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**Comments of
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Submitted to
the Department of Homeland Security
Concerning its Proposed Rulemaking on Public Charge Inadmissibility
December 10, 2018**

U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, DC 20529-2140

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

INTRODUCTION

The Department of Homeland Security (DHS) proposes to redefine “public charge” for inadmissibility determinations. The statute (8 U.S.C. 1182(a)(4)) currently prohibits status to those “likely to become a public charge,” and the purpose of the rulemaking is to ensure that applicants subject to the rule will be self-sufficient during their time in the United States. While achieving this goal would benefit the United States, the proposal suffers from four main deficiencies that violate the purpose of the statute and undermine the benefits of the public charge rule:

- I. DHS’s definition of public charge rejects the historic meaning of the phrase by ignoring the extent to which applicants will be self-sufficient—labeling applicants public charges who even adjudicators find will be almost entirely self-sufficient in the United States.
 - DHS should keep the current “primarily dependent” standard, as it appropriately factors in both income and benefits use.
- II. DHS fails to define “likely” (i.e. the threshold probability of becoming a public charge)—thus hiding what DHS considers an acceptable wrongful denial rate, leading to arbitrarily variant outcomes, and causing denials where approvals should be issued and vice versa.
 - DHS should define “likely” as a probability of 75 percent or higher.

* The Cato Institute is a nonpartisan 501(c)(3) nonprofit think tank founded in 1977 and located in Washington D.C. It is dedicated to the principles of individual liberty, limited government, free markets, and peace.

III. DHS’s model of predicting the likelihood of becoming a public charge is nontransparent and inaccurate. This disables applicants from knowing in advance whether they are eligible and again triggers denials for applicants who should receive approvals and vice versa.

- DHS should use administrative or survey data to create a statistically valid factor model that predicts the probability of an immigrant becoming a public charge.

IV. DHS fails to estimate the most important effect of the rule—the number of applicants who will be deemed inadmissible on public charge grounds—underestimating both the costs and benefits of the rule significantly.

- DHS should estimate both the number of applicants whom the rule will deny or deter from applying and their fiscal net present value, using the National Academies of Sciences, Engineering, and Medicine’s 2016 report.

It is entirely feasible for DHS to make these improvements to the rule. DHS should amend the proposed rule to make these corrections and reissue it.

I. DHS’s definition of public charge rejects its historic meaning by ignoring the extent to which applicants will be self-sufficient.

The definition of a public charge under existing DHS guidance is “becoming primarily dependent on the government for subsistence, as demonstrated by either: Receipt of public cash assistance for income maintenance; or Institutionalization for long-term care at government expense.” DHS plans to redefine public charge to mean use of certain monetizable public benefits in excess of 15 percent of the poverty line or use of certain nonmonetizable public benefits for more than 12 months over a 36-month period (or, in combination with other monetizable benefits, 9 months).¹ DHS’s redefinition is deficient in four primary ways.

1. The historic meaning of public charge does not support DHS’s low threshold.

DHS can cite no legislative history nor any case law supporting its new low threshold for public charge determinations, and the meaning of the phrase in regular language does not support DHS’s definition either. The 15 percent of the poverty line standard amounts to \$1,821, or just \$5 per day, for a household of one.² This is a level that is so low that someone receiving such an amount could not reasonably be expected to live off these benefits alone, particularly if the \$5 per day are solely in noncash benefits. This proposed benefits level to qualify for a public charge benefits level departs from the historic meaning of the phrase. In 1882, Congress passed the original public charge statute in response to the Supreme Court’s decision in *Henderson v. Mayor of City of New York* (1875) that struck down state and local public charge statutes, which used residence in public almshouse as the definition of a public charge.³ People who lived in public almshouses were entirely supported by the government. DHS acknowledges that “public charges” in the original meaning of the phrase were only those who lived in “almshouses.”⁴

Consistent with this, courts subsequently read this phrase “to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future” (*Howe v. Savitsky* (1917); *Ex Parte Mitchell* (1919)). Occupants of almshouses were almost entirely provided for by the government. DHS cites *In re Keshishian* (1924), *Ex parte*

Kichmiriantz (1922), *Coykendall v. Skrmetta* (1927), and *Iorio v. Day* (1929) for the proposition that any support by the government would allow for a public charge determination.⁵ Yet none of these courts concluded this. Rather, they emphasized that because the courts determined that none of the plaintiffs in these cases had received *any* public support, the public charge inquiry need not even begin. They did not find that, had the plaintiffs received any support, they should have been deemed a public charge, which is what DHS implies.

A “charge on the public” is synonymous with “ward of the state,” someone for whom the government has primary responsibility—not someone who uses any public benefits at all. A \$5 per day standard simply does not accord with this clear understanding.

2. *DHS’s definition ignores the degree to which immigrants support themselves.*

From 1882 to 2018, the meaning of public charge has always had two components: the immigrant must receive a significant level of support *and* be unable or unwilling to support himself without government aid. Courts found that Congress sought “to exclude persons who were likely to become occupants of almshouses *for want of means with which to support themselves in the future*” (emphasis added) (*Howe v. United States* (1917); *Ex Parte Mitchell* (1919)).⁶ Thus, it was not enough that they receive benefits, but also that they had no means with which to support themselves. *United States v. Williams* (1910) construed it to include “not only those persons who through misfortune cannot be self-supporting, but also those who will not undertake honest pursuits, and who are likely to become periodically the inmates of prisons.”⁷ In other words, people who, in addition to being cared for by the government, are not engaged—voluntarily or otherwise—in profitable endeavors.

DHS’s current definition of public charge factors in both aspects of the historic meaning of public charge whereby the immigrant must receive a majority of his income in the form of public benefits. DHS responds only that “it is possible and likely probable that individuals below such threshold [i.e. 51 percent] will lack self-sufficiency and be dependent on the public for support.”⁸ But then its redefinition does not lower this threshold, but rather eliminates it entirely. Its \$5 per day standard is an absolute amount of benefits that entirely ignores the degree to which immigrants support themselves. This departs from nearly two centuries of understanding of what a public charge is.

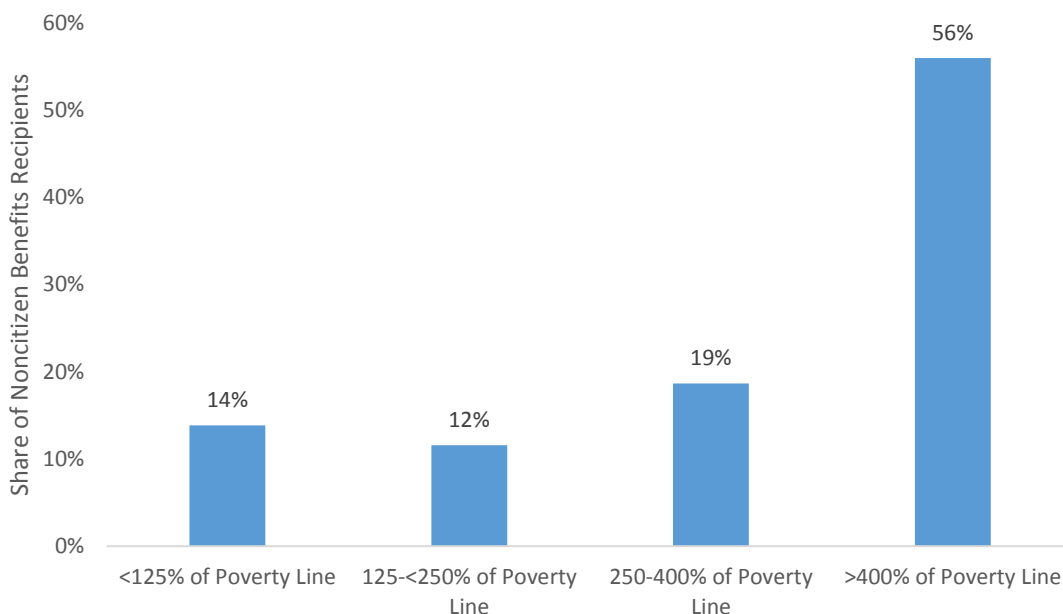
Consider that a single person with an income of 200 percent of the poverty line who received 15 percent of the poverty line in benefits would be 92.5 percent self-supporting. Someone with an income of 400 percent of the poverty line in benefits would be 96.3 percent self-supporting. Even someone with a wages 15 percent below the poverty level would be 85 percent self-supporting. DHS’s proposed low threshold has zero support in American legislative history or case law, and the plain meaning of public charge does not support it. Someone who is engaged in productive pursuits and is primarily supporting himself is not a public charge.

3. *DHS’s definition would exclude numerous people who are economic contributors.*

DHS’s proposed new definition of public charge is economically harmful because it would exclude numerous people who are largely self-sufficient and are significantly contributing to the

U.S. economy. Far from an uncommon situation, noncitizens who access public benefits generally have incomes well above the poverty line. Figure 1 illustrates this point, using the data from Survey of Income and Program Participation (SIPP) data cited in the DHS rule.⁹ A full majority—56 percent—of all noncitizen public benefits recipients had incomes of at least 400 percent of the poverty line (Figure 1). Three quarters had an income greater than 250 percent of the poverty line, and 86 percent had an income greater than 125 percent of the poverty line.

Figure 1: Noncitizen Public Benefit Recipients by Income Level, 2013



Source: U.S. Citizenship and Immigration Services analysis of Wave 1 of the 2014 Survey of Income and Program Participation (SIPP), “Inadmissibility on Public Charge Grounds,” 83 Fed. Reg. 196 (October 10, 2018)

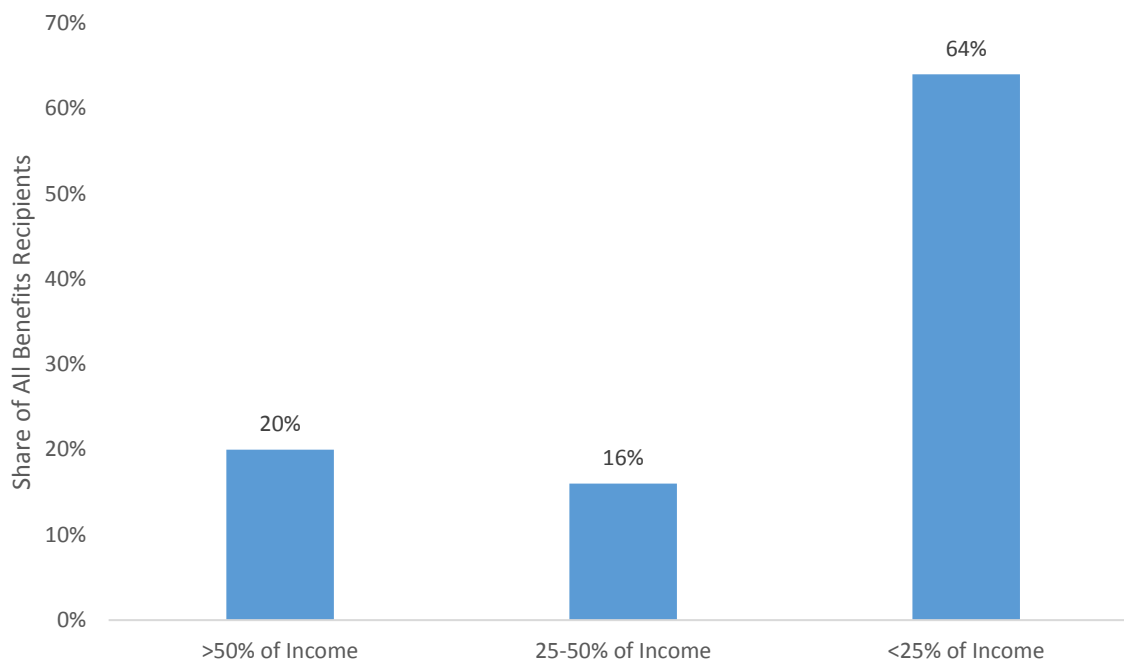
Note: Includes Medicaid, Supplemental Nutrition Assistance Program (i.e. Food Stamps), Housing vouchers, Rent subsidies, Supplemental Security Income, Temporary Assistance to Needy Families, and State General Assistance

The Department of Health and Human Services has found that in 2015, 80 percent of all users of the primary monetizable benefits programs—Supplemental Nutrition Assistance Program, Supplemental Security Income, or Temporary Assistance to Needy Families—received less than half of their income from the benefits (Figure 2).¹⁰ Nearly two thirds—64 percent—received less than 25 percent of their income from these programs. DHS notes that when the public charge statute was first implemented, “the wide array of limited-purpose public benefits now available did not yet exist.”¹¹ But it is exactly for this reason that DHS should define public charge in a way that accounts for the fact that most public benefit users are not “public charges” or even close to primarily dependent on the government.

DHS states that it will “heavily weight” in favor of the applicant an income of greater than 250 percent of the poverty line.¹² But this does not obviate the need to define public charge properly as the percentage of the immigrant’s income that is derived from public benefits. For one thing, this weight would not overcome the heavily weighted negative factor of having received public benefits in excess of \$5 per day.¹³ Moreover, this heavily weighted positive factor does nothing to clarify how someone who is 90 percent self-sufficient at an income of 200 percent of the poverty line should be treated if they are determined to “likely” use more than \$5 per day in

benefits. DHS cannot maintain that applicants who are almost entirely self-sufficient are public charges. These are people who are legally accessing public benefits but also contributing significantly to the economy.

Figure 2: Recipients of Monetizable Benefits by Share of Income from Benefits, 2015



Source: Department of Health and Human Services analysis of the Current Population Survey, Annual Social and Economic Supplements and microsimulation model TRIM3.

Note: Includes Supplemental Nutrition Assistance Program, Supplemental Security Income, or Temporary Assistance to Needy Families

4. DHS's nonmonetizable standard is flawed.

DHS's proposed rule creates a separate standard for so-called "nonmonetizable" benefits. This standard—12 months of receipt per year in a three-year period—is no more reasonable than the one for monetizable benefits. First, the average cost for a non-elderly, non-disabled adult in Medicaid—by far the largest benefits program—was \$5,494 in 2016, so four months of Medicaid coverage would be just an *average* of \$1,831, which is roughly the same as DHS's 15 percent threshold.¹⁴ If the 15 percent threshold is unreasonably low for monetizable benefits, and incompatible with the historic meaning of the phrase, it is even more unreasonable in the context of nonmonetizable benefits, as it would be impossible for someone to live off of this amount of Medicaid alone.

This low threshold of benefits receipt is even worse in the Medicaid context because medical expenses are unevenly distributed, so it is inaccurate to treat all enrollees as equal to the average. For example, according to Health and Human Services, the elderly and disabled made up 23 percent of Medicaid enrollees but imposed 56 percent of Medicaid costs.¹⁵ Moreover, according to data from the Medical Expenditure Panel Survey, 23 percent of Medicaid enrollees charged

the program nothing at all in 2016.¹⁶ In other words, the rule could—depending on how adjudicators define “receiving” benefits—deny people who actually consume no benefits.

DHS justifies the nonmonetizable threshold by stating that “DHS lacks an easily administrable standard for assessing the monetary value of an alien’s receipt of some non-cash benefits”—primarily Medicaid.¹⁷ Yet this is simply incorrect. DHS can request information on what medical expenses Medicaid has covered on behalf of the applicant from the applicant or directly from the Department of Health and Human Services.

Recommendations for the public charge definition:

- DHS should eliminate the nonmonetizable benefit standard and require applicants to supply information on the value of the benefits received.
- DHS should incorporate noncash benefits into the current “primarily dependent” definition of public charge.

II. DHS fails to define “likely,” which is the threshold probability of becoming a public charge to trigger a denial of immigration benefits.

DHS uses the word “likely” 286 times in the regulation without ever defining the term. It provides precisely the exact dollar amounts of permissible public benefits use by detailed program types, yet it fails to give any threshold for how likely it must be for an applicant to use those amounts. Without a definition of “likely,” adjudicators have no clear standard with which to determine whether someone should be denied as “*likely* to become a public charge.” DHS should not proceed with the proposed rule without first providing adjudicators a threshold probability to trigger a denial.

Moreover, without defining the term, DHS has not established what it considers to be an acceptable wrongful denial rate for public charge inadmissibility determinations. For example, if DHS determined that a 30 percent probability of becoming a public charge meant someone was “likely” to become a public charge, 70 percent of the applicants that DHS finds inadmissible would not have actually become a public charge in the United States, implying that DHS considers a wrongful denial rate of 70 percent to be acceptable. Despite providing numerous statistics on benefits use rates, DHS never clarifies what likelihood is high enough to justify a denial. As written, the proposed rule will result in arbitrary application of the new public charge definition. Both applicants and adjudicators need a uniform understanding of the threshold necessary for approval or denial.

In 1999, the Central Intelligence Agency studied measures of uncertainty in intelligence reports, and it concluded that NATO military officers did not interpret the words “likely” and “unlikely” (i.e. not likely) in a consistent manner. The officers assigned probabilities to “likely” between 30 and 89 percent, while the officers gave a range of 64 percent to 98 percent for “unlikely.”¹⁸ This wide variation may reflect some officers’ lack of certainty in the intelligence reports, not a lack of clarity of the meaning of these terms. Nonetheless, the CIA concludes:

Putting a numerical qualifier in parentheses after the phrase expressing degree of uncertainty is an appropriate means of avoiding misinterpretation. This may be an odds ratio (less than a one-in-four chance) or a percentage range (5 to 20 percent) or (less than 20 percent).¹⁹

DHS should follow this advice. Meriam-Webster defines “likely” as “having a high probability of occurring or being true.”²⁰ The plain meaning of “likely” is something greater than a coin flip but less than a guarantee. A reasonable definition would take the midpoint between 50 percent and 100 percent, yielding a probability of 75 percent. The *average* NATO officer assigned about a 60 percent probability to “likely” and an 80 percent probability of not happening to “unlikely,” yielding a similar 70 percent threshold. Such a clear standard would provide adjudicators and applicants a uniform point of reference to structure their evidence or analyze an application.

The current public charge guidance also fails to define “likely,” but because DHS’s current guidance excludes consideration of noncash benefits, the baseline probability of a noncitizen becoming a public charge is, according to DHS’s analysis, less than 2 percent.²¹ Thus, virtually the only people who are denied on public charge grounds are those who are already public charges. By incorporating noncash benefits into the analysis, DHS increases the baseline probability thirteenfold.²² Given this fact, this change requires a specified threshold probability of becoming a public charge to trigger a denial.

Recommendation for definition of “likely”:

- DHS should define the term “likely” as a probability of becoming a public charge equal to or greater than 75 percent.

III. DHS’s model of predicting the likelihood of becoming a public charge is nontransparent and inaccurate.

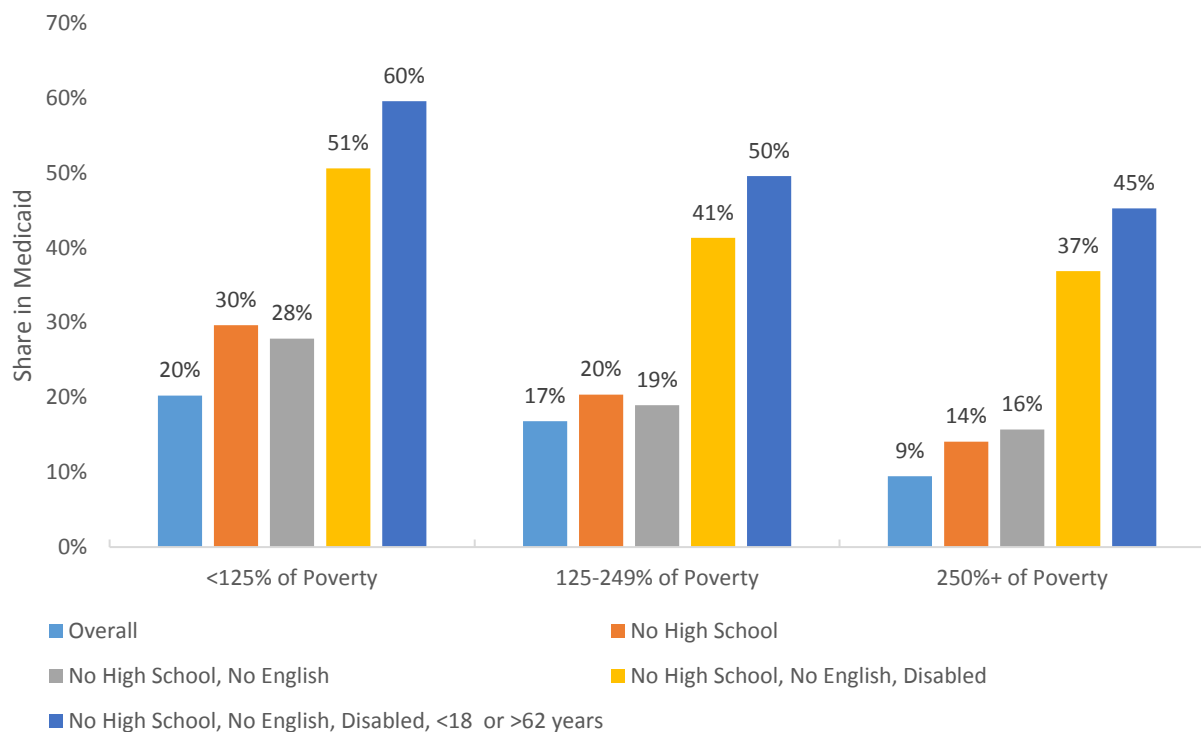
DHS proposes to weight positively or negatively various factors with either “heavy” a weight or a “neutral” weight. DHS does not give these weights any numerical values nor does it state how many negative or positive factors that an applicant will need to possess in order to receive an approval or denial of immigration benefits. DHS states, “The weight given to an individual factor not designated as carrying heavy weight would depend on the particular facts and circumstances of each case and the relationship of the factor to other factors in the analysis.”²³ In other words, no one will know—in advance—the value of any particular factor, and that the weighting scheme will change depending on the applicant and the adjudicator involved. This inconsistency will inevitably result in denials for people who should receive approvals and vice versa.

DHS gives only two specific applicant examples of how it will implement the proposed.²⁴ They show that adjudicators will use what amounts to a pro-con checklist, summing the pros and cons and deciding which “outweighs” the other. But this methodology will not yield valid results because it implies that each negative doubles the predictive power of any single negative, that

three negatives triple it, that four negatives quadruple it, etc. Not only is this obviously incorrect, some negative factors in DHS’s model have zero additional predictive power.

DHS needs to accurately assess the marginal effects of the factors that it proposes to weight. For example, Figure 3 uses data from the American Community Survey to estimate Medicaid participation rates based on various factors. Each column to the right adds an additional variable. As it shows, not having a high school degree and not speaking English well or better are not more predictive together than not having a high school degree. Figure 3 also shows that the effect of income is not nearly as important for Medicaid use as some other factors, such as disability and age.

Figure 3: Noncitizen Medicaid Participation Rate by Income Relative to Poverty Line

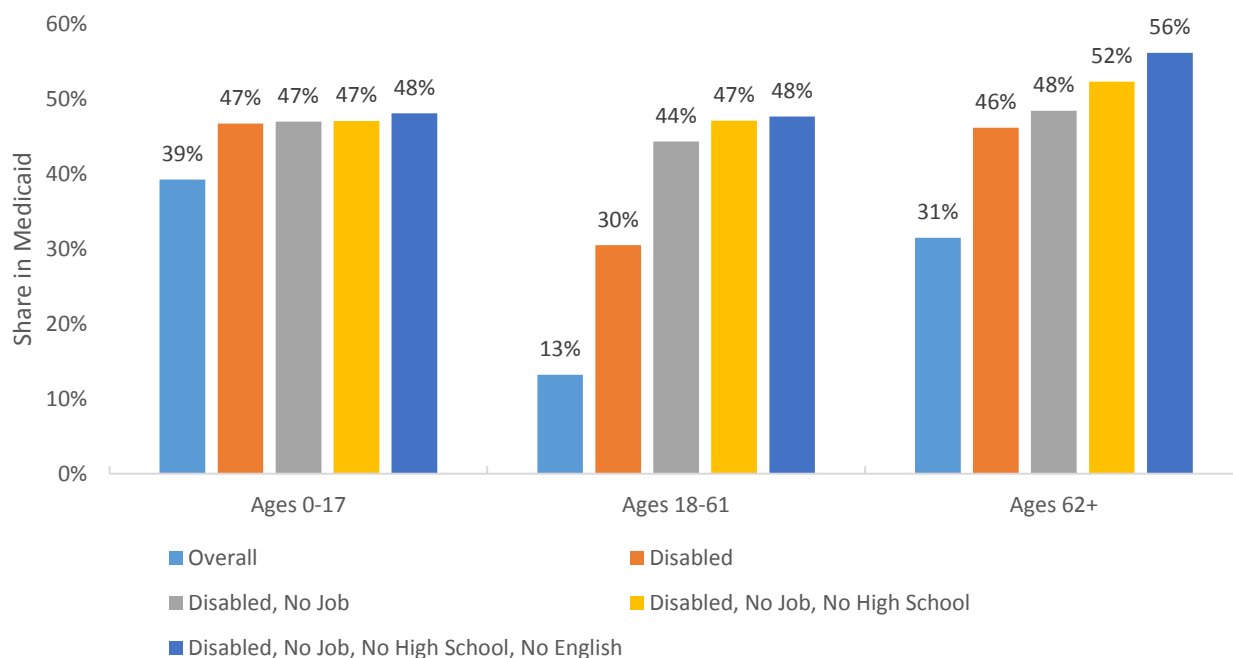


Source: American Community Survey, 5-year sample, 2016

Notes: No English refers to people speaking English less than “well.”

Figure 3 focuses only on those with incomes between 125 and 250 percent and those most likely to receive Medicaid. It shows that age does predict significantly more benefit use, but not for disabled people without a job. Again, the marginal effect of not having a high school degree or lacking English is almost zero for most ages. DHS’s model is simply inaccurate because it supposes that the marginal effect of each negative or each positive factor is significant.

Figure 4: Medicaid Participation Rates For Noncitizens With Incomes Between 125 and 250 Percent of the Poverty Line



Source: American Community Survey, 5-year sample, 2016

Notes: No English refers to people speaking English less than “well.”

This inaccurate system is totally unnecessary. In a succession of detailed tables, DHS demonstrates that it has ample administrative and survey data with which to build a functional factor model that would use applicant information to predict precisely their probability of becoming a public charge. DHS makes no effort at all to estimate the marginal effects of its variables, which result in arbitrary outcomes for applicants. After developing it, DHS should make its factor model based on statistics from administrative or survey data available online, so that immigrants can input their data and accurately determine their eligibility in advance of applying. This would reduce unnecessary applications and save costs for DHS and applicants.

Canada already uses this type of online portal for Canada’s points-based immigration system where immigrants receive points based on their ages, employment, education, marital status, and English language ability.²⁵ Points above a certain threshold indicate that the applicant is eligible for permanent residence. If data limitations preclude making a precise estimate for every factor, then DHS cannot justify incorporating them into its model in the first place. But even if DHS insists on including factors for which data is not available to estimate the marginal effect, it could use data that is available to produce a baseline probability estimate. This baseline would provide applicants and adjudicators with concrete valuations for known variables that each could then use to rationally consider the importance of the unquantified factors.

Recommendations for weighting factors:

- DHS should calculate weights using valid statistical methods.

- DHS should use administrative or survey data to create a factor model to precisely calculate the probability of future use.
- DHS should make the factor model available online for applicants to determine eligibility before applying.

IV. DHS fails to estimate the number of applicants who will be deemed inadmissible on public charge grounds.

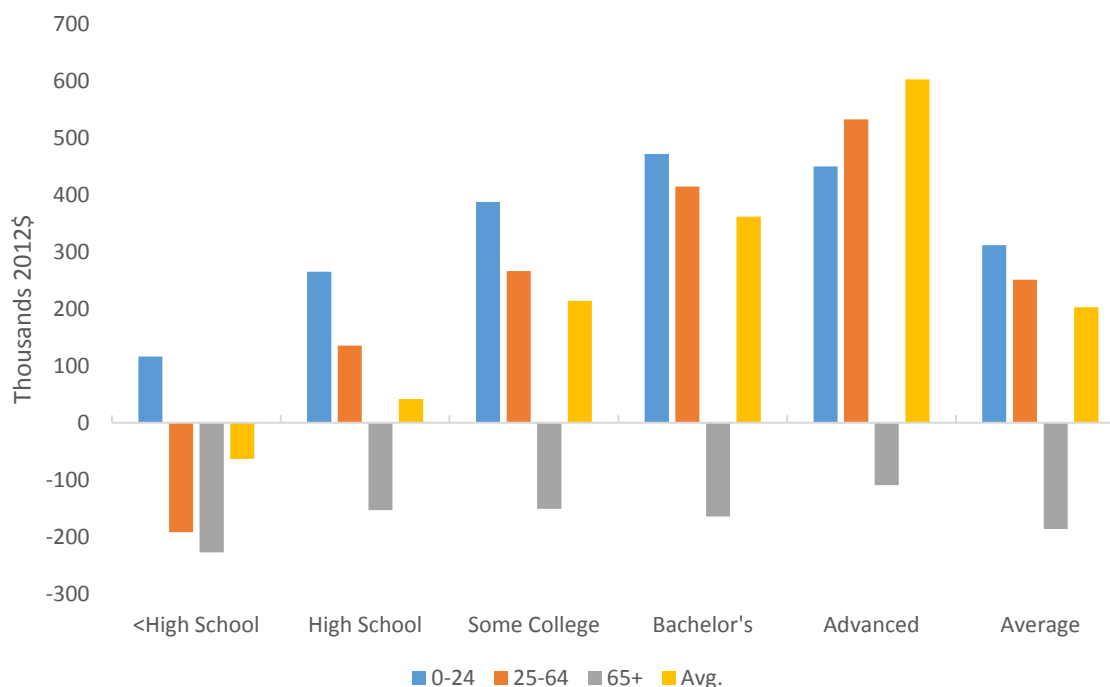
DHS does not estimate the most important effect of the proposed regulation: the number of applicants who will be deemed inadmissible on public charge grounds or deterred from applying for green cards due to a higher rate of public charge denials. DHS states that it “is not able to quantify the number of aliens who would possibly be denied admission based on a public charge determination pursuant to this proposed rule, but is qualitatively acknowledging this potential impact.”²⁶ However, if DHS provided a numerical definition for “likely” and used survey or administrative data to calculate the probability that noncitizens will use benefits in the future, it could accurately report the number of applicants who will likely be denied.

DHS proposes to weight positively or negatively various factors with either “heavy” a weight or a “neutral” weight. DHS does not give these weights any numerical values nor does it states how many negative or positive factors that an applicant will need to possess in order to receive an approval or denial of immigration benefits (as well as U.S. citizen petitioners). Moreover, without estimating the number of applicants who will be denied or fail to apply, DHS cannot calculate the costs and benefits of the rule. DHS states that “there is a lack of academic literature and economic research examining the link between immigration and public benefits.”²⁷ This statement is false. The literature is voluminous.²⁸ Moreover, DHS’s citation to Harvard economist George Borjas’s nonacademic book *We Wanted Workers* does not support this proposition. His book extensively cites the detailed National Academies of Sciences, Engineering, and Medicine’s 2016 report (NAS) on the fiscal effects of immigration.²⁹

The NAS estimates are universally recognized as the most rigorous fiscal effects analysis of immigration to the United States. To calculate the net fiscal effects of the rule, DHS should use Table 8-15 from the NAS’s fiscal effects section.³⁰ Table 8-15 provides three estimates of the 75-year net present value of immigrants and their descendants to the federal government under three future budgetary scenarios by ages of arrival and education level. This is the present value of the immigrants’ taxes minus benefits received over 75 years at the time that they enter the country.

Figure 5 shows the averages of the three estimates by age and educational attainment of the immigrant. DHS should use these averages to calculate the costs and benefits of the public charge rule. As Figure 5 shows, the fiscal effects vary considerably based on age and education, but for most age and education groups, the fiscal effects are positive for the federal government. This underscores the importance of calculating the immigration and fiscal effects of the public charge rule as well as improving the process for identifying public charges.

Figure 5: 75-year Net Present Value for Federal Government Average of Three Budget Scenarios by Ages of Arrival and Educational Attainment of Immigrant (Thousands 2012\$)



Source: National Academies of Sciences, Engineering, and Medicine

Note: Total impact of immigrants and descendants, public goods excluded

Recommendations for cost analysis:

- DHS should use the models developed in Chapters 7, 8, and 9 of the National Academies of Sciences, Engineering, and Medicine's 2016 report on the fiscal and economic effects of immigration to estimate the fiscal effect of the public charge rule on federal budgets.
- DHS should use the administrative or survey data to estimate the number of annual inadmissibility determinations.

¹ P. 51290.

² P. 51164.

³ Hidetaka Hirota, *Expelling the Poor*, Oxford University Press: New York (2017).

⁴ P. 51163.

⁵ 299 F. 804 (S.D. NY 1924); 283 F. 697 (N.D. Cal. 1922); 22 F.2d 121 (5th Cir. 1927); 34 F.2d 921 (2d Cir. 1929)

⁶ 247 F. 292 (2nd Cir. 1917); 256 F. 230 (N.D. N.Y. 1919)

⁷ 175 Fed. 274 (S.D. N.Y. 1910)

⁸ P. 51164.

⁹ P. 51162 (Table 11, part 4).

¹⁰ Gilbert Crouse and Suzanne Macartney, "Welfare Indicators and Risk Factors Seventeenth Report to Congress," U.S. Department of Health and Human Services, May 4, 2018, p. 8,

<https://aspe.hhs.gov/system/files/pdf/259196/WELFAREINDICATORS17THREPORT.pdf>.

¹¹ P. 51163.

¹² P. 51292.

¹³ P. 51198.

¹⁴ Calculated by averaging expansion and non-expansion adults: Department of Health & Human Services, "2017 Actuarial Report On the Financial Outlook for Medicaid," p. 61 <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/MedicaidReport2017.pdf>.

¹⁵ Ibid, p. 65.

¹⁶ Department of Health & Human Services, "Medical Expenditure Panel Survey," https://meps.ahrq.gov/mepsweb/data_stats/download_data_files.jsp.

¹⁷ P. 51165.

¹⁸ Richards J. Heuer, Jr., *Psychology of Intelligence Analysis*, Central Intelligence Agency (1999), p. 155, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/psychology-of-intelligence-analysis/PsychofIntelNew.pdf>.

¹⁹ Ibid, p. 156.

²⁰ Merriam-Webster, "Likely," <https://www.merriam-webster.com/dictionary/likely>.

²¹ P. 51162.

²² P. 51126

²³ P. 51179.

²⁴ Pp. 51216-51217.

²⁵ Government of Canada, "Comprehensive Ranking System (CRS) tool: skilled immigrants (Express Entry)," June 6, 2017, <http://www.cic.gc.ca/english/immigrate/skilled/crs-tool.asp>.

²⁶ P. 51260.

²⁷ P. 51235.

²⁸ Alex Nowrasteh, "The Fiscal Impact of Immigration," Cato Institute Working Paper No. 21, July 23, 2014, <https://www.cato.org/publications/working-paper/fiscal-impact-immigration>.

²⁹ George Borjas, *We wanted workers: Unraveling the immigration narrative*. Chapter 9, pp. 175–176, 190–191. W.W. Norton & Company, New York (2016), pp. 172-176.

³⁰ National Academies of Sciences, Engineering, and Medicine, "The Economic and Fiscal Consequences of Immigration," Washington, DC: The National Academies Press, 2017, p. 349, <https://doi.org/10.17226/23550>.