



October 22, 2021

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Office of Policy and Strategy
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
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VIA ELECTRONIC FILING

Re: Public Charge Ground of Inadmissibility

Dear Mr. Parker,

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the request for comments on the Advance Notice of Proposed Rulemaking (ANPRM) titled *Public Charge Ground of Inadmissibility*, as published in the Federal Register on August 23, 2021.¹

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation’s only think tank devoted exclusively to the research of U.S. immigration policy to inform policymakers and the public about immigration’s far-reaching impact. The Center is animated by a unique **pro-immigrant, low-immigration** vision which seeks fewer immigrants but a warmer welcome for those admitted.

I. INTRODUCTION

The concept of public charge, namely that an alien² should be economically self-sufficient, has been a part of U.S. immigration law dating back to at least 1882. As U.S. Citizenship and Immigration Services (USCIS) explains on its website:

¹ See Public Charge Ground of Inadmissibility (Docket No.: USCIS-2021-0013; RIN 1615-AC74), 86 Fed. Reg. 47025 (Aug. 23, 2021), available at <https://www.federalregister.gov/documents/2021/08/23/2021-17837/public-charge-ground-of-inadmissibility>.

² Section 101(a)(3) of the Immigration and Nationality Act (INA) defines the term “alien” as “any person not a citizen or national of the United States.” This is a legal term of art that will be used throughout my declaration where appropriate. The Department of Homeland Security’s decision, at the direction of the Biden administration political appointees, to use the word “noncitizen” in place of “alien” deprives the public of specificity when discussing U.S. immigration law. These words are not synonymous under U.S. immigration law and, therefore, it is erroneous to treat them as interchangeable terms to define a foreign national subject to the INA. See Robert Law,

*Immigration policies barring the admission of aliens likely to become public charges predate federal immigration regulations and have been a part of U.S. immigration policy since the first general immigration law of 1882. For more than 100 years the LPC provision remained one of the most common reasons for excluding immigrants from the United States. Federal policies providing for the deportation of immigrants who have actually become public charges date to 1891 and also remain part of current immigration law. Deportations of public charges already living in the U.S. have been much less common than LPC exclusions of aliens attempting entry, especially in the years since the first decades of the twentieth century.*³

Today, under section 212(a)(4) of the Immigration and Nationality Act (INA), an alien seeking admission or adjustment of status is inadmissible if he or she is “likely at any time to become a public charge”.⁴ While the statute does not define “public charge”, Congress did provide several mandatory factors that must be taken into account when assessing whether or not an alien is a public charge. Specifically, the consular officer or USCIS adjudicator must consider the alien’s (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills.⁵ The government may also consider any affidavit of support under section 213A of the INA when making the public charge determination.⁶

Again, while Congress has not provided a specific definition of public charge, it has passed separate legislation clearly articulating the underlying national policy. In a related statute, Congress declared, “Self-sufficiency has been a basic principle of United States immigration law since the country’s earliest immigration statutes.”⁷ Additionally, Congress emphasized that “It continues to be the immigration policy of the United States that – aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.”⁸

Immigration Newspeak II – USCIS Edition, CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2021) (Alas, this illogical scrubbing of technical language has reached my former agency. As first [reported](#) by Axios (and confirmed by my sources), USCIS staff received a memo February 16 — dated February 12 — with the subject “Terminology Changes” Un-ironically, the memo contradicts itself by saying the guidance “does not affect legal, policy or other operational documents, including forms, where using terms (i.e., applicant, petitioner, etc.) as defined by the INA would be the most appropriate.” In the table replacing “alien” with “noncitizen” there is an associated footnote that reads, “Use noncitizen except when citing statute or regulation, or in a Form I-862, Notice to Appear, or Form I-863, Notice of Referral to Immigration Judge.” Translation: This cringe-worthy effort is a messaging gimmick.), available at: <https://cis.org/Law/Immigration-Newspeak-II-USCIS-Edition> ; Andrew Arthur, *Defining Immigrants, Noncitizens, Aliens, Nonimmigrants, and Nationals*,

Who’s Who in Immigration Law?, CENTER FOR IMMIGRATION STUDIES (Jun. 26, 2017) (“So, citizens are nationals of the United States, but not all nationals are citizens. Therefore, the term “noncitizen” includes aliens and nationals who are not citizens. But, nationals are not subject to removal proceedings under section 240 of the INA, only aliens are; therefore, any case that discusses whether or an individual is to be removed, unless it is a case involving contested citizenship, relates to an ‘an alien’ not a ‘noncitizen’.”), available at: <https://cis.org/Arthur/Defining-Immigrants-Noncitizens-Aliens-Nonimmigrants-and-Nationals>.

³ <https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/public-charge-provisions-of-immigration-law-a-brief-historical-background>.

⁴ [8 USC 1182](#).

⁵ *Id.*

⁶ [8 USC 1183a](#).

⁷ [8 USC 1601\(1\)](#).

⁸ [8 USC 1601\(2\)\(A\)](#).

Finally, it is the immigration policy of the United States that “the availability of public benefits not constitute an incentive for immigration to the United States.”⁹

The above provisions come from the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 where Congress sought to reduce welfare use. This seminal statement of alien-sufficiency is highly relevant to any Executive Branch rulemaking defining public charge. It is unfortunate that USCIS chose to bury it in footnote 10 of the ANPRM, instead of amplifying this clear congressional edict in the preamble main body text.¹⁰

II. THE BIDEN ADMINISTRATION’S JUDICIAL VACATUR OF THE TRUMP ADMINISTRATION’S PUBLIC CHARGE FINAL RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

It is the prerogative of a new administration to develop its own policies and regulations, but it must follow the requirements of the Administrative Procedure Act (APA) in doing so. In response to PRWORA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the Clinton administration issued Interim Field Guidance and a proposed rule in 1999 defining public charge.¹¹ The Clinton administration never finalized its rulemaking so the guidance, known as the “Pearson Memo”, was controlling on adjudicators making public charge inadmissibility determinations. The Pearson Memo defined a public charge as an alien “primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”¹²

The 1999 Interim Field Guidance remained the standard for public charge until the Trump administration determined that its formula was inconsistent with the general principles of self-sufficiency.¹³ To remedy this, the Trump administration redefined public charge through the rulemaking process in full compliance with the APA. On October 10, 2018, DHS published a NPRM entitled *Inadmissibility on Public Charge Grounds* that proposed definitions for the terms “public charge”, “likely at any time to become a public charge”, “public benefit”, and “alien’s household”, as well as proposed groups of aliens generally subject to, or exempt from, the public charge inadmissibility ground.¹⁴ On August 14, 2019, DHS published a final rule that retained certain provisions but revised other proposals after considering the 266,077 comments received during the comment period.¹⁵ While the effective date of the *Inadmissibility on Public Charge Grounds* final rule was supposed to be October 15, 2019, obstructionist district courts prevented

⁹ 8 USC 1601(2)(B).

¹⁰ See 86 Fed. Reg. 47025 at 47026.

¹¹ See 64 Fed. Reg. 28689, available at <https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf>.

¹² *Id.*

¹³ See Robert Law, *USCIS Crowd Sourcing Public Charge Revision*, CENTER FOR IMMIGRATION STUDIES (Aug. 27, 2021), available at <https://cis.org/Law/USCIS-Crowdsourcing-Public-Charge-Revision>.

¹⁴ See *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (Oct. 10, 2018), available at <https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds>.

¹⁵ 84 Fed. Reg. 41292, available at <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds#citation-17-p41297>

that from happening. The final rule did not go into effect until February 24, 2020 after the United States Supreme Court stayed the last remaining injunction which prevented implementation.¹⁶

President Biden was inaugurated on January 20, 2021 and his administration decided it did not like the public charge definition established by the Trump administration rulemaking. Yet, instead of complying with the APA and publishing a NPRM to rescind the 2019 *Inadmissibility on Public Charge Grounds* final rule, the Biden Department of Justice impermissibly allowed a judge to vacate the rule and revert to the Pearson Memo.¹⁷ This is a blatant violation of the APA and any future NPRM pursued by the Biden administration will be tainted by this legal fallacy.

III. QUESTIONS FOR THE PUBLIC FEEDBACK

The structure of the ANPRM suggests that DHS lacks a coherent vision of how to define public charge beyond definitively opposing the definition contained in the 2019 *Inadmissibility on Public Charge Grounds* final rule. Accordingly, the Center offers the following feedback in response to the numerous “Questions for the Public” contained in the ANPRM.

Section III.A.2.

1. How should DHS define the term “public charge”?

Any definition of “public charge” must reject the structure of the Pearson Memo which (1) excludes all non-cash welfare and (2) is only triggered if the alien is primarily dependent. The only aspect of the Pearson Memo definition that should be retained is that the inadmissibility analysis should be a totality of the circumstances test.

Generally speaking, DHS should revert to the definition of “public charge” contained in the 2019 final rule. Specifically, that final rule defined public charge to mean “an alien who receives one or more public benefits, as defined in [the rule], for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”¹⁸ In addition to traditional cash welfare benefits, the final rule included non-cash welfare assistance such as SNAP (formerly known as food stamps), Medicaid, Section 8 housing assistance, Section 8 rental assistance, and most other forms of housing assistance.¹⁹

An enhanced definition of “public charge” not included in the 2019 final rule but should be included in future rulemaking is the refundable portion of the Earned Income Tax Credit and the Additional Child Tax Credit. Despite being named “tax credits”, they are in fact cash payments from the U.S. government to taxpayers after tax liabilities have been paid.

¹⁶ See <https://www.uscis.gov/archive/public-charge-fact-sheet>.

¹⁷ See <https://www.uscis.gov/sites/default/files/document/notices/SOPDD-Letter-to-USCIS-Interagency-Partners-on-Public-Charge.pdf>.

¹⁸ 84 Fed. Reg. 41292, available at <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds#citation-17-p41297>

¹⁹ *Id.*

2. *What data or evidence is available and relevant to how DHS should define the term “public charge”?*

Regardless of the data or evidence available, DHS must adhere to Congress’s clear directive that “It continues to be the immigration policy of the United States that – aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.”²⁰

With that in mind, the Center’s own analysis of the latest data (2018) from the Census Bureau’s Survey of Income and Program Participation (SIPP) show that in 2018, 49 percent of households headed by all immigrants — naturalized citizens, legal residents, and illegal immigrants — used at least one major welfare program, compared to 32 percent of households headed by the native-born.²¹ Additionally, among households headed by non-citizens, 55 percent used at least one welfare program. Non-citizens in the SIPP include those in the country legally (e.g. green card holders) and those in the country illegally.²²

3. *How might DHS define the term “public charge”, or otherwise draft its rule, so as to minimize confusion and uncertainty that could lead otherwise-eligible individuals to forgo the receipt of public benefits?*

The general premise of this question is flawed. It is not the responsibility of DHS to encourage aliens to maximize the use of public benefits they are potentially eligible for. Instead, DHS is charged with enforcing our immigration laws, including the public charge ground of inadmissibility. The Center respectfully reminds DHS that Congress made clear it is the immigration policy of the United States that “the availability of public benefits not constitute an incentive for immigration to the United States.”²³

The Center does agree that minimizing confusion is essential to a properly functioning immigration system. For starters, DHS should revert to proper INA terminology like “alien” and dispense with meaningless, inaccurate words like “noncitizen”. In the public charge context, DHS should make clear that this ground of inadmissibility is not a so-called “wealth test” but instead a self-sufficiency analysis. Unfortunately, many of the outside critics of the Trump administration’s 2019 final rule who perpetuated the “wealth test” disinformation now serve in political positions within DHS, including USCIS. It is incumbent upon DHS to properly and clearly define public charge, as the 2019 final rule did, and to refute inaccurate coverage of this ground of inadmissibility.

4. *What national policies, including the policies referenced throughout this ANPRM, policies related to controlling paperwork burdens on the public, and policies related to promoting the public health and general well-being, should DHS consider when defining the term “public charge” and administering the statute more generally?*

²⁰ [8 USC 1601\(2\)\(A\)](#).

²¹ See Steven Camarota, *Welfare Use for Immigrants and Native-Born Households*, CENTER FOR IMMIGRATION STUDIES (Sept. 1, 2021), available at <https://cis.org/Camarota/Welfare-Use-Immigrants-and-NativeBorn-Households>.

²² *Id.*

²³ [8 USC 1601\(2\)\(B\)](#).

The only relevant policy DHS should consider, and must adhere to, is the directive from Congress in PRWORA. For the Department’s convenience, the operative language is provided again here: “Self-sufficiency has been a basic principle of United States immigration law since the country’s earliest immigration statutes.”²⁴ Additionally, “It continues to be the immigration policy of the United States that – aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.”²⁵ Finally, it is the immigration policy of the United States that “the availability of public benefits not constitute an incentive for immigration to the United States.”²⁶

5. *What potentially disproportionate negative impacts on underserved communities (e.g., people of color, persons with disabilities) could arise from the definition of “public charge” and how could DHS avoid or mitigate them?*

The Center is interested in why DHS believes, without providing any evidence in the ANPRM, that “people of color” or “persons with disabilities” would face “disproportionate negative impacts” by defining public charge for purposes of an inadmissibility determination under section 212(a)(4) of the INA. The Center reminds DHS that public charge is a self-sufficiency analysis and not a wealth test. Even if DHS implies that minority communities tend to earn less money, that is not how public charge operates. Instead, the public charge analysis simply explores whether or not the alien is able to live within his or her means, whatever that level may be. When properly analyzed through this lens, there should not be any disproportionate negative impact on any specific community or group.

Regarding the disabled, the Center reminds DHS that a mandatory factor in the public charge analysis is the alien’s health. As stated above, the public charge analysis is a totality of the circumstances test so the alien’s disability alone should not result in an inadmissibility determination.

6. *What tools and approaches can DHS use to ensure that future rulemaking is appropriately informed by available evidence?*

In the absence of DHS identifying past rulemaking that was developed without “appropriately informed” evidence, DHS may be seeking to solve a problem that does not exist. Still, DHS, and USCIS specifically, should do a better job of making data available for the public. USCIS should promptly make all forms available in an electronic format which would also allow for the data capture of all fields on all forms. This alone would be the most useful data available for DHS as it pursues future rulemaking and for the public to analyze as it provides comments on those proposals.

Section 3.B.2.

1. *To the extent that DHS considers an [alien’s] past or current receipt of public benefits, for what period of time before the public charge inadmissibility determination should DHS consider the [alien’s] receipt of public benefits? Why is that time period relevant?*

²⁴ [8 USC 1601\(1\)](#).

²⁵ [8 USC 1601\(2\)\(A\)](#).

²⁶ [8 USC 1601\(2\)\(B\)](#).

As DHS explained in the 2019 final rule, it is critically important and relevant to consider an alien's past and current use of public benefits when analyzing the future likelihood of an alien becoming a public charge. At a minimum, public charge should mean "an alien who receives one or more public benefits, as defined in [the rule], for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months.)" Alternatively, DHS should consider a 5-year window for past benefit usage in the public charge analysis. The 5-year period would be justifiable under PRWORA's five year waiting period for an alien to become a "qualified alien" to even become eligible for certain federal public benefits. PRWORA is still Congress's most meaningful welfare reform and aligning the five year period to the public charge inadmissibility determination would be a rational timeframe to consider.

Section 3.C.2. Questions regarding the mandatory factors for public charge

DHS includes a number of questions for the public to respond to under each of the four mandatory factors: age; health; family status; and assets, resources, and financial status. Rather than list each question, the Center offers the following general feedback for this section. DHS misunderstands public charge by asking which factors are "are most predictive" of whether or not an alien will become a public charge. When crafting section 212(a)(4) of the INA, Congress intentionally did not rank or weight these factors. Instead, Congress indicated that, *at a minimum*, these factors are relevant to the public charge inadmissibility determination. It would be inconsistent with the statutory structure for DHS to impose such ranking or weighting. DHS also raises the "potential for perceived or actual unfairness or discrimination" in applying public charge without elaboration or any data to suggest either currently (or ever) existed. Perhaps it was a poorly worded question, but it appears that DHS is implying that USCIS adjudicators suffer from "cognitive, racial, or other biases" and are "arbitrar[y]" in their public charge decisions. The Center has confidence in the USCIS workforce responsible for making public charge determinations and does not believe there is any merit to these specific concerns raised in the ANPRM. Of course, clear and consistent training will always benefit adjudicators, new and experienced, but it is surprising to read that DHS believes there is "variation" in outcomes based on similar fact patterns.

Regarding financial assets, DHS must consider all outstanding debts, including child or spousal support as funds that should be subtracted from the baseline. Cost of living (i.e., geography) is only relevant to the extent that DHS is looking to see if the alien is likely to become a public charge. Again, public charge is not a wealth test but is a self-sufficiency analysis; the alien is expected to live within his or her means, whatever that level is.

DHS also includes several curious questions that lack specificity or explanation and, therefore, do not appear relevant to the public charge inadmissibility determination. For example, DHS references supposed "social determinants of health" regarding "historically disadvantaged groups". This statement appears to contain predetermined assumption by DHS that it fails to articulate. Again, Congress directed the consideration of health as a mandatory factor and that is applicable to all aliens subject to section 212(a)(4) of the INA. Likewise, it is unclear who DHS assumes is "not served by a bank". In fact, there are numerous federal, state, and local banks throughout the country available to everyone, including illegal aliens. Perhaps the only population "not served by a bank" as those who engage in criminal activity. Surely, DHS does not intend to actually reward such lawbreakers by considering a bank's refusal to allow ill-gotten funds to be deposited in their financial institutions. Additionally, DHS appears to fail to consider that certain populations may choose to not involve themselves with U.S. banks and other financial institutions.

It is not unheard of for people from former Communist or totalitarian regimes to avoid banks having experienced their money looted by corrupt governments in their home countries. Also, there is a growing population who rejects the current financial institutional structure and intentionally avoid it by storing their money in various cryptocurrencies. These people should not be rewarded nor punished when it comes to analyzing their “assets, resources, and financial status”. Alleged “varied economic opportunities” is arbitrary and vague, and would be impossible to apply in a consistent manner (a professed goal of the ANPRM). The United States is an extraordinary country that offers anyone the chance to pursue whatever job or career the desire.

Section 3.E.2. Questions Regarding Other Factors to Consider and Section 3.G.2. Previous Rulemaking Efforts

DHS should consider all of the factors beyond the mandatory factors that were included in the 2019 final rule. Rather than restating the rationale here, the Center suggests DHS re-examine the well-thought rationale in both the NPRM and final rule that was developed under the previous administration. DHS should also retain consideration of the length of the alien’s stay when making its INA 212(a)(4) analysis. Again, the prior rulemaking lays out the relevance of this consideration in great detail and the Center suggests DHS consult that rulemaking again.

Section 3.F.2. Public Benefits Considered

The Center’s response here, in part, is identical to the response above regarding the definition of public charge. For DHS’s convenience, the Center restates its suggestion here.

Any definition of “public charge” must reject the structure of the Pearson Memo which (1) excludes all non-cash welfare and (2) is only triggered if the alien is primarily dependent. The only aspect of the Pearson Memo definition that should be retained is that the inadmissibility analysis should be a totality of the circumstances test.

Generally speaking, DHS should revert to the definition of “public charge” contained in the 2019 final rule. Specifically, that final rule defined public charge to mean “an alien who receives one or more public benefits, as defined in [the rule], for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”²⁷ In addition to traditional cash welfare benefits, the final rule included non-cash welfare assistance such as SNAP (formerly known as food stamps), Medicaid, Section 8 housing assistance, Section 8 rental assistance, and most other forms of housing assistance.²⁸

An enhanced definition of “public charge” not included in the 2019 final rule but should be included in future rulemaking is the refundable portion of the Earned Income Tax Credit and the Additional Child Tax Credit. Despite being named “tax credits”, they are in fact cash payments from the U.S. government to taxpayers after tax liabilities have been paid.

Regarding the question about DHS’s concern that some aliens may forgo certain public benefits they are eligible for because of its implications for public charge, the Center again reminds DHS that its mission is not to ensure maximum utilization of welfare benefits by the public, either citizens or aliens. Instead, DHS is tasked with upholding the nation’s immigration laws and

²⁷ 84 Fed. Reg. 41292, available at <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds#citation-17-p41297>

²⁸ *Id.*

adhering to Congress’s clear policy statement from PRWORA. For DHS’s benefit, the Center restates the relevant policy edict here:

Congress declared, “Self-sufficiency has been a basic principle of United States immigration law since the country’s earliest immigration statutes.”²⁹ Additionally, Congress emphasized that “It continues to be the immigration policy of the United States that – aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations.”³⁰ Finally, it is the immigration policy of the United States that “the availability of public benefits not constitute an incentive for immigration to the United States.”³¹

IV. DHS IS REQUIRED TO CONDUCT AN ENVIRONMENTAL IMPACT STATEMENT, OR, AT THE VERY LEAST, AN ENVIRONMENTAL ASSESSMENT UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT IN A NPRM.

USCIS must conduct a programmatic environmental impact statement on the environmental effects of immigration before promulgating a rule like this—which has the potential to expand immigration even further. USCIS must recognize that when it changes its policies in ways that lead to substantially increased immigration into the United States, it must take account that these changes will add to the national population, and must analyze these changes under the National Environmental Policy Act (NEPA). The federal government has already unambiguously acknowledged the environmental significance of population growth, both at the time it passed NEPA and afterwards. NEPA itself was explicitly concerned with population growth; in fact, population growth is the first concern mentioned in NEPA’s “Congressional declaration of national environmental policy”:

The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of *population growth*, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331 (a) (emphasis added).

²⁹ [8 USC 1601\(1\)](#).

³⁰ [8 USC 1601\(2\)\(A\)](#).

³¹ [8 USC 1601\(2\)\(B\)](#).

Population growth itself was mentioned by the statutory language of NEPA as the most important environmental consideration making the passage of NEPA necessary-- and that focus demonstrates conclusively that there is no exemption of the effects of immigration programs, which essentially are federal population growth programs.

According to the Pew Research Center, immigrants and their descendants accounted for 72 million in U.S. population growth between 1965 and 2015, after the Hart Cellar Immigration Act of 1965 was passed.³² The bulk of this immigration-induced population growth occurred well after the passage of NEPA in 1970. Immigration will also continue to greatly increase the national population in ever growing amounts for the foreseeable future. Not only does immigration cause national population growth, today it's the *primary* cause of national population growth. If immigration continues as the Census Bureau projects, the nation's population will increase from 325.5 million in 2017 to 403.7 million in 2060 — a 78.2 million (24 percent) increase in just four decades. If there were no net immigration, the U.S. population would still be 3.4 million larger in 2060 than it is today. Therefore, 74.8 million or about 96 percent of the projected increase in the U.S. population by 2060 will be due to future immigration.³³ Changes that expand projected immigration further will only make immigration's impact on population growth even more substantial. This requires a programmatic analysis to understand.

DHS claims it does not have to comply with NEPA because USCIS cannot know the impacts without “speculating”. This assertion, even if true, does not absolve DHS of its obligations under NEPA and it cannot simply bush aside the potential environmental impacts of the potential for population growth. USCIS cannot claim that any sort of estimation of the environmental effects of population growth caused by administrative immigration decisions presents a particularly impenetrable problem requiring an excessive degree of speculation. Environmental scientists routinely calculate human impacts on the environment and the effects of trends in population growth are a crucial, unavoidable part of any such calculation.³⁴ Calculating the environmental impacts of additional population does not require more guesswork than many NEPA analyses agencies have routinely produced for decades.

Agencies involved in regulating immigration—like all agencies applying NEPA analysis—would be allowed to make reasonably informed estimates and, just as in other contexts, the public would not be able to demand that all agency predictions prove to be absolutely accurate. All agencies had to engage in what could be termed “speculation” when they first had to implement NEPA. Performing an immigration NEPA analysis would not require excessive speculation, and it would certainly not be unreasonably difficult.³⁵

³² Pew Research Center, 2015. “Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065: Views of Immigration’s Impact on U.S. Society Mixed.” Washington, D.C.: September. <http://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/ph> 2015-09-28 immigration-through-2065-03/

³³ Camarota, Steven. *Projecting the Impact of Immigration On the U.S. Population*. Washington D.C.: Center for Immigration Studies, 2018. Forthcoming.

³⁴ See, e.g., POPULATION ECOLOGY AND HUMAN POPULATIONS, <https://sites.google.com/a/bvsvd.org/mr-little-ap-environmental-science/unit-5-human-populations>

³⁵ For instance, Progressives for Immigration Reform, a nonprofit organization based in Washington, D.C., commissioned its own Programmatic Environmental Impact Statement on Immigration. If a small nonprofit

To claim that NEPA does not apply because of the speculation involved in analyzing immigration programs ignores the well-established use of nationwide, programmatic NEPA reviews by federal agencies that are much akin to and no more speculative than would be a nationwide, programmatic analysis of immigration programs. An illustrative example of a wide reaching, expansive programmatic review is the “Programmatic Environmental Assessment for the Office of Coast Survey Hydrographic Survey Projects”³⁶ which applies to surveying by the agency within all coastal U.S. waters. This programmatic EA for the National Ocean Service (NOS) of the National Oceanic and Atmospheric Administration (NOAA) analyzes the environmental effects of all of NOS's surveying and mapping activities (using echo sounders as well as other instruments) over a five-year period within the Economic Exclusion Zone (EEZ) of the entire United States. The geographic area subject to analysis is vast, encompassing all the waters all to the 200-mile limit from the U.S. coastline, including the North Atlantic Region, South Atlantic Region, Caribbean Sea, Gulf of Mexico, Alaskan waters, Bering Sea, California coast and the entire West Coast, as well as huge areas of the Pacific Ocean surrounding Hawaii and other U.S. territories such as American Samoa. This project area thus includes hundreds of thousands of square miles in two oceans and several seas. The primary environmental concern analyzed is potential impacts to hearing and behavior in marine mammals from the use of underwater devices related to active sonar, but the EA covers other environmental concerns as well.

Although NOS doesn't know where the specific marine mammals are located on which its action might have adverse effects, it does know where its surveys and mapping have taken place in the past and where they are likely to occur in the coming five years covered by the EA. So, for example, NOS could project that 15% of the project activity is likely to take place along the West Coast, 10% in Alaska, 5% in the Pacific Islands, 30% in the Gulf of Mexico, etc. It would then use modeling to determine which species of cetaceans (whales and dolphins) and other marine mammals (e.g., sea otters, manatees, walrus) are most likely to be affected by the proposed action, and to what extent. It can then determine whether or not those predicted impacts are “significant” (which is always a judgment call), and whether or not a full EIS needs to be conducted. Therefore, estimating impacts of a particular wide scale federal program even when they are not known precisely, based on past information, is at the heart of much NEPA analysis.

The kind of forecasting necessary to complete the NOS' programmatic EA is analogous to a process that immigration agencies could easily conduct. Based on recent experience and available Census and DHS data, DHS could certainly project where new immigrants are likely to settle and create growth pressures, both on the local and regional scales, and then cumulatively, on a national scale. DHS has further information for these estimates, at least on a macro level, based on the locations that immigrants declare in their benefits applications, as well as where their U.S. sponsors live. In fact, DHS already publishes annual statistics on the metropolitan

organization can conduct a PEIS on immigration, a federal agency can as well. The analysis can be found here: Environmental Impact Statement, Progressives for Immigration Reform, (Oct. 2015), <http://www.immigrationeis.org/ieis-docs/PFIR-Immigration-EIS-2015oct-Abstract-and-Executive-Summary.pdf>.

³⁶ Final Programmatic Environmental Assessment for the Office of Coast Survey Hydrographic Survey Projects (May 2013), National Oceanic and Atmospheric Administration, <https://nauticalcharts.noaa.gov/about/docs/regulations-and-policies/2013-18-nepa-ocs-final-pea.pdf>.

areas in which new arrivals settle.³⁷ Patterns of immigration settlement have remained relatively consistent for many decades, and thus, projecting the environmental impacts of our immigration is quite feasible. It can be done from a combination of mining data from administrative benefits applications and examining historical settlement trends. In addition, the Census Bureau data offer rich and even more detailed statistics on the settlement patterns of immigrants. From there, reasonable predictions about the environmental impacts of immigration driven population growth can easily be produced. Not only could the environmental impacts of our immigration policies be estimated, but also there is already ample data already collected and published that could be used to do so.³⁸ It is merely of matter of connecting the dots in an organized fashion.

Therefore, there is no merit to the argument that environmental analysis that involves forecasting and quantifying human impacts over wide areas where the locations of those impacts cannot be predetermined and assessed with laser precision need not be done at all. This argument is contrary to the very purpose of programmatic environmental reviews. Indeed, such forecasting is the essence of NEPA. If agencies could avoid NEPA compliance by merely labeling the impacts of their actions “speculative,” then agencies could essentially nullify NEPA. Such agency posturing degrades NEPA into little more than an aspirational statute. But the courts have made clear since the seminal case of *Calvert Cliffs* that NEPA has real teeth and requires genuine action on the part of agencies.³⁹

The departments might object that the common practice of agencies conducting programmatic analysis of ongoing programs over large areas is not comparable to environmental analysis of our immigration programs because our immigration programs are much more consequential with far more significant and manifold impacts. It is true that our nation’s immigration programs have much farther reaching, and myriad, environmental consequences than a very large number of the routine programmatic environmental analyses (generally EAs, rather than EISs) conducted across the federal government.⁴⁰ However, the argument that the environmental impacts of a certain type of program are far more significant, far reaching, and manifold than so many other programs and projects which routinely undergo NEPA compliance fails to persuade that such programs are exempt from NEPA. Rather, it highlights the need for NEPA compliance.

³⁷ See Department of Homeland Security, Yearbook of Immigration Statistics, <https://www.dhs.gov/immigration-statistics/yearbook>.

³⁸ *Id.*

³⁹ *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F. 2d 1109 (D.C. Cir. 1971).

⁴⁰ To give a few examples, agencies conduct PEAs of: federal support for broadband in rural communities nationwide, see *Programmatic Env’t Assessment, Broadband Deployment to Rural America*, U.S. Department of Agriculture (Sept. 2018), https://www.rd.usda.gov/sites/default/files/Final_FONSI_RUS_PEA_signed.pdf; https://www.rd.usda.gov/sites/default/files/Final_FONSI_RUS_PEA_signed.pdf; the effects of a nationwide program requiring owners of antennas to register them with the Federal Aviation Administration, see *Final Programmatic Env’t Assessment for the Office of Coast Survey Hydrographic Survey Projects*, Nat’l Oceanic and Atmospheric Admin., (May 2013), <https://nauticalcharts.noaa.gov/about/docs/regulations-and-policies/2013-18-nepa-ocs-final-pea.pdf>; the effects of a worldwide network of moored buoys and coastal stations operated by the National Oceanic and Atmospheric Administration, see *Programmatic Environmental Assessment for NDBC Operations*, National Data Buoy Center (Jan. 2018), https://www.ndbc.noaa.gov/pea/ndbc_final_pea_20180104.pdf; the effects of the issuance of credit assistance under the Water Infrastructure and Finance Act, see *Programmatic Environmental Assessment: Finding of No Significant Impact*, Env’t Protection Agency (Apr. 2018), <https://www.federalregister.gov/d/2018-08865>

Because environmental scientists have been so concerned about population growth for such a long time, it has been extensively studied in the decades since NEPA was adopted and is comparatively well understood. Therefore, the models used by environmental scientists regarding population growth and its known environmental impacts have become so sophisticated that developing an analysis that would provide the government genuinely beneficial information about the impacts of our immigration programs based on local and national population growth would be a far less onerous undertaking than the departments imagine in this poor excuse for an exemption from NEPA for immigration programs. The effects of immigration are hardly the mysterious unknowable unknown that DHS purports it to be. The very purpose of NEPA was to make decision-making on the part of agencies more environmentally enlightened. The agencies that implement immigration programs are subject to this requirement.

V. CONCLUSION

The Biden administration is entitled to make any regulatory changes it desires within the confines of the law. The nullification of the 2019 *Inadmissibility on Public Charge Grounds* final rule outside of the rulemaking process was a clear violation of the APA. As DHS appears poised to develop new rulemaking on public charge, it is essential that the definition include both cash and non-cash public benefits. The Pearson Memo's exclusion of all non-cash benefits as well as the "primarily dependent" threshold is consistent with Congressional intent as clearly expressed in PRWORA. The Center has offered up numerous thoughts, responses, and suggestions that should help inform DHS as it develops a new NPRM. Finally, given the high probability that any proposal out of the current administration has the objective of increasing immigration, the Center reminds DHS that it is required to make the necessary environmental impact analysis under NEPA.

Sincerely,

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