December 10, 2018

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: DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to Proposed Rulemaking on Inadmissibility on Public Charge Grounds

Dear Ms. Deshommes:

Thank you for the opportunity to submit comments on behalf of the Center for Public Representation (CPR) regarding the Department of Homeland Security (DHS) Proposed Rule regarding Inadmissibility on Public Charge. CPR is a national legal advocacy organization that promotes the full inclusion of people with disabilities in all aspects of life. We write to express strong opposition to the proposed rule. The changes proposed to the rule would cause serious and far-reaching harm to people with disabilities and their families and communities. The changes are unfair, discriminatory and bad policy for this country. We urge that the proposed rule be withdrawn in its entirety.

Federal law, including Section 504 of the Rehabilitation Act, prohibits discrimination on the basis of disability by federal agencies. Yet the proposed public charge rule will discriminate against people with disabilities. The proposed rule is an insidious and unwelcome throwback to outdated notions of people with disabilities, rooted in prejudice. Many people with disabilities will be screened out as likely to become a “public charge” under the proposed rule. While the preamble asserts that “the mere presence of a medical condition would not render an individual inadmissible,” the reality, as discussed in detail below, is that the proposed rule would effectively exclude people with disabilities simply because they have a disability based on the proposed factors and how they are weighed.

Current law establishes the minimum factors DHS should consider in public charge determination: age; health; family status; assets, resources, and financial status; and education and skills. The proposed rule goes beyond the legislative framework and sets new strict standards, evidence DHS looks at when considering the factors, and specifies how these factors

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1 Section 504 of the Rehabilitation Act prohibits disability-based discrimination in any program or activity of a federal executive branch agency, including DHS. 29 U.S.C. § 794(a).
are weighed. The rule greatly expands the category of people who will be inadmissible as a "public charge" by considerably broadening the types of benefits included in the public charge test and dramatically lowering the threshold for being considered reliant on those benefits. The rule also significantly increases the consideration of an individual’s health and the negative impact that having a chronic health condition or disability has on being determined a public charge. These and other provisions in the proposed rule are based on an unreasonable new interpretation of what it means to be a “public charge” and will directly hurt and exclude people with disabilities. The proposed rule reflects a harmful, outdated and inaccurate prejudice that people with disabilities are not contributors to society – a perspective that Congress has explicitly rejected in multiple statutes, including the Americans with Disabilities Act.

**Factors in the Proposed Rule That Will Particularly Harm People with Disabilities**

**Health**

Under the proposed rule, DHS will consider whether a person’s health makes them more or less likely to become a public charge, including whether they have been “diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with their ability to provide for and care for themselves, to attend school, or to work.” § 212.22(b)(2).

Whether someone’s health is considered likely to make them a public charge will be decided by DHS predicting outcomes of what a person can and will do based on their diagnosis and other information submitted to DHS, such as an attestation from their treating physician regarding whether a medical condition impacts the ability to work or go to school. The health factor with the proposed standards and related evidence explicitly singles out people with disabilities and chronic health conditions and perpetuates the false assumption that a medical diagnosis is solely determinative of an individual’s current abilities and future prospects.

While health has always been a factor in the public charge test, the proposed rule codifies and unduly weights the specific standard for evaluating an individual’s health. The new standard includes any medical condition likely to require extensive medical treatment or institutionalization or that will interfere with a person's ability to provide and care for him- or herself, to attend school, or to work. This category will include most people with disabilities – including people with intellectual and developmental disabilities, psychiatric disabilities, or physical disabilities who need personal care services. Thus, most people with disabilities will have this factor weigh against them in the public charge determination. In the reverse, the preamble states that absence of a diagnosis of such a condition would be a positive factor. Again, virtually no people with disabilities will be able to meet this positive factor. Moreover, the harmful impact of this new health standard is intensified against people with disabilities when combined with a person’s ability to pay for their health care costs (which is an element in the assets factor) and with the ability to pay for medical costs or have them covered under private insurance (which is a “heavily weighed negative factor”), both described below. In sum, this new interpretation of the health factor, particularly when combined with the other components related to health in the proposed rule, will in effect exclude people simply because they have a disability.
Assets, Resources, and Financial Status

In the definition of “public benefit” in proposed § 212.21(b) that is a key part of the assets, resources and financial status factor, the proposed rule dramatically expands the programs and benefits that will be considered in deciding who is a public charge. Many of the programs and benefits included in the new rule are ones that people with disabilities and their families often use, including Medicaid-funded community services. The proposed rule uses a much lower standard than the current rule’s “primarily dependent” on benefits standard. In addition, the complicated and confusing application of the multi-faceted formula in the public benefit definition will encourage more individuals and families to opt out of benefits they need and are eligible for out of fear.

Medicaid, as a part of the assets, resources, and financial status factor

People with disabilities will be particularly impacted by the broad inclusion of Medicaid-funded services as part of the public charge consideration. Medicaid is the largest insurer for long-term services and supports, mental health care and substance use disorder treatment in this country, filling the gaps left by other insurance plans that are not required to cover many of these services. Most home and community based services are not available through private insurance, and few people have the resources to pay for these costs out of pocket. The proposed rule would consider Medicaid-funded community services in the public charge (the current public charge rule only includes Medicaid-funded institutional long-term care).

Again, Medicaid is the only source for critical community living supports (like personal care services, nursing services, respite, intensive mental health services and employment supports) for people with disabilities; these community services aren’t generally available under private insurance. Many people with disabilities rely on Medicaid to live, work, attend school and participate in their communities. Medicaid plays a unique and crucial role in the lives of people with disabilities by facilitating to access so that people can get the services and supports they need.

Other benefits, as a part of the assets, resources, and financial status factor

People with disabilities will also be disproportionately impacted by the inclusion of other programs, including housing and food assistance, in the public charge test. Accessible, affordable housing is critical to helping many people with disabilities live in the community. Having a disability can raise expenses and make it harder for people with disabilities and their caregivers to work, which can strain other necessary items like having enough food. Moreover, almost one in three Medicare beneficiaries enrolled in Part D prescription drug coverage get “Extra Help” with their premiums and copays through the low-income subsidy. This benefit is only available to immigrant seniors who have worked for many years in the U.S. and earned coverage under Medicare. Overall, these are widespread programs that help keep people housed, fed and receiving needed health care – programs that serve as investments in social and individual well-being and future productivity. Immigrants and their families should not be punished for using, or even applying for, a relatively small amount of support from these benefits.
The “assets, resources, and financial status” factor also specifically looks at whether a person’s family can cover any likely medical costs of a person with a disability or health condition. § 212.22(b)(4)(B). In addition, it separately looks at whether a person with a disability or health condition has private health insurance or resources that would cover all medical costs related to the health condition or disability. § 212.22(b)(4)(I). Because private insurance does not cover many disability services and people on Medicaid must limit their financial resources to remain eligible, this factor would count against many people with disabilities.

Overall, people with disabilities in the U.S. live in poverty at a rate twice as high as people without disabilities. For this reason the gross income element of this factor is likely to have a disproportionately negative impact on people with disabilities and their families. People with disabilities in the U.S. are also more “asset poor,” in part due to economic disparities related to the higher costs associated with living with a disability, including costs for assistive technology, and the need for and expense of accessible housing and transportation. The proposed rule would use a legacy of social and economic disadvantage as the basis for further discrimination and exclusion.

**Education and skills**

Education and employment are areas where many people with disabilities often face significant disadvantages based on their disability. The rule acknowledges that working people with disabilities contribute significantly to the U.S. economy. This is an important reality. However, unemployment rates for people with disabilities in this country are still drastically higher than those for people without disabilities, and the disparity is even more dramatic internationally. Similarly, many people with disabilities around the world have been denied access to equal educational opportunities, putting them at a disadvantage with respect to this factor. In the U.S., disparities in education and educational barriers for people with a disability have been ongoing for generations, resulting in lower rates of high school completion. Great disparities also exist when comparing the attainment of higher degrees. Thus, many people with disabilities will also be negatively impacted by the “education and skills” factor. In addition, some people with

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2 Poverty among people with disabilities was at 20.9% in 2016, compared with 13.1% for people without disabilities that same year. The poverty percentage gap, or the difference between the percentages of those with and without disabilities, has been between 7.4 and 8.3 percentage points over the 8 years from 2009 to 2016. L. Kraus et al., “2017 Disability Statistics Annual Report,” 2 (2018) at https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf.


7 According to the 2015 Census, about 15.1 percent of the population age 25 and over with a disability have obtained a bachelor’s degree or higher, while 33 percent of individuals in the same age category with no disability have attained the same educational status (U.S. Census Bureau, 2015).
disabilities need supports to be able to work or attend school that are typically only available under Medicaid, which would be counted against them under the “assets, resources and financial status” factor discussed above. Medicaid allows people to remain in or return to work, which in turn leads to better financial stability. The rule otherwise penalizes people with disabilities using Medicaid as a vehicle for education, employment economic self-sufficiency.

The evidence considered in the education and skills factor also includes a person’s proficiency in English. This factor adversely affects immigrants of color, and may also adversely impact the deaf community and people with hearing or speech disabilities, people who primarily communicate through assistive devices, people with less access to formal education and others.

**Family Status**

The family status factor, along with the assets, resources, and financial status factor, could mean that a person’s disability would impact the public charge determination for other family members. Immigrants would be penalized for providing support for other individuals, such as a sibling with a disability.

**The Heavily Weighed Factors Will Discriminate Against People with Disabilities**

The proposed rule includes additional factors that weigh heavily toward a finding that an individual is likely to become a public charge. Several of these heavily weighed negative factors will apply to many people with disabilities, including that the person has a “medical condition that is likely to require extensive medical treatment or institutionalization” or will impact their ability to care for himself, attend school or work; that the person does not have private insurance or the resources to pay for medical costs related to their condition; or that the person received public benefits (including Medicaid). § 212.22(c)(1). This means that many people with disabilities are likely to be seen as a public charge and excluded. These heavily weighed negative factors amplify the impact these circumstances could have. And even though the proposed rule states that a person’s disability will not be the only basis for a public charge inadmissibility finding, the factors and heavily weighed negative factors make it clear it will be very difficult, if not impossible, for a person with a significant disability to avoid being considered a public charge. For example, a person with a disability who would need Medicaid-funded community services (which are unavailable through private insurance) would be saddled with two heavily weighed negative factors. Disability is a natural part of the human experience, and should not be categorically screened out in the immigration process. People with disabilities must have an opportunity to equally participate in the social and economic life of this country.

The rule only proposes one heavily weighed positive factor – that the household has or will make at least 250% of the Federal Poverty Guidelines. § 212.22(c)(2). This means that low- and middle-income families will not have the benefit of a heavily weighed positive factor as part of their calculation to offset any negative factors. Fewer people with disabilities and their families

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will have the benefit of this factor weighing in favor of their admissibility determination than for people without a disability. 9

Finally, the proposed rule also allows for public charge bonds, which can overcome some negative factors in the totality of circumstances test. Some people who are initially refused based on public charge may be offered the opportunity to post a public charge bond so that they could still be admissible. Even where it’s offered, the minimum amount of a bond is $10,000, which means it would be beyond the means of most families. An even greater barrier, however, is that the proposed rule also says that, based on the agency’s discretion, the option of a public bond is unlikely to apply if a person has even one of the heavily weighed negative factors. § 213.1(b). For example, a person found to be a public charge based on their disability and the need to use Medicaid for services not covered by private insurance would probably be ineligible for the bond. This is another way that the proposed rule discriminates against people with disabilities.

The Proposed Rule is Bad for Public Health

The proposed rule also discourages the use of important public programs and benefits. Families may decide not to use critical public services they are eligible for out of fear of harming their immigration status. For example, the proposed rule would likely lead to disenrollment from Medicaid and other programs among noncitizens as well as among a broader group of individuals in immigrant families, including their primarily U.S.-born children. 10 Reduced participation in Medicaid and other programs would negatively affect the health and financial stability of immigrant families and the growth and healthy development of their children, who are predominantly U.S.-born. 11

The proposed rule identifies a number of possible bad outcomes. People may be less able to take their medications as prescribed. They will put off medical care, resulting in more emergency room visits, and increased disease in the U.S. This also leads to more uncompensated care, which strains the health care system. Overall, the rule would increase poverty and housing instability, reduce productivity and educational attainment, and drive up health care costs. The rule compounds obstacles faced by people with disabilities and their families, for example, health conditions may be made worse by a lack of food or a low-quality diet. 12

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9 Results from the American Community Survey (Americans With Disabilities Act Participatory Action Research, 2016) reveal significant disparities in the median incomes for those with and without disabilities, suggesting that "many more people with disabilities and their families live in poverty than people without disabilities and their families, and may struggle to meet basic needs," at http://centerondisability.org/ada_parc/utils/indicators.php?id=38.
11 Id.

**The Proposed Rule Will Limit Independence and Community Integration**

In addition, the proposed rule would have indirect effects on people with disabilities, as it could further shrink the number of available home care and other direct support workers – many of whom are immigrants who often rely on publicly-funded programs due to low wages – leading to a loss of independence and community integration for people with disabilities.\footnote{Wendy Parmet & Elisabeth Ryan, “New Dangers For Immigrants And The Health Care System,” (April 20, 2018) at https://www.healthaffairs.org/do/10.1377/hblog20180419.892713/full/} An estimated one million immigrants work in direct care, making up a quarter of the direct care workforce.\footnote{Robert Espinoza, PHI, Immigrants and the Direct Care Workforce (June 20, 2017), at https://phinational.org/resource/immigrants-and-the-direct-care-workforce/} Nearly half of immigrant direct support workers live at or below 200% of the federal poverty level, and more than 40% rely on programs such as SNAP and Medicaid.\footnote{Id.} With the changes in the proposed public charge rule, potential direct service workers could be prevented from coming to the U.S. in the first place, and without access to health care, nutritious food and housing, many direct support workers may be unable to afford to remain in the U.S. The fear of applying for or using the healthcare services for which they are eligible means that direct support workers will also forego the services, medications, and vaccinations that help them stay consistently healthy and reliable as critical employees. The ripple effect would exacerbate the existing shortage of direct support workers, leaving people with disabilities without access to the services critical to live and participate in the community.

**Conclusion**

The Department’s proposals are a drastic change from current policy. The proposed rule is discriminatory and inconsistent with fundamental American principles, including equal opportunity. It’s an unwelcome throwback to the historical isolation, fear, segregation and exclusion of people with disabilities. We urge DHS to withdraw this proposed rule.

Please feel free to contact Alison Barkoff, abarkoff@cpr-us.org or Molly Burgdorf, mburgdorf@cpr-us.org, with any questions about these comments, or for additional information.

Sincerely,

\[Signature\]

Alison Barkoff  
Director of Advocacy

\[Signature\]

Molly Burgdorf  
Senior Policy Attorney