary dependence” has changed, but the principle itself has remained steadfast. In 1882, this meaning was understood to refer to individuals who could not support themselves and were likely to end up in almshouses or asylums.

Today, 140 years later, it is understood to refer to individuals who cannot support themselves and who are thus primarily dependent on cash assistance for income maintenance or who require long-term institutional care. These minor differences in application simply reaffirm the constancy of the term’s more general meaning—*primary* dependence on the government for care. As will be explained below, Congress understood this to be the meaning each of the numerous times it re-employed the term in legislation since 1882. Given that Congress never altered the term’s longstanding meaning, each such implementation amounts to a congressional ratification of that meaning.

*a. The Original Meaning of Public Charge.*

There is little question that the term “public charge” originally referred to persons who could not care for themselves and were thus primarily dependent on the public for support. The first federal statute banning the admission of aliens based on public charge grounds was included

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<sup>1</sup> Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570 (proposed Feb. 24, 2022) [hereinafter “DHS NPRM”].

in the Immigration Act of 1882.<sup>2</sup> That statute specifically denied admission to “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”<sup>3</sup> This provision was modeled on state immigration laws developed in New York and Massachusetts that sought to deny admission to individuals who could not provide for themselves and would thus end up in publicly-funded almshouses or asylums.<sup>4</sup> For example, a New York state law enacted in 1847 prohibited the landing of “any lunatic, idiot, deaf and dumb, blind or infirm persons, not members of emigrating families, and who are likely to become permanently a public charge.”<sup>5</sup> These and similar statutes clearly indicated the intent to ban individuals who through moral, mental, or physical deficiencies could not care for themselves. They did not, however, ban individuals who were capable of providing for themselves but who could also, because of their situation in life, benefit from supplemental assistance as they worked to become increasingly self-sufficient.

This original meaning is consistent with the plain meaning of the words “public charge.” Black’s Law Dictionary (6<sup>th</sup> ed.), for example, defines *charge* as “[a] person or thing committed to the care of another.”<sup>6</sup> And it specifically defines *public charge* as “[a]n indigent[; a] person whom it is *necessary* to support at public expense by reason of poverty alone or illness and poverty.”<sup>7</sup> Both of these definitions suggest individuals who are incapable of providing for themselves and are thus necessarily dependent on the public for their support. They do not suggest individuals who are capable of providing for themselves, even if they could simultaneously benefit from supplemental assistance as they do so.

This original meaning of public charge is thereafter reinforced over the years, through additional legislation and judicial and administrative case law. In the decades following 1882, for example, Congress passed numerous laws that continued to list the term “public charge” after other, more specific conditions for individuals who would be generally incapable of providing for themselves and would thus become primarily dependent on public support. In 1891, Congress excluded “[a]ll idiots, insane persons, paupers or persons likely to become a public charge.”<sup>8</sup>

In 1907, Congress expanded on the categories of excludable individuals to include “epileptics” and “professional beggars,” while also adding a new catch-all provision that clearly reflected the congressional intent behind its list of specific exclusions.<sup>9</sup> This catch-all provision covered “persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a

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<sup>2</sup> Immigration Act of August 3, 1882, ch. 376, § 2, 22 Stat. 214.

<sup>3</sup> *Id.*

<sup>4</sup> HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES & THE 19TH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY 2* (Oxford Univ. Press 2017).

<sup>5</sup> Act of May 5, 1847, ch. 195, § 3, 1847 N.Y. Laws 451.

<sup>6</sup> BLACK’S LAW DICTIONARY 233 (6th ed. 1990).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084. A substantially similar provision was included in a bill enacted in 1903. See Act of March 3, 1903, ch. 206, § 2, 32 Stat. 1213.

<sup>9</sup> Act of February 20, 1907, ch. 1134, § 2, 34 Stat. 898.

living.<sup>10</sup> In 1917, Congress again included this catch-all provision in its revised list of excludable aliens.<sup>11</sup>

This public charge language remained unchanged for the next 35 years until Congress enacted the Immigration and Nationality Act of 1952,<sup>12</sup> the modern codification of immigration and naturalization law. In that act, Congress excluded various groups of individuals who could become primarily dependent on the government for support. These included: (1) those with “a physical defect, disease, or disability . . . of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living;” (2) those who are “paupers, professional beggars, or vagrants;” and (3) those “who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges.”<sup>13</sup> It is the language in this third section that has survived into current law, while the first two sections were subsequently eliminated.

The contemporaneous interpretations of the judiciary and executive officers tasked with administering the various acts above only confirm the congressional intent behind the public charge provisions. For example, a federal court in 1887 analyzed the original public charge language from the Immigration Act of 1882 and concluded that “the ultimate fact which the commissioners are called on to decide [is] whether these immigrants were unable to take care of themselves.”<sup>14</sup> In 1949, the Board of Immigration Appeals (BIA or Board) sustained the appeal of a mother and child who had been excluded on the 1917 public charge grounds after their husband/father was excluded for criminal reasons.<sup>15</sup> The Board noted that the mother was “quite capable of earning her own livelihood independent of her husband” and the child had training in an industry that “presents a wide field for employment in this country.”<sup>16</sup>

Similarly, the Attorney General determined in 1964 that the public charge provision in the 1952 Act requires the presence of some “specific circumstances, such as mental or physical disability, advanced age, or other facts reasonably tending to show that the burden of supporting the alien is likely to be cast on the public.”<sup>17</sup> The Attorney General further concluded 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.”<sup>18</sup> In 1988, the BIA sustained the appeal of an alien who had been denied immigration benefits under the same public charge provision, in part because her family had received “public cash assistance” while being

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<sup>10</sup> *Id.*

<sup>11</sup> Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874.

<sup>12</sup> Pub. L. No. 82-414, 66 Stat. 163.

<sup>13</sup> *Id.* §§ 212(a)(7), (8), and (15)

<sup>14</sup> *In re O’Sullivan*, 31 F. 447, 449 (C.C.S.D.N.Y. 1887).

<sup>15</sup> *Matter of T—*, 3 I. & N. Dec. 641 (BIA 1949).

<sup>16</sup> *Id.*

<sup>17</sup> *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409 (AG 1964).

<sup>18</sup> *Id.*

unemployed for nearly four years.<sup>19</sup> In sustaining the appeal, the Board noted that the alien was “young” and had no “physical or mental defect which might affect her earning capacity.”<sup>20</sup> The Board also noted that the alien had recently begun working, and that during the time when she was absent from the workforce, she had been caring for her children.<sup>21</sup>

*b. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.*

Changes in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),<sup>22</sup> as well as changes to public benefit eligibility under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),<sup>23</sup> did not alter the longstanding meaning of the public charge provision. PRWORA limited immigrant eligibility for certain means-tested federal benefits, but it did not modify or address the public charge ground of inadmissibility in any way. IIRIRA did modify the public charge statute in several ways, including by: (1) codifying the “totality of the circumstances” test that had developed through case law over the years;<sup>24</sup> (2) requiring adjudicators to consider certain specific factors—age; health; family status; assets, resources, and financial status; and education and skills—when applying that test;<sup>25</sup> and requiring legally enforceable affidavit of support, while limiting the categories of people who could provide such affidavits.<sup>26</sup> The act did not, however, affect the longstanding meaning of public charge.

Indeed, Congress considered and rejected changes to require consideration of short-term receipt of benefits in the legislative process leading to the passage of IIRIRA. H.R. 2202 of the 104<sup>th</sup> Congress, the House bill that would eventually become IIRIRA, passed the House on March 21, 1996.<sup>27</sup> Section 622(a) of that bill included a provision generally defining public charge to include an alien who “receives benefits . . . under one or more of the public assistance programs described in subparagraph (D) for an aggregate period . . . of at least 12 months within 7 years after the date of entry.”<sup>28</sup> The public assistance programs listed in subparagraph (D) expressly included Medicaid, food stamp, and housing assistance programs.<sup>29</sup> Those provisions, however, were rejected in conference and not included in the enacted version of IIRIRA.<sup>30</sup>

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<sup>19</sup> *Matter of A—*, 19 I. & N. Dec. 867 (BIA 1988).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Pub. L. No. 104-208, 110 Stat. 3009.

<sup>23</sup> Pub. L. No. 104-193, 110 Stat. 2105.

<sup>24</sup> Pub. L. No. 104-208 § 551 (codified at 8 U.S.C. § 1182(a)(4)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (codified at 8 U.S.C. § 1183a).

<sup>27</sup> H.R. 2202, 104th Cong. § 622(a) (1995); *See also* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019).

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; *see also* H.R. REP. NO. 104-828, at 138.

<sup>30</sup> *Compare* H.R. 2202, 104th Cong. § 622(a) *with* Pub. L. 104-208, § 551.

The fact that IIRIRA and PRWORA maintained the longstanding meaning of the “public charge” ground was immediately understood by the various public agencies tasked with administering the statute. In 1997 and 1998, both the Immigration and Naturalization Service (INS) and the State Department clarified to its respective officers that IIRIRA now required legally enforceable affidavits of support, but that the act had otherwise failed to change the substance of the public charge ground. On December 16, 1997, for example, the INS issued guidance stating that “[e]xcept for the new requirements concerning the enforceable affidavit of support, [IIRIRA] has not altered the standards used to determine the likelihood of an alien to become a public charge nor has it significantly changed the criteria to be considered in determining such a likelihood.”<sup>31</sup> Similarly, on June 8, 1998, the State Department issued a cable clarifying that IIRIRA’s principal change was to require “a legally enforceable affidavit of support” and that the act had “not changed the long-standing legal presumption that an able-bodied, employable individual will be able to work upon arrival in the United States” and thus not become a public charge.<sup>32</sup> A separate cable noted that “[t]here is no ground of ineligibility based solely on the prior receipt of public benefits” and that “in most cases, prior receipt of benefits, by itself, should not lead to an automatic finding of ineligibility.”<sup>33</sup>

Subsequently, on May 26, 1999, the INS published two documents in the Federal Register to “help alleviate public confusion over the meaning of the term ‘public charge’ in immigration law and its relationship to the receipt of Federal, State, and local public benefits” and to “provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.”<sup>34</sup> The first was a Notice of Proposed Rulemaking in which the INS proposed to define “public charge” to mean an individual “who is likely to become . . . primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at Government expense.”<sup>35</sup> The second was INS Field Guidance that “both summarize[d] longstanding law with respect to public charge and provide[d] new guidance on public charge determinations.”<sup>36</sup> Through this Field Guidance, the INS was able to immediately

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<sup>31</sup> IMMIGRATION AND NATURALIZATION SERV., DEP’T OF JUSTICE, PUBLIC CHARGE: INA SECTIONS 212(A)(4) AND 237(A)(5) – DURATION OF DEPARTURE FOR LPRS AND REPAYMENT OF PUBLIC BENEFITS (Dec. 16, 1997).

<sup>32</sup> DEP’T OF STATE, I-864 AFFIDAVIT OF SUPPORT: UPDATE NO. 14 – COMMITMENT TO PROVIDE ASSISTANCE, UNCLAS STATE 102426 (cable dated June 8, 1998). The cable further provided that “[t]he presumption that the applicant will find work coupled with the fact that the [affidavit of support] is a legally enforceable contract will provide in most cases a sufficient basis to accept a sponsor’s . . . technically sufficient [affidavit] as overcoming the public charge ground.” *Id.*

<sup>33</sup> DEP’T OF STATE, I-864 AFFIDAVIT OF SUPPORT UPDATE NO. ONE – PUBLIC CHARGE ISSUES, UNCLAS STATE 228862 (cable dated Dec. 1997). The cable further clarified that “[i]f there is a sufficient Affidavit of Support and the applicant appears to be able to support him/herself and dependents, a public charge finding may not be appropriate notwithstanding the petitioner’s reliance on public assistance.” *Id.*

<sup>34</sup> IMMIGRATION AND NATURALIZATION SERV., DEP’T OF JUSTICE, FIELD GUIDANCE ON DEPORTABILITY AND INADMISSIBILITY ON PUBLIC CHARGE GROUNDS, 64 Fed. Reg. 28,689 (May 26, 1999) [hereinafter “1999 INS Field Guidance”].

<sup>35</sup> Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, at 28,677 (proposed May 26, 1999) [hereinafter “1999 INS NPRM”].

<sup>36</sup> 1999 INS Field Guidance, 64 Fed. Reg. 28,689.

adopt the definition in the proposed rule as a means of addressing public confusion “while allowing the public an opportunity to comment on the proposed rule.”<sup>37</sup>

The INS provided several reasons for deciding to adopt the definition of public charge in both the 1999 proposed rule and the Field Guidance. Each of these reasons reflect the widely understood congressional intent behind the public charge statute:

1. First, the INS noted that uncertainty following IIRIRA was “undermining the Government’s policies of increasing access to health care and helping people to become self-sufficient.”<sup>38</sup> As the INS explained, “confusion about the relationship between the receipt of public benefits and the concept of ‘public charge’” had “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.”<sup>39</sup> Furthermore, this “reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare.”<sup>40</sup>
2. Second, the INS observed that non-cash benefits “are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family.”<sup>41</sup> Thus, by focusing only on cash assistance for income maintenance, the Service could “identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests.”<sup>42</sup>
3. Third, the INS acknowledged that “federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient.”<sup>43</sup> INS therefore concluded that “participation in such non-cash programs is not evidence of poverty or dependence.”<sup>44</sup>

The INS also noted that its proposed definition was consistent with the advice provided by federal benefit-granting agencies, including the Department of Health and Human Services, the Department of Agriculture, and the Social Security Administration. Each department had concurred that “receipt of cash assistance for income maintenance is the best evidence of primary dependence on the Government” because “non-cash benefits generally provide supplementary

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<sup>37</sup> *Id.*

<sup>38</sup> 1999 INS NPRM, 64 Fed. Reg. 28,677.

<sup>39</sup> 1999 INS Field Guidance, 64 Fed. Reg. 28,689.

<sup>40</sup> *Id.* at 28,692.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

support . . . to low-income working families to sustain and improve their ability to remain self-sufficient.”<sup>45</sup>

*c. DHS’s Proposed Rule Codifies Longstanding Congressional Intent.*

DHS now proposes to codify this longstanding meaning of public charge. As in the 1999 Interim Field Guidance, DHS would now consider the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense to determine whether an individual is primarily dependent on the government for subsistence.<sup>46</sup> DHS’s proposal excludes most non-cash benefits from consideration, consistent with congressional intent.<sup>47</sup> While past and present use of public benefits may be an indication of whether or not an individual is a public charge, it has long been understood that most non-cash benefits “are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family.”<sup>48</sup> As such, the proposed rule is consistent with the intent of congress to apply the public charge ground of inadmissibility to those who are primarily dependent on the government for subsistence.

*d. Conclusion*

We applaud DHS for taking this significant step to codify the definition of public charge, consistent with longstanding precedent and congressional intent. We urge the Department to finalize this proposal, as it would provide certainty to applicants and petitioners navigating our immigration system. We look forward to working with DHS to implement this important rule.

Sincerely,

/s/  
Jerrold Nadler  
Chairman  
House Committee on the Judiciary

/s/  
Richard J. Durbin  
Chair  
Senate Committee on the Judiciary

/s/  
Zoe Lofgren  
Chair  
House Subcommittee on Immigration  
and Citizenship

/s/  
Alex Padilla  
Chair  
Senate Subcommittee on Immigration,  
Citizenship, and Border Safety

/s/  
Suzanne Bonamici  
Member of Congress

/s/  
Jason Crow  
Member of Congress

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<sup>45</sup> 1999 INS NPRM, 64 Fed. Reg. 28,677.

<sup>46</sup> *Id.* and 87 Fed. Reg. at 10607; and *proposed* 8 C.F.R. 212.21, 87 Fed. Reg. at 10669.

<sup>47</sup> 87 Fed. Reg. at 10607

<sup>48</sup> 1999 INS Field Guidance, 64 Fed. Reg. 28,692.

/s/  
Mark DeSaulnier  
Member of Congress

/s/  
Sylvia R. Garcia  
Member of Congress

/s/  
Shelia Jackson Lee  
Member of Congress

/s/  
Henry C. "Hank" Johnson, Jr.  
Member of Congress

/s/  
Barbara Lee  
Member of Congress

/s/  
Gwen Moore  
Member of Congress

/s/  
Linda T. Sánchez  
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/s/  
Mark Takano  
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/s/  
Nydia M. Velazquez  
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/s/  
Adriano Espaillat  
Member of Congress

/s/  
Mazie Hirono  
Senator

/s/  
Pramila Jayapal  
Member of Congress

/s/  
Raja Krishnamoorthi  
Member of Congress

/s/  
Alan Lowenthal  
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Jamie Raskin  
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Mary Gay Scanlon  
Member of Congress

/s/  
Adam Smith  
Member of Congress

/s/  
Rashida Tlaib  
Member of Congress

/s/  
Nikema Williams  
Member of Congress