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Department of Homeland Security
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Submitted via www.regulations.gov

Re: Comments in Response to Proposed Rulemaking, *Public Charge Ground of Inadmissibility*, 87 Fed. Reg. 10570 (February 24, 2022), DHS Docket No. USCIS-2021-0013, RIN 1615-AC74

Dear Ms. Deshommes:

Below please find comments submitted in response to the Advance Notice of Rulemaking on the Public Charge Ground of Inadmissibility, CIS No. 2715-22; DHS Docket No. USCIS-2021-0013, RIN 1615-AC74, published in the Federal Register on February 24, 2022, at Volume 87, No. 37, on behalf of the Asian Pacific Institute on Gender-Based Violence (API-GBV). The API-GBV is a national resource center on domestic violence, sexual violence, human trafficking, and other forms of gender-based violence in Asian and Pacific Islander (API) and immigrant communities, and serves a national network of advocates, community-based victim services programs, federal agencies, national and state organizations, legal, health, and mental health professionals, researchers and policy advocates.

API-GBV co-chairs the Alliance for Immigrant Survivors (AIS), supporting domestic violence and sexual assault victim advocates and their statewide and national coalitions by

informing them about immigration policy changes and their particular impacts on the safety-planning that survivor advocates engage in with immigrant victims to mitigate risks to their well-being. API-GBV endorses the comments submitted by 73 national, statewide, and local organizations that serve survivors of domestic violence, sexual assault, and human trafficking, addressing the impacts of the public charge rule on immigrant survivors more generally, and submits the following additional comments to provide more specific recommendations.

Survivors hold all forms of immigration status, from U.S. citizenship to permanent residency to those immigrating through family or employment sponsorship, or as foreign students, temporary workers, or diversity visa applicants.¹ Even in instances where survivors have secure status and the proposed rule does not directly apply to them because they are not seeking admission or adjustment, their family members who may be seeking admission or permanent residence are impacted by the rule.

Any public charge rule will have a dramatic impact on Asian American and Pacific Islander (AAPI) survivors. AAPIs are among the fastest growing populations in the U.S., and in recent years, approximately 35% of individuals obtaining permanent residence status are from Asia and Pacific Island nations.² At least 35% of the millions of individuals and families waiting in long backlogs for family-based immigration are from Asia and Pacific Island nations.³ In addition, the rule impacts Compact of Free Association (COFA) migrants from the Republic of the Marshall Islands, Federated States of Micronesia, and Republic of Palau who are able to reside in the U.S. as non-immigrants under treaty obligations. While COFA migrants are ineligible for

¹ E. Erez, M. Adelman, C. Gregory, *Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 *Feminist Criminology* (1), 32-56 (2009). DOI: 10.1177/1557085108325413.

² Department of Homeland Security, Yearbook of Immigration Statistics 2019, <https://www.dhs.gov/immigration-statistics/yearbook/2019>.

³ Department of State, Annual Report of Immigrant Visa Applicants, 2020, https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2020_vF.pdf.

many federal benefits, they are eligible for federal Medicaid, as well as various state and local programs.

Worldwide, one in three women will experience domestic or sexual violence in her lifetime.⁴ In the AAPI community, between 21-55% of AAPI women report experiencing domestic or sexual violence during their lifetimes.⁵ The United Nations estimates these figures to reach even higher percentages in some places across Asia and the Pacific Islands, with data showing ranges between 14.8% to 67.6 % of women and girls having experienced physical or sexual violence by a partner or other individual in their lifetimes.⁶ Over the course of the COVID-19 pandemic, domestic violence has increased in frequency and severity.⁷ In addition, a study conducted by the Centers for Disease Control found that in the Asian and Pacific Islander (API) community, 22.9% of women and 9.4% of men experienced some sort of contact sexual violence and 21.4% women and 9.4% men experienced non-contact unwanted sexual experiences in their lifetime.⁸

API-GBV appreciates DHS' stated intent to develop a rule that is clear, fair and comprehensible,⁹ and applauds the stated intent to mitigate the possibility of widespread chilling effects with respect to individuals disenrolling or declining to enroll themselves or

⁴ See World Health Org. et al., *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence 2* (2013).

⁵ Yoshihama, M. & Dabby, C. (2015) Asian Pacific Institute on Gender-Based Violence. Facts & Stats Report: Domestic Violence in Asian and Pacific Islander Homes, Oakland, CA: Retrieved from: <https://www.api-gbv.org/resources/facts-stats-dv-api-homes/>

⁶ United Nations Population Fund, Asia and the Pacific Regional Office (2019, May). Know VAW Data: Measuring Prevalence of Violence Against Women in Asia/Pacific Retrieved from: <https://asiapacific.unfpa.org/sites/default/files/resource-pdf/kNOwVAWdata%20regional%20VAW%20map%20April%2013%202019.pdf>

⁷ D.J. Parrott, M.B. Halmos, C.A. Stappenbeck, & K. Moino, (2021). Intimate Partner Aggression During the COVID-19 Pandemic: Associations with Stress and Heavy Drinking. *Psychology of Violence*. retrieved from: <https://psycnet.apa.org/record/2021-70494-001> ; S. Al-Arshani, (Aug. 2020). COVID-19 lockdowns generated a crisis within a crisis for the victims of domestic violence, new study finds. *Insider*. Retrieved from <https://www.insider.com/covid-19-lockdowns-amplified-the-severity-of-domestic-abuse-cases-2020-8>

⁸ S.G. Smith, J. Chen, K.C. Basile, L.T. Gilbert, M.T. Merrick, N. Patel (2017). *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report*. Retrieved from: <https://www.cdc.gov/violenceprevention/pdf/NISVSSStateReportBook.pdf>

⁹ 87 Fed. Reg. 10571.

family members in public benefits programs for which they are eligible, especially by individuals who are not subject to the public charge ground of inadmissibility.¹⁰

As noted in our response to the Advanced Notice of Public Rulemaking¹¹, API-GBV strongly urges that as USCIS moves forward with final regulations, that they promote Congressional intent to reinforce the progress communities have made to protect survivors of domestic violence, sexual assault, and human trafficking through policies like the Violence Against Women Act (VAWA),¹² the Victims of Trafficking and Violence Protection Act (TVPA),¹³ the Family Violence Prevention and Services Act (“FVPSA”)¹⁴, and the Victims of Crime Act (“VOCA”),¹⁵ among other enactments. API-GBV urges DHS to strengthen the proposed rule published on February 25 by promptly ***publishing a rule that advances victim and public safety and health; encourages victims to seek or utilized safety net benefits that are crucial to their ability to escape or recover from abuse and trauma; that does not serve to punish victims for the violence they have experienced; and strengthens their ties to their families***, who are essential sources of support in escaping and recovering from abuse. If finalized with our recommendations, the rule would provide needed clarity and stability for immigrant survivors and their families, reduce isolation, and increase individual and community safety and well-being. To that end, API-GBV submits the following comments on the proposed regulation as follows:

¹⁰ *Id.*

¹¹ API-GBV, Comments in Response to USCIS Advanced Notice of Public Rulemaking on Public Charge (October 22, 2021), available at <https://www.regulations.gov/comment/USCIS-2021-0013-0187>

¹² The Violence Against Women Act of 1994, Pub. L. No. 103-222, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C. and 42 U.S.C.) and subsequent reauthorizations; Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, ((2006), and the Violence Against Women Reauthorization Act of 2013, P.L.,113-4,127 Stat. 54 (2013)

¹³ The Victims of Trafficking Protection Act of 2000, Pub. L. No. 106-386 (2000)

¹⁴ The Family Violence Prevention and Service Act, Title III of the Child Abuse Amendments of 1984, Pub.L. No. 98-457 (1984) (codified at 42 USC §10401 et seq.)

¹⁵ Victims of Crime Act of 1984, Pub. L. No. 98-473, 98 Stat. 2171 (codified at 42 USC §10601 et seq.)

1. Proposed 8 CFR §212.18 and 8 CFR §245.23

We applaud the inclusion of proposed 8 CFR § 212.18 - Application for Waivers of inadmissibility in connection with an application for adjustment of status by T nonimmigrant status holders, and 8 CFR § 245.23, Adjustment of aliens in T nonimmigrant classification. Proposed §§ 212.18 and 245.23 clarify that trafficking survivors with T status seeking adjustment of status are exempt from the public charge ground of inadmissibility. The proposed sections support Congress' intent to provide access to support and stability for survivors of human trafficking by implementing the 2013 statutory amendments to the Trafficking Victims Protection Act, which made clear that T-visa applicants and T-visa holders who meet the definition of a “qualified” noncitizen under 8 USC §1641(c) are exempt from the public charge ground of inadmissibility.¹⁶ The 2013 amendments built upon the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,¹⁷ which had added trafficking victims to the list of those who are considered “qualified” noncitizens.

2. Proposed Definitions - 8 CFR §212.21

A. **§212.21(a)** We appreciate DHS' improvements over the 2019 rule and the 1999 guidance by including a “primarily dependent” on the government for subsistence standard for a public charge determination, but in response to DHS' request for comment on whether the “primarily” dependent level of dependence is appropriate,¹⁸ we recommend that **§212.21(a)** define “likely to become a public charge” to mean a *“More than a substantial likelihood, to become primarily and permanently dependent on the federal government for survival, unless receipt of benefits is*

¹⁶ Pub. Law 113-4 Sec. 804 and codified at 8 USC §1182(a)(4)(E)(iii).

¹⁷ Pub. Law 110-457 Sec. 211 and codified at 8 U.S.C. §1641(c).

¹⁸ 87 Fed. Reg. at 10608.

... tied to the need to escape, recover from, or otherwise overcome the impacts of domestic violence, sexual assault, human trafficking, or other abuse or exploitation.”

As noted in the NPRM, the basic thrust of the term public charge implies “significant reliance on the government for support.”¹⁹ We believe that the addition of qualifiers such as “more than a substantial likelihood,” and “permanent” dependence further add clarity. In addition, the additional qualifiers would better take into consideration whether the assistance was used by survivors of domestic and sexual violence and other serious crimes, as well as the impact of disasters, an accident, or by pregnant or recently pregnant persons, children, etc. If the benefits were used to overcome hardships caused by a temporary situation that no longer applies, it does not predict whether the individual is likely to rely on that assistance in the future.

API-GBV urges that the public charge assessment in the final rule acknowledge that if benefits are used to overcome hardships related to domestic or sexual violence or human trafficking, survivors should not be punished for accessing them. Domestic violence abusers, sexual assault perpetrators, and human traffickers cause significant physical, emotional, and often, financial injury to their victims, which increases the likelihood that their victims will need access to public supports to overcome the abuse. Many abusive partners, in order to dominate or control their partners and their children, will try to prevent or sabotage their partners from attaining economic independence or stability by limiting their access to financial resources, interfering with employment, ruining credit, and more.²⁰ Victims who might not have previously been considered low income may experience financial abuse; become impoverished due to the abuse; or abuse may have undermined the victim’s ability to work, maintain housing, health, or

¹⁹ 87 Fed. Reg. at 10606.

²⁰ See, e.g., J.L. Postmus, S.B. Plummer, S. McMahon, N.S. Murshid, & M.S. Kim, *Understanding Economic Abuse in the Lives of Survivors*. 27 *Journal of Interpersonal Violence* 3,411–430 (2012); A. Adams, C. Sullivan, D. Bybee, & M. Greeson, *Development of the Scale of Economic Abuse*. 13 *Violence Against Women*, 563-588 (2008).

otherwise obtain financial security.²¹ Denying survivors admission for accessing benefits to overcome abuse serves as double punishment for the violence they have experienced.

B. Proposed 8 CFR §212.21(b)- We recommend narrowing the final regulation to consideration of only *federal* public cash assistance for income maintenance, such as Supplemental Security Income (SSI), or Temporary Assistance for Needy Families (TANF), *unless receipt of such assistance is again, tied to the need to escape, recover from, or otherwise overcome the impacts of domestic violence, sexual assault, human trafficking, or other abuse or exploitation.* Importantly, the final rule should make clear that receipt of such assistance will not automatically result in a public charge determination, but will simply be considered along with other factors in the totality of the circumstances.

Limiting consideration to federal cash benefits would result in a *uniform, federal standard.* Having a single, uniform standard would provide clarity and support safety-planning efforts with victims. Domestic and sexual violence and trafficking victim advocates frequently spend significant time and resources trying to familiarize themselves with not only the contours of the public charge rule, but also the myriad of specific funding sources for the variety of supports to which they refer survivors. These supportive programs are often funded through multiple funding streams, such that victim advocates trying to ethically and accurately safety-plan with survivors needed to scrutinize whether accessing them would implicate the public charge rule. Limiting the rule to federal cash benefits would help reduce the significant, administrative costs shouldered by victim advocacy and other human services programs that will be supporting immigrant victims with safety planning and assessing the risks of accessing various benefits.

²¹ See, e.g., E. Lyon, *Welfare, Poverty and Abused Women: New Research and its Implications*, National Resource Center on Domestic Violence (Oct. 2000), available at <https://vawnet.org/material/welfare-poverty-and-abused-women-new-research-and-its-implications>;

States and localities have strong interests in promoting health and safety, which includes their ability to provide state-funded benefits without federal restrictions. As noted in their comments in response to the public charge ANPRM, the Attorneys General of 19 states collectively express that state cash assistance, whether filling a gap for people ineligible for TANF, or cash for specific, supplemental purposes, should *not count* in a public charge determination. They commented that States make independent public policy determinations, including with respect to providing public benefits to all individuals within their jurisdictions regardless of immigration status.”²² For example, various states have implemented financial assistance programs for survivors of domestic violence,²³ or short-term emergency assistance programs²⁴ that can provide many non-citizens access to state-funded cash or other assistance. There are also states that have been exploring alternatives to unemployment insurance for excluded workers, and others which are considering providing monthly advance payments of state child tax credits. Recently, some states have been exploring guaranteed income pilots, which supplement rather than replace income. These pilot programs are generally not open to the entire population, and have been found to increase access to full-time employment and financial stability among those who received the payments.²⁵

²² State Attorney General’s Comment on Advance Notice of Proposed Rulemaking, Public Charge Ground of Inadmissibility, October 22, 2021, available at: <https://www.regulations.gov/comment/USCIS-2021-0013-0116>

²³ See, e.g. Pennsylvania’s General Assistance Program for Domestic Violence victims, at <https://www.dhs.pa.gov/Services/Assistance/Pages/General-Assistance.aspx> or Oregon’s Temporary Assistance for Domestic Violence Survivors, <https://www.oregon.gov/dhs/abuse/domestic/pages/tadvs.aspx>

²⁴ See Washington’s Consolidated Emergency Assistance Program, <https://www.dshs.wa.gov/esa/emergency-assistance-programs/consolidated-emergency-assistance-program-ceap>; or Massachusetts’ Emergency Assistance Program: <https://www.mass.gov/doc/760-cmr-67/download>

²⁵ S. West, et al., White Paper, Stockton Economic Empowerment Demonstration: Preliminary Analysis of SEED’s First Year, available at: https://static1.squarespace.com/static/6039d612b17d055cac14070f/t/6050294a1212aa40fdaf773a/1615866187890/SEED_Preliminary+Analysis-SEEDs+First+Year_Final+Report_Individual+Pages+.pdf (The Stockton program found that the Demonstration fund increased full time employment by 12 percentage points.); See also, D. Jones and I Marinescu, The Labor Market Impacts of Universal and Permanent Cash Transfer: Evidence from the Alaska Permanent Fund, available at: https://www.nber.org/system/files/working_papers/w24312/w24312.pdf

In response to *DHS*' request for comments on how, if at all, to clarify exclusions, like special purpose and earned-benefit cash assistance programs that would not be considered in a public charge assessment²⁶, as noted previously, API-GBV strongly recommends excluding ***all state and local benefits from consideration*** in a public charge determination, including programs providing cash assistance for income maintenance. Failure to exclude all non-federal programs, including cash assistance programs, would undermine state and local initiatives and efforts to address survivor safety, health and economic equity in their communities,²⁷ as well as undermine nationwide efforts to combat the persistent chilling effect of the 2019 rule.

Whether or not DHS decides to include state and local cash assistance for income maintenance, it will still be critical for DHS to differentiate other federal, state and local programs from federally funded-cash assistance. We recommend that DHS include language in the final regulation that distinguishes the aforementioned types of programs from “federal cash assistance for income maintenance,” beyond just the preamble. For example, we ***recommend that the regulatory text explicitly exclude the following programs*** and provide a non-exclusive list of examples, to more clearly explain that earned cash benefits such as Title II Social Security, government pensions; unemployment insurance, workers’ compensation and veterans’ benefits; any benefits received via a tax credit or deduction, and special purpose cash benefits used for rent, child care, utilities, or other specific expenses will not be considered in a public charge determination:²⁸

²⁶ 87 Fed. Reg. 10613.

²⁷ See, e.g., C.M., Sullivan, H.D. Bomsta, M.A. HacsKaylo, Flexible Funding as a Promising Strategy to Prevent Homelessness for Survivors of Intimate Partner Violence. *Journal of Interpersonal Violence*. 2019;34(14):3017-3033. doi:[10.1177/0886260516664318](https://doi.org/10.1177/0886260516664318); see also, S. Goodman, *The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims’ Economic Security* (2018), available at <https://vawnet.org/material/difference-between-surviving-and-not-surviving-public-benefits-programs-and-domestic-and>

²⁸ 87 Fed. Reg. 10613.

- State, tribal, territorial or local cash benefit programs for income maintenance (“General Assistance”);
- Special purpose cash (e.g. child care assistance, energy assistance such as LIHEAP, rental assistance, crime victim compensation/restitution, housing and homelessness prevention, foster care or adoption assistance payments);
- Financial assistance targeted to aid specific populations such as domestic violence, sexual assault, or human trafficking survivors, other crime victims, veterans, the elderly, or the disabled; those exiting incarceration, child welfare, or the juvenile justice system;
- Disaster assistance such as Individual Assistance Under the Federal Emergency Management Agency’s (FEMA) Individuals and Households Program and other disaster assistance provided by state, Tribal, territorial or local governments;
- Pandemic cash assistance such as federal, state, local, tribal or territorial cash assistance; Economic Impact Payments, state Pandemic Emergency Assistance Funds, Paycheck Protection Act assistance, or other types of public health relief payments;
- Non-cash services under TANF and short-term non-recurring benefits under TANF as defined at 45 CFR 260.31(b)(1);
- Earned cash benefits (e.g. state unemployment insurance or similar programs, workers compensation, veterans benefits, social security payments, Title II Social Security disability payments; government pensions);
- Tax-related benefits (e.g. child tax credit, earned income tax credit, economic impact payments, any other tax credit or reduction, and similar state or local programs);
- Programs that provide temporary, universal or “guaranteed” income to a targeted or selected group of people. The very nature of these programs is to raise the income of the community across the board and not to address individual needs or personal circumstances;
- Programs that provide non-means tested payments such as the Alaska Permanent Fund Dividend or a broad stimulus payment provided outside of the tax system;
- Educational financial aid.

We cannot over-emphasize enough the impact of the confusion about which benefits programs can be considered in a public charge determination and which are excluded. Based on API-GBV’s experience, many immigrant victims are afraid to participate in programs designed by their state or local government to support them. For example, during the course of the pandemic, API-GBV received numerous questions from victim advocates about whether receipt of unemployment compensation, or state-funded emergency assistance would impact a public charge determination. In addition, over the past 5 years, API-GBV has heard devastating stories from victim advocates about victims foregoing programs specifically designed for survivors of

domestic violence and sexual assault, including domestic violence transitional housing, food pantry assistance, and sexual assault nurse examination and associated counseling services due to fear of the impact of public charge,²⁹ as well as withdrawing from assistance programs that support their basic needs.³⁰ It is also our experience that immigration attorneys who are often unfamiliar with the variety of federal, State, Tribal, territorial, or local cash and other benefits programs simply advise their clients not to use public benefits, often to the detriment to their immigrant clients and their children.

API-GBV further recommends that the rule specify that only the applicant's *current* use of such benefits should be considered—as a person who has received benefits in the past but is not currently using benefits may have had a change in circumstances that may make them unlikely to need safety net programs in the future. Past use of benefits should *not* be considered in public charge determinations, as doing so would put immigrant victims in a position to be deemed public charges based on receipt of safety-net benefits that would be critical for them in obtaining safety, contravening Congressional intent not only in PRWORA, but also in VAWA, FVPSA, VOCA and the TVPA.

The final rule should also explicitly exclude past benefits use that has been short-term or time-limited, or for emergent needs, including cash assistance that survivors need for short-term

²⁹ Brief of Amici Curiae Nonprofit Anti-Domestic Violence and Sexual Assault Organizations in Support of Plaintiff's Motion for Preliminary Injunction. "State of Washington et al v. DHS et al. (Sept. 19, 2019), available at <http://bit.ly/2mfArzU>; For background on victims' decision making related to help-seeking, see E. M. Fisher, A.M. Stylianou,(2016), *To Stay or to Leave: Factors Influencing Victims' Decisions to Stay or Leave a Domestic Violence Emergency Shelter*, Journal of Interpersonal Violence 1–27(one primary factor influencing participants' decisions to stay or leave domestic violence shelters was affordability of alternative options) DOI: 10.1177/0886260516645816

³⁰ E.g., E. Hellerstein, (2019) *A Looming Change in Immigration Policy is spooking Bay Area families*, The Mercury News, retrieved from <https://www.mercurynews.com/2019/09/22/a-looming-immigration-policy-is-spooking-bay-area-families/> ; H. Bernstein, D. Gonzalez, M. Karpman, & S. Zuckerman, (2020) *Amid Confusion Over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019*, The Urban Institute, retrieved from <https://www.urban.org/research/publication/amid-confusion-over-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-2019> ; S. Artiga, U. Petry (2017) *Living in An Immigrant Family in America: How Fear and Toxic Stress Are Affecting Daily Life, Wellbeing, and Health*, The Henry J. Kaiser Family Foundation (2017), Available at <https://www.kff.org/report-section/living-in-an-immigrant-family-in-america-issue-brief/>

income maintenance. For many survivors, cash assistance, such as TANF or state-funded cash benefits, provides the crucial support they need to begin the journey of re-stabilizing their lives and achieving self-sufficiency. In a 2017 survey of service providers and victim advocates working with victims of violence, nearly 85% of respondents said that TANF is a very critical resource for a significant number of domestic violence and sexual assault victims. Specifically, more than two-thirds of respondents said that most domestic violence victims rely on TANF to help address their basic needs and to establish safety and stability, and 45% of respondents said the same is true of most sexual assault victims.³¹ With financial instability posing limited options for escaping or recovering from abuse, access to cash assistance is an important factor in victims' decision-making about whether and how they can afford to leave a dangerous situation, and in planning how to keep themselves and their children healthy, well, and housed.³²

C. Proposed 8 CFR §212.21(c)- API-GBV recommends that the final rule exclude consideration of long-term institutionalization at government expense. Institutional care is frequently supported by Medicaid, and allowing any type of Medicaid coverage to be considered in a public charge determination causes confusion and perpetuates the chilling effect caused by the 2019 public charge rule.

Access to Medicaid and other health care programs provide a critical lifeline for survivors of domestic violence, sexual assault, and human trafficking to treat the significant health

³¹ S. Goodman, *Supra*, Note 27.

³² E. Lyon, S. Lane, & A. Menard, (2008) *Meeting Survivors' Needs: A Multi-State Study of Domestic Violence Shelter Experiences*. Washington, DC: National Institute of Justice. Available at: http://www.vawnet.org/Assoc_Files_VAWnet/MeetingSurvivorsNeeds-FullReport.pdf; E. Lyon, J. Bradshaw, & A. Menard, (2011) *Meeting Survivors' Needs through Non-Residential Domestic Violence Services & Supports: Results of a Multi-State Study*. Harrisburg, PA: National Resource Center on Domestic Violence, Available at: http://www.vawnet.org/Assoc_Files_VAWnet/DVServicesStudy-FINALReport2011.pdf; R. Kimerling, J. Alvarez, J. Pavao, K.P. Mack, M.W. Smith, & N. Baumrind, (2009) *Unemployment Among Women: Examining the Relationship of Physical and Psychological Intimate Partner Violence and Posttraumatic Stress Disorder*, 24 *Journal of Interpersonal Violence* 3, 450-463.

consequences of abuse including: acute injury, chronic pain, sexually transmitted infections, gastrointestinal problems, diabetes, hypertension, and traumatic brain injury, among others.³³ Service providers report that Medicaid is valuable to the recovery of survivors as healthcare is a benefit that many survivors cannot afford, with 76% of providers reporting that healthcare assistance consistently helps the survivors with whom they work. CDC data found the lifetime per-victim cost of intimate partner violence was \$103,767 for women victims with 59% going to medical costs.³⁴ Public funding paid 37% of this total cost. It is clear that Medicaid coverage helps survivors access care: when looking at trauma care alone, Kaiser Family Foundation found that Medicaid increased coverage of individuals with traumatic injuries for acute and post-acute care and protects against unexpected medical bills.³⁵ Survivors are also more likely than others to need health, mental and behavioral health services because of increased risk for suicide, depression, anxiety, posttraumatic stress disorder, and substance abuse. Ensuring they can get the care they need, when they need it, can improve their health and well-being for the rest of their lives.

Because the public charge assessment is intended to be a forward-looking test, it is difficult to provide clear assurances and messaging to people who need Medicaid that their enrollment for non-institutional purposes now will not be used to indicate that they will rely on Medicaid should they need long-term care in the future.

If long-term institutionalization is considered in a public charge determination, we support the inclusion of language specifying that imprisonment for conviction of crime or

³³ M.J. Breiding, M.C. Black, G.W. Ryan, (2005) *Chronic Disease and Health Risk Behaviors Associated with Intimate Partner Violence-18 U.S. States/Territories*, 18 *Annals of Epidemiology* 2008, 538-44

³⁴ C. Peterson, M.C. Kearns, W.L. McIntosh, L.F. Estefan, C. Nicolaidis, K.E. McCollister, A. Gordon, and C. Florence, (2018) *Lifetime Economic Burden of Intimate Partner Violence Among U.S. Adults*, 55 *American Journal of Preventative Medicine* 4, 433-444, DOI: 10.1016/j.amepre.2018.04.049.

³⁵ S. Goodman, *Supra*, Note 27, at 11

institutionalization for short periods of time for rehabilitation purposes do not count and that only Medicaid § 1905(a) institutional services count. We also strongly support the explicit clarification in the preamble that Medicaid HCBS do not count. DHS should include this clarification in the preamble to the final rule as well as sub-regulatory guidance and policies for adjudicating officers to follow.

DHS further should clarify that state, Tribal, territorial or locally funded institutionalization is excluded from consideration, and that only *current* long-term institutionalization be considered. The fact that an individual has been institutionalized in the past does not suggest a likelihood of future institutionalization. Past institutionalization may reflect a lack of access to community-based mental health or other medical care, a medical issue that has since been resolved, a lack of access to community-based services that have since been provided, a lack of access to accessible housing, or any number of other factors that make future institutionalization unlikely. Access to home-based community services varies greatly by state and even within states, as well as by disability and age, though states and the federal government are increasingly investing in home-based community services, increasing access. Thus, community-based support that was not available 5 years ago or today, may very well be available in the future.

Including institutionalization at government expense also discriminates against people, including survivors of domestic violence and sexual assault, with disabilities, because only people with disabilities and older adults experience long-term institutionalization. We appreciate DHS's acknowledgment of the injustice of the Medicaid program's institutional biases and potential violations of civil rights in applying the public charge test. Many Americans with disabilities and older adults who want to and can be supported to live in the community simply do not have access to Medicaid home and community-based services (HCBS) and are forced into

institutions to get the help they need with self-care and daily living. While an adjudicator may be able to readily find evidence that a particular state is placing people on HCBS waiting lists, clear evidence of a state's barriers may not always be available. For example, some states do not have waiting lists at all, yet not everyone who is eligible for Medicaid can get the full amount and range of HCBS they need to live safely in their own homes and communities. Other people who are currently institutionalized may be unaware of or have access to limited programs and funding to support their return to the community, especially those who face language barriers. We strongly recommend that applicants not be required to produce evidence to demonstrate a violation of federal law.

D. As stated earlier, API-GBV recommends that the final regulatory definition of public charge clarify that receipt of such benefits that are tied to the need to escape, recover from, or otherwise overcome the impacts of domestic violence, sexual assault, human trafficking, or other gender-based violence they have experienced, are excluded from consideration in determining whether someone is likely to become a public charge. When Congress passed the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)³⁶ limiting access to federal public benefits, including TANF and SSI to certain non-citizens, Congress also passed the Family Violence Option, recognizing the importance of access to benefits to support victims of domestic violence to recover and escape violence and provided exemptions from program requirements that would unfairly punish or put victims at further risk of family violence.³⁷ In defining who is likely to become a public charge, DHS should put forth a definition that recognizes that utilization of federal benefits, including those authorized under PRWORA,

³⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193 (1996).

³⁷ 42 U.S.C. § 602 (a)(7).

should not punish victims for needing the benefits to escape or recover from abuse, nor puts victims at further risk of violence.

With financial instability posing limited options for escaping or recovering from abuse, access to cash assistance is an important factor in victims' decision-making about whether and how they can afford to leave a dangerous situation, and in planning how to keep themselves and their children healthy, well, and housed.³⁸ Access to safety net benefits can play a pivotal role in a victim's ability to escape and overcome domestic violence and sexual assault, by helping victims afford the basics (such as food, housing, emergency cash assistance and healthcare) and rebuild their lives after violence. The Centers for Disease Control has concluded that improving financial security for individuals and families can help reduce and prevent intimate partner violence.³⁹ Survivors of domestic violence, sexual assault, and human trafficking should not be discouraged from seeking and utilizing the assistance they need to escape and recover from the harm they have experienced.

E. Proposed **8 CFR §212.21(d)**-We support the proposed rule's definition of "receipt" of benefits for the purpose of public charge determinations clarifying that an individual must be listed as a beneficiary by a public benefit granting agency, but as mentioned previously, would ***recommend language aligning to the prior recommendation that it be solely for federal public cash assistance for income maintenance.*** We further support the language clarifying that applying for benefits, being approved for benefits in the future, assisting another to apply for benefits, or being in a household or family with someone who receives benefits does not count as

³⁸ R. Kimerling et.al, *Supra* Note 32.

³⁹ Centers for Disease Control (2017). Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs, Policies, and Practices. Retrieved from <https://www.cdc.gov/violenceprevention/pdf/ipv-technicalpackages.pdf>

receipt of benefits. This provision is crucial to ensure the administrability of the public charge rule and to mitigate the chilling effect of the 2019 public charge policy, especially on U.S. citizen children in mixed-status households.

The clarification in proposed 8 CFR §212.21(d), that applying for or receiving benefits on behalf of another, often a parent applying for or receiving benefits on behalf of a child, will not be considered in a parent’s public charge determination, is critical for ensuring that children in immigrant families continue to receive public benefits they are eligible for, like other children.

While any reference to receipt of countable benefits is likely to have some chilling effect on non-citizens’ use of government benefits and services – even those non-citizens and their U.S. citizen family members who are not subject to public charge assessment – being as specific as possible about what would be considered as “receipt,” like in the manner reflected in the proposed rule, is essential to reducing the chilling effect to accessing benefits in immigrant communities. Because many non-citizens have a relationship to either the countable public benefits, or to other, non-countable benefits, though they may not be in “receipt” of the benefits as defined in the proposed rule, the more clarity provided in the rule, the better. For example, many non-citizens may receive benefits but on behalf of a family member, such as a dependent child, without being the named “beneficiary” as required by the rule. This is a relatively common situation – in the most recent year for which TANF data are available, over 10% of all households receiving TANF benefits were “child-only” cases in which an ineligible immigrant parent was excluded from the assistance unit.⁴⁰ Many more mixed-status households are likely eligible, but have not applied for benefits due to fear of public charge or broader immigration

⁴⁰ Administration for Children and Families, Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2020, available at: <https://www.acf.hhs.gov/ofa/data/characteristics-and-financial-circumstances-tanf-recipients-fiscal-year-2020>

concerns. Other non-citizens may also have applied for benefits, not realizing that they were ineligible, and/or applied and withdrawn their application, all without having received any benefits in a manner that would count under the proposed definition. Thus, we support the proposed definition's recognition that helping someone else with a successful application does not count; nor does actually applying for a benefit and being certified to receive that benefit for some period into the future count if the intending immigrant has not actually received the benefit.

In addition, as part of the totality of circumstances test, USCIS can provide common-sense guidance to USCIS officials that when considering the totality of circumstances, it is normal for children to be dependent on their family and school, and that the fact that a child is young or receives assistance today, is not an indication about the person's ability to earn income, or contribute to a household or community in the future.

To further improve the rule, API-GBV recommends that the definition specifically ***state at the beginning of the rule that issuance of the actual benefit or provision of the service is essential to the definition*** of receipt. Currently, the proposed rule only includes being *named* as a beneficiary by the relevant benefits administering agency. It is not until one reviews the second part of the definition that it is made clear that simply being approved or certified for receipt of benefit at some point in the future is insufficient and that actual issuance or provision of service is required. In some instances, state benefits agencies inaccurately approve a non-citizen to receive benefits for which they are actually ineligible based on income, immigration status, or another reason. Counsel would advise them to affirmatively withdraw from the benefit program, but some people may not even know that they were determined eligible for a program and this should not count against them in a public charge determination. In addition, there is often a single-application for multiple benefits programs and an individual may not be aware that s/he

was determined eligible to one of the programs included in the application. This language should be moved to the beginning of the rule to make it clearer.

In addition, API-GBV recommends that the second part of the definition ***include additional guidance as to what does not count as receipt***. For example, the rule should directly state that an intending immigrant who is ineligible for a particular countable benefit will not be considered to be in receipt of that benefit themselves, even if another person in their household receives it, or they are listed as a member of the household by the benefits granting agency. The second part of the definition should also include common words that do not necessarily equate to receipt, such as “payee” or “representative payee,” “designee,” “head of household,” or receipt “on behalf of.” The second part of the definition should also contain describe instances when government-funded long-term institutional care (in the event that long-term institutional care is included), does not count, such as when there has been an approval for care although the individual is not a resident of the designated care facility.

API-GBV also recommends that the regulation provide ***a non-exclusive list of examples of what does not count as receipt of benefits by an intending immigrant***, to further ease administration of the rule and reduce the chilling effect. For example, the list should include “child only” TANF cases; and also “serving as the representative payee” for someone under the SSI program. Including such a non-exclusive list in the regulatory text would go a long way in addressing DHS’s request for input on “how to communicate to parents of U.S. citizen children that the receipt of benefits by such children would not be considered part of the public charge inadmissibility determination for the parents.”⁴¹

⁴¹ 87 Fed. Reg. at 10615.

Including such a list would help reduce confusion, as the current proposed rule includes both state and local cash benefits. Each state, as well as numerous localities that administer such countable benefits, has its own way of handling non-recipient family members. A person who is listed as a beneficiary may not be evident. For example, a non-recipient household member may nevertheless appear on a household composition screen indicating who is in receipt of the relevant benefit. That the intending immigrant is part of the beneficiary household but not a beneficiary themselves may not be obvious, and/or may be represented on totally different documents. In many cases, intending applicants themselves do not know whether or not they are a listed beneficiary for a particular benefit. They may only know that they applied on behalf of their child and that they receive and spend the benefit to meet their child's needs. Indeed, they may erroneously believe they *are* in receipt of a countable benefit even though they are not eligible and are not in receipt under the proposed definition.

F. Proposed 8 CFR §212.21(e)- In response to DHS' request for comments on whether DHS should define government, and, if so, whether it should be limited to Federal, State, Tribal, territorial, and local entities, and why or why not,⁴² API-GBV recommends that proposed 8 CFR §212.21(e) be deleted. Rather than defining government, API-GBV recommends that only federal cash benefits be considered, so defining government would be unnecessary.

G. Additional definitions: In response to DHS' request for comment⁴³ on how, if at all, "alien's household" should be defined, API-GBV recommends that the term be left undefined, as it does not appear in the statute, nor elsewhere in the proposed regulations. There is a definition for Household Size related to the sponsor or joint sponsor. Another definition related to

⁴² 87 Fed. Reg. at 10616.

⁴³ 87 Fed. Reg. at 10616.

adjustment of status applicant is superfluous, and past experience with the 2019 Final Rule demonstrates that when given a specific definition, especially one quite distinct from the one applied to the sponsor—it created unwarranted confusion. For domestic violence victims, adding an additional definition also creates additional challenges, as many survivors may have little to no control over whether an abusive partner resides with the survivor, as well as little or no input on whether or not the abusers’ income and resources are available to them. Relying on a single definition in the context of the sponsor’s household size reduces the likelihood of inconsistency and confusion.

3. Proposed 8 CFR §212.22 Statutory Factors

A. Proposed *8 CFR § 212.22(a)(1)* Factors to Consider, and *8 CFR § 212.22(a)(2)*, Consideration of Affidavit of Support. DHS requests comment on how each of the statutory minimum factors should be considered in the totality of circumstances in a public charge inadmissibility determination and on the initial evidence applicants should provide regarding each of the statutory minimum factors.⁴⁴ API-GBV supports DHS’s proposed language at proposed 8 CFR §212.22(a)(1) that simply acknowledges the statutory language and proposed §212.22(a)(2), that elects not to specifically define the five factors, but rather favorably considers the affidavit of support. API-GBV strongly recommends maintaining a discrete analysis based on the sponsor’s financial status and current income, rather than trying to specifically define the statutory factors, which would result in redirecting the focus onto the applicant.

8 USC §1182(a)(4)(B)(i) instructs adjudicating officers to consider, at a minimum, the applicant’s age, health, family status, assets, resources and financial status, and education and skills when making a public charge inadmissibility determination. Any effort to specifically

⁴⁴ 87 Fed. Reg. 10617

define these five statutory public charge factors would result in a far more complicated and subjective discretionary determination. Doing so is both unnecessary and potentially harmful, disproportionately harming survivors of domestic violence, sexual assault, and human trafficking.

In addition to their relatively low importance compared with the affidavit of support, defining the five factors invites potential abuse by adjudicators. Consular and USCIS officials would be required to juggle a variety of factors that have little relationship to the likelihood that the applicant would become a public charge at a time well into the future. The last administration's attempt to define them resulted in a confusing mix of competing factors—ranging from weighted to heavily weighted—that took into account, among other factors, the applicant's current and estimated income, job history, job skills, liabilities and debts, health status, health insurance enrollment, assets, credit reports, prior income tax filings, educational level (lack of high school degree was a negative factor), foreign education degree equivalency reports, and proficiency in English. Many of these factors are not listed in or contemplated by the statute, and resulted in victim advocates' increased uncertainty on how to support survivors in planning for their safety.

Domestic violence abusers, sexual assault perpetrators, and human traffickers cause significant physical, emotional, and often, financial injury to their victims, which increases the likelihood that any or all of the statutory factors would be negatively applied in a public charge determination. Many abusive partners, in order to dominate or control their partners and their children, will isolate their partners and try to prevent or sabotage them from attaining economic independence or stability by limiting their access to education, financial resources, interfering with employment, ruining credit, and more.⁴⁵ For example, abusers have been shown to interfere

⁴⁵ See, e.g., J.L. Postmus, et al, *Supra*, Note 20; A. Adams, C. Sullivan, D. Bybee, & M. Greeson, *Development of the Scale of Economic Abuse*. 13 *Violence Against Women*, 563-588 (2008).

with a victim's ability to maintain economic resources by having debt generated in the victim's name, or by refusing to pay rent, make mortgage payments or pay other bills, ultimately placing the responsibility and consequences on their partners.⁴⁶ Abusive partners have also been shown to generate debt for their partners by engaging in identity theft, including obtaining credit cards in the victim's name without consent.⁴⁷ Thus, domestic violence and stalking victims are at risk for accruing personal debt and poor credit history. In addition, abusers often isolate immigrant survivors and bar them from gaining skills, preventing them from learning English, or other skills.⁴⁸

In addition, domestic violence, sexual assault, and human trafficking is linked to many long-term physical and mental health problems. Physical and psychological abuse are linked to a number of adverse physical health effects including arthritis, chronic neck or back pain, migraine and other frequent headaches, stammering, visual problems, sexually transmitted infections, chronic pelvic pain, and stomach ulcers.⁴⁹ In addition to the immediate trauma and injuries caused during violent incidents, domestic and sexual violence contribute to a number of chronic health problems, including depression, alcohol and substance abuse, and sexually transmitted diseases such as HIV/AIDS, and often limits the ability of women to manage other chronic illnesses such as diabetes and hypertension.⁵⁰ A study by the Centers for Disease Control and Prevention (CDC) found that more than 550,000 injuries due to intimate partner violence require

⁴⁶ M.P. Brewster, (2003) *Power and Control Dynamics in Prestalking and Stalking Situations*. Journal of Family Violence, 18, 207-217

⁴⁷ *Id.*

⁴⁸ See Michael Runner et al., Family Violence Prevention Fund for the Robert Wood Johnson Foundation, (2009) *Intimate Partner Violence in Immigrant and Refugee Communities: Challenges, Promising Practices, and Recommendations* 10, at 12 (Abusers "frequently rely on foreign-born women's limited English proficiency skills to control their behavior. For example, perpetrators who possess greater English language skills might silence their victims by serving as the family's sole communicator in English.")

⁴⁹ A. Coker, P. Smith, L. Bethea, M. King, & R. McKeown, (2000) *Physical Health Consequences of Physical and Psychological Intimate Partner Violence*. Archives of Family Medicine 9.

⁵⁰ S.G. Smith, et al, *Supra*, Note 8.

medical attention each year.⁵¹ Data from the Behavioral Risk Factor Surveillance Survey (BRFSS), which is conducted annually and is the largest U.S. nationally representative phone survey about general health behaviors and conditions, highlight the increased risk of chronic conditions such as asthma, arthritis, stroke, and cardiovascular disease in individuals who have ever experienced partner violence.⁵² The average lifetime cost of services for female victims of domestic violence is \$103,767, with 59% of that total going to medical costs.⁵³ Sexual violence can also have harmful and lasting physical and psychological consequences including chronic pain, gastrointestinal disorders, gynecological complications, migraines or other frequent headaches, sexually transmitted infections, cervical cancer, genital injuries,⁵⁴ as well as post-traumatic stress disorder, or attempted or completed suicide.

A significant number of women and girls in violent relationships experience reproductive control resulting in coerced pregnancies.⁵⁵ “Reproductive coercion” describes a spectrum of conduct, ranging from rape to threats of physical harm to sabotaging a partner’s birth control, used primarily to force pregnancy.⁵⁶ Approximately one in four survivors who are raped by their partners become pregnant, a rate five times the national average for rape-related pregnancy.⁵⁷ The consequences of reproductive coercion, along with increased barriers for economic

⁵¹ Centers for Disease Control and Prevention (2003) *Costs of Intimate Partner Violence Against Women in the United States*, Retrieved from: <https://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>

⁵² M.J. Breiding, M.C. Black, G.W. Ryan, *Supra*, Note 33.

⁵³ C. Peterson et al., *Supra*, Note 34.

⁵⁴ R. Jewkes, P. Sen, C. Garcia-Moreno (2002) *Sexual violence*. In: E. Krug, L.L. Dahlberg, J.A. Mercy, et al., editors. *World Report on Violence and Health*. Geneva (Switzerland): World Health Organization, 213–239

⁵⁵ E. Miller et al. (2010), *Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 81 *Contraception* 316

⁵⁶ A. M. Moore et al.,(2010) *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 *Soc. Science & Med.* 1737, 1738 ; See also, *Reproductive and Sexual Coercion*, Committee Opinion 554, American College of Obstetricians and Gynecologists. *Obstet Gynecol* 121: 411-415 (2013).

⁵⁷ J. McFarlane, (2007) *Pregnancy Following Partner Rape: What We Know and What We Need to Know*, 8 *Trauma, Violence, & Abuse* 127, 128.

autonomy, are increased household sizes, implicating additional considerations in a public charge determination.

To address how the statutory factors impact the totality of circumstances analysis, API-GBV ***urges instead that the final rule include guidance that adjudicators consider the impact of domestic violence, sexual assault, human trafficking and other gender-based violence on the statutory factors.*** In considering the totality of the circumstances, DHS should provide guidance to limiting consideration of factors which would unfairly penalize survivors for the violence they have experienced, or make it more difficult for them to escape abuse.

Since 1996, those five statutory factors had never been defined by the Immigration and Naturalization Service (INS) or DHS, until the previous administration tried to use the public charge rule to exclude working class applicants. The principal reason why these factors had never been defined in the regulations, Adjudicator's Field Manual, USCIS Policy Manual, agency policy memos, or administrative appellate decisions is due to the central function of the affidavit of support. When IIRIRA created of a new affidavit of support, INS acknowledged the role of the affidavit in in 1999 in imposing legally enforceable support obligation on the sponsor.⁵⁸ In addition, the State Department's implementation relied on the affidavit as sufficient, assuming that "the applicant and his/her spouse or dependents are in good health and appear to be employable,"⁵⁹ though consular officers should still consider other factors, such as a need for medical treatment or other financial obligations which the sponsor didn't appear capable of meeting.⁶⁰ These interpretations are consistent with the Attorney General's holding

⁵⁸ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (May 26, 1999).

⁵⁹ Department of State, "I-864 Affidavit of Support Update No. One – Public Charge Issues," UNCLAS STATE 228862 (Dec. 1997).

⁶⁰ Department of State, "I-864 Affidavit of Support: Update No. 12: § 212(a)(4) v. § 221(g)," 98-State-064917 (April 1998); Department of State, "I-864 Affidavit of Support: Update No. 14 – Commitment to Provide Assistance," UNCLAS STATE 102426 (June 1998).

in *Matter of Martinez-Lopez*, 10 I&N 409, 421–422 (AG, Jan. 6, 1964), which held that in order to make a finding of public charge inadmissibility “[s]pecific circumstances, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present. A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency.”

The combination of the PRWORA’s immigrant access restrictions, income sponsor deeming, obligations on the sponsor to support the applicant and requirements to reimburse benefits agencies for the sponsored immigrant’s receipt of benefits, meant that it would be virtually impossible that immigrant visa applicant to become a public charge, at least for the first five years after immigrating. Once granted lawful permanent residence, the individual would be disqualified from receiving the major federal benefits programs, including cash assistance for income maintenance purposes or long-term institutionalization.

B. Proposed 8 CFR §212.22(a)(3) Consideration of current and or past receipt of public benefits. API-GBV recommends past usage of public benefits *not* be considered in a public charge assessment. In particular, as noted in our comments regarding proposed 8 CFR §212.21(a), we recommend that benefits tied to the need to escape, recover from, or otherwise overcome the impacts of domestic violence, sexual assault, human trafficking, or other abuse or exploitation not be considered. As stated previously, for some survivors, without access to public benefits, escaping abuse can be all but impossible. Survivors’ ability to meet basic needs is central to their decision-making about whether or not they can leave abusive relationships. For

example, two-thirds (67%) of survivors surveyed said that they stayed longer than they had wanted or returned to abusive relationships because of financial concerns, such as not being able to pay bills, afford rent/mortgage, or feed their families.⁶¹ Programs that support basic economic security are of critical importance for domestic and sexual violence and human trafficking victims, and considering them in a public charge assessment serves to punish them for having been subjected to abuse, and potentially makes it harder for them to escape and overcome violence. A path to financial security, including access to public benefits at times, is thus a critical prerequisite to escaping and overcoming abuse.⁶²

To the extent that the rule contemplates consideration of public benefits receipt, API-GBV supports part of the proposed language noting that consideration of receipt will be done in the totality of the circumstances, but recommends that DHS limit consideration to *current receipt of federal cash assistance* for income maintenance. To the extent that an individual is currently receiving benefits, the applicant's receipt should be weighed against other factors, including eligibility restrictions on further receipt upon being granted LPR status. In addition to limiting the inquiry to focus on current receipt of relevant benefit programs, DHS should make clear that any past benefits used by an applicant's family members or sponsors would not be considered in the applicant's public charge test. Such limitation would help prevent speculation by officers into irrelevant facts and improper discrimination against those who received or are receiving necessary services for which they are eligible.

Receipt—past or present—of public benefits is not one of the statutory factors that adjudicators must consider when determining the likelihood of becoming a public charge. Any

⁶¹ National Resource Center on Domestic Violence, *We Would Have Had to Stay: Survivor' Economic Security and Access to Public Benefits Programs* (2018), Available at: https://vawnet.org/sites/default/files/assets/files/2018-11/NRC DV_PublicBenefits-WeWouldHaveHadToStay-Nov2018.pdf

⁶² See CDC, *Supra*, Note 39.

consideration of past receipt of benefits sends a chilling message to the community, much like the fear exacerbated by the 2019 Final Rule that resulted in a dramatic decline in applications for government services. This chilling effect not only harms immigrants and their families, but puts public health at risk. In addition, focusing on the present use of benefits helps ensure that people in a temporary crisis or vulnerable situation can secure stability and safety for their families.

When their situation has improved, the use of TANF or SSI during a past crisis should not count against them in assessing their likelihood of becoming a public charge in the future.

C. We appreciate the inclusion of language in proposed **8 CFR §212.22(a)(4)**, explaining that finding that an applicant has a disability, alone is insufficient for a finding of public charge, and reminding adjudicators to avoid violating section 504 of the Rehabilitation Act. A large percentage of adults, and in particular, survivors of domestic and sexual violence, have a disability or chronic health condition. Any consideration of these characteristics in a negative light risks disqualifying applicants based on their disability. USCIS adjudicators are not trained in measuring the severity and impact of such health factors on the applicant's future earning potential. Applicants whose health conditions are recorded as a Class B certification by the civil surgeon performing the medical screening should be able to overcome any public charge concerns with presentation of a legally sufficient affidavit of support. Health factors that do not give rise to such a certification should be disregarded.

D. Proposed **8 CFR §212.22(b)**- In considering the statutory factors, API-GBV supports the language in proposed 8 CFR 212.22(b) specifically stating that the factors at 8 USC §1182(a)(4)(B) will be considered *in totality*, including the affidavit of support. DHS should propose that adjudicators look at all the factors, combined, to determine whether they would make an individual likely to become a public charge. The rule should further specify that none of

the statutory factors, by itself, is to be dispositive. In order to implement this, DHS should not change the initial evidence that adjustment of status applicants currently must provide with the Form I-485. We also recommend that there not be additional questions related to the five statutory factors added to the I-485 form. Information about the applicant's age, employment history, past receipt of public benefits, and nuclear family size is already captured on the I-485. Health-related factors—if they exist—will appear on the results of the medical examination, Form I-693, which is required from every applicant. With respect to public benefits, we strongly recommend that the I-485, at Part 8, Questions #61 and #62, inquire only about the specific public benefits (i.e., federal cash assistance for income maintenance), that are relevant to a public charge determination. If the adjudicating officer believes that there are significant public charge factors present that are not remedied with the submitted affidavit of support, or with an additional one from a joint sponsor, the officer can issue a Request for Evidence.

In addition, as previously mentioned, the final rule should further clarify that *any* of the five factors and totality of circumstances test can be used to demonstrate that an applicant would *not* be excludable as a public charge and that they should not be intended to be a list of negative and positive factors to be weighed in every case. For example, if “financial status” appears to be a negative factor because an immigrant survivor has no income or assets as a result of their abuser's isolation and financial abuse, the fact that the individual has the support of domestic violence victim services program, and has the assistance of an attorney to obtain an equitable distribution of property and alimony or maintenance should be weighed. In this circumstance, on balance, they do not have a "more than substantial likelihood of being primarily and permanently dependent on the federal government for survival."

API-GBV recommends that *the rule provide opportunities for individuals to address or overcome any concerns about the statutory factors*. First, DHS should look to the totality of circumstances to determine whether the applicant can demonstrate ways to *overcome* the concerns. This should include a properly filed affidavit of support being sufficient to help overcome or outweigh any negative factors identified.

The proposed rule should also consider the supportive and protective effects of access to secure legal status for survivors, as recognized in VAWA. Research conducted among immigrant victims across the U.S. found that 65% of immigrant victims reported that their violent partner had used some form of a threat of deportation after arrival in the U.S. as a form of abuse.⁶³ The rule should recognize how adjustment of status or admission increase their ability to escape the violence or overcome the trauma they've suffered as well as can provide access to employment and supportive networks. For example, family members serve as one of the main sources of support for survivors, and the presence of a strong support system can be vital to a survivor's ability to disclose, escape, and heal from the trauma of domestic violence, sexual assault, and other gender-based abuses, as well as help alleviate housing, food, and childcare costs, transportation, and other needs. Survivors stress that having family in their lives is essential to their recovery, providing survivors with the affirmation, encouragement, stability, and resources they need to grow and move forward.⁶⁴

E. API-GBV recommends that DHS retain the proposed language in proposed **8 CFR §212.22(c)**, requiring that every denial decision to be in writing, and reflect consideration of each

⁶³ E. Erez & N. Ammar,(2003) *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study*. National Network on Behalf of Battered Immigrant Women, National Institute of Justice Report grant # 98-WT-VX-0030

⁶⁴ Anderson, K.M., Renner, L.M., Danis, F.S. (2012). Recovery: Resilience and Growth in the Aftermath of Domestic Violence. *Violence Against Women*, 18(11), 1279-1299. DOI: 10.1177/1077801212470543.

of the five statutory factors, as well as the affidavit of support, and articulate a reason for the determination, to reduce the likelihood of improper denials, and errors in applying the regulatory standard.

F. We support the policy in proposed **8 CFR § 212.22(d)** and **8 CFR § 212.22(e)** explaining that receipt of benefits while in exempt immigration category, or receipt of benefits available to refugees, do not count in a public charge assessment, and have three recommended additional changes. API-GBV recommends that proposed 8 CFR § 212.22(d) should also include immigrants granted withholding of removal/deportation among those for whom benefits received while in such status may not be considered in a public charge assessment. Because 8 CFR § 212.22(d) by its terms applies only to the categories of immigrants listed in the exemptions provision, proposed 8 CFR §212.23(a), and because withholding of removal/deportation is neither listed as a category nor listed explicitly in §212.23(a)(29), the exemption catch-all, we recommend that the final rule be amended to expressly include such immigrants. We recommend that **8 CFR §212.23(a)(29) should also be amended** to include a clause at the end of the sentence as follows: “such as individuals granted withholding of removal under 8 U.S.C. §1231(b)(3).” Alternatively, DHS should add a final clause at the end of **8 CFR §212.22(d)** such as: “or was present in the United States pursuant to a grant of withholding of removal under 8 USC §1231(b)(3).” This provision should be included as those who are granted withholding and who are “qualified” immigrants for federal and state benefits eligibility purposes⁶⁵ should not be denied adjustment because they received those benefits in a status that is identical in all meaningful respects to that of refugees, asylees, and other categories of immigrants treated like refugees, because of similar conditions such as violence or an urgent need for humanitarian

⁶⁵ 8 U.S.C. § 1641.

protection.⁶⁶ Withholding status, which *must* be provided to those whose “life or freedom would be threatened” on account of one of the five grounds that also apply to asylum and refugee status, embodies a core U.S. and international value of protecting victims of persecution.⁶⁷ Nothing in the INA authorizes the denial of such status because the individual is likely to become a public charge; rather, the statute permits denial only for specified narrow exceptions to permit signatory U.S. Refugee Convention countries to deny humanitarian relief without betraying its international obligations.⁶⁸

In addition, adding withholding beneficiaries to this provision is consistent with the underlying justifications provided for the listed exempt groups meriting such protection. As noted in the preamble to the proposed rule, “[i]n general, the aforementioned classes of noncitizens are vulnerable populations of immigrants and nonimmigrants. Some have been persecuted or victimized and others have little to no private support network in the United States. These individuals tend to require government protection and support for a period of time.”⁶⁹

This reasoning applies to withholding beneficiaries who are also categorically victims of persecution, whom Congress similarly has recognized as needing governmental support by designating them “qualified” for benefits purposes. Torture victims whose physical injuries impede the ability to work for a period of time and obtain the disability benefits Congress authorized them to receive should not be penalized for using those benefits when they later seek a family-based adjustment of status merely because they were granted withholding rather than asylum, for example. Extending the same protections accorded to similarly situated individuals

⁶⁶ See *INS v. Stevic*, 467 U.S. 407 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁶⁷ See 8 U.S.C. § 1231(b)(3).

⁶⁸ These reasons include, for example, having persecuted others, committed particularly serious crimes, etc. 8 U.S.C. § 1231(b)(3).

⁶⁹ 87 Fed Reg. at 10626.

to withholding beneficiaries the under 8 CFR §212.22(d) provides uniform treatment among vulnerable groups and also reduces the chilling effect that may result from confusion when immigrants associate asylum and withholding, given that DHS and EOIR use a single form to apply for both statuses.⁷⁰

In addition, if DHS opts to retain consideration of the receipt of state or locally funded cash benefits, the rule should provide protection for the receipt of such benefits by clarifying that 8 CFR §212.22(d) applies to categories of lawfully present immigrants to whom public charge inadmissibility grounds are inapplicable. This protection should apply not only to those listed expressly in §212.23(a)(1)-(28) but to all those who should be considered included within the exemption catch-all, §212.23(a)(29) or who are otherwise protected under §212.22(d). In addition to withholding discussed above, the statuses to be clarified for these purposes should include asylum, U visa and SIJ applicants, individuals granted parole, Deferred Enforced Departure (DED), DACA and other forms of deferred action, and suspension of deportation/cancellation of removal, as well as applicants for these and the listed categories.

Including language specifying that those who qualify for limited state and local cash benefit programs from a public charge assessment that should not apply to them will help prevent the chilling effect on immigrants who need such programs to avoid poverty while supporting state efforts to reduce poverty, including in communities of color.⁷¹ Various state and local cash

⁷⁰ U.S. Citizenship and Immigr. Serv., Instructions for Application for Asylum and Withholding of Removal (Form I-586). OMB No. 1615-0067. Expires July 31, 2022. Available at: <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>

⁷¹ See, A.Sherman and T. Mitchell, (2017) *Economic Security Programs Help Low-Income Children Succeed Over Long Term, Many Studies Find*, Center on Budget and Policy Priorities, available at: <https://www.cbpp.org/research/poverty-and-inequality/economic-security-programs-help-low-income-children-succeed-over>. See also, T. Draut, C. Ruetschlin, & A.Traub, (2015) *The Racial Wealth Gap-Why Policy Matters*, Inst. for Assets & Soc. Pol’y - Brandeis University, available at: https://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf; D. Trisi and M. Saenz, (2021) *Economic Security Programs Reduce Overall Poverty, Racial and Ethnic Inequities*, Center on Budget and Policy Priorities, available at: <https://www.cbpp.org/research/poverty-and-inequality/economic-security-programs-reduce-overall-poverty-racial-and-ethnic>

benefit programs have eligibility criteria that are broader than the federal “qualified” definition and include the statuses we recommend should be clarified.⁷² Providing protection against adverse consideration of such benefits for as many applicable categories of immigrants as possible within the bounds of the law would ameliorate the chilling effect that undermines the goals of such programs. This approach would simplify public charge policy, so that immigrants, advocates and adjudicators are not relegated to making determinations about the same statuses over and over again in individual cases.

Among the statuses that are not addressed clearly in the rule are asylum applicants as well as applicants for other humanitarian statuses.⁷³ Neither the INA nor the implementing asylum regulations permit asylum denial on the basis of public charge inadmissibility.⁷⁴ USCIS and legacy INS pronouncements recognize that this ground does not apply to those seeking asylum,⁷⁵ and the rule should expressly recognize asylum-seekers as deserving of §212.22(d)’s protection.

Parolees should be accorded the protection of 8 CFR §212.22(d). The INA authorizes parole based on “humanitarian reasons or significant public benefit” to “any” noncitizen,⁷⁶ and

⁷² See, for example, 106 C.M.R. § 703.440, a Massachusetts state program that incorporates the judicially crafted “permanently residing in the U.S. under color of law” standard from cases like *Holley v Levine*, 553 F.2d 845 (2d Cir. 1977) and *Cruz v. Comm’r of Pub. Welfare*, 395 Mass. 107, 115, 478 N.E.2d 1262 (1985) and that specifically recognizes deferred action grantees and applicants for asylum or other statuses, among others, as eligible; see also Washington state’s EAZ manual, [Citizenship and Alien Status for State Cash Programs | DSHS \(wa.gov\)](#) and Administrative Code, [WAC 388-424-0015](#) (available to non-qualified immigrants who meet state residence requirements, as well as survivors of trafficking or serious crimes; other non-immigrants and undocumented are ineligible) and Maine’s [GA Rule 22A Guidance.pdf \(maine.gov\)](#) (clarifying that lawfully present individuals, including DACA recipients, and asylum applicants, may receive General Assistance.)

⁷³ Proposed category 8 CFR §212.23(a)(2) states that the public charge ground does not apply to asylees “at the time of the grant” and “at the time of adjustment of status.” While it is clear that benefits received by a person *granted* asylum do not count when received in that status, as 8 CFR §212.22(d) attaches to benefits received while present “in an exempt status” under 212.23(a), the receipt of benefits as an asylum applicant is not addressed clearly.

⁷⁴ See 8 U.S.C. §1158 et.seq. and subsection (b)(2) thereof (enumerating other inadmissibility grounds that *do* apply to asylum applicants) and 8 C.F.R. §208.13.

⁷⁵ See, eg., Letter from Ur M. Jaddou, Director, U.S. Citizenship and Immigr. Serv., to Interagency Partners (Nov. 16, 2021), https://www.uscis.gov/sites/default/files/document/legal-docs/USCIS_Public_Charge_Interagency_Letter_11.16.21.pdf

⁷⁶ 8 U.S.C. §1182(d)(5). The standard changed slightly in 1996, from “emergent reasons or for reasons deemed strictly in the public interest” to “urgent humanitarian reasons or significant public benefit.” Immigration Reform and Control Act of 1996, P. L. 104-208, Div. C, sec. 602(a).

eligibility is not restricted to those who satisfy admissibility requirements.⁷⁷ Thus, a noncitizen who is in fact a public charge within the meaning of 8 USC §1182(a)(4) may be paroled; the grant of parole effectively overrides potential inadmissibility issues.⁷⁸ In addition, other administrative statuses, such as Deferred Enforced Departure, Deferred Action for Childhood Arrivals (DACA), and deferred action, which are similarly provided without regard to public charge admissibility grounds,⁷⁹ should also be covered under 8 CFR §212.22(d). Availability of this protection also should be clarified for those granted cancellation of removal/suspension of deportation, statutory forms of relief that are available irrespective of public charge grounds.⁸⁰ Although very few individuals who receive a relevant cash benefit while in one of these statuses and later seek adjustment of status,⁸¹ clarifying public charge applicability via this rule can help codify principles that inform further policy development or adjudication by EOIR, which may rely on the USCIS rule as persuasive authority.

To implement 8 CFR §212.22(d), DHS should provide guidance in the preamble or USCIS Policy Manual to ***clarify that the circumstances that allowed a protected individuals to receive***

⁷⁷ As the preamble recognizes, parole is not an admission. Footnote 55, 87 Fed. Reg. at 10581. See also, A. Bruno, Cong. Res. Serv., R46570, Immigration Parole at 6 (Oct. 15, 2020), available at <https://crsreports.congress.gov/R46570> (comparing parole to TPS and DACA and discussing requirements for parole.)

⁷⁸ Parole was originally created administratively to permit certain individuals who could not be admitted, to come into the United States. Congress simply codified the administrative practice in the INA. *Leng May Ma v. Barber*, 357 U.S. 1072 (1958).

⁷⁹ U.S. Immigr. and Naturalization Servs., *Adjudicators Field Manual*, ch. 38.2(a); *Reinstatement of Deferred Enforced Departure and Continuation of Employment Authorization and Automatic Extension of Existing Employment Authorization Documents for Eligible Liberians*, 86 Fed. Reg. 9531 (Feb. 16, 2021)(reinstating DED for Liberians); *Memorandum for the Secretary of State [and] the Secretary of Homeland Security, Deferred Enforced Departure for Certain Hong Kong Residents*, 86 Fed. Reg. 43587 (Aug. 10, 2021)(establishing DED for Hong Kong in light of human rights abuses); See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (describing deferred action); and Memorandum from Janet Napolitano, Secretary, DHS, to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection (CBP), et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁸⁰ 8 U.S.C. § 1229b (and former suspension of deportation provision).

⁸¹ An LPR, including one who obtained status through cancellation of removal/suspension of deportation could become removable later and seek to adjust status anew with any applicable waivers. See, for example, *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

benefits covered by 8 CFR §212.22(d) may not be taken into negative consideration in a public charge determination. The language of 8 CFR §212.22(d) is unambiguous in its directive that the benefits “will not be considered;” what is less clear is whether adjudicators may consider the underlying reasons for which the immigrant received the benefit, as when a TPS beneficiary or other protected immigrant receives a benefit because of a trauma-induced disability that temporarily prevents them from working, or is an abused child too young to work, for example. Agency guidance is warranted to ensure that these provisions will be meaningfully implemented.

In addition, we support the provisions in proposed **8 CFR §212.22(e)**, which protects individuals from public charge consequences for benefits received at any time in the past if the immigrant is eligible for resettlement assistance, entitlement programs, and other benefits typically reserved for refugees, without regard to whether the immigrant has been granted refugee/asylum status. The protection appropriately applies not only to survivors of trafficking and Afghan Special Immigrant Visa holders or evacuees, but to other humanitarian immigrants who are eligible for these benefits. This provision will provide these vulnerable populations with safer access to the benefits they may need to recover from the conditions that qualified them for humanitarian protection.

4. Proposed 8 CFR §212.23 Exemptions and waivers

While we support this provision with respect to the listing of 29 categories to whom the public charge ground of inadmissibility does not apply, including those listed in the rescinded 2019 DHS public charge rule, and the additional categories, we recommend two important improvements. Providing a comprehensive list can simplify communications with protected immigrants about public charge issues, reduce an unintended “chilling effect” against their use of

benefits, and make statutory and regulatory public charge provisions more meaningful in practice.

However, API-GBV strongly recommends that *DHS simplify the application of the included exemptions and strengthen the scope of the final regulation to cover immigrant survivors*, such as VAWA self-petitioners, qualified battered immigrants, and individuals who have applied for or obtained U or T status without regard to their path for adjustment of status. The final rule should remove proposed *8 CFR §212.23(b)* and corresponding language in *8 CFR §212.23(a)(18), (19), (20), and (21)* that cross-references *§212.23(b)*. In addition, the final regulation should add language clarifying that, consistent with the statute, survivors under *§212.23(a)(18)-(21)* inclusive are exempt from a public charge determination, regardless of their pathway to adjustment of status. We also recommend removing the extra timing requirements in categories (18)(ii) and (19)(ii).

Victims who fall in the VAWA self-petitioner and “qualified” immigrant categories - exemptions (20) and (21) - should receive the benefit of their statutory exemption regardless of the pathway to adjustment taken, as is the case under the exemptions for Ts and Us at (18) and (19). In the latter case, the rule correctly recognizes that the statutory language of the T and U exemptions, at least, is rooted in the condition of being an applicant for or grantee of such status and thus does not depend on the particular pathway to permanent status. The same is true for VAWA self-petitioners and “qualified” immigrants under 8 USC §1641(c). The INA unambiguously states that the public charge inadmissibility ground “shall not” be applied to an immigrant who “is” a VAWA self-petitioner or one who “is” a qualified immigrant, as further delineated. Thus, unlike statutory provisions that exempt an immigrant at a particular juncture,

such as certain adjustment of status provisions,⁸² in these provisions, Congress signaled its intent to protect the victims from public charge consequences by virtue of the fact that they were victims, not because of the manner by which they ultimately obtain their permanent resident status. The preamble to the rescinded 2019 rule recognized this.⁸³ The language of this rule should accordingly be amended to incorporate the “including but not limited to adjustment of status under 245(a)” clause that currently appears in exemptions (18) and (19) for Ts and Us. Correcting this omission in the final rule will ensure equal treatment for victims of comparable harms and remove unnecessary barriers to their securing permanent status.

In addition, the extra requirements the rule imposed on T and U nonimmigrants to be in valid T or U status at the time of application and at the time of adjudication, in order to adjust under INA § 245(a) or to seek another immigration benefit for which admissibility is required, should also be omitted from the final rule. This limitation is unnecessary and can potentially undermine the effectiveness of the exemptions at protecting these immigrants, who often experience barriers in preserving their status, including trauma, and lack of access to counsel.

In addition, we recommend that 8 CFR §212.23(a)(29), include statuses protected against application of public charge criteria for reasons other than an express INA §212(a)(4) exemption, by adding language that enumerates or describes them, or adding language to the preamble that supplies such clarification and can be incorporated into a policy manual or other guidance. As previously mentioned in response to proposed 8 CFR §212.22(d) above, the rule does not explicitly address immigrant categories to whom the public charge inadmissibility grounds do

⁸² National Defense Authorization Act of 2020, Pub. L. 116–92, div. F, title LXXVI, §7611(b)(2), 133 Stat. 2309 (December 20, 2019); 8 U.S.C. 1255.

⁸³ See 84 Fed. Reg. 41341, note 238 (noting that all four groups – Ts, Us, VAWAs, and “qualified” immigrants – were protected against public charge consequences regardless of adjustment pathway and did not need to file the public charge form, i.e., the former I-944.)

not apply because they are not subject to inadmissibility criteria statutorily, by operation of law, or as a matter of administrative practice governing the creation of such statuses. As further explained, immigrants with such statuses may qualify for certain cash assistance programs yet be deprived of the protection of 8 CFR § 212.22(d) without further clarification. These statuses include withholding of deportation/removal, parole, and suspension of deportation/cancellation of removal under the INA as well as several administrative statuses, Deferred Enforced Departure (DED), and DACA and other forms of deferred action, in addition to applicants⁸⁴ for statuses listed in exemptions (1)-(28). As previously discussed, the text of the INA, its statutory framework, and agency policies governing these statuses insulate them from public charge consequences in variant ways, and the catch-all should address this in conformity with all applicable law. Such clarifications will reduce duplicative case-by-case USCIS adjudications about the nature of these statuses and will help ensure that immigrants are not afraid to obtain any essential benefits for which they qualify, particularly during this COVID recovery stage.

Furthermore, we strongly recommend that the rule further support the ameliorative purposes of VAWA, the TVPA and other victim protections and *clearly provide waivers for individuals* who would *otherwise qualify* for protections provided for victims of domestic violence, sexual assault, and human trafficking afforded under VAWA, the TVPA, and other humanitarian immigration provisions, and are seeking admission or adjustment of status under another provision in the INA, such as through family or employment sponsorship, the diversity visa program, or other programs. Doing so not only provides increased protection for survivors, but also reduces the burden on the immigration system, by decreasing additional processing of immigration applications, and reducing pressure on immigration court dockets.

⁸⁴ Clarifying the applicability of the catch-all exemption to applicants for status is important because not all the exemptions in this proposed rule clearly encompass them.

5. Outreach and coordination with federal agencies, states and localities

We appreciate DHS' awareness of the importance of a clear and fair public charge rule, its commitment to ensuring that the rule does not cause confusion to immigrants and their families, and the steps DHS has already taken, in partnership with other federal agencies, to communicate that the 2019 public charge rule is no longer in effect.⁸⁵ However, much work remains to communicate these important changes in accessible ways, and strengthen immigrants' confidence so that they are better able to access critical benefits for which they are eligible, and secure lawful permanent residence, especially once the proposed rule is finalized.

As DHS acknowledges, the 2019 rule created fear and confusion that deterred eligible immigrants from receiving health, nutrition, and housing assistance programs. As previously noted, API-GBV heard from numerous victim service providers, the 2019 public charge rule had extensive harmful impacts, including on eligible immigrant victims who chose to forego public benefits, including cash, medical, food, housing assistance, childcare, and other services for themselves and their children. Many of these immigrant survivors were not covered under the scope of the 2019 rule, and many of the programs from which survivors withdrew or declined, were not implicated by the rule. This resulted in situations where survivors returned to abusive relationships, became or remained homeless, went without healthcare or medication, and experienced needless hardship and ongoing trauma. In a survey of adults with family or friends

⁸⁵ *Public Charge Resources*, U.S. Citizenship and Immigration Services, Department of Homeland Security <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/public-charge-resources> (last updated Nov. 17, 2021). U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Public Charge Interagency Letter* (Nov. 16, 2021), https://www.uscis.gov/sites/default/files/document/legal-docs/USCIS_Public_Charge_Interagency_Letter_11.16.21.pdf. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *Public Charge and Safeguarding Beneficiary Information* (July 22, 2021), <https://www.medicare.gov/federal-policy-guidance/downloads/cib072221.pdf>. U.S. Department of Agriculture, Food and Nutrition Service, *Joint Letter on Public Charge 2022* (Jan. 5, 2022), <https://www.fns.usda.gov/snap/joint-letter-public-charge>.

who are noncitizens done in September 2021, 50 percent of respondents said that knowledge about changes to public charge would make them more likely to use safety net programs when necessary, highlighting the importance of continued outreach to immigrant communities about changes to the policy.⁸⁶

In response to DHS' request for public comments regarding: (a) ways to shape public communications around the final rule to mitigate chilling effects among U.S. citizens and among the great majority of noncitizens who are either ineligible for the public benefits covered by this rule prior to admission or adjustment of status or are exempt from a public charge determination under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4); (b) effective ways to communicate to the public that, with respect to Federal public benefits covered by this rule, DHS's consideration of past or current receipt of SSI, TANF, or Medicaid (only for long-term institutionalization at government expense) would be in the totality of the noncitizen's circumstances, and that such receipt may result in a determination that an applicant is likely at any time to become a public charge, but would not necessarily result in such a determination in all cases; (c) effective ways to communicate to the public that, with respect to Federal public benefits covered by this rule, DHS would only consider past or current receipt of SSI, TANF for cash assistance for income maintenance, or Medicaid (only for long-term institutionalization at government expense) by listed categories of noncitizens; (d) how to communicate to parents of U.S. citizen children that the receipt of benefits by such children would not be considered as part of a public charge inadmissibility determination for the parents; and (e) ways to shape public communications about the final rule that mitigate chilling effects,⁸⁷ we offer the following recommendations:

⁸⁶ No Kid Hungry, *Public Charge was Reversed, But Not Enough Immigrant Families Know*, Dec. 2021, https://www.nokidhungry.org/sites/default/files/2021-12/NKH_Public%20Charge_Micro-Report_English_0.pdf.

⁸⁷ 87 Fed. Reg. 10592, 10615.

A. Multiple agencies should issue letters that distinguish federal cash assistance programs for income maintenance from other “cash-related” programs that their agency oversees.⁸⁸ Reducing the pervasive chilling effect of the 2019 public charge rule will take a deliberate effort by DHS and other federal agencies. Message testing conducted with focus groups with immigrant families in California indicated that the “double validation” of seeing benefits on a “safe list” and not on a “risky” list was reassuring to immigrant families. These letters should be on agency letterhead and posted on DHS’s public charge resource page and should be updated annually if new programs are developed. It would also be helpful for DHS and HHS to provide individual letters to each state with its specific TANF program name or a template that states could modify with their specific TANF program names. These agencies would include the Department of Health and Human Services (regarding TANF, human services programs including child welfare and domestic violence services), the Department of Agriculture (regarding the federal nutrition programs), the Social Security Administration (regarding Social Security and Supplemental Security Income), the Department of Housing and Urban Development (regarding federal housing programs, including those that had been included in 2019 final rule), the Department of Justice (victim services, Crime Victims’ Compensation), the Department of Education (regarding student loans and grants, adult and higher education program, and other adult educational benefits), the Department of Labor (regarding unemployment, workforce development, and worker’s compensation benefits), the Federal Emergency Management Assistance (regarding disaster relief benefits), and the Department of

⁸⁸ The California Health Care Foundation, Message Testing to Combat Public Charge’s Chilling Effect in California, March 2020, available at: <https://www.chcf.org/wp-content/uploads/2020/03/MessageTestingCombatPublicCharge.pdf>

Treasury (regarding tax credits such as the Earned Income Tax Credit, Child Tax Credit, and all COVID-19 relief payments).

B. DHS, in partnership with benefits granting agencies, should create materials clearly communicating the new public charge rule in multiple languages. DHS should update its current Frequently Asked Questions (FAQ) explaining the new public charge rule, particularly where the new rule differs from the 1999 Field Guidance, which is current policy. Additionally, DHS should work with the above-mentioned agencies, i.e., HHS, USDA, HUD, DOL, ED, DOJ, Treasury, SBA, and other relevant agencies to create public charge resource pages on the agency websites, similar to the public charge webpage that DHS currently has, explaining the new rule and its limited applicability to benefits programs. These websites must be available in multiple languages and have clear links to translated versions in the upper righthand corner of the webpage. Additionally, DHS and benefits-granting agencies should create co-branded materials to state benefits agencies, victim services funding administrators, immigrant-serving organizations, and community organizations.⁸⁹ These materials should be shared broadly with victim services agencies and legal services organizations, health centers, and other community-based organizations providing services to immigrants and their families. Additionally, DHS and partner agencies should provide training materials and support to state agencies, call center staff, state outreach partners, and immigrant-serving organizations so that their personnel have updated and accurate information about the new public charge rule. DHS and partner agencies should share responses to questions received from the field and use those to further refine training and outreach materials.

⁸⁹ See Joint Letter on Public Charge 2022, *supra* note 87

C. DHS and benefits granting agencies should create and disseminate information in multiple languages about the contours of the public charge rule ready for states and service providers to use. States and community groups who work directly with families must be given outreach materials suited to their populations and their ways of interacting with their clients. These materials should use language that is accessible to immigrant communities and should be available in multiple languages for communities with limited English proficiency. These materials must communicate key messages about the public charge rule and be available in multiple forms, such as:

- The Biden Administration has permanently ended the 2019 public charge policy, and there is a new public charge policy.
- Only the receipt of federal cash assistance, such as Supplemental Security Income or Temporary Assistance for Needy Families, may be considered in a public charge test.
- Even if you receive SSI or TANF, that does not automatically mean that the government will decide you are likely to become a public charge. The government has to look at the circumstances of your life in making that decision.
- Many categories of immigrant victims are exempt from public charge, including those with VAWA, T, and U visa cases, humanitarian immigrants like asylees, refugees, and special immigrant juveniles, lawful permanent residents who are renewing their green card or applying for citizenship, and many others.
- Victim services, restitution, domestic violence shelter, transitional housing, Sexual Assault Nurse Exams, and other victim supports won't affect your immigration status or any immigration status you may apply for in the future.
- Getting COVID testing, vaccination, and care, help with health care, food, education, job training, or housing also won't affect your immigration status or applications.
- While this rule is in place, you can get health care, food, education, job training, and housing assistance without immigration consequences
- Benefits received by your children or other members of your household won't affect your own immigration status or applications.
- If you have an immigrant family member, let them know they can seek health care, food, or housing assistance without fear of immigration consequences.⁹⁰

⁹⁰ Research shows that 47% of U.S.-born family members in mixed status families believe that applying for assistance programs could cause immigration problems. Thus, U.S. citizen family members in mixed-status families are important targets to let their family members know they can safely access public benefits. *Public Charge was Reversed, But Not Enough Immigrant Families Know*, *supra* note 87.

DHS can provide, which states and community groups could adjust to reach their specific immigrant communities:

- Sample language for fact sheets;
- Training materials;
- Social media posts and graphics;
- SMS or other direct message application language;
- Mailings;
- Flyers and posters, with the DHS and benefits granting agencies' "seal" on them
- Sample language for states to include on their applications forms and public-facing websites (for example, DHS and USDA provided a sample chart for states to include on its forms and agency websites clarifying that applying or receiving SNAP is not considered in a public charge determination).⁹¹

DHS should launch a public relations campaign through social media and ethnic media channels. Immigrant communities go to trusted community members and media channels to get their information. Research shows that TV news, social media, and friends and family are the sources of information immigrant communities trust the most.⁹² In order to communicate the new public charge rule effectively, DHS must meet immigrant communities where they are through a campaign that uses all available communications channels, including social media and ethnic media.

Additionally, official information coming from the federal government would provide greater assurances to community members about the ramifications of accessing benefits programs.⁹³ High-level administration officials from DHS and benefits granting agencies should be visible messengers in media and posts to communicate the new rule, including in various languages where possible, and federal agencies should encourage states to undertake similar media campaigns.

⁹¹ See *Joint Letter on Public Charge 2022*, *supra* note 87.

⁹² *Public Charge was Reversed, But Not Enough Immigrant Families Know*, *supra* note 88.

⁹³ *Id.*

D. DHS should provide funding to trusted community organizations that can provide outreach and education to immigrants and their families. Culturally specific, community-based organizations are trusted sources of information for immigrant families.⁹⁴ DHS should partner with relevant federal agencies to provide funding for these organizations so that trusted community leaders can share information about the new public charge rule directly to families and in public settings like in the media and on a one-on-one basis.

When the last Administration publicized the enjoined 2019 public charge rule, a substantial burden was placed on victim advocacy organizations in learning about and disseminating information about the rule, as well as changing how they did safety planning with victims. Victim advocates had to spend significant time and resources trying to familiarize themselves with not only the contours of the rule, but also the myriad of specific funding sources for the variety of supports to which they refer survivors, such as housing and medical programs. Many of these supportive programs available in communities are funded through multiple funding streams, such that victim advocates trying to ethically and accurately safety-plan with survivors needed to scrutinize whether accessing them would implicate the public charge rule. These were significant, administrative costs shouldered by victim advocacy and other human services programs that should be accounted for as agencies engage in public outreach.

HHS recently announced outreach grants available to a wide range of organizations, including state/local governments, tribal entities, safety net providers, nonprofits, schools, and organizations that use community health workers, community-based doula programs, and more may apply for up to \$1.5 million over three years to connect eligible people to Medicaid or CHIP

⁹⁴ *Id.*

under the grants.⁹⁵ DHS could provide similar grants for organizations to educate people about the final public charge policy.

E. HHS Letter and Request to Other Agencies

We commend DHS for obtaining on-the-record letters from the Department of Health and Human Services and the Department of Agriculture about the proposed rule, and its impact on health and human services programs such as Medicaid and TANF, and nutrition programs such as the Supplemental Nutrition Assistance Program (SNAP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).⁹⁶ We strongly encourage DHS to obtain and include in the record for final rulemaking similar letters from the Social Security Administration (regarding Social Security and SSI), the Department of Housing and Urban Development (regarding federal housing programs, including those that had been included in 2019 final rule), the Department of Education (regarding student loans, adult and higher education programs, and other educational benefits), the Department of Labor (regarding unemployment, workforce development, and worker's compensation benefits), the Federal Emergency Management Assistance (regarding disaster relief benefits), the Department of Treasury (regarding tax credits such as the Earned Income Tax Credit, Child Tax Credit, and all COVID-19 relief payments) and the Department of Justice (for certain programs serving victims of crime).

⁹⁵ Maggie Clark, Outreach for Pregnant People Included in Latest CMS Grant Funding Opportunity, Georgetown Center for Children and Families, February 22, 2022, available at: <https://ccf.georgetown.edu/2022/02/22/outreach-for-pregnant-people-included-in-latest-cms-grant-fund>

⁹⁶ 87 Fed. Reg. at 10610; *see* <https://www.regulations.gov/document/USCIS-2021-0013-0206> and <https://www.regulations.gov/document/USCIS-2021-0013-0199>.

F. The COVID-19 Pandemic Reinforces the Importance of a Narrow Interpretation of Public Charge

In addition, we appreciate the proposed rule’s discussion of how the COVID-19 pandemic reinforces the importance of a narrow interpretation of inadmissibility based on public charge.⁹⁷ Even prior to the COVID-19 pandemic, DHS received comments about the public health implications of the chilling effects from the 2019 Final Rule.⁹⁸ In this NPRM, DHS admits that the 2019 Final Rule did not directly address commenters’ concerns that a loss of trust in government healthcare services might hamper the government’s ability to respond to a novel disease outbreak.⁹⁹ In this NRPM, DHS notes that, despite publications of a USCIS Policy Manual and an alert box on the USCIS website seeking to clarify that testing, treatment, and vaccination related to COVID-19 would not be considered as part of public charge inadmissibility determination, there was no way for an individual to enroll in Medicaid for the sole purpose of COVID-19-related care, and there was nothing in the 2019 Final Rule specifically authorizing these exemptions.¹⁰⁰ There are strong public health and national interest rationales for ensuring that all individuals access COVID-19 testing, treatment, and vaccination – including coverage by Medicaid - without any chilling effects from fears about impact on one’s immigration status.

Moreover, we have learned through the COVID-19 pandemic about the connection between access to stable housing, and food, to maintaining one’s health and limiting one’s risk of exposure to COVID-19. For hundreds of thousands of Americans who have lost their jobs, closed their businesses, have been unable to pay their rent, or otherwise are facing financial

⁹⁷ 87 Fed. Reg. at 10593-10597

⁹⁸ 87 Fed. Reg. at 10596.

⁹⁹ 87 Fed. Reg. at 10596.

¹⁰⁰ 87 Fed. Reg. at 10596.

hardships, accessing public benefits such as SNAP or public housing have been vital to maintaining their own health and safety, as well as the health and safety of their families and communities. The prior USCIS publications under the 2019 Final Rule failed to address how the receipt of SNAP and public housing benefits related to COVID-19, i.e., loss of employment, income, or housing would be exempted from a public charge determination. On the one hand, USCIS stated: if one “is prevented from working or attending school and must rely on public benefits for the duration of the COVID-19 outbreak and recovery phase, [they] can provide an explanation and relevant supporting documentation. To the extent relevant and credible, USCIS will take all such evidence into consideration in the totality of circumstances.”¹⁰¹ In the NPRM, DHS now admits that the alert did not provide further detail about how USCIS would treat COVID-19-related mitigating circumstances in its public charge inadmissibility determinations or explain whether a general economic downturn might warrant similar special consideration.¹⁰²

Accordingly, there are strong public health and national interest rationales for ensuring that all individuals access needed public benefits such as SNAP and public housing without any chilling effects from fears about impact on one’s immigration status. Given the fact that the current declaration of a national public health emergency has been extended to at least April 16, 2022 (continuous extensions since the first declaration on January 31, 2000), the unpredictable and unprecedented nature of this current COVID-19 pandemic provides additional public health and national interest rationales for a narrow interpretation of inadmissibility based on public charge that excludes receipt of state and local cash supports, Medicaid, SNAP, and public housing benefits. These additional rationales are not limited to the specifics of the current

¹⁰¹ 87 Fed. Reg. at 10596-10597.

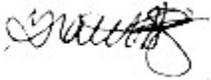
¹⁰² 87 Fed. Reg. at 10597

COVID-19 pandemic, but are applicable to future novel disease outbreaks as well as other local, regional, and national emergencies and disasters.

6. Conclusion

In summary, API-GBV urges USCIS to issue a public charge rule that takes into account the impacts of domestic violence, sexual assault, human trafficking, and other gender-based harms, incorporate provisions that support survivors in accessing protections they need to escape or recover from abuse, and decline to include provisions that punish survivors for the harm they have faced. Thank you for the opportunity to provide input, and please feel free to contact me at ghuang@api-gbv.org if you have any questions or concerns relating to these comments.

Respectfully submitted,
ASIAN PACIFIC INSTITUTE ON
GENDER-BASED VIOLENCE



GRACE HUANG
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