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Center for Family Representation

November 2, 2020

Comments to Notice of Proposed Rulemaking:
"Affidavit of Support on Behalf of Immigrants"

Docket ID: USCIS-2019-0023

Introduction

We submit these comments on behalf of the Center for Family Representation, Inc. ("CFR"), a not-for-profit organization founded in 2002 to reduce reliance on foster care and improve outcomes for children and their families. CFR is an interdisciplinary legal services organization providing holistic representation to families and youth involved in the child welfare and juvenile justice systems in New York City. CFR pairs every client with an attorney, social worker and often a parent advocate (parent advocates are professionals who experienced the child welfare system firsthand and successfully reunited with their families). CFR's mission is to keep families together and to address the underlying causes of family instability. Our primary goal is to keep children and youth out of foster care (or shorten their time in care) in order to avoid the devastating consequences of family separation. We serve more than 3000 parents and youth annually in the Queens and New York county Family Courts in New York City, and also provide representation in criminal court, and in civil legal services and immigration matters. At present, 26% of CFR's clients are noncitizens, 7% are undocumented and 55% use public benefits.

This comment assumes familiarity with the Federal government's proposed changes to the regulations governing the affidavit of support requirements under section 213A of the Immigration and Nationality Act, and will outline the harmful effects of those changes. Given our expertise in the child welfare system, this comment focuses on the aspects of the proposed rule (the "Proposed Rule") that will affect children, families, and the New York City child welfare system. Because the Proposed Rule covers myriad topics and the comment period is only 30 days, we are not able to comment on every proposed change. However, the fact that we do not discuss a particular change in no way means we agree with it. We oppose the Proposed Rule in its entirety and urge the United States Citizenship and Immigration Services ("USCIS") and Department of Homeland Security ("DHS") to withdraw it.

I. **We Object to USCIS and DHS Allowing Only 30 Days to Comment on the Notice of Proposed Rulemaking (“NPRM”)**

As discussed further below, the Proposed Rule contains changes that we expect will negatively affect children, families, and the child welfare system, and is yet another general attack on lower income people in the immigration context. The NPRM is 189 pages long, including dense, technical language and sweeping new requirements that have the power to reshape the family-based immigration system. These changes merit at least 60 days for the public to absorb their magnitude, perform research and analysis, and provide a thoughtful and comprehensive response. By Executive Order:

Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. . . . In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*.

Executive Order 12866 at 6, 58 Fed. Reg. No. 190 (Oct. 4, 1993) (emphasis added). Contrary to this standing order, here USCIS and DHS have restricted the comment period to a mere 30 days, which is insufficient to respond to the various changes issued in a single, mammoth document, in violation of the Administrative Procedure Act.

Under any circumstances, it would be wrong for the government to give such a short time period to comment on changes that are this extensive, but the extraordinary challenges caused by COVID-19 make it particularly burdensome to respond to the NPRM within this unreasonably constricted timeframe. CFR's offices remain essentially closed, and our staff continues to work remotely despite the logistical difficulties we face in being unable to access the full resources that would have been available to us in our offices. In addition, many of CFR's partners and clients are at particularly high risk for COVID-19 infection and are susceptible to the financial hardships wrought by the pandemic. In recognition of the unique challenges posed by the COVID-19 pandemic, other federal agencies have adopted a flexible approach to rulemaking. For instance, the Consumer Financial Protection Bureau recently extended a comment period from an initial 60 days to add an *additional 90 days* after receiving comments from the public that the COVID-19 pandemic affected the public's ability to comment in a timely fashion.¹ Similarly, the Commodity Futures Trading Commission (“CFTC”) extended comment periods based on the pandemic, with its Chairman, Heath P. Tarbert, stating: “These extensions reflect my commitment to providing market participants with additional flexibility during this pandemic. Commenters on recently proposed rules will now have at least 90 days, and in many cases more, to provide feedback that we value tremendously as we seek to finalize rules.”² The

¹ See 85 Fed. Reg. (May 21, 2020).

² CFTC Extends Certain Comment Periods in Response to COVID-19 (Apr. 10, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8146-20>.

Federal Deposit Insurance Corporation (“FDIC”) likewise extended a rulemaking by 60 days “[i]n light of the challenges associated with COVID-19.”³ And the FDIC and Federal Reserve System, again, extended by 30 days a comment period regarding resolution plans for foreign banks, “in light of the challenges arising from the COVID-19 emergency.”⁴

For this procedural reason alone, we urge DHS to rescind the Proposed Rule. If it wishes to reissue the proposed regulations, it should grant the public at least 60 days to have adequate time to provide comprehensive comments.

II. **We Strongly Object to the Substance of the Proposed Rule because it Will Increase Family Separation in Immigrant Populations and Chill the Use of Life Sustaining Public Benefits**

The Proposed Rule will make it more difficult for many noncitizens to immigrate to or remain in the United States, which can have the negative effect of separating, or prolonging the separation of, immigrant families. In addition, the proposed changes send a signal that the use of public benefits is detrimental to family-based immigration. This is likely to cause parents (whether they are the intending immigrants or hopeful United States Citizen/Green Card holding sponsors or both) to cease or avoid seeking public benefits for fear that such benefits will jeopardize their immigration status or their role as potential sponsors. These consequences of the Proposed Rule will have devastating effects on children and families and will generate significant unnecessary costs for municipal, state and federal agencies.

A. **The Proposed Changes Will Make it More Difficult to Immigrate to the United States, Leading to Family Separation**

By imposing onerous requirements on petitioning sponsors and joint sponsors, the Proposed Rule would gravely limit the ability of lawful permanent residents and United States citizens, including children, to live with members of their family who wish to immigrate to the United States. Among its sweeping changes, the Proposed Rule contemplates the following particularly limiting and intimidating new items:

- A Financial Sponsor cannot act alone (and must find a joint sponsor) if (i) he or she used any amount of means-tested public benefits during the 36 months prior to submitting Form I-864 ("Affidavit of Support Under Section 213A of the INA"), or (ii) the petitioning sponsor had a judgment entered against him or her at any time for failing to meet any prior sponsorship or household member obligation.

³ FDIC Extends Comment Period on Modernizing Brokered Deposit Restrictions (Apr. 3, 2020), <https://www.fdic.gov/news/press-releases/2020/pr20045.html>.

⁴ Agencies extend comment period on updates to resolution plan guidance for large foreign banks (Apr. 27, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200427a.htm>.

- An individual is also disqualified as a joint sponsor if he or she has received means-tested public benefits during the previous three years or had a judgment entered for failure to meet sponsor or household member obligations.
- The class of people who can be considered "household members" for purposes of adding their incomes to the sponsor's income is significantly limited (for example, to combine the intending immigrant's income with the sponsor's, the immigrant and the sponsor must plan to live in the same household).
- Potential sponsors must comply with onerous and intrusive requests for sensitive personal information, including three years of bank account and tax documentation.
- The requirement that benefits agencies and other requesters need a subpoena to access sponsors' personal information from the USCIS is eliminated.

These proposed changes are patent attempts to limit the number of individuals who can act, or would be willing to act, as sponsors to intending immigrants. As intending immigrants are often parents of children already living in the United States, the Proposed Rule would compound family separation by keeping these intending immigrants outside the United States. For example, one of CFR's clients is a noncitizen who is married to a United States citizen. The client's citizen spouse is disabled and lacks income, so she cannot qualify as a sponsor on her own. The noncitizen client, unlike the vast majority of our clients, has another relative whose income is large enough, combined with the noncitizen client, to meet a sponsor's income requirements. Under current rules, this would constitute a valid sponsorship relationship. However, under the Proposed Rule, the sponsor and the noncitizen client could not combine their incomes unless they planned to live in the same household. In this way, the Proposed Rule raises new hurdles that keep intending immigrants from the United States, many of whom are trying to immigrate to reunite with their children.

B. The Proposed Changes Are Likely To Chill the Use and Pursuit of Public Benefits by Individuals Hoping to Act as Sponsors, Regardless of Immigration Status

The proposed changes send a signal that the use of public benefits is detrimental to the family-based immigration system, and, as a result, may cause immigrants and potential sponsors to avoid (or stop) seeking access to public benefits. As referenced above, the proposed changes include a requirement that any petitioning sponsor who used a means-tested public benefit within three years before submitting Form I-864 must find a joint sponsor. The joint sponsor must also show that he or she did not use public benefits within the past three years.⁵

When proposed changes to the immigration system indicate that the use of public benefits is somehow a "black mark," many immigrants (even those whose status would be unaffected by the changes) are frightened and may cease or never apply for public benefits for which they are eligible. This trend has been observed after previous changes in immigration policy—following the passage of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, there

⁵ This rule has only one limited exception for petitioning sponsors on active military duty.

was a decline in benefits participation by immigrants,⁶ even among groups whose eligibility was unaffected by the legislative change (such as refugees and children who were United States citizens).⁷ Even a *proposed* (not final) change to immigration rules can have this effect—for example, following the issuance of the NPRM regarding "admissibility on public charge grounds" (Docket ID USCIS-2010-0012), many immigrants reported a fear of applying for or receiving benefits.⁸ Subsequently, when that proposed rule went into effect, reduction in child Medicaid use suggests that the adoption of that rule could have led to 260,000 eligible low-income children failing to receive Medicaid benefits.⁹

The proposed changes compound these fears and extend them to a new group that was not previously threatened by public benefit use—*potential sponsors*, which may include United States citizens (even those with no immigration history) and lawful permanent residents, as many people in each of these groups have family connections to individuals outside the United States and immigrants within the United States.

Due to the complexity of immigration laws, both noncitizen clients and government case workers are frequently confused or misinformed about the implications of immigration reform for individuals and families. For immigrants living in poverty, factors such as language barriers and lack of quality representation exacerbate this problem. In CFR's experience, the clear message that the proposed changes limit the ability to act as a sponsor due to use of *any* public benefits will continue to frighten individuals with unstable immigration status, and, for the first time, United States citizens and lawful permanent residents who hope to sponsor family members (including parents of United States-based children) living abroad.

C. Decreased Use of Public Benefits Will Likely Increase or Prolong Interaction with the Child Welfare System

The relationship between decreased public benefit participation and increased involvement with the child welfare system is straightforward. The Proposed Rule penalizes the use of means-tested public benefits in the sponsorship process by limiting sponsorship eligibility based on benefits use. Many means-tested public benefits help provide for basic needs, such as non-

⁶ *Id.*, citing Fix, Michael et al., "Immigrants and Welfare: Overview" *Immigrants and Welfare: The Impact of Welfare Reform on America's Newcomers*, Edited by Michael Fix, Russel Sage Foundation, NY 2009.

⁷ Pedraza, Francisco and Zhu, Ling, "The 'Chilling Effect' of America's New Immigration Enforcement Regime," *Pathways*, Spring 2015, https://inequality.stanford.edu/sites/default/files/Pathways_Spring_2015_Pedraza_Zhu.pdf.

⁸ Batlova, Jeanne et al., "Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use," Migration Policy Institute, June 2018, available at: <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

⁹ Barofsky, Jeremy, Vargas, Ariadna, Rodriguez, Dinardo and Barrows, Anthony, "Spreading Fear: The Announcement Of The Public Charge Rule Reduced Enrollment In Child Safety-Net Programs," *Health Affairs* 39, No. 10 (October 2020).

emergency Medicaid, "SNAP" (food stamps), and certain forms of housing assistance. If potential sponsors are afraid to use these benefits on their own behalf or on behalf of their children, they may become unable to provide their children with basic necessities, a serious consequence that CFR helps clients avoid and that the child welfare system may use as a basis to file a neglect petition.

Under the law of New York (where CFR operates), the term "neglected child" includes a child under eighteen "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care...in supplying the child with adequate food, clothing, shelter or education...though financially able to do so or offered financial or other reasonable means to do so" (emphasis added).¹⁰ When mandatory reporters (for example, schools, medical professionals) or other reporters (such as neighbors) notice the children lack access to these basic necessities, they are likely to report suspicions of child neglect to the Administration for Children's Services ("ACS").

A report to ACS can initiate a process that is lengthy, stressful and expensive for both families and the government, during which ACS conducts a neglect or abuse investigation and may file a petition in Family Court. In a Family Court proceeding, a Family Court judge decides whether children may be released to live with their parents, other relatives or removed to foster care. The proceedings require parents to make multiple court appearances, placing employment at risk. In addition to court appearances, parents must attend multiple meetings with ACS and agencies outside of court. Throughout each proceeding, a series of court conferences, monitoring appointments, custody orders and ACS meetings take place, all costing government (i.e., taxpayer) funds.

In addition, parents whom ACS has already charged with neglect may be less likely to seek insurance they need to participate in services required to demonstrate parental fitness, like individual and family therapy, anger management or drug treatment. These parents could be forced to choose between defying an ACS or court order or, in their minds, risking their sponsorship eligibility to obtain benefits (such as insurance) that would allow them to comply. The failure to comply with such orders results in prolonged interactions with ACS and Family Court (as the families negotiate their obligations), protracted stays in foster care for children, delays in reunification, and extra litigation. All of this makes permanent legal separation of children more likely due to non-compliance.

D. Increased Engagement with the Child Welfare System and Family Separation Will Unnecessarily Increase Government Cost

As illustrated by the two preceding sections, an influx of families into the child welfare system will multiply the instances of investigations, hearings and proceedings that cost government funds. The added burden on ACS and family courts will further strain these institutions, leading to additional backups and ever-slower administration of justice. These downstream costs are

¹⁰ New York Family Court Act § 1012(f).

difficult to predict and can mount much higher than the threshold costs of providing families with basic needs.

In addition, to the extent that a decrease in public benefit participation leads to the separation of families, it will generate significant costs for the government. Take, for example, the costs of foster care in New York, CFR's primary center of operation. In December 2019, New York City had 7,709 children in foster care, and a 2019 fiscal year foster care program budget of \$524,600,000 (a foster care spending rate of \$68,050 per child per year).¹¹ The cost of foster care per child has been relatively consistent, both over time and at municipal versus state levels: The preliminary foster care services budget for fiscal year 2021 is \$579,500,000 (a rate of \$64,388 per child per year, assuming 9000 children are in foster care).¹² By comparison, in 2010-2011, the average cost of foster care, across New York State, was \$56,060 per child.¹³ In New York, foster care is funded by a combination of municipal, state and federal funds.¹⁴ Broadly (including outside New York), more than half of children who enter foster care or other non-family care remain there for longer than a year, and 22% remain for more than three years before being reunited with families or permanently placed.¹⁵ Based on CFR's data, we estimate that our work in preventing and/or shortening stays in foster care has saved New York taxpayers over \$48 million since 2007.

Even further, children placed in foster care show increased rates of encounters with other institutions like the juvenile justice and criminal justice systems. In New York City, ACS also runs the juvenile incarceration system; in fiscal year 2019, there were 1,449 juvenile admissions to secure and non-secure detention, and the average daily cost per youth per day in detention was \$1,651.¹⁶ Thus, delayed reunification may multiply government expenses even beyond foster care.

¹¹ The Council of the City of New York, "Report of the Finance Division on the Fiscal 2021 Preliminary Capital Budget, Fiscal 2021 Preliminary Capital Commitment Plan, and the Fiscal 2020 Preliminary Mayor's Management Report for the Administration for Children's Services", *Finance Division*, March 23, 2020, at *25-26.

¹² *Id.* at *26.

¹³ Wallace, Gerard and Johnson, Ryan. "New York State- Child Welfare Costs and Kinship Services," *New York State Kinship Navigator*, <http://www.nysnavigator.org/pg/professionals/documents/NewYorkStateChildWelfareCostsandKinshipCare.pdf>.

¹⁴ The Council of the City of New York, "Report of the Finance Division on the Fiscal 2021 Preliminary Capital Budget, Fiscal 2021 Preliminary Capital Commitment Plan, and the Fiscal 2020 Preliminary Mayor's Management Report for the Administration for Children's Services", *Finance Division*, March 23, 2020, at *26.

¹⁵ Szilagyi, Moira MD, PhD, et al., "Health Care Issues for Children and Adolescents in Foster Care and Kinship Care," *American Academy of Pediatrics*, <http://pediatrics.aappublications.org/content/136/4/e1142> (2015), at 4.

¹⁶ The Council of the City of New York, "Report of the Finance Division on the Fiscal 2021 Preliminary Capital Budget, Fiscal 2021 Preliminary Capital Commitment Plan, and the Fiscal 2020 Preliminary Mayor's Management Report for the Administration for Children's Services", *Finance Division*, March 23, 2020, at *43.

In the absence of a policy that chills access to potential citizen and non-citizen sponsors, these costs are avoidable.

E. Family Separation, Increased Engagement with the Child Welfare System, and the Potential Negative Outcomes of this Engagement are Harmful to New York City's Children.

Research indicates that family separation can negatively affect the life outcomes of affected children. When a child experiences separation from a parent or primary caregiver, the child can experience a range of problems, including but not limited to, fear, confusion, anxiety, and grief, and may exhibit posttraumatic stress responses including intrusive thoughts, nightmares, negative self-images, behavioral changes, self-destructive thoughts, plans or actions, issues with focus or concentration and physical symptoms such as stomach pain and headaches.¹⁷ This causes some children to reject emotional connections and avoid positive relationships and necessary support.¹⁸

Similarly, engagement with the child welfare system is associated with negative life outcomes in children. Compared to similarly situated children who remain with their families, children placed in foster care nationwide are more likely to experience involvement in the juvenile justice system, teen pregnancy, unemployment and incarceration, according to the National Child Traumatic Stress Network.¹⁹ Within one year of emancipation from foster care, 22-36% experience homelessness, and 33% of former foster care participants live at or below the poverty level.²⁰ In addition, studies of former foster children show that 54% have clinically significant mental health problems and 30% have a chronic mental illness.²¹

III. **The Proposed Rule is an Immoral Attack on Lower Income Populations**

At its core, the Proposed Rule is a blatant attack on lower income populations. It imposes onerous requirements on petitioning sponsors and joint sponsors, effectively punishing Americans who lack high incomes or who have had any financial difficulties in the past three years, irrespective of an individual's actual income at the present time. The Proposed Rule does not merely penalize poverty (i.e., indigent populations)—by looking at the past three years of possible public benefit use, it penalizes anyone who, even in the distant past, may have benefited

¹⁷ “Children with Traumatic Separation: Information for Professionals,” *The National Child Traumatic Stress Network*, <https://www.nctsn.org/resources/children-traumatic-separation-information-professionals>.

¹⁸ *Id.*

¹⁹ Doyle, Joseph, Jr., “Child Protection and Child Outcomes: Measuring the Effects of Foster Care,” *American Economic Review* (2007), http://www.mit.edu/~jjdoyle/fostercare_aer.pdf (advancing statistics based on core data gathered from the Illinois Department of Children and Family Services).

²⁰ Szilagy, *supra* note 7.

²¹ *Id.*

from public assistance, creating a long-lasting stain on someone who might otherwise participate in family based immigration. The proposed changes would also intimidate potential sponsors with onerous and intrusive requests for sensitive personal information, sending a clear message that those with any sensitivity to financial stability or privacy are unwelcome and endangered by the sponsorship process. By creating barriers for sponsors and joint sponsors, the rule also eviscerates a potential income stream for impoverished individuals seeking to bring to the United States family members who could contribute to the family's income and ability to thrive.

This three-year lookback for *any* public benefits use is even more restrictive than the analysis for whether an individual is likely to become a "public charge" for purposes of admissibility to the United States. There, the use of public benefits for 12 out of the past 36 months is penalized. While the public charge analysis itself is unduly restrictive, the proposed changes to the sponsorship rules are even more draconian.

The fundamental unfairness of the Proposed Rule is compounded by the fact that the United States is in a state of economic crisis due to the COVID-19 pandemic, something the NPRM patently ignores. The COVID-19 pandemic not only makes it impracticable to respond thoroughly to the sweeping changes of the Proposed Rule, but also makes it more likely that huge numbers of potential sponsors (whether or not they are citizens or immigrants) are in need of public benefits, and must either (a) refrain from using them out of fear that the Proposed Rule will go into effect, or (b) use them and potentially disqualify themselves from acting as a sponsor or joint sponsor for a loved one living outside the United States.

IV. **Conclusion**

The Proposed Rule will jeopardize the family-based immigration system. Its proposed changes thus merit a full 60-day comment period for the public to prepare comments adequately. Substantively, the Proposed Rule is likely to increase family separation and chill the use of public benefits. These consequences of the Proposed Rule would not only be devastating to children and families but would generate increased government costs by way of ACS investigations, Family Court hearings, and, in cases that involve family separation, the unnecessary and significant expense of foster care.

In light of the anticipated consequences, CFR believes that the proposed changes will have devastating and unnecessary impacts on America's immigrant families and on its child welfare systems and taxpayers. Accordingly, CFR calls upon the administration to withdraw the Proposed Rule in its entirety.

Respectfully,

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