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Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue NW
Washington, D.C. 20529-2140

Re: DHS Docket No. USCIS-2010-0012

Dear Ms. Deshommes:

The Massachusetts Bar Association writes to express its firm opposition to the Department of Homeland Security's proposed "public charge" rule changes.

By way of background, the Massachusetts Bar Association is a private non-profit organization, incorporated in 1911, that is the largest voluntary statewide bar association in Massachusetts. It is the preeminent voice of the legal profession in Massachusetts. The Massachusetts Bar Association (MBA) serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence and respect for the law.

The MBA's House of Delegates, its governing body, unanimously authorized the MBA to file comments in opposition to the proposed "public charge" regulations, published by the Department of Homeland Security in the Federal Register on Oct. 10, 2018. The MBA's House of Delegates' vote also reaffirmed the MBA's "unequivocal support for the protection of rights for documented and undocumented immigrants in the Commonwealth." The MBA's 84-member House of Delegates includes the officers of the MBA, the leadership of its 20 section councils, along with the presidents of the affinity bar associations and the county bar associations in Massachusetts.

The MBA states the following six reasons for its firm opposition to the proposed regulations:

First, the existing "public charge" regulations already provide the necessary guidance and standards to effectively enable an accurate determination on who will likely become a "public charge." Current guidelines define a "public charge" as an immigrant who is "primarily dependent on the government for subsistence," determined through an analysis of use of cash benefit programs or by institutionalization for long-term care at government expense. The proposed "public charge" regulations, however, are not only unnecessary, they dramatically expand the definition and factors to be applied to predict who will likely at any time become a "public charge," unfairly making it much more difficult for immigrants to obtain an "Adjustment-of-Status," including obtaining a new visa while residing in the United States, becoming a lawful permanent resident, or obtaining a visa for admission into the United States.

Second, the proposed regulations seek to adopt a financial litmus test for an immigrant with a family income at or below 125 percent of the federal poverty income level that is not at all probative of whether a person will likely become a "public charge" at any time in the future. The proposed regulations consider receipt of a relatively small amount and percentage (relative to income) of public benefits as a heavily weighted negative factor, likely resulting in a "public charge" determination. For example, the proposed regulations would define "public charge" to mean a lower-income immigrant whose public benefits exceed 15 percent of the Federal Poverty Guidelines (FPG) within "any period of 12 consecutive months based on the per-month average FPG for the months during which the benefits are received." As a result, the proposed regulations would effectively require a "public charge" determination where a lower-income immigrant had been, for example, 84 percent self-sufficient during the

applicable 12-consecutive-month period, thereby discounting the fact that the immigrant was "primarily" supporting him or herself financially. Furthermore, the proposed regulations are defective in that they fail to require, as a countervailing strong positive factor, evidence of that immigrant's financial self-sufficiency prior or subsequent to the 12-consecutive-month period, to prevent penalizing an immigrant for what may have constituted a brief period of financial hardship. Therefore, as discussed above, the proposed financial litmus test for lower-income immigrants would constitute an unfair and inappropriate departure from the current guidelines that define a "public charge" as an immigrant who is "primarily dependent on the government for subsistence."

Third, the proposed regulations would unfairly consider the receipt of a fee waiver related to adjudication and naturalization services and immigration benefit forms as a basis for denying an application for an Adjustment-of-Status. Including fee waivers as a negative factor would improperly place lower-income immigrants in the untenable position of choosing between their fundamental right to access to justice in immigration-related adjudication proceedings and naturalization services versus being determined a "public charge" by receiving a needed fee waiver, with the resulting adverse consequence of a denial of an Adjustment-of-Status.

Fourth, except in limited circumstances, the proposed regulations fail to establish clear and uniform criteria for how Department of Homeland Security adjudicators are to weigh and apply factors when making, in effect, a prediction about whether an immigrant would likely at any time in the future become a "public charge." In many case-related situations, the proposed regulations authorize Department of Homeland Security adjudicators to use unbridled discretion in how they weigh and balance the positive and negative factors when making a prediction about whether an immigrant would likely become a "public charge" in the future, resulting in the very substantial risk of substantively disparate results and unfair denials.

Fifth, the proposed regulations, if adopted, will undoubtedly adversely impact the health and basic human needs of many immigrants and their families, while also negatively affecting the communities in which they reside. Under the proposed regulations, receipt of critically important public benefits to serve the basic human and health needs of immigrants and their families, including food stamps under the Supplemental Nutrition Assistance Program (SNAP), non-emergency Medicaid, Medicare Part D Low-Income Subsidy (a prescription drug program for the elderly and disabled), and housing assistance, including heating assistance and Section 8 vouchers, would serve as the basis for denying an application for an Adjustment-of-Status. See, for example, the careful study and analysis by the City of Boston, through its Planning and Development Agency, of the anticipated significant harm and serious economic, health and family unity-related consequences on the affected immigrant population residing in Boston, as well as on the City of Boston itself from adoption of the proposed regulations. *Impact of Proposed Federal Immigration Rule Changes on Boston: Public Charge Test for Inadmissibility*. www.boston.gov/departments/immigrant-advancement ("Local Impact Analysis"). The findings from Boston's study reinforce the compelling need for, and requirement that, before finalizing the proposed regulations, the Department of Homeland Security should engage in a national impact study, similar to the City of Boston's study, analyzing the nature and extent of the harmful economic, health and family unity-related effects of the proposed regulations on immigrants and their families, and on the communities in which they reside, and then modify or withdraw the proposed regulations based on what is learned.

Sixth, due to the extensive list of newly proposed negative factors, especially related to an immigrant's use of certain federal programs, the proposed regulations will also have a significant chilling effect on immigrant families' willingness to access governmental benefits and programs needed to address their basic human needs. Many immigrants will refuse or disenroll from essential benefits and programs for themselves and their children that they are legally eligible to receive, because of the fear they will be deemed a "public charge," resulting in a denial of an Adjustment-of Status, and potentially deportation. This is not only an educated prediction. A number of current credible reports support that this is already occurring in anticipation of the proposed regulations taking effect.

Additionally, transmitted herewith, please find the comments of the MBA's Access to Justice Section Council, Criminal Justice Section Council, Solo/Small Firm Law Practice Management Section Council and the Juvenile & Child Welfare Section Council, who speak from experiences in their individual areas of practice.

Access to Justice Section Council:

The Access to Justice Section Council of the Massachusetts Bar Association writes in strong opposition to the Department of Homeland Security's proposed "public charge" rule change. This policy will undermine access to essential health, nutrition and housing programs for immigrants and their families, who will be fearful of seeking these services. Without access to these necessities, families will be unable to meaningfully contribute to our communities. As such, this proposed rule change runs counter to our nation's most fundamental values.

The proposed "public charge" rule change would discourage eligible immigrants from accessing essential nutrition, housing and health care assistance for themselves and their citizen children. Families' withdrawal from programs that provide basic necessities for them and their children will not only harm the families in question, but our nation as a whole. A lack of access to food services can lead to malnutrition and reduced productivity for children at school and adults at work. A lack of access to housing resources can result in housing instability and homelessness. A lack of access to health care assistance can lead to a loss of patients at health centers, use of emergency rooms for primary care, poor health outcomes resulting from delayed treatment, and the spread of communicable diseases.

The ability to obtain services for basic necessities, when needed, will ensure that eligible immigrant families and their children can meaningfully participate in, and contribute to, our nation's communities. Yet, the proposed rule change would force many eligible immigrant families to choose between the services to which they and their citizen children are legally entitled and seeking a green card to live and work legally in the United States. This proposed rule change would come at a great expense to contributing members of our society and the nation as a whole, and so we strongly oppose its implementation.

Criminal Justice Section Council:

The Criminal Justice Section Council of the Massachusetts Bar Association strongly opposes the Department of Homeland Security's proposed rule change to "public charge" determinations.

First, the proposed "public charge" regulations would have an adverse impact on law enforcement and prosecutions because restrictions of this nature tend to drive people underground and discourage them from participating in public life or seeking help from public officials. As a result, victims and witnesses to crime will be less likely to come forward. In a 2013 survey, 70 percent of undocumented immigrants reported they are "less likely" to report crimes to law enforcement because they fear questions about their immigration status.[1] Human trafficking and domestic violence are serious problems in all states, and immigrant workers are sometimes abused, exploited or put into dangerous situations by unscrupulous employers. The proposed "public charge" regulations would exacerbate the reluctance of victims and witnesses to come forward or engage with law enforcement to protect themselves or others. While there are some exceptions in the proposed regulations for immigrants who qualify for relief under the Violence Against Women Act or are eligible for U-Visas,[2] this will not be enough to protect many victims, who typically are poor, do not have legal counsel and are not knowledgeable about their rights.

Second, a recent study shows the proposed changes will harm countless immigrant families that include naturalized citizens and individuals born in the United States.[3] People in financially dire and life-threatening health-related situations are already giving up Medicaid, SNAP and other critical benefits because they fear deportation. Families with non-citizen children, or adults who are victims of abuse, trafficking and other trauma, are afraid to seek medical assistance. No family, however, should have to sacrifice the health of a child or parent as a prerequisite for a green card.

Third, victims of domestic violence and sexual assault often fall into poverty when they leave their abusive partners because they are unable to work to maintain their housing and health.[4] SNAP is a crucial benefit for victims of violence. In a 2017 survey of service providers for victims of violence, 80 percent of respondents reported that most domestic violence victims they served relied on SNAP to help address their basic needs and to establish safety and stability.[5] If victims do not receive necessary resources to maintain their well-being, they may be compelled to return to an abusive relationship if they become homeless or destitute.[6] The proposed regulations would eviscerate state and federal victim protections by removing the safety net of public benefits needed to keep victims and their children safe.

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1. Theodore, Nik, "Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement," (May 2013) available at http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.
2. INA 212(a)(4)(E), and proposed 8 CFR 212.25.
3. *See*, Roche, Vaquera, White, Rivera, "Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents," (May 2018), available at https://www.ncbi.nlm.nih.gov/pubmed/29503033.
4. *See, e.g.,* Eleanor 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.
5. Goodman, S., "The Difference Between Surviving and Not Surviving: Public Benefits Programs and Domestic and Sexual Violence Victims' Economic Security," (Jan. 2018), available at https://vawnet.org/material/difference-between-surviving-and-not-surviving-public-benefits-programs-and-domestic-and.
6. *See* Eleanor Lyon, "Poverty, Welfare and Battered Women: What Does the Research Tell Us?," National Electronic Network on Violence Against Women 1 (Dec. 1997).

Solo/Small Firm Law Practice Management Section Council:

The Solo/Small Firm Law Practice Management Section Council of the Massachusetts Bar Association writes in strong opposition to the Department of Homeland Security's proposed "public charge" rule change.

On Oct. 10, 2018, the Secretary for the Department of Homeland Security published a proposed rule for determining an intending immigrant's admissibility on "public charge" grounds. This rule, which would apply to individuals adjusting status while in the United States, differs from the current rule, which allows immigrants to demonstrate that they will not be a "public charge" through submission of an affidavit of support by the Petitioner (and sometimes a joint sponsor as well), that includes evidence of assets or income that meet 125 percent of the FPG. The proposed rule is not quantitative and appears to be more "qualitative," although, in fact, it is very vague as to the guidelines that would be used to determine whether or not an immigrant may become a "public charge." Its list of applicable benefits and programs, however, is specific enough to cause significant concern in the immigrant community.

First, DHS is proposing to define a "public charge" as an alien who receives one or more public benefits, as defined in 8 CFR 212.21(b).237. DHS believes that a person should be considered a "public charge" based on the receipt of financial support through government funding (i.e., public benefits or programs). (See page 93). The alien should "not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations" (see page 5). Specifically, as indicated above, DHS would consider receipt of cash benefits and the following non-cash benefits: Nonemergency Medicaid, Premium and Cost Sharing Subsidies for Medicare Part D; SNAP; benefits provided for institutionalization for long-term care at government expense; and housing programs, including Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental assistance (including Moderate Rehabilitation), and Subsidized Public Housing (see pages 98-99).

DHS plans to measure an immigrant's likelihood of use of these federal, state or local safety net programs "depending on the particular facts and circumstances of each case" (see page 161). Some factors it would consider are: One's age, marriage, income and being uninsured with a medical condition requiring extensive treatment. However, what is missing from the proposed rule are practical and clear guidelines as to how USCIS adjudicators would weigh these factors.

Further, the proposed regulations have effectively generated fear among immigrant parents who now are unsure about making use of safety net systems without becoming a "public charge." They may, as a consequence, avoid them altogether, choosing instead to live in substandard conditions with their U.S.-born children, even though those children may be entitled to benefits, such as Medicaid, Children's Health Insurance Program, SNAP, Federal Rental Assistance or other programs. As a result, this could become a public health issue (see page 99). For example, intending immigrants could refuse to receive disaster cash assistance — which is one of the exemptions of the proposed regulations (see page 39).

In regard to possible economic advantages of the proposed "public charge" regulations, the proposal claims that it would bring savings of $35.78 per petitioner. It fails, however, to indicate how substantial the percentage of applicants who would actually be denied because of a "public charge" determination would be (see page 18). The vagueness of this proposal has stirred up fear and confusion among immigrants — a very high cost considering that the proposed regulations would stop a relatively very small amount and percentage of public benefits from being disbursed, since, currently, most immigrants do not qualify for state or federal benefits.

This proposal also generates concerns related to the safety of the general population. Asylum and other non-immigrant applicants could stop seeking the assistance of law enforcement agencies and the courts if they fear that by doing so, they could be labeled a "public charge."

Juvenile/Child Welfare Section Council:

The Juvenile & Child Welfare Section of the Massachusetts Bar Association is comprised of attorneys engaged in the practice of child welfare and juvenile delinquency law. We have members who are prosecutors, public defenders, and solo practitioners. We represent and work with mothers, fathers and children, many of whom are immigrants or children of immigrants. We interact with individuals and clients from diverse, mixed-status families that include United States citizens and immigrants. The majority are also low-income. Typically, our intervention comes at a time of crisis for a family: A family member's struggle with opioid addiction has put a child at risk, a layoff has led to homelessness for a family, a child's outburst at school has led to delinquency charges, and so on. Our advocacy on behalf of our clients is focused on stabilizing, reunifying and fortifying family units.

In this way, our advocacy is closely tied to the mission of the Commonwealth's Juvenile Courts, where we practice. It is the declared policy of the Commonwealth to strengthen and encourage family life through its Juvenile Courts for the care and protection of children and to provide substitute care of children when the family itself or the resources available to the family are unable to provide the necessary care and protection to ensure the rights of any child to sound health, and normal physical, mental, spiritual and moral development. M.G.L. ch. 119, § 1. Similarly, it is the declared policy of the Commonwealth to treat delinquent children as "children in need of aid, encouragement and guidance" and to bring remedial services to families when a child is delinquent.

Neither our advocacy nor the mission of the Juvenile Court can be accomplished without an array of private and public services — access to which USCIS is proposing in its present rule to close off to our clients. To achieve stabilization of a family in crisis, it is our practice to connect families with services that may include Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), other state and local cash benefit programs for income maintenance, SNAP, and public housing (including Section 8 Housing Choice Voucher Program and Section 8 Project-Based Rental Assistance), as well as non-cash benefits, such as the state's Medicaid insurance program (known as MassHealth) and subsidized housing.

USCIS has acknowledged that "the proposed rule would […] result in a reduction in transfer payments from the federal government to individuals who may choose to disenroll from or forego enrollment in a public benefits program. Individuals may make such a choice due to concern about the consequences to that person receiving public benefits and being found to be likely to become a public charge for purposes outlined under section 212(a)(4) of the Act, even if such individuals are otherwise eligible to receive benefits." *See* Notice of Proposed Rulemaking, Inadmissibility on Public Charge Grounds, 83 FR 51114 (2018) at pg. 51117. We expect, as USCIS has described, that our clients who are immigrants or who belong to mixed-status households will choose to forego enrollment in public benefit programs for fear — whether justified or not — of the "public charge" consequences. The disenrollment or refusal to enroll in public benefits programs will put in further jeopardy families in crisis and make it much more difficult for us to achieve stabilization or reunification of family units. For example, clients may feel compelled to decline needed mental-health related services funded by Medicaid/MassHealth, negatively impacting their ability to regain custody of their child. In practice, the Department of Children and Families is likely to more frequently oppose reunification of a child with his or her parents when parents no longer obtain federally-related benefits and programs needed for the health and well-being of their children. Contrary to USCIS's stated aim of encouraging self-sufficiency, the proposed rule is in fact more likely to extend the period of crisis and dependency of our clients.

Extended periods of crisis will be more costly to the commonwealth and the federal government because greater and more expensive resources will be required to stabilize individuals who have faced prolonged periods of crisis. Here is but one example. In Massachusetts, a mother who exposes her child to domestic violence may be found to have neglected her child, and domestic violence in a household is grounds for the Department of Children and Families to remove a child from his or her parents. *Adoption of Ramon*, 41 Mass. App. Ct. 709, 714 (1996) (child had been traumatized through witnessing domestic violence; father's violence started in front of child; father yelled at child; child showed signs of exposure to violence in play therapy.); *Custody of Vaughn*, 422 Mass. 590, 595 (1996) (domestic violence has an undeniable effect on children and children who witness domestic violence suffer a distinctly grievous kind of harm); *Adoption of Larry*, 434 Mass. 456, 468, 471 (2001) (if mother is separated from abuser at time of trial but does not intend to remain separated, still constitutes failure to protect from abuse). Cost-effective benefits, such as SNAP and public housing, may allow a mother who is the victim of domestic violence to separate from her abuser, and, in doing so, retain legal and physical custody of her minor child. These benefits provide a bridge so that the mother may separate and then secure her financial independence through employment. Without access to these public benefits, a mother may be tied financially to her abuser, and her child will necessarily spend a greater period of time in state-funded foster care. The additional expense of foster care and the mental health services that will be required to stabilize the family after prolonged exposure to domestic violence and family separation are far greater than the public benefits a mother might need to initially separate from her abuser.

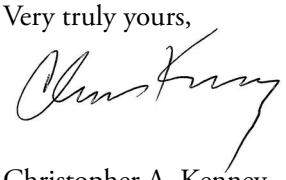
We believe that USCIS's proposed rule relies on a faulty understanding of what it means for a person to be "self-sufficient." USCIS states that "[t]he primary benefit of the proposed rule would be to help ensure that aliens who apply for admission to the United States, seek extension of stay or change of status, or apply for adjustment of status are self-sufficient, i.e., do not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their family, sponsor, and private organizations." *See* 83 FR at pg. 51118. USCIS goes so far as to claim that "[f]ood, shelter, and necessary medical treatment are basic necessities of life. A person who needs the public's

assistance to provide for these basic necessities is not self-sufficient." *See* 83 FR at pg. 51159. Many of our low-income clients are employed and work hard to maintain themselves and their families. A significant portion of our clients work at minimum wage in retail stores, landscaping or fast food restaurants and, through no fault of their own, are not always assigned sufficient hours from one job to obtain health insurance or other benefits. As a result, many work a second or third job, and still are unable to afford private health insurance for themselves and their families. These clients work over 40 hours a week and would be considered "self-sufficient" but for their working conditions and wages. Clients therefore depend on work-support programs, such as SNAP, Section 8 or MassHealth. These supplementary supports become particularly critical when a family is in crisis. Use of these supports does not necessarily mean that a family is not primarily self-sufficient. Furthermore, USCIS has proposed a limit of 12 months cumulative during a 36-month period for non-monetized public benefits (e.g., Medicaid). In our experience, this time limit is insufficient. Families in crisis may depend on supplementary supports, such as Medicaid/MassHealth, for more than 12 months in a 36-month period before achieving complete stabilization. Finally, we know from practicing in the child welfare field that alternative supports — such as family or private organizations — are scarce and can be hard to access. By effectively closing off access to the above federal public benefits for immigrant clients, USCIS is leaving our clients without adequate support in times of crisis.

In addition, we oppose USCIS's proposed rule regarding "public charge" due to the unnecessary burden the rule will impose on us as practitioners. USCIS acknowledges that "the proposed rule would add new direct and indirect costs on various entities and individuals associated with the regulatory familiarization with the provisions of this rule […] For example, immigration lawyers, immigration advocacy groups, health care providers of all types, non-profit organizations, non-governmental organizations, and religious organizations, among others, may need or want to become familiar with the provisions of this proposed rule." *See* 83 FR at pg. 51118. Members of our Juvenile and Child Welfare Section, which include private practitioners who accept state-court appointments, will be among those required to familiarize themselves with the new rule regarding "public charge" in order to appropriately counsel clients choosing between accessing services to stabilize a family crisis and ensuring the ability of clients or their family members to secure immigration admission or adjustment of status. Not only will our practitioners face familiarization costs, they will also face regular opportunity costs of time as they undertake the complicated task of determining a client's risk under a "public charge" analysis in their daily practice. This is particularly so where USCIS is proposing to abandon a bright line 50 percent threshold whereby a person must be "primarily dependent" in favor of a complicated calculation involving a 15 percent of the FPG threshold for the cumulative value of monetized non-cash benefits and a standard tied to the duration of receipt of public benefits for non-cash benefits that cannot be monetized, with an attendant monetization calculation and a number of exceptions to the calculations. Our practitioners are already stretched thin as they juggle the multiple demands of counseling families in crisis, connecting families to stabilizing services and preparing for court proceedings. Imposing these additional time-consuming calculations on their practice is unjustified and unnecessary.

For the reasons stated above, the Massachusetts Bar Association firmly opposes the Department of Homeland Security's proposed "public charge" rule changes. Thank you for your consideration of our views.

Very truly yours,



Christopher A. Kenney

President