



## UNITED STATES COMMISSION ON CIVIL RIGHTS

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December 7, 2018

### **VIA MAIL AND ELECTRONIC FILING**

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.: U.S. Commission on Civil Rights Comment in Opposition to Notice of  
Proposed Rulemaking re. Inadmissibility on Public Charge Grounds  
DHS Docket No. USCIS–2010–0012

Dear Ms. Deshommes:

The U.S. Commission on Civil Rights, by majority vote, submits the following comments in opposition to the Department of Homeland Security’s (DHS) Notice of Proposed Rulemaking and how it determines whether an immigrant is inadmissible to the United States because he or she is likely at any time to become a public charge.<sup>1</sup> The Commission is an independent, bipartisan, fact-finding federal agency whose mission is to inform the development of national civil rights policy and enhance enforcement of federal civil rights laws.<sup>2</sup> Congress has charged the Commission to, among other duties, “make appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice.”<sup>3</sup> For decades, the Commission and its state advisory committees have investigated and reported on the often negative civil and human rights implications of our nation’s immigration laws and policies.<sup>4</sup> The Commission has very strong concerns that the proposed rule communicates government animus against multiple marginalized communities such as people with limited English proficiency, lesbian, gay, bisexual, and transgender (LGBT) individuals, and people with disabilities and that the proposed rule will undermine the equity principles that are foundational to the United States. The Commission requests DHS to consider and respond to the

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<sup>1</sup> DHS, Notice of Proposed Rulemaking, Inadmissibility on Public Charge Grounds 83 FR 51114 (Oct. 10, 2018) [hereinafter NPRM].

<sup>2</sup> Mission, U.S. Comm’n on Civil Rights, <https://www.usccr.gov/about/index.php>.

<sup>3</sup> 42 U.S.C. § 1975a(a)(2)(B).

<sup>4</sup> See U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights Commends President Obama on Issuance of Immigration Accountability Executive Action (Nov. 21, 2014), [http://www.usccr.gov/press/2014/Immigration\\_letter.pdf](http://www.usccr.gov/press/2014/Immigration_letter.pdf) (summarizing history of USCCR immigration investigations).

following comments and strongly urges DHS to keep the existing 1999 Field Guidance on this subject in effect.

The proposed rule represents a drastic change in immigration policy. U.S. Citizenship and Immigration Services (USCIS) currently defines public charge as 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>5</sup> The proposed rule significantly expands the range of immigrants who will be considered a public charge to include not just people who receive public cash assistance as their primary source of support, but also those who use government programs to supplement their earnings, such as Medicaid, Section 8 housing programs, and the Supplemental Nutrition Assistance Program (SNAP).<sup>6</sup> Under the proposed rule we expect a greater number of immigrants will be denied visas or adjustment of immigrant status for the sole reason of accessing public benefits that support their basic living needs such as food, housing, and healthcare. These changes dramatically alter our nation’s immigration policies to prefer immigration that values only income and wealth, and in so doing undermines a core American value celebrating economic opportunity that follows from hard work. In addition, the changes would operate specific harm to limited English speakers, LGBT communities, and the disability community. Our country’s diversity is the source of its strength. As President Lyndon B. Johnson stated when he signed the Immigration and Nationality Act of 1965:

Our beautiful America was built by a nation of strangers. From a hundred different places or more they have poured forth into an empty land, joining and blending in one mighty and irresistible tide. The land flourished because it was fed from so many sources--because it was nourished by so many cultures and traditions and peoples.<sup>7</sup>

The Commission is also disturbed by the potential negative impacts this proposed rule could have on communities of color. The vast majority of immigrants to and in this country are people of color.<sup>8</sup> Because most applicants for legal permanent residence are not eligible for public benefits in the first instance, the likely greatest impact of the proposed rule will bear out in the analysis that immigration officials will apply when assessing the likelihood of applicants to use public benefits in the future.<sup>9</sup>

The “totality of circumstances” analysis the proposed rule authorizes specifically allows for implicit or explicit animus based on race or national origin to infect speculative determination of

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<sup>5</sup> See DOJ, INS, Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 FR 28689 (May 26, 1999)

<sup>6</sup> NPRM at 51159.

<sup>7</sup> LBJ on Immigration, LBJ Presidential Library, <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration>.

<sup>8</sup> See Jie Zong, Jeanne Batalova, and Jeffrey Hallock, Migration Policy Institute, Frequently Requested Statistics on Immigrants and Immigration in the United States, <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Demographic>; Gustavo Lopez, Kristen Bialik, and Jynnah Radford, Pew Research Center, Key findings about U.S. immigrants, Nov. 30, 2018, <http://www.pewresearch.org/fact-tank/2018/11/30/key-findings-about-u-s-immigrants/>.

<sup>9</sup> Randy Capps, Mark Greenberg, Michael Fix, Jie Zong, Migration Policy Institute, Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration, Nov. 2018, at 5-6, <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>.

likely total circumstances that might follow from a choice to welcome immigrants of color. The context in which this proposed rulemaking occurs makes that possibility especially likely: other statements and policies from this Administration have indicated a preference against immigrants from African, Latin American, or predominately Muslim countries.<sup>10</sup>

In addition to immigrants who would be directly affected by the proposed rule, the proposed rule would also create harmful chilling effects that discourage millions of immigrants legally present and not affected by the proposed rule from accessing nutritional, medical, and housing services even when critically necessary on a temporary basis.<sup>11</sup> The proposed rule even acknowledges the rule may “increase the poverty of certain families and children, including U.S. citizen children.”<sup>12</sup> Social and economic outcomes for children are highly dependent on the well-being of their parents and families, and if their parents are discouraged from receiving aid from programs that support their fundamental needs such as health care, food, and housing, the negative outcomes for these affected children cannot be underestimated.

### Limited English Proficient (LEP) Communities

For the first time, DHS proposes English language proficiency as a factor in determining whether an immigrant will likely become a public charge in the future despite not being explicitly listed in Section 212 of the Immigration and Nationality Act as a factor to be considered.<sup>13</sup> The Commission is troubled with the disproportionate impact this factor would have on communities with high levels of LEP individuals including the Asian American, Latino, Russian, Eastern European, Middle Eastern, and African immigrant communities.<sup>14</sup>

The Commission is also particularly troubled by the inclusion of English proficiency despite well settled case law, statutes, and policies explaining that discrimination based on language or English proficiency is prohibited. The Supreme Court unanimously held in *Lau v. Nichols* that discrimination based on the inability to speak and understand English constitutes national origin discrimination.<sup>15</sup> By barring a person from entry to the United States (or adjustment of visa status)

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<sup>10</sup> See, e.g., Josh Dawsey, *Trump derides protections for immigrants from ‘shithole’ countries*, Washington Post, Jan. 12, 2018, [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html?utm\\_term=.e57d1dea28e5](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.e57d1dea28e5); The U.S. Commission on Civil Rights Expresses Concern Over Executive Orders Promoting Religious and National Origin Discrimination, Feb. 24, 2017,

<https://www.usccr.gov/press/2017/statement-02-24-17-EO.pdf>; U.S. Commission on Civil Rights Decries Supreme Court Decision in Muslim Ban Case, Jul. 13, 2018, <https://www.usccr.gov/press/2018/07-13-18-Statement.pdf>.

<sup>11</sup> See Jeanne Batalova, Michael Fix, and Mark Greenberg, Migration Policy Institute, Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use, June 2018, [https://www.migrationpolicy.org/sites/default/files/publications/ProposedPublicChargeRule\\_FinalWEB.pdf](https://www.migrationpolicy.org/sites/default/files/publications/ProposedPublicChargeRule_FinalWEB.pdf).

<sup>12</sup> Nprm at 51277.

<sup>13</sup> Id. at 51195-196; see 8 U.S.C. § 1182(a)(4)(B) (listing factors).

<sup>14</sup> See Jeanne Batalova and Jie Zong, Migration Policy Institute, Language Diversity and English Proficiency in the United States, Nov. 11, 2016, <https://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states>; Gustavo López, Neil G. Ruiz, and Eileen Patten, *Key Facts About Asian Americans, a Diverse and Growing Population*, Pew Research Center (Sept. 8, 2017), <http://www.pewresearch.org/fact-tank/2017/09/08/key-facts-about-asian-americans/>; Facts on U.S. Latinos, 2015, Pew Research Center (Sept. 18, 2017), <http://www.pewhispanic.org/2017/09/18/facts-on-u-s-latinos/#share-foreign-born>.

<sup>15</sup> 414 U.S. 563 (1974). The federal government has committed to principles of nondiscrimination based on national origin. Titles VI and VII of the Civil Rights Act of 1964 respectively prohibit discrimination on the basis of race,

based on projection about what persons from that country, or LEP persons from that country, might do once here, is itself its own form of discrimination that this country has since repudiated. Prior to the passage of the Immigration and Nationality Act of 1965, our nation's immigration laws were largely based on xenophobic and discriminatory beliefs and were designed to restrict immigration from certain regions and countries.<sup>16</sup> In 1965 Congress amended our nation's immigration statute to include an anti-discrimination provision declaring that no individual shall "be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth or place of residence."<sup>17</sup> Accordingly, by discriminating based on English language proficiency the proposed rule violates our nation's well-considered immigration laws banning national origin discrimination.

### LGBT Communities

The proposed rule will have a harmful effect on members of the immigrant LGBT community and runs counter to our nation's commitment to welcoming and supporting persons who may have been discriminated against in their home countries due to their LGBT status. As detailed below, participation from members of the LGBT community in particular federal benefit programs could stem in part from discrimination that the LGBT community experiences in the workplace. Penalizing immigrant LGBT persons for participation in federal benefit programs would, therefore, potentially doubly penalize persons for the discrimination this country has not yet eradicated, totally inconsistent with our nation's promise of equity. Implementing this proposed rule could perpetuate and exacerbate a cycle of discrimination.

In 2013 there were approximately 904,000 LGBT adult immigrants.<sup>18</sup> LGBT immigrants are eligible to use all available means of immigration categories to apply for legal permanent residence, including spousal visas after the Supreme Court's decision in *U.S. v. Windsor*, employment-based visas, and refugee visas for LGBT immigrants who have fled persecution in their home countries. Studies have indicated that LGBT adults are more likely to participate in

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color and national origin in programs and activities receiving federal assistance, and discrimination on the basis of race, color, religion, sex, or national origin in employment. 42 U.S.C. §§ 2000d (federal assisted programs), 2000e-2 (employment). Although these statutes are inapplicable to federal action, Courts use the Fifth Amendment's Due Process Clause protections to regulate what the Fourteenth Amendment's Equal Protection Clause would consider discriminatory at the state level. See *Bolling v Sharpe*, 74 U.S. 497 (1955). Moreover, under Executive Order 13166, "*because the federal government adheres to the principles of nondiscrimination and inclusion embodied in Title VI*, the Executive Order requires all federal agencies to meet the same standards as federal financial assistance recipients in providing meaningful access for LEP individuals to federally conducted programs." EO 13166, Department of Justice, <https://www.justice.gov/crt/eo-13166> (emphasis added).

<sup>16</sup> See, e.g., Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998) (describing restrictions on Asian immigration); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 279-80 (1996) (describing the national origins quota system and its aim of reducing southern and eastern European immigration as well as restrictions on African Immigrants).

<sup>17</sup> 8 U.S.C. § 1152(a)(1)(A); see Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 Mich. St. L. Rev. 1, 53-54, 58-60 (2018) (discussing development of nondiscrimination in the INA).

<sup>18</sup> Gary J. Gates, *LGBT Adult Immigrants in the United States*, The Williams Institute (March 2013), <https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-lgbt-immigrants-mar-2013/>.

SNAP than non-LGBT adults and that nearly 1.2 million LGBT adults rely on Medicaid as their primary source of health insurance.<sup>19</sup>

Recent investigations by the Commission highlight our concerns regarding the proposed rule's likely negative impact on members of the immigrant LGBT community, especially because the proposed rule would discourage their enrollment in benefits programs such as Medicaid. In our report on workplace discrimination against the LGBT community, we found LGBT "workers have faced a long, serious, and pervasive history of official and unofficial employment discrimination by both federal, state, and local governments and private employers,"<sup>20</sup> leaving these workers particularly vulnerable to unemployment resulting from discrimination and therefore in need at times of access to public benefits.<sup>21</sup> Our research indicated "workplace discrimination can drastically increase psychological stress and other mental health problems."<sup>22</sup>

The Commission's investigations have also found that the transgender community is a uniquely vulnerable community that faces discrimination and significant health, social, and economic barriers. "[M]any transgender workers report experiencing hostile work environments where they are often mistreated, harassed, physically or sexually assaulted, forced to present as a gender they do not identify with, asked inappropriate questions, and deliberately taunted by the use of incorrect pronouns by their coworkers."<sup>23</sup> Our report also found:

[M]any transgender individuals consider themselves underemployed because they are overqualified for their position. For example, transgender people report often taking such jobs because of difficulties of being hired. According to a 2011 report, transgender respondents who were unemployed have nearly double the rate of engaging in survival sex work, four times the rate of homelessness, and 85 percent more incarceration compared to those who were employed. In addition, they are disproportionately more likely to be HIV positive, smoke, use drugs or drink heavily, and have multiple suicide attempts.<sup>24</sup>

As the Commission's research makes clear, the LGBT community faces multiple forms of discrimination whose cumulative effect could make members of this community particularly vulnerable to the negative effects of the proposed rule. The proposed rule would serve to apply the effects of discrimination as experienced by the American LGBT community – including increased

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<sup>19</sup> Taylor N.T. Brown, Adam P. Romero, and Gary J. Gates, *Food Insecurity and SNAP Participation in the LGBT Community*, The Williams Institute (July 2016), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf>; Kerith J. Conron & Shoshana K. Goldberg, *Over Half a Million LGBT Adults Face Uncertainty about Health Insurance Coverage Due to HHS Guidance on Medicaid Requirements*, The Williams Institute (Jan. 2018), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Medicaid.pdf>.

<sup>20</sup> U.S. Comm'n on Civil Rights, *Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans* 4 (Nov. 2017), available at [https://www.usccr.gov/pubs/docs/LGBT\\_Employment\\_Discrimination2017.pdf](https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf).

<sup>21</sup> *Id.* at 14.

<sup>22</sup> *Id.* at 60.

<sup>23</sup> *Id.* at 18.

<sup>24</sup> *Id.*

likelihood of unemployment and underemployment, and a resulting need to draw on public benefits – and inequitably curb immigration of LGBT individuals as a result.

### People with Disabilities

The Commission is especially troubled by the proposed rule’s targeting of and discriminatory impact on immigrants with disabilities. The proposed rule grants immigration officials greater discretion and opens the door for them to rely on stereotypes and misconceptions that people with disabilities cannot live meaningful, productive lives. Under the proposed rule, DHS provides an ambiguous description of how immigration officials will be able to “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,” such as “potential effects on the alien’s ability to work, attend school or otherwise support him or herself.”<sup>25</sup>

The NPRM states “an applicant’s disability could not be the sole basis for a public charge inadmissibility finding,”<sup>26</sup> ostensibly to avoid running afoul of federal disability laws.<sup>27</sup> The NPRM pays mere lip service to the numerous protections federal laws provide to people with disabilities in order to prevent discrimination in federal programs, education, and the workforce,<sup>28</sup> and fails to provide nondiscrimination protection to immigrants with disabilities that reflects these protections. As the Commission stated in its landmark 1983 report on disability rights that helped contribute to the development of the Americans with Disabilities Act, anti-disability discrimination “law must, of course, acknowledge functional impairments, but it must also focus on ways in which society can reasonably adapt to a wider range of mental and physical differences than the handicapped-normal dichotomy has permitted.”<sup>29</sup> Moreover, the proposed rule does not provide any meaningful guidance to immigration officials on permissible and impermissible considerations they may take when factoring in a person’s disability for the purposes of a public charge inadmissibility finding, leaving officials with “seemingly open-ended interpretation.”<sup>30</sup>

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<sup>25</sup> NPRM at 51183.

<sup>26</sup> *Id.* at 51184.

<sup>27</sup> Section 504 of the Rehabilitation Act prohibits an individual with a disability, “solely by reason of her or his disability . . . be subjected to discrimination . . . under any program or activity conducted by any Executive agency[.]” 29 U.S.C. §794(a).

<sup>28</sup> NPRM at 51184 (“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.”)

<sup>29</sup> U.S. Comm’n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 99 (Sept. 1983), available at <http://www2.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf>.

<sup>30</sup> See *Timpinaro v. SEC*, 3 F.3d 453, 460 (D.C. Cir. 1993) (finding agency that proposed multifactor regulation could provide more guidance on factors, including safe harbor).

People with disabilities also disproportionately rely on Medicaid<sup>31</sup> and SNAP<sup>32</sup>, oftentimes because their disability qualifies for such programs. People with disabilities rely on these programs to help support their full inclusion in society. Yet the rule counts the use of these programs against immigrants with disabilities, which disregards, among others, the aims of the Rehabilitation Act to “achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency” for people with disabilities.<sup>33</sup>

## Conclusion

For all the above-mentioned reasons, the Commission urges DHS to consider and respond to these comments and strongly urges DHS to keep the existing 1999 Field Guidance on this subject in effect. The proposed rule raises numerous civil rights concerns and is in fundamental disagreement with the spirit of our nation’s civil rights laws and core principles of equal opportunity.

Thank you for the opportunity to submit comments on this proposed rulemaking. We welcome the opportunity to meet with relevant staff and DHS leadership to discuss our concerns. Please feel free to contact Rukku Singla, Special Assistant to Chair Catherine E. Lhamon, at [rsingla@usccr.gov](mailto:rsingla@usccr.gov), or Jason T. Lagria, Special Assistant to Commissioner Karen K. Narasaki, at [jlagria@usccr.gov](mailto:jlagria@usccr.gov) if you have any questions or concerns.

Sincerely,



Catherine E. Lhamon, Chair



Patricia Timmons-Goodson, Vice-Chair



Debo Adegbile, Commissioner



David Kladney, Commissioner

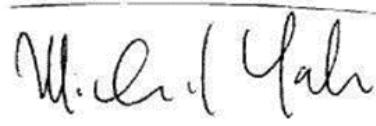
<sup>31</sup> Centers for Medicare & Medicaid Services, *Nationwide Adult Medicaid CAHPS, Analytic Brief: Health Care Experience of Adults with Disabilities Enrolled in Medicaid Only: Findings from a 2014-2015 Nationwide Survey of Medicaid Beneficiaries* 3 (Nov. 2017), available at <https://www.medicaid.gov/medicaid/quality-of-care/downloads/performance-measurement/namcahpsdisabilitybrief.pdf> (approximately one quarter of Medicaid beneficiaries are covered on the basis of a disability).

<sup>32</sup> Steven Carlson, Brynne Keith-Jennings, and Raheem Chaudhry, Center on Budget and Policy Priorities *SNAP Provides Needed Food Assistance to Millions of People with Disabilities* (June 14, 2017), <https://www.cbpp.org/research/food-assistance/snap-provides-needed-food-assistance-to-millions-of-people-with-disabilities> (26% of SNAP recipients had a disability in 2015).

<sup>33</sup> 29 U.S.C. §701(a)(6)(B).



Karen K. Narasaki, Commissioner



Michael Yaki, Commissioner