October 29, 2020

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Acting Secretary
U.S. Department of Homeland Security
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Attention: Desk Officer, U.S. Citizenship and Immigration Services, DHS

Affidavit of Support on Behalf of Immigrants
DHS Docket No. USCIS–2019–0023, Docket RIN 1615-AC39

COMMENTS BY THE IMMIGRANT LAW CENTER OF MINNESOTA IN OPPOSITION TO THE PROPOSED RULE

INTRODUCTION

The Immigrant Law Center of Minnesota (ILCM) strongly opposes the proposed regulatory changes to the I-864 affidavit of support on behalf of immigrants.

The Immigrant Law Center of Minnesota ("ILCM") enhances opportunities for immigrants and refugees through legal representation for low-income individuals, and through education and advocacy with diverse communities. ILCM serves immigrants and refugees residing in the state of Minnesota who earn less than 187.5 percent of federal poverty guidelines. In 2019, ILCM served clients coming from 115 countries, with 36 percent of ILCM cases originating from Mexico, 21 percent from countries in Central and South America, 20 percent from countries in Asia, 20 percent from

countries in Africa, and the remainder from countries in Europe, Oceania, and from Canada.

ILCM provides a wide range of legal services to low-income immigrants and refugees, including representation of families seeking reunification, of immigrants applying for naturalization, and of refugees and asylum seekers and their families, and of unaccompanied children seeking Special Immigrant Juvenile Status.

Many of our clients would be directly harmed by this regulation, both because it increases the cost and duration of the family reunification process and because it discriminates against hard-working but low-income families and extended-family households.

DHS proposes changes to 8 CFR § 213a based on the current Administration's purported goals of enforcing sponsorship obligations. 85 Fed. Reg. 62432 at 62435 (October 2, 2020). The worst of these unnecessary changes would:

1) require supplemental irrelevant documentation from sponsors such as three years of tax transcripts, credit scores and reports, and bank records;

2) subject sponsors to unnecessary scrutiny if public benefits were received within three years of sponsorship;

3) dramatically change the definition of a household and its implications for economically contributing to the household; and

4) arbitrarily require more immigrants to obtain joint sponsors.

ILCM opposes this rule as arbitrary and capricious, as lacking rational basis for burdening sponsors with additional documentation requirements, and as unjustly

restricting family-based immigration. Furthermore, DHS proposes these changes during a worldwide COVID-19 pandemic when U.S. citizen family members need to seek extra temporary help as they face a healthcare crisis, rising unemployment rates, and financial hardships in these unprecedented times. This is also when they most need to ensure that every family member be properly documented and eligible to work and provide income.

COMMENTS

I. THE PROPOSED CHANGES ARE ARBITRARY AND CAPRICIOUS BECAUSE THEY LACK ANY EVIDENCE OF A PROBLEM TO JUSTIFY MASSIVE CHANGES TO A FUNCTIONING PROCESS.

The vast majority of family based immigrants are ineligible to receive public benefits until they become U.S. citizens. The proposed regulations do not offer one shred of evidence that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which has been in effect for almost 25 years, has been circumvented by immigrants or ignored by state social service agencies.

a. Protocols currently in place ensure that state agencies comply with federal law and sponsors fulfill their obligations for immigrant applicants.

The proposed rule lacks any evidentiary basis for its claims that ineligible immigrants themselves actually receive means-tested benefits or that the contracts signed by sponsors are insufficiently enforceable for the government to receive reimbursement. 85 Fed. Reg. 62432-62481. The law is clear. Under PWRORA, family-

based immigrants are barred from receiving assistance for five years or until they become U.S. citizens. Once the five years is up, even if they apply for assistance, their sponsor's income is considered as theirs unless they have acquired 40 quarters of work with the SSA or have become U.S. citizens.

i. State agencies already have protocols in place to ensure that immigrants do not receive public benefits.

In Minnesota and around the country, state and federal benefit-granting organizations control who can receive public benefits funded by the government. For example, Minnesota state law mandates that county benefit-granting agencies verify immigration status at the time of application. Minn. Stat. § 256P.04. Family-based immigrants are required to provide information about their sponsors.[1] Immigrants provide ample documentation to determine eligibility to state agencies, allowing for agencies to appropriately determine eligibility status.[2]

The impetus for these proposed changes, the president's executive order, argues that agencies need to be more stringent on following through with sponsors' responsibilities. 85 Fed. Reg. 62436. However, the executive order itself provides unhelpful and misleading information that completely fails to support these proposed regulations. The executive order begins with a hateful stereotype, unsupported by evidence: "Vast numbers of non-citizens and their families take advantage of our

[1] USCIS, *Form I-864*, (October 15, 2019) https://www.uscis.gov/sites/default/files/document/forms/i-864-pc.pdf

[2] MN House Research, "Eligibility of Noncitizens for Health Care and Cash Assistance Programs", (November 2019) found at: https://www.house.leg.state.mn.us/hrd/pubs/ncitzhhs.pdf.

welfare programs."[3] It continues with statistics, derived from an unknown source, about non-citizen heads of households. However, as the CATO Institute explains, employing statistics that only encompass households headed by non-citizens produces incomplete and less accurate data.[4]

The executive order, and these proposed regulations fail to mention that families headed by immigrants usually include U.S. citizen children, spouses, and often lawful permanent residents who have been in the country for more than five years and are indeed eligible for those programs. Or the non-citizen head of household could be any of a number of immigrant categories such as refugees who are eligible to receive a wide array of services and are not subject to either the public charge ground of inadmissibility or the affidavit of support. In other words, their receipt of public assistance in no way supports this proposed regulation.

Overall, immigrants receive 38 percent fewer public benefits than their native counterparts.[5]

This proposal blames immigrants and their family members for a fabricated problem. Worse, it is crafted as a tool to limit family reunification through legal immigration.

ii. Sponsors already enter into a binding, enforceable contract with the U.S. government by signing form I-864.

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[3] President Donald J. Trump, *President Donald J. Trump Is Taking Action to Protect Our Social Safety Net and Promote Self-Sufficiency for Non-Citizens*, (May 23, 2019) available at: https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-action-protect-social-safety-net-promote-self-sufficiency-non-citizens/

[4] CATO Institute, *Immigration and the Welfare State*, 1-8, 7, (May 10, 2018) https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb6.pdf

[5] *Id.* at 7.

The requirement of a legally binding affidavit of support of an immigrant applicant was adopted under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The purpose of the affidavit of support is to ensure that the immigrant applicant does not become a public charge relying on the U.S. government.[6]

The I-864 form instructions and the form itself sufficiently explain the binding nature of the contract and the responsibility of the sponsor to support the immigrant applicant.[7] "A contract is a promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[8] The statute already grants the federal government and related state agencies sufficient power to enforce this contract without the additional proposed requirements. 8 U.S.C. § 1183a(a)(1)(B). DHS unaccountably rejects the notion that enforceable contracts sufficiently bind the contracting parties without offering support for this notion.

DHS attempts to explain proposed changes by pointing to the current administration's priority of enforcing sponsorship obligations. 85 Fed. Reg. at 62453. However, it offers no statistics to support the assertion that sponsors do not understand their legal obligations or that they are defaulting on their legal sponsorship obligations.

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[6] National Immigration Law Center, *Understanding the President's Memorandum on Enforcing the Responsibilities of Sponsors*, (August 29, 2019) https://www.nilc.org/wp-content/uploads/2019/05/sponsor-liability-FAQ.pdf

[7] USCIS, *Form I-864 Instructions*, 1-17, 1 (October 15, 2019) available at: https://www.uscis.gov/sites/default/files/document/forms/i-864instr-pc.pdf

[8] Samuel Williston, *A Treatise on the Law of Contracts § 1*, at 1–2 (Walter H.E. Jaeger ed., 3d ed. 1957).

DHS's failure to properly quantify the benefits of the proposed rule demonstrate the lack of evidentiary support that a problem even exists.

II. PROPOSED REQUIREMENTS FOR SPONSORS ARE NOT RATIONALLY RELATED TO A DETERMINATION OF THE SPONSOR'S ABILITY TO SUPPORT THE APPLICANT OR REIMBURSE THE GOVERNMENT.

Current regulations simply and reasonably require that a sponsor verify his or her current year's income to prove the ability to support the intending immigrant. 8 CFR 213(a).2(v)(A) The regulation provides that additional evidence can be required. If more than a year has passed since the paperwork was filed, the adjudicating officer can request proof of the subsequent year's income. 8 CFR 213A.2(v)(B) These regulations keep the focus on where it belongs—on the sponsor's current financial situation. This benefits both the immigrant and the agency making the decision.

a. Past receipt of public benefits does not equate to an inability of the sponsor to support the immigrant applicant.

Restricting sponsorship for those who lawfully received public benefits during the prior three years does not rationally relate to the ability of sponsors to support the immigrant applicant in the present or future moment. If the purpose of the proposed changes to the federal rule is truly to ensure that all sponsors have the means and will follow through with their responsibility, these requirements do not fulfill that purpose. U.S. citizens or lawful permanent residents eligible for public benefits should not be disqualified based on temporary receipt of past benefits.

In the midst of a global pandemic, unemployment rates are high and families are burdened. By disqualifying sponsors for past receipt of public benefits the government only seeks to limit those who seek benefits and harm American families.

i. COVID-19 will require more people to temporarily accept public benefits and jeopardize future immigration applications for years to come.

People across the United States of America have experienced devastating effects from the worst pandemic in modern-day history. U.S. citizens are eligible to receive public benefits as they face record levels of unemployment and uncertainty as to the future. Furthermore, unemployment rates have wavered throughout 2020, from a national rate of 14.7 percent in April to a current national rate of 7.9 percent. [9]

In Minnesota alone, nearly 150,000 more people have applied for Medical Assistance benefits through the state in October 2020 as compared to January of this year.[10] Nearly one million Minnesotans currently receive medical benefits from the state of Minnesota.[11] Sponsors should not be punished for seeking assistance during the current crisis.

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[9] National Conference of State Legislatures, *National Employment Monthly Update*, (August 7, 2020) available at: https://www.ncsl.org/research/labor-and-employment/national-employment-monthly-update.aspx

[10] Department of Human Services, *Managed care enrollment figures*, (October 2020) https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=dhs16_141529)

[11] *Id.*

Even prior to COVID-19, nearly one-third of Americans who received public benefits quit receiving them within one year.[12] As the Washington Post reported in 2015:

> "The reality is that Americans who need government aid, like Americans living below the poverty line, represent a shifting population. A parent who loses his job — and the health care that came with it — may need to rely on Medicaid temporarily. A graduate who can't find more than part-time work right out of school may need food stamps until she does."[13]

In a time of crisis, DHS attempts to deter eligible U.S. citizens, lawful permanent residents, and others who could potentially rely on these benefits. This proposal is nothing short of cruel.

ii. U.S. citizens with immigrant loved ones would avoid receiving necessary aid because they might be penalized in the future.

This policy has a dangerous chilling effect on the receipt of benefits during a time where people need accessible healthcare more than ever. Requiring lawful permanent residents and U.S. citizens to choose between healthcare in a global pandemic and being reunited with immigrant family members places an unfair burden on the people who would otherwise serve as sponsors.

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[12] Arthur Delaney, *How Long Do People Stay on Public Benefits?*, Huffington Post (May 29, 2015), https://www.huffingtonpost.com/2015/05/29/public-benefits-safety-net_n_7470060.html)

[13] Emily Badger, "What It Really Means to Rely on Food Stamps and Welfare." Washington Post (May 29, 2015) https://www.washingtonpost.com/news/wonk/wp/2015/05/29/what-it-really-means-to-rely-on-food-stamps-and-welfare/

This rule punishes U.S. citizens and lawful permanent residents by requiring they choose between sponsoring a loved one and financial, medical, or literal survival in a time of crisis. DHS admits to the qualitative cost of potential sponsors disenrolling or forgoing enrollment in programs for which they are eligible. 85 Fed. Reg. at 62453. However, similar to its public charge determination, DHS disregards these costs as outweighed by fabricated benefits.

b. Credit reports and credit scores are largely unrelated to someone's ability to follow through with debt payments.

Credit reports and credit scores reflect years (if not a persons' entire adult life) of spending habits, loan payments, and many complexities that fall outside of an obligation to pay off debts. The statute requires a sponsor must support the immigrant, not that the sponsor must have a stellar credit history. 8 U.S.C. § 1183a. A credit record is built over time, however the statute only requires evidence from the date of the application through the enforceable period. 8 U.S.C. § 1183a. Spending habits vary greatly amongst U.S. households. Sponsors of immigrant applicants should not be penalized because of spending choices made in the past.

Credit scores are much too broad to directly relate to the ability to pay during the time the immigration application is in process and throughout the period of enforceability. A person's reliable payment history only constitutes 35% of the total credit score, meaning that the majority of a credit score is not indicative of one's

reliability to repay debts.[14] One's purchasing power and spending habits often positively impact a credit score, whereas someone who spends little on credit but consistently pays on time would receive a lower score. Credit score differences amongst communities also parallel racial disparities in the U.S.[15] Because Latinx households, for example, own less than 8 cents in wealth compared to every dollar of wealth in white households, they will not have equivalent opportunities to build credit over time.[16]

Furthermore, credit scores grant a sense of false stability. Recently, American credit scores hit an all-time high despite record unemployment rates, a global pandemic, and missed debt payments for many Americans.[17] The United States is currently seeing artificially inflated credit scores due to temporary federal government assistance in COVID-19 relief.

DHS draws a weak analogy between credit scores and reports and a sponsor's ability to carry out financial obligations of the sponsorship. 85 Fed. Reg. at 62445. DHS states that "a poor credit score or negative information on the credit report…*may* indicate that a sponsor does not have the means to maintain income to support the intending immigrant or that the sponsor will not be able to carry out the support obligations." 85 Fed. Reg. at 62445 (emphasis added). Adding this arbitrary

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[14] CEB TowerGroup, *Understanding FICO Scores*, (May 2015) https://www2.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf

[15] National Consumer Law Center, *Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination*, (May 2016) https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf

[16] *Id.*

[17] AnnaMaria Andriotis, *Coronavirus Tanked the Economy. Then Credit Scores Went Up.*, The Wall Street Journal, (October 18, 2020) https://www.wsj.com/articles/coronavirus-tanked-the-economy-then-credit-scores-went-up-11603013402)

requirement, which lacks any significant relationship to the proposed purpose, is overly burdensome on sponsors without achieving any named goal. DHS simply cannot rely on this mechanism for determining one's ability to pay debts.

c. Bank records are an unjustified requirement unrelated to a sponsor's ability to pay and will only deter potential sponsors.

Rather than attempting an explanation for requiring bank account records, DHS simply fails to explain *any* basis for requiring a sponsor's bank account information. 85 Fed. Reg. at 62446. There is no rational relationship between someone's bank account and the ability to support an immigrant applicant if that becomes necessary. Many Americans will be unwilling to disclose bank account information without a good cause. The only explanation for this rule is to further deter lawful permanent residents and U.S. citizens from assuming the role of a sponsor.

The statute provides flexibility, indicating that Congress intended to allow for sponsors to show eligible income through various means and acknowledged that income fluctuates over time. 8 U.S.C. § 1183a(f)(6)(A)(ii). Those additional assets such as bank records and other forms of wealth should be admissible as supplemental evidence when incorporated at the choice of the sponsor. However, this arbitrary requirement now represents another hindrance in the process.

d. Requiring three years of tax transcripts is overly burdensome for sponsors.

While the statute does permit DHS to collect three years of tax returns, the new requirement of tax transcripts unduly burdens sponsors and is unrelated to their ability to support an immigrant applicant.

Historically, DHS has only required one year of tax returns to sufficiently indicate a sponsor's salary at the date of the immigration application. From that date forward, the sponsor binds him or herself to the immigrant applicant during the period of enforceability. DHS notes that immigration officers will determine patterns in the sponsor's income history, but there is no provision for someone to explain such patterns discovered throughout the process. 85 Fed. Reg. at 62446.

Congress granted power to the Secretary of State or the Attorney General to limit tax returns to only the most recent year under an adjustment of status application. 8 U.S.C. § 1183a(f)(6)(B). This limitation, the practice of DHS, and the flexibility provided by the statute all point to a clear interpretation that a sponsor's tax returns from the most recent year most significantly matter in determining a sponsor's income.

Finally, the requirement of tax transcripts adds an unnecessary layer of responsibility on sponsors who already sign under penalty of perjury that their income information is true and correct. U.S.C. § 1183a(f)(6)(A)(i). It makes no sense to force sponsors to incur added costs and delay in an already costly and prolonged process by requesting transcripts of their tax returns from the IRS. According to DHS, this requirement will cost sponsors over $156 billion. 85 Fed. Reg. at 62464. This astronomical amount should not be incurred by sponsors who already provide tax returns under penalty of perjury.

III. CHANGES TO THE DEFINITION OF HOUSEHOLD WILL MAKE IT SIGNIFICANTLY MORE RESTRICTIVE FOR LOW AND MODERATE INCOME HOUSEHOLDS TO PETITION FOR AND SPONSOR FAMILY MEMBERS.

a. Changes to the definition of a household and of household income will unjustifiably restrict family-based immigration.

The proposal to alter the definitions of household income and household size constitute two more attacks on family-based immigration. First, the proposed regulation severely changes and limits who in the family can have their income count as household income. Then it increases the size of the household to include those in as-yet-unaccepted affidavits of support. Their inclusion increases the size of the household, even though they may not be dependent on the household for support. For families at or near the 150% of poverty guidelines, these changes would have profound limiting effects.

The current regulations allow for every family member who counts toward the family size to have their income counted as well, as long as they are working legally. 8 CFR 213a.1 This is logical and fair and has served the immigration process since 1996.

In 2016, 20 percent of the U.S. population (64 million people in the U.S.) lived in multi-generational households.[18] These rates are even higher amongst immigrant communities and non-white households.[19] Under the current regulation, people living in the household and earning an income may have that income counted as part of the

[18] D'Vera Cohn and Jeffrey S. Passel, *A record 64 million Americans live in multigenerational* households, Pew Research Center, (April 5, 2018) https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/

[19] *Id.*

household income. The proposed regulation would count, for example, siblings or grandparents living in the household as part of household size, but would exclude their income from the definition of household income. Only the income of the sponsor, their spouse, and the intending immigrant (if living in the household) would count as household income.

People with differing needs and expectations of what constitutes a household will be unfairly burdened by this new definition, which would especially impact immigrant families.

Each person in the family should not be required to individually contract with the government in order for the household income to surpass the required threshold. Pooling financial resources actually allows for families to build wealth, such as in home ownership.[20] This rule creates further barriers to family-based immigration without significantly impacting a sponsor's fulfillment of the obligations outlined in an affidavit of support.

b. Many applications would unnecessarily require a joint sponsor because of the added requirements despite eligibility under the statute.

COVID-19 has ravaged American communities, significantly affecting communities of color and immigrant communities. Due to the COVID-19 pandemic, household sizes and its members are shifting as housing instabilities, medical emergencies, and unemployment devastate American families. A shocking 63 percent of

[20] Chris Farrell, *Multigenerational households are on the rise, and that's a good thing*, Star Tribune, (November 2, 2019) https://www.startribune.com/multigenerational-households-are-on-the-rise-and-that-s-a-good-thing/564112072/)

Americans lack sufficient savings to cover a $500 to $1,000 emergency if needed.[21] At a time when households are coming together to weather this crisis, DHS seeks to create new obstacles for immigrant families.

The proposed requirements that household members meet all these enhanced documentary requirements would create huge obstacles for immigrant families. Since there is no demonstrated need for these changes, DHS simply seeks to complicate the process of sponsoring immigrants in order to undercut family-based immigration. U.S. citizens and lawful permanent residents will bear the financial and emotional burden of being unable to sponsor family members because of these arbitrary requirements.

CONCLUSION

DHS lacks any rational basis or evidence to support the proposed changes to the affidavit of support. The proposed rule will have devastating effects not only on immigrant applicants but on U.S. citizen and lawful permanent resident family members. For the reasons stated above, ILCM opposes this proposed rule on the Affidavit of Support on Behalf of Immigrants.

Respectfully submitted by the Immigrant Law Center of Minnesota.

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[21] Maggie McGrath, *63% Of Americans Don't Have Enough Savings To Cover A $500 Emergency*, Forbes, (January 6, 2016) https://www.forbes.com/sites/maggiemcgrath/2016/01/06/63-of-americans-dont-have-enough-savings-to-cover-a-500-emergency/#205043af4e0d

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