



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

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Megan Herndon
Deputy Director for Legal Affairs
Visa Services, Bureau of Consular Affairs
Department of State
600 19th St NW
Washington, DC 20006

Submitted via www.regulations.gov
Docket ID No. DOS-2019-0035

**Re: Interim Final Rule: Visas: Ineligibility Based on Public Charge Grounds
RIN: 1400-AE87**

Dear Ms. Herndon:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced request for comments on the Department of State (DOS) Interim Final Rule, “Visas: Ineligibility Based on Public Charge Grounds,” published in the Federal Register on October 11, 2019.¹

Established in 1946, AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and naturalization and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

AILA opposes the interim final rule and urges its immediate withdrawal. As an initial matter, the rule follows the legal justification and rationale of an enjoined Department of Homeland Security (DHS) final rule that runs contrary to law. And like the DHS rule it emulates, the DOS rule will needlessly and substantially restrict legal immigration to the United States with adverse consequences for individuals, families, and American businesses nationwide. No less concerning, the interim final rule will exacerbate an already widespread chilling effect on the use of vital, legally accessed public benefits by immigrant and mixed-status families.

Yet withdrawal of the rule alone is insufficient. DOS must also reverse its unnecessary and harmful January 2018 revisions to the Foreign Affairs Manual (FAM) that were promulgated without notice and comment. Together, the withdrawal of the interim final rule and reversal of the FAM revisions

¹ 84 Fed. Reg. 54996 (Oct. 11, 2019).

would result in a fairer and more consistent legal immigration system while improving the safety and well-being of families and children.

The Interim Final Rule Is Based on an Enjoined DHS Rule That Runs Contrary to Law

As the interim final rule largely mirrors an enjoined DHS rule, DOS should withdraw it without delay. The interim final rule states that it is “intended to align the Department's standards with those of the Department of Homeland Security.”² DHS published its public charge standards in a final rule issued on August 14, 2019.³ Five federal courts have already found that rule to likely be unlawful. Among them, the district courts in New York, Washington, and Maryland have issued nationwide preliminary injunctions.⁴ DOS should not promulgate a public charge rule modeled after an enjoined rule that runs contrary to law. Indeed, DOS’s institution of standards that DHS is blocked from implementing would ensure inconsistency between the two Departments’ policies—precisely the outcome the interim final rule is meant to avoid.

Similarly, the injunctions on the DHS rule eliminate the good cause exception that the interim final rule relied upon to justify immediate implementation of the rule without engaging in proper notice and comment. The interim final rule states that, “[i]f implementation of the rule is delayed pending completion of notice and comment, consular officers would apply public charge-related ineligibility standards differing from those applied by DHS... This inconsistency between the two agencies’ adjudications would create a public harm and would significantly disrupt the Department's interest in issuing visas only to individuals who appear to qualify for admission to the United States.”⁵ As noted, implementation of the interim final rule while the DHS rule remains enjoined would guarantee discrepancies between DOS and DHS policy. By DOS’ logic, then, there is good cause to withdraw its rule rather than allow it to remain in effect.

The DHS Rule on Which the IFR Is Based Lacks Justification

The DHS rule that the interim final rule emulates is without basis. DHS states that its rule is intended 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.”⁶ But not only are immigrants ineligible for most public benefits, when they are eligible, their net consumption is far less than native-born Americans.⁷ Moreover, studies overwhelmingly confirm the economic benefits of immigration and, in the long term, the positive net fiscal contributions of

² 84 Fed. Reg. 54996.

³ 83 Fed. Reg. 51114 (Oct. 10, 2018).

⁴ See AILA, *Featured Issue: Public Charge Changes at USCIS, DOJ, and DOS*; <https://www.aila.org/advocacy/media/issues/all/public-charge-changes-at-uscis-doj-and-dos>.

⁵ 84 Fed. Reg. 54996, 55011.

⁶ 83 Fed. Reg. 51114, 41295.

⁷ “Immigration and the Welfare State: Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs,” *CATO Institute* (May 10, 2018), available at <https://object.cato.org/sites/cato.org/files/pubs/pdf/irpb6.pdf>.

immigrants and their children.⁸ The DHS rule and DOS interim final rule, therefore, are solutions in search of a problem.

The IFR Will Needlessly Curtail Legal Immigration and Further Chill Use of Vital Benefits

While the IFR will not solve any problems, it will create numerous ones. To begin with, the interim final rule threatens to substantially curtail legal immigration to the United States. The rule will institute a nebulous “totality of circumstances” public charge test requiring consular officers to weigh an elaborate set of factors, many of which are heavily weighted against noncitizens. These factors, coupled with the confusing, and even arbitrary, nature of the test, stand to substantially escalate application and petition denial rates by DOS. That escalation will have harmful consequences for the U.S. economy, family unity, and America’s long-held identity as a nation of immigrants.

The IFR will also deepen the chilling effect on the use of vital, legally accessed public benefits that the DHS rule has already exerted throughout the country. In October 2019, for example, the Kaiser Family Foundation found “nearly half (47%) of health centers reported that many or some immigrant patients declined to enroll themselves in Medicaid in the past year” and that “nearly one-third (32%) said that many or some immigrant patients disenrolled from or declined to renew Medicaid coverage.”⁹ By exacerbating this trend, the interim final rule will further jeopardize the health and welfare of immigrant and mixed-status families.

DOS Should Reinstate Public Charge Policy as Articulated in the May 1999 Field Guidance

Withdrawing the interim final rule alone is an insufficient remedy. DOS’s January 2018 revisions to the Foreign Affairs Manual (FAM) needlessly restricted longstanding criteria to admissibility to the United States and resulted in inconsistent DOS and USCIS standards.¹⁰ DOS should reverse those FAM revisions and realign its policies with the principles articulated in the May 1999 public charge Field Guidance.¹¹

In all, the withdrawal of the interim final rule and the reversal of the January 2018 revisions would enhance fairness and consistency in our legal immigration system while promoting the health and safety and immigrant and mixed-status families throughout the nation.

⁸ See generally, The American Immigration Council: Economics of Immigration, available at <https://www.americanimmigrationcouncil.org/topics/economics-immigration>; “7 Ways Immigrants Enrich Our Economy and Society,” UnidosUS, available at <https://www.unidosus.org/issues/immigration/resources/facts>; “Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power,” National Immigration Forum (Sept. 6, 2018), available at <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/>.

⁹ Kaiser Family Foundation, “Impact of Shifting Immigration Policy on Medicaid Enrollment and Utilization of Care among Health Center Patients” (Oct. 15, 2019); <https://www.kff.org/report-section/impact-of-shifting-immigration-policy-on-medicaid-enrollment-and-utilization-of-care-among-health-center-patients-issue-brief/>.

¹⁰ See, “AILA, CLINIC, and NILC Express Concerns Over Improper Public Charge Determinations and I-601A Revocations”(Aug. 28, 2018); <https://www.aila.org/advo-media/aila-correspondence/2018/aila-clinic-and-nilc-express-concerns-over>.

¹¹ “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999); <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html>.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION