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August 25, 2016

U.S. Citizenship and Immigration Services,
Department of Homeland Security
Washington, D.C.

OMB Control Number 1615-0023; USCIS-2009-0020

Re: Comments on U.S. Citizenship and Immigration Services, OMB Control Number 1615-0023, Agency Information Collection Activities: Application To Register Permanent Residence or Adjust Status, Form I-485, and Adjustment of Status Under Section 245(i), Supplement A to Form I-485; Revision of a Currently Approved Collection

Dear Sir or Madam:

Thank you for the opportunity to comment on the federal notice concerning an information collection request regarding the estimated public burden of Form I-485, the Application to Register Permanent Residence or Adjust Status. 81 Fed. Reg. No. 143 (484336, July 26, 2016) and previously published in the Federal Register on March 31, 2016, at 81 FR 18636. We are especially grateful for the agency's interest in evaluating "whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility."

The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights of low-income immigrants and their family members. NILC specializes in the intersection of public benefits and immigration laws and policies, offering technical assistance, trainings, and publications to government agencies and non-profit organizations.

With more than 30 years of experience, NILC understands the challenges and barriers that immigrant families confront in their efforts to participate fully in and contribute to our nation's communities.

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We ask that you consider NILC’s following comments:

Questions 61 and 62 of Part 8 of the I-485 Form

A person residing in the United States seeking to adjust to permanent resident status or register for permanent residence must file Form I-485 with the U.S. Citizenship and Immigration Services (USCIS). The proposed form contains questions in Part 8 related to Public Charge that are confusing and inconsistent with existing USCIS policy.

The proposed questions are below:

61. *Have you **EVER** received **any form** of public assistance in the United States from any source, including the U.S. Government or any state, country, city, or municipality (other than emergency medical treatment)? [Y/N]*
62. *Are you likely to receive public assistance in the future? [Y/N]*

It is helpful that the public charge section is set apart from other general eligibility and inadmissibility grounds questions; however, the questions contained within are confusing to applicants, attorneys, advocates, and adjudication officials, and are inconsistent with USCIS policy on public charge. Furthermore, the Instructions for Form I-485 instruct the applicant to list all forms of public assistance received, including those that are not considered in public charge determinations. The instructions then provide a link to the existing USCIS policy,¹ where it is clearly stated that non-cash benefits and special-purpose cash benefits are not considered in public charge determinations. The instructions, as written, offer conflicting instructions to applicants that are at odds with the referenced USCIS policy on public charge.

Most importantly, the questions, as written, perpetuate a longstanding misunderstanding and concern among immigrants that receiving *any form of public assistance* will undermine their ability to adjust their status or will otherwise put them at risk, because they will be considered a “public charge.” This, in turn, has a chilling effect on immigrants’ willingness to apply for critical benefits for themselves or their children.

Rather than clarifying the agency’s rules on public charge, the proposed Form I-485 and its accompanying instructions will increase confusion and fear among immigrant families. Immigrants will be less likely to apply for critical benefits for which they or their family members—including citizen children—might be eligible, which will result in negative public health consequences for American communities.

1999 INS Rule and Field Guidance on Public charge

In 1999, the former Immigration and Naturalization Service (INS, now USCIS) issued field guidance confirming the agency’s long-standing practice defining the term “public charge,” establishing procedures to be used by INS officers when making public charge

¹ <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet>

determinations, and clarifying the benefits that immigrants can receive without public charge consequences.²

Simultaneously, the Department of Justice published a proposed rule addressing the same issues³ and the Department of State issued a cable incorporating the definitions and rules contained in the guidance.⁴ The guidance took effect on May 21, 1999. The INS issued the guidance and proposed rule to alleviate “considerable public confusion about the relationship between the receipt of federal, state and local public benefits” and “public charge” determinations in immigration law.⁵

After extensive consultation with benefit-granting agencies including the Departments of Health and Human Services and Agriculture and the Social Security Administration, the INS noted that,

“This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children’s immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants’ fears of obtaining these necessary medical and other benefits are not only causing them considerable harm, but are also jeopardizing the general public.”⁶

INS definition of public charge

The 1999 INS rule and guidance clarified that “public charge” refers to an individual who is likely to become “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.”⁷ The term describes persons who cannot support themselves and who depend on benefits that provide cash—specifically Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), or state and local cash assistance programs—for their income. In addition, public assistance, including Medicaid, that is used for long-term institutional care, such as in a nursing home or mental health institution, may be considered as a factor in establishing public charge.

The receipt of these benefits does not automatically make an individual inadmissible, ineligible to adjust to lawful permanent residence, or deportable on public charge

² Field Guidance on Deportability and Inadmissibility on Public Charge Grounds [64 FR 28689] [FR 27-99] <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html> (last visited October 10, 2012).

³ 64 Fed. Reg. 28676 (May 26, 1999), <http://www.gpo.gov/fdsys/pkg/FR-1999-05-26/html/99-13188.htm> (last visited Oct. 10, 2012).

⁴ U.S. Department of State Foreign Affairs Manual Volume 9, Fam 40.41 Public Charge, INA 212(A)(4) <http://www.state.gov/documents/organization/86986.pdf> (last visited Oct. 10, 2012).

⁵ 64 Fed. Reg. 28689

⁶ 64 Fed. Reg. 28676

⁷ “Public Charge” (USCIS webpage), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge> (last visited Oct. 11, 2012).

grounds. Each determination is made on a case-by-case basis in the context of the totality of the circumstances. Other factors to be considered include an individual's age, health, income, family size, education, and skills, as well as the affidavit of support. No single factor will determine whether an individual is a public charge. Although the government can look at whether the individual used cash welfare, it cannot make its decision based only on what happened in the past.

USCIS Policy is Clear: Noncash Benefits Are Not Subject to Public Charge Consideration

The guidance states that noncash benefits and special-purpose cash benefits that are not intended for income maintenance, but rather to promote other important societal interests, are not subject to public charge consideration.⁸ These programs include use of Medicaid, the Children's Health Insurance Program (CHIP), or other health programs by the individual or a member of the family; or the Supplemental Nutritional Assistance Program (SNAP), WIC, public housing, or other noncash programs used by the individual or a family member. All other noncash programs, such as housing, school lunch, job training, child care, shelters, energy assistance, disaster relief, and health clinics, also are not relevant in the public charge determination.

The Need to Conform the I-485 Form to Existing USCIS Policy

Once again, USCIS must act to address "considerable public confusion about the relationship between the receipt of federal, state and local public benefits" and "public charge" determinations in immigration law.⁹ Questions 61 and 62 of Part 8 on Form I-485 fail to distinguish between cash and noncash benefits.

Recommendations:

If questions pertaining to the use of public benefits are deemed necessary, they must be revised to track the rules governing the public charge grounds for admissibility, and inquire only about benefits that are relevant to public charge determinations. We offer the revised questions below as recommendations:

- *Have you received Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), or cash welfare from state and local income assistance programs?*
- *Have you been in long-term institutional care—such as in a nursing home or mental health institution—paid for by Medicaid?*

⁸ Ibid. 5

⁹ Ibid. 4

The Instructions for Form I-485 must be revised to track the long-standing USCIS policy on public charge. We recommend the following revisions to the public charge instructions on page 7:

In Part 8., Item Numbers 61. and 62., you must include ~~all~~ only cash welfare received ~~or believe that you are likely to receive~~ from the U.S. Government or a U.S. state or local government, or if you have received long-term institutional care, such as in a nursing home or mental health institution, paid for by Medicaid. Receiving public assistance does not necessarily make you ineligible for adjustment of status. ~~but USCIS needs to know all types of U.S. Federal, state, and local public benefits you have received, or believe you are likely to receive, in order to determine relevancy to the public charge analysis.~~

Additionally, the Instructions for Form I-485 must include a section explaining these questions by:

- Specifying that noncash benefits such as SNAP, Medicaid, CHIP, WIC, housing benefits, child care services, energy assistance, emergency disaster relief, foster care and adoption assistance, education assistance, job training are not considered in the public charge determination.
- Specifying that receipt of monthly cash benefits for income maintenance purposes—SSI, TANF, cash from state and local income assistance programs and long-term institutional care—may be considered as a factor in the public charge determination, but does not automatically make an individual ineligible to adjust status to lawful permanent residence on public charge grounds.

In Conclusion

Once again, USCIS must act to alleviate “considerable public confusion about the relationship between the receipt of federal, state and local public benefits” and “public charge” determinations in immigration law.¹⁰ Despite the issuance of the guidance, immigrants and their families continue to avoid seeking critical services for which they are eligible. Advocates, attorneys and social service workers report that otherwise eligible non-citizen households express reluctance to apply for nutrition assistance or SNAP based on a belief that receipt of these and other noncash benefits for themselves and/or US citizen household members will prevent them from becoming a lawful permanent resident.

This misunderstanding of USCIS policy will only be made worse if questions 61 and 62 of Part 8 of Form I-485 are not corrected. The questions promote confusion among immigration attorneys as well as USCIS officials. It is understandable why immigrants are wary of applying for noncash benefits.

¹⁰ Ibid. 4

Because these questions on the adjustment forms are overly broad, asking about the use of public benefits generally, including those that are not relevant to the public charge inquiry, the resulting responses and data collected must be considered flawed, unnecessary for the agency's functioning, and lacking in practical utility.

We are grateful for your consideration of these comments. If you have any questions, please contact me at 202-499-7217 or at padilla@nilc.org.

Respectfully,

/s/

Angel Padilla
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National Immigration Law Center