**SAN FRANCISCO**
1458 Howard Street
San Francisco, CA 94103

**WASHINGTON, D.C.**
1015 15th Street, NW
Suite 600
Washington, D.C. 20005

**SAN ANTONIO**
500 Sixth Street
Suite 204
San Antonio, TX 78215

**AUSTIN**
6633 East Hwy 290
Suite 102
Austin, TX 78723

ilrc@ilrc.org
www.ilrc.org

October 30, 2020

Mark Phillips, Residence and Naturalization Chief
Office of Policy and Strategy
U.S. Citizenship and Immigration Services, DHS
20 Massachusetts NW
Washington, DC 20529-2140

*Submitted via https://www.regulations.gov/*

**RE: RIN 1615-AC39; CIS No. 2655-20; DHS Docket No. USCIS-2019-0023,**
**Public Comment Opposing Proposed Rule on Affidavit of Support on Behalf of Immigrants**

Dear Chief Phillips,

The Immigrant Legal Resource Center (ILRC) submits this comment in opposition to the proposed rule, issued by the U.S. Department of Homeland Security, Affidavit of Support on Behalf of Immigrants, RIN 1615-AC39; CIS No. 2655-20; DHS Docket No. USCIS-2019-0023 (October 2, 2020).

The ILRC is a national non-profit organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The ILRC's mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. Since its inception in 1979, the ILRC has provided technical assistance on hundreds of thousands of immigration law issues, trained thousands of advocates and pro bono attorneys annually on immigration law, distributed thousands of practitioner guides, provided expertise to immigrant-led advocacy efforts across the country, and supported hundreds of immigration legal non-profit organizations in building their capacity. The ILRC has produced legal trainings, practice advisories, and other materials pertaining to the affidavit of support, public charge inadmissibility, and family-based immigration more broadly.

The ILRC also leads the New Americans Campaign, a national non-partisan effort that brings together private philanthropic funders, leading national immigration and service organizations, and over two hundred local service providers across more than 20 different regions to help prospective Americans apply for U.S. citizenship. For many, one of the benefits of becoming a U.S. citizen is being able to sponsor family members such as parents, children, and siblings by filing a visa petition and an affidavit of support. Through our extensive networks with service providers, immigration practitioners, and naturalization applicants, we have developed a profound understanding of the barriers faced by low-income individuals seeking to obtain immigration benefits and sponsor family members.

The ILRC is a leader in family-based immigration, including the affidavit of support, producing trusted legal resources including webinars, trainings, and manuals such as *Families & Immigration: A Practical Guide* and *Public Charge and Immigration Law*. The ILRC provides technical legal support for attorneys, DOJ-accredited representatives, and non-profit programs who represent immigrants during the process of applying for permanent residence. The changes proposed to the affidavit of support would have a profoundly negative impact on U.S. citizens and U.S. permanent residents who will be deterred or even disqualified from being able to immigrate their loved ones because of the onerous requirements in this proposed rule.

The ILRC strongly opposes the proposed changes to the affidavit of support rule because the costs are not justified by the benefits. DHS has failed to prove that the changes are necessary or justified, has not provided any data that was evaluated or considered as part of these policy shifts, and does not justify departure from current practice. These proposed changes will suppress family-based immigration, in stark contrast to our country's commitment to family reunification and facilitating the inclusion and integration of immigrants into the United States. It will also cause families to forgo needed public programs, fearing that utilizing public programs for which they are eligible will prevent them from sponsoring family members in the future, which will have a detrimental effect on overall public health and safety.

## I. The Proposed Rule Fails to Justify Changes to Evidentiary Requirements That Will Unduly Burden U.S. Citizen and U.S. Permanent Resident Sponsors as Well as USCIS Adjudicators

Currently, the required supporting documentation for the affidavit of support consists of a complete copy of the sponsor's most recent federal income tax return, including W-2s and all schedules and Form 1099s, meant to establish that their annual household income meets the required amount based on the Federal Poverty Guidelines for their household size. Contributing household members who execute Form I-864A, Contract Between Sponsor and Household Member, must also provide a complete copy of their most recent federal income tax return with all associated schedules, W-2s, and 1099s.

The proposed rule would increase the years of tax return supporting documentation from one year to three years and require that the tax documentation take the form of IRS-certified copies or transcripts. Both IRS-certified copies and IRS transcripts require submitting a separate form to the IRS to obtain this evidence, and IRS-certified copies of tax returns cost $50 per return.[1] This means it will cost the sponsor a total of $150 for the required three years, if the sponsor submits official copies instead of transcripts of their tax returns. In addition, the proposed rule would require that all sponsors, as well as household members who execute Form I-864A, submit a credit report and credit score. While all individuals are entitled to one free credit report per year, they must pay to obtain their credit score. Credit scores cost about $20.[2] Although the proposed rule would, for now, maintain the status quo of not requiring a filing fee for Forms I-864, I-864EZ, or I-864A, these new costs to obtain supporting evidence will mean that sponsors may have to pay up to $170 associated with filing their Form I-864, I-864EZ, or I-864A. These changes to the evidentiary requirements will also be more burdensome in terms of the time required for sponsors to request and compile this evidence, for the IRS to provide the tax documentation, and for USCIS adjudicators who must sift through all this additional paperwork, adding to already excessive case processing times.[3]

[1] Proposed Rule, 85 FR at 62464.
[2] *Id.*
[3] *See, e.g.,* Joint Written Testimony of Don Neufeld, Associate Director, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, et al., Hearing on Policy Changes and Processing Delays at USCIS before the House Committee on the Judiciary Subcommittee on Immigration and Citizenship on July 16, 2019.

### A. Reverting to Requirement of Three Years of Taxes Instead of One Year of Taxes

After the affidavit of support was implemented through an interim rule by INS in 1997, from 1997 to 2006 sponsors were required to submit three years of tax returns. In 2006, a joint rule was promulgated with the Department of Justice to also cover adjudications in immigration court and at that time, the rule reduced the amount of tax returns from three years to one. Since the 2006 rule, the sponsor has only been required to present the current year's tax return, but also had the option to present additional years if the sponsor found it would be helpful to establishing their economic situation. The agency's purpose in reducing the amount of required documentation in the 2006 rule was to make the process clearer and less burdensome, while still ensuring that sponsors had sufficient financial means as required by the statute at INA § 213A.

The proposed rule's justification for reverting from one year of taxes back to three years is that this and other changes to the documentary evidence requirements will "better enable" immigration officers to determine whether a sponsor meets the financial requirements for the affidavit of support,[4] without any explanation of why three years of tax documentation is necessary to do that (the current affidavit of support form requests income information from the last three tax years, even though only a copy of the most recent return is required), and without any discussion of the fact that the 2006 rule had the same purpose, but accomplished it by requiring only one year of photocopied taxes. There is no rationale nor data in the proposed rule to justify the policy shift, other than the implied one which is to deliberately increase the burden on all parties concerned so that they will be unable or unwilling to participate in the affidavit of support process. The Department does not provide any data or explanation showing that the move from three years of tax returns to one year of tax returns in 2006 was a mistake that should now be reversed, for instance because only requiring one year of tax returns had led to a higher rate of sponsors defaulting on their support obligations. The agency's arbitrary policy shift, essentially flip-flopping to the more burdensome alternative that was abandoned in the last version of the affidavit of support rule, does not meet the minimum required for reasoned decision-making.

### B. Requiring IRS Transcripts or IRS-Certified Copies in Place of Photocopies of Tax Returns

DHS provides no rationale for why the tax returns must now be IRS-certified copies (or transcripts), rather than ordinary photocopies. In the past, the agency found it unnecessary to require IRS-certified copies of tax returns:

> If, as the IRS recommends, the sponsor has kept photocopies or duplicate originals of the sponsor's returns in the sponsor's own file, the sponsor may submit copies of his or her own file copies . . . the interim rule and the Form I-864 itself make it clear that, by signing the Form I-864, the sponsor certifies under penalty of perjury that the copies are true copies.

71 FR at 35738. For policy changes that contradict prior findings, the Department must provide a more detailed justification than it would when creating a new policy on a blank slate.[5]

Not only is this change unnecessary, this proposed change is also burdensome and costly in terms of both time and money. Requesting an IRS-certified copy of a tax return costs $50 per return,[6] and because the proposed rule would require three years of tax returns rather than just one, that means sponsors will have to pay up to $150 to obtain

[4] 85 FR at 62445.
[5] *Encino Motorcars, LLC v. Navarro*, __ U.S. __, 136 S.Ct. 2117, 2125 (2016); *FCC v. Fox Television Studios, Inc.,* 556 U.S. 502, 515-16 (2009); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015).
[6] 85 FR at 62464.

required supporting evidence—in addition to the added cost to obtain a credit score, see below—unless they opt for transcripts which are available for free from the IRS but nonetheless require time to fill out an IRS request form. This new evidentiary requirement for transcripts or an official IRS copy of tax returns for the last three years adds a wholly unnecessary time and resource burden, as sponsors must either file IRS Form 4506-T to request a tax transcript or IRS Form 4506 to request an IRS-certified copy of their tax return, and the Department has not provided any data or rationale for why complete photocopies of tax returns, along with the sponsor's certification under penalty of perjury that the copies are true copies, is insufficient.

Adding this requirement also unduly burdens another agency, the IRS, creating unjustified taxpayer expense. The Department cites to no problems in the prior process that require this shift.

### C. Requiring Credit Reports and Credit Scores

The proposed rule requires that petitioning sponsors, joint sponsors, and household members who execute Form I-864A also provide two new items as part of the supporting documentation for the affidavit of support, in addition to the new tax documentation: credit report and credit score. Both these pieces of evidence must be separately requested from a credit reporting agency, and while an individual is entitled to one free credit report per year, they must pay to obtain a credit score. Credit scores cost about $20.[7]

According to the proposed rule, negative information on the credit report or a credit score below 580 "may indicate" that the sponsor has not demonstrated means to maintain income at the required level and fulfill their support obligations, should they arise.[8] However, inaccurate information on credit reports is an ongoing problem; a survey by the Federal Trade Commission in 2012 found that more than a quarter of participants had at least one potentially material error on their credit report.[9] The Consumer Financial Protection Bureau receives more complaints on credit reporting "than in any other industry it regulates."[10] Further, the "predictability power" of credit scores only lasts for approximately one to two years[11] but affidavit of support obligations may last anywhere from a few years to ten years or longer, thus providing limited value in ascertaining a sponsor's likely ability to maintain financial means over the full, often lengthy period of time that the affidavit of support is in effect.[12] A 2012 report by the National Fair Housing Alliance noted that *not* relying on credit reports and credit scores appeared, in fact, to be more effective than using this flawed information: "Many lenders that either do not rely on credit scoring mechanisms at all or minimally rely on them experience default rates that are *lower* than the industry average."[13] Finally, and most importantly, credit scoring systems have a harmful, disparate impact on communities of color.[14]

---

[7] 85 FR 62464.
[8] *See* 85 FR 62445.
[9] Cooper, Cheryl R. et al., Congressional Research Services, R44125, at 9 (2020), *available at* https://fas.org/sgp/crs/misc/R44125.pdf.
[10] *Id.* at 14.
[11] *Id.* at 5.
[12] USCIS, Affidavit of Support, https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support#:~:text=An%20affidavit%20of%20support%20is,work%20(usually%2010%20years) ("… the sponsor's responsibility usually lasts until the family member or other individual either becomes a U.S. citizen [which can happen no earlier than three to five years after becoming a permanent resident], or is credited with 40 quarters of work (usually 10 years).")
[13] Rice, Lisa and Deirdre Swesnik, Nat'l Fair Housing Alliance, 2012 report at 22 (emphasis added), *available at* https://nationalfairhousing.org/wp-content/uploads/2017/04/NFHA-credit-scoring-paper-for-Suffolk-NCLC-symposium-submitted-to-Suffolk-Law.pdf.
[14] *See, e.g.,* Rice, Lisa and Deirdre Swesnik, Nat'l Fair Housing Alliance, 2012 report at 3, *available at* https://nationalfairhousing.org/wp-content/uploads/2017/04/NFHA-credit-scoring-paper-for-Suffolk-NCLC-symposium-submitted-to-Suffolk-Law.pdf ("Access to credit is still often based on where we live rather than our individual ability to repay

For all these reasons, credit reports and credit scores should not be relied upon as part of the affidavit of support sponsorship requirement.

These new evidentiary requirements, as with other documentary changes in the proposed rule, will impose additional time and resource burdens on sponsors and household members without adequate justification. The proposed rule states that this additional documentary evidence will "better ensure" sponsors are able to meet their financial obligations; however, no data or analysis is provided showing that currently sponsors are failing to fulfil their affidavit of support obligations due to insufficient financial means, necessitating such a change. Moreover, credit reports and credit scores are not indicative of a sponsor or household member's ability to maintain income at the required level or fulfill future support obligations and should not be relied upon because they are a flawed and discriminatory financial measure.

## II. The Proposed Rule's Joint Sponsor Requirements Will Discourage People from Becoming Joint Sponsors and Deter the Lawful Receipt of Public Benefits by U.S. Citizens and U.S. Permanent Residents

The proposed rule would amend current regulations regarding sponsors by requiring submission of an affidavit of support by a joint sponsor if (1) the petitioning or substitute sponsor received any means-tested benefits on or after the effective date of the rule and within the 36-month period prior to executing the affidavit of support or (2) the petitioning or substitute sponsor had a judgment entered against them for failing to meet a prior sponsorship or household member obligation.[15] In addition, individuals who fall under either of these criteria would be barred from being a joint sponsor.[16]

Shrinking the pool of individuals who could serve as sponsors will constrain the ability of U.S. citizens and U.S. permanent residents to immigrate family members, as is their statutory right.[17] It may also chill the lawful receipt of public benefits by U.S. citizens and U.S. permanent residents because doing so could prevent them from sponsoring close family members, a chilling effect that the proposed rule acknowledges.[18] This chilling effect would jeopardize the health and well-being of lawfully present members of U.S. society.

### A. Requiring a Joint Sponsor If the Petitioning or Substitute Sponsor Received Means-Tested Benefits in the Three Years before Executing the Affidavit of Support

The proposed rule would require a joint sponsor based on *any* receipt of means-tested public benefits by the sponsor in the last three years,[19] even use of a single benefit for a single month nearly three years ago, and regardless if the sponsor now has sufficient income. There is no supporting evidence to show a person who receives

---

that credit."); Racial Justice & Equal Economic Opportunity Project, Nat'l Consumer Law Center, "Past Imperfect: How Credit Scores and Other Analytics 'Bake In' and Perpetuate Past Discrimination," (May 2016) at 2, *available at* https://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf ("In light of the troubling racial disparities reflected in credit reports and scores, they should not be used outside of the credit context absent the most compelling justification."); "Missing Credit: How the U.S. Credit System Restricts Access to Consumers of Color," testimony of Lisa Rice, President and CEO of Nat'l Fair Housing Alliance, before the U.S. House Committee on Financial Services (Feb. 26, 2019), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-ricel-20190226.pdf; Botella, Elena, SLATE, "Removing Racial Bias From Credit Scores Isn't Possible,"(Oct. 11, 2019), *available at* https://slate.com/technology/2019/10/sanders-credit-score-fico-racial-bias.html.

[15] 85 FR 62442-43.

[16] *Id. See also* 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4) (proposed).

[17] *See generally* INA § 204, 8 U.S.C. § 1154.

[18] *See* 85 FR 62435, 62453, 62454.

[19] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4)(i) (proposed).

a single means-tested public benefit for a single month would be unable to support a family member in the future. One need only consider the ongoing COVID-19 pandemic and associated economic downturn, which has caused millions of people to become unemployed in 2020 and to depend temporarily on one or more means-tested benefits to support their families,[20] to understand the overbreadth and illogic of the Department's three-year look-back proposal regardless the amount of benefits used during that period as a barometer of sponsors' current (and future) financial means.[21] Therefore, DHS's proposal that a sponsor's receipt of any public benefits in the last three years would be a blanket disqualifier is irrational and recklessly overbroad. Indeed, given that the obligation of a sponsor is to provide future support should it be necessary, *any* look-back period is irrational and not justified.

The 2006 affidavit of support rule explicitly rejected the idea that information about a sponsor's receipt of means-tested benefits was relevant or useful: "In most cases, however, information about this issue [sponsor's receipt of means-tested benefits] will not add much evidence of probative value."[22] For this reason, the 2006 affidavit of support rule decided not to ask about a sponsor's past receipt of means-tested benefits, and chose to simply prohibit the sponsor from including income from means-tested benefits in calculating household income. The proposed rule does not explain this departure and further fails to justify this inexplicable shift in policy, again in direct conflict with previous findings in prior versions of the affidavit of support rule. As with the move from requiring three years of tax returns to one year to three years again, the Department must provide a reasonable explanation for contradicting previous policy and disregarding reasons it relied upon in the past, in this case for changing its mind and deciding that a sponsor's use of means-tested benefits is, apparently, probative.[23] The Department must provide a reasoned explanation for any administrative policy shifts, involving an assessment of all costs and benefits of the proposed rule and of all the possible regulatory alternatives, including the alternative of not issuing the regulation.[24] The Department offers no acceptable explanation for why it should deviate from its 2006 affidavit of support policy, or what has changed between 2006 and 2020 necessitating consideration of a sponsor's receipt of means-tested benefits, when this approach was specifically rejected as irrelevant in the past.

In addition, this proposal could deter the lawful receipt of means-tested public benefits by U.S. citizens, U.S. nationals, and U.S. permanent residents who may worry that they will be unable to sponsor their close relatives for immigration – their lawful right[25] – if they enter a period of financial difficulty, no matter how brief, and thus may decide to forgo needed public benefits for which they are eligible and that they are entitled to access. This would perpetuate poverty and homelessness among lawfully residing members of U.S. society, including U.S. citizen children, and, if such individuals opt out of government-subsidized health insurance, could aggravate national public health crises like COVID-19.

The Department attempts to justify this proposed policy shift by explaining that receipt of means-tested benefits by a sponsor "may indicate" that they do not have the financial means to maintain an annual income at the required level and is "relevant" to determining whether the sponsor will meet future support obligations.[26] Yet DHS's suggestions that such information about a sponsor "may indicate" or "is relevant to" consideration of that sponsor's

---

[20] *See, e.g.,* Center on Budget and Policy Priorities, "Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships" (last updated Oct. 15, 2020), *available at* https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and.
[21] 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4)(i) (proposed).
[22] 71 FR 35732, 35738.
[23] *Encino Motorcars, LLC v. Navarro*, __ U.S. __, 136 S.Ct. 2117, 2125 (2016); *FCC v. Fox Television Studios, Inc.,* 556 U.S. 502, 515-16 (2009).
[24] *See* 85 FR 62451.
[25] *See generally* INA § 204, 8 U.S.C. § 1154.
[26] 85 FR 62433.

future ability to financially support a close family relative is not supported by any data. Indeed, the Department admits there is no data to support its assumption that there is a correlation between a sponsor's receipt of means-tested benefits and a failure to reimburse agencies for benefits received by the intending immigrant.[27] In place of data, the Department relies upon the Trump administration's declared sponsorship enforcement priorities to make "a policy determination" that the proposed changes will achieve these goals.[28] DHS further states that while it "recognizes that an individual's financial circumstances can vary over time and the receipt of a means-tested public benefit in the past may be less indicative of a current inability to demonstrate the means to maintain income at the applicable threshold for an Affidavit," the agency "believes looking at the 36-month period before executing Form I-864 will provide a more complete picture of the petitioning sponsor's or substitute sponsor's ability to maintain income and carry out his or her support obligations."[29] Apart from choosing three years to match the three years of tax returns,[30] this time period appears to be random. DHS fails to demonstrate that sponsors are not, as a group, adequately supporting their family members who immigrate to the United States under the current scheme, and therefore that there is a compelling public need for such a radical policy shift.

Further, the Department does not meaningfully engage in a costs and benefits analysis regarding its proposed change to require a joint sponsor where the petitioning or substitute sponsor received means-tested benefits in the last three years. The Department states that this policy proposal "*may impose some costs* if a joint sponsor must executive an Affidavit in cases where a sponsor has received any means-tested public benefits within 36 months of filing the Affidavit and/or has failed to meet the support or reimbursement obligations under an existing Affidavit or Contract," noting that *"[t]here would be a reduction in the number of immigrants granted an immigration benefit* in cases where the intending immigrant is unable to obtain a sponsor who can meet the new requirements under this proposed rule."[31] In turn, the Department describes that "[t]he proposed rule could result in some sponsors and joint sponsors who may intend to sponsor a family member in the future to forego enrollment or disenroll from a means-tested public benefits program to avoid triggering the proposed additional requirements."[32] Moreover, DHS acknowledges additional harms that represent costs imposed by these proposed changes, that the proposed regulation "would likely reduce the number of individuals who would be eligible to qualify as a sponsor who may execute an Affidavit," but states that it is "unable to determine the magnitude of the reduction at this time."[33] The Department does not even attempt to quantify or grapple with the significant social consequences of such results.

The stakes are high if an applicant is unable to secure a qualifying joint sponsor under these proposed requirements: if an intending immigrant who is required to submit an affidavit of support, as are most family-based (and some employment-based) applicants for permanent resident status, is unable to do so, they will be found inadmissible as likely to become a public charge.[34] And because in general there is no waiver available for public charge inadmissibility, and DHS's new discretionary bond process will be used sparingly,[35] inability to submit an affidavit of support that meets the proposed rule's requirements will result in the denial of the application for permanent residence. Juxtaposing DHS's weak rationale for these newly proposed, onerous sponsor requirements with the heavy potential consequences for U.S. citizens and U.S. permanent residents (e.g., indefinite family separation if they are unable to sponsor their relatives for immigration, or negative health and well-being outcomes due to

[27] 85 FR 62460.
[28] *Id.*
[29] 85 FR 62442. *See also* 85 FR 62435.
[30] 85 FR 62442.
[31] 85 FR 62435, 62453, 62454 (emphasis added).
[32] 85 FR 62435, 62453, 62454.
[33] 85 FR 62457.
[34] *See* INA § 212(a)(4)(A), 8 U.S.C. § 1182(a)(4)(A); INA § 213A(f), 8 U.S.C. § 1183a(f).
[35] *See* USCIS Policy Manual, Vol. 8, Part G, 19(B).

foregoing or disenrolling from needed public benefits for fear of sacrificing their ability to sponsor relatives) underscores the overly burdensome nature of the Department's proposal. The lack of data to support such a burden on U.S. citizens and U.S. permanent residents and the Department's willingness to impose such a burden reveals the intention to stymie or curb legal immigration through these regulatory measures.

### B. Requiring a Joint Sponsor If the Petitioning or Substitute Sponsor Had a Judgement Entered against Them for Failing to Fulfill Prior Affidavit of Support Obligations

The proposed rule would also require a joint sponsor if the petitioning or substitute sponsor failed to fulfill prior affidavit of support obligations, "regardless of whether the individual has since complied with the support obligation (for example, repaid what was owed), and regardless of the individual's current income."[36] A person who had a judgement entered against them for failing to fulfill prior affidavit of support obligations would also be permanently barred from serving as a joint sponsor. DHS states that it "does not have data on reimbursement efforts or successful recoveries by benefits-granting agencies" and is "unable to determine whether the proposed rule's benefits are likely to exceed its costs."[37] Instead, the Department merely provides that "the Administration has identified enforcement of the reimbursement requirement as a problem that needs fixing."[38]

DHS states that it considered the alternative of "permanently barring an individual who had previously defaulted on a support obligation from becoming a sponsor," but concluded that this was not feasible because the immigration statute requires that the petitioner for family-based immigrants be a sponsor, so "such a policy would unreasonably restrict an individual from petitioning for eligible family members as permitted by section 204 of the Act . . ."[39] Abandoning an alternative because it conflicts with the law does not meet the standard for regulatory changes, which should be based on a reasonable consideration of viable alternatives and an assessment of the costs and benefits backed by data. The agency goes so far as to request "views and data that would inform whether, and to what extent, DHS should consider previous defaults on support obligations by a petitioning sponsor or substitute sponsor . . ."[40] While one use of the regulatory notice-and-comment period may be for an administrative agency to request input from informed members of the public, it is first and foremost DHS's job to gather the data to support its proposed policy shifts, including demonstrating that there is a problem with sponsors defaulting on their support obligations under the current affidavit of support rule. DHS presents no such evidence.

In all, making "a policy determination" devoid of data is legally inadequate to justify such drastic shifts to sponsor requirements. Additionally, by not including data to support its revisions during the notice-and-comment period for this proposed rule, the Department limits the public's ability to meaningfully consider and comment on the proposal, in violation of the Administrative Procedure Act.

## III. The Proposed Rule's Changes to Household Income and Household Size Are Arbitrary and Capricious

The proposed rule artificially excludes individuals actually living in the same house from contributing their income to support the intending immigrant that will live them, while simultaneously increasing the number of people in the concept of "household" to include those not living in the same residence for purposes of determining the amount of

[36] 85 FR 62443.
[37] *Id.*
[38] *Id.*
[39] 85 FR 62443. *See also* INA § 213A(f)(1)(D), 8 U.S.C. § 1183a(f)(1)(D).
[40] 85 FR 62443-44 (emphasis added).

financial resources needed to support the immigrant. These new requirements create arbitrary definitions to the concept of household and are clearly designed to create unfounded hurdles to family immigration and unification.

### A. Limiting Household Members for Purposes of Assessing Contributing Income

The current affidavit of support rule allows the following close family members to contribute to household income in addition to the sponsor if they execute Form I-864A and have the same principal residence as the sponsor: the sponsor's spouse, parents, children who are at least eighteen years old, and siblings.[41] In certain circumstances, the intending immigrant may also contribute to the household income. This practice helps to capture the actual resources available to support the immigrant and the household, providing the adjudicating officer with useful information about the real financial resources available to the immigrant and a given household.

The proposed rule asserts that the current affidavit of support rule allows "too many household members" to contribute income to the sponsor's household and would redefine household income to include only the sponsor's spouse (or the intending immigrant in certain circumstances).[42] No data is cited for the premise that excessive use of household members defeats the affidavit of support's core aim, ensuring that new immigrants are not reliant upon the U.S. government for support; the proposed rule merely relies upon DHS's "belief" that some household members may not actually have sufficient income notwithstanding what is reported with the I-864A, and assumptions that the income of other close family members who are part of the sponsor's household may "actually be unavailable" due to "other financial obligations," although the Department does not elaborate further on these supposed household dynamics.[43]

As elsewhere in the proposed rule, in place of data, the Department references its own unfounded beliefs and assumptions for why this change to the definition of household income is necessary and justified, without providing any evidence in support of these beliefs and assumptions: "DHS *believes* that limiting household income… more accurately reflects income that will be available…"; "DHS *believes* there is a greater likelihood that the income of the sponsor's spouse… would actually be available… because spouses often share financial resources with each other"; "DHS further *believes* that there is a greater likelihood that the income of an intending immigrant would actually be available to the sponsor if the intending immigrant is accompanied by his or her spouse or children…"[44] The Department admits that there is no data to justify their ideas on which contributing household members should be able to include their income for affidavit of support purposes: "data are unavailable demonstrating that non-spouse household members are less likely to uphold their contract obligations…"[45] Such unfounded conclusions that only spouses, but not other close family members within the household, can be actually relied upon financially ignore the fact that anyone who executes an affidavit of support form or contract will be held jointly and severally liable under the law and consequently subject to enforcement action, which this proposed rule also intends to strengthen. Neither a sponsor nor a contributing household member who enters into an affidavit of support contract can evade their legal financial responsibilities if they have other preferred or even competing financial obligations. Indeed, such a proposal demonstrates the true intention is to deter immigration, or at minimum, demonstrates ignorance to the functioning of households and/or lack of common sense and data-driven policies. Including all close family members residing in the same household who in fact contribute to the household income and are willing to sign an affidavit of support contract is critical to accurately reflecting actual household income, and therefore the true

[41] 8 C.F.R. 213a.1.
[42] 85 FR 62441.
[43] 85 FR 62444.
[44] 85 FR 62444 (emphasis added).
[45] 85 FR 62451.

financial means as the affidavit of support law intends: "Congress' determination that [noncitizens] '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.'"[46] Thus, DHS's asserted policy preference that "intending immigrants should not rely upon a sponsor and a potentially unlimited group of household members…" is contrary to Congress' intent when it created the affidavit of support requirement.

### B. Expanding the Concept of Household Size to Determine Income Required for Support

While the proposed rule would restrict the household members whose income can count as part of the household income, the rule would expand the individuals who must be counted as part of the household when determining whether the sponsor has sufficient financial resources to support the household. Thus, while the rule artificially restricts the household size when accounting for income flowing into the house, it artificially expands the household size when determining if there are sufficient resources to support the household.

Currently, a sponsor's household size includes themselves, their spouse, unmarried children under age 21 unless they have reached the age of majority under the law of their place of domicile and the sponsor does not claim them as dependents on their tax returns, any other tax dependents, the intending immigrant, and anyone else for whom the sponsor is obligated under Form I-864 or I-864EZ. The proposed rule would (1) add to this list anyone for whom the sponsor filled out an I-864A and (2) change it so that even Forms I-864, I-864EZ, or I-864A that are still part of pending applications for permanent residence would also count, even if the application has not yet been granted and thus the affidavit of support obligations are not yet in effect, on the basis that "[t]he sponsor has already agreed to support these individuals," although whether they have agreed and they are actually obligated to do so are two very different things.[47] The only way a not yet granted permanent resident application's associated affidavit of support will not count in this household size calculation would be if the affidavit has been withdrawn or the adjustment or immigrant visa application has not only been denied but also all appeals have been exhausted or waived.[48] The Department states that they rejected the idea of keeping the existing household size definition because they want to "reduce the instances of sponsors undertaking support obligations that they cannot, or do not intend to, fulfill,"[49] although the Department offers no evidence of a problem with insufficient affidavit filings under current policy. Rather, this change will mean that sponsors will be less likely to be able to meet the affidavit of support requirements with such an inflated household size. As with the proposed changes to sponsors and joint sponsors, these changes to household income and household size will make it harder for applicants to meet the affidavit of support requirement at INA 213A, which in turn will mean that more applicants will be found inadmissible for public charge and thus will be unable to immigrate.

## IV. The Proposed Rule Overreaches: DHS Lacks Authority to Make Regulations for the Department of Justice (DOJ) Immigration Courts and Department of State (DOS) Consular Officers and Will Create Disparate Standards for Affidavits of Support

The proposed rule is solely a creation of the Department of Homeland Security, which encompasses USCIS. It does not have any authority over the Department of Justice (DOJ) Executive Office for Immigration Review, which is responsible for the operation of the immigration courts, or the Department of State (DOS) consular officers. In its justification for the rule, the Department states: "By reviewing 3 years of tax returns for all sponsors, as well as

[46] 85 FR 62436 (emphasis added).
[47] 85 FR 62444.
[48] 85 FR 62445.
[49] *Id.*

household members executing a contract, immigration officers *and immigration judges* will have a more complete picture of a sponsor's financial circumstances,"[50] yet nowhere in the proposed rule itself does it purport to explain how DHS can dictate a rule that has not been passed by DOJ. The proposed rule also appears to cover DOS, including consular officers in the definition of immigration officer[51] and mentioning that DOS anticipates additional costs as a result of the proposed changes.[52] No mention is made of immigration courts in the definitions, nor would DHS have authority to include them without a joint rule. Oddly, immigration judges and consular officers are included in verification sections of the proposed rule, with no explanation of how DHS has any authority to make rules for DOJ or DOS.[53]

DHS states several times in the proposed rule that it is dictating standards to the immigration judges, which it has no authority to do. This was not a joint rule such as the affidavit of support rule that DHS and DOJ issued in 2006.[54] Therefore, DOJ and the immigration judges will need to adhere to the standards in the 2006 rule, whereas USCIS will be adopting different standards and documentation for adjustment applicants. Consular officers are bound by current regulations on the affidavit of support, and would not be covered by this proposed rule. Again, the agency's lack of forethought and failure to evaluate overall impact of interrelated rules and agencies does not argue in support of rational policy shifts that are sufficiently supported by evidence, and in fact supports the opposite conclusion.

This is not a joint rule with the Department of Justice or Department of State, and has no authority over immigration courts or consular officers, yet DHS purports to dictate in the description of the rule how immigration judges and consular officers will interpret affidavit of support requirements. DHS lacks any legal authority to dictate the standards applied by immigration judges or consular officers.

## V. The Proposed Rule's Requirement that Sponsors and Household Members Supply Bank Account Information and Routing Numbers Is an Egregious Violation of Privacy and Is Not Rationally Supported by the Rule

The proposed rule requires sponsors and household members to sign away privacy rights, including bank account information and routing numbers, or their affidavit of support will be considered withdrawn.[55] If the release waiver for this information is not signed, the applicant will be denied the immigration benefit that the affidavit is being supplied for.[56]

This section of the proposed rule states:

> Verification of employment, income, and assets.
> (A) *The Federal Government may pursue verification of any information* provided on or with an Affidavit of Support Under Section 213A of the INA or Contract Between Sponsor and Household Member, with an employer, financial or other institutions, the Internal Revenue Service, or the Social Security Administration, *including, but not limited to, information about*:

[50] 85 FR 62446 (emphasis added).
[51] 85 FR 62446.
[52] *See* 85 FR 62470.
[53] 85 FR 62446, 62480.
[54] 71 FR 35731.
[55] 8 C.F.R. § 213a.2(c)(2)(v) (proposed).
[56] *Id.*

(1) Employment;
(2) Income;
(3) Assets; or
(4) *Bank account(s) (including, but not limited, to bank account numbers and routing numbers)*.

(B) *To facilitate the verification process* described in paragraph (c)(2)(v)(A) of this section, *sponsors or household members must sign and submit any necessary waiver form* when directed to do so by the immigration officer, immigration judge, or consular officer who has jurisdiction to adjudicate the case to which the Affidavit of Support Under Section 213A of the INA or Contract Between Sponsor and Household Member relates. *The failure or refusal of a sponsor or household member* (who executed a Contract Between a Sponsor and a Household Member) *to sign any waiver needed to verify the information when directed to do so constitutes a withdrawal of the Affidavit of Support* Under Section 213A of the INA or Contract Between Sponsor and Household Member, so that, in adjudicating the intending immigrant's application for an immigrant visa or adjustment of status, the Affidavit of Support Under Section 213A of the INA or Contract Between Sponsor and Household Member will be deemed not to have been filed.

8 C.F.R. § 213a.2(c)(2)(v) (proposed) (emphasis added).

The proposed rule would already require sponsors to present three years of certified tax returns with all attachments in addition to credit reports and credit scores. No rational explanation exists for requiring these U.S. citizen and lawful permanent resident sponsors and household members to also supply routing numbers and other bank account information. Collection of such information is an unnecessary and unjustifiable intrusion of privacy, with no guarantee of security in the information delivered.

As part of enforcement action against a sponsor, such information would be obtainable in the course of a court action and civil discovery. Here, the proposed rule appears to be taking the position that the agency needs to be able to withdraw funds from a sponsor or household member's account, as this would be the purpose of providing a routing and account number. Absent a finding of wrongdoing for failure to repay benefits received by the sponsored immigrant and pursuit of enforcement action through established channels with procedural safeguards, the proposed rule seems to be operating from the assumption that every sponsor and household member is not only likely to default on their affidavit of support obligations, but already guilty of having done so.

The actual effect of such a requirement, rather than ensuring that the sponsor has sufficient income, is to intimidate persons who might be a sponsor and discourage applicants from the immigration benefits process. This is not a rational basis to support a policy shift.

## VI. The Proposed Rule Will Have a Chilling Effect on Family-Based Immigration

By the Department's own admission, the proposed rule will lead to less people being able to meet the affidavit of support requirements, which in turn will lead to less family-based immigration. The proposed rule states: "DHS acknowledges this proposed new regulatory provision would likely reduce the number of individuals who would be eligible to qualify as a sponsor,"[57] and that the proposed rule "could [lead to] a reduction in the number of

[57] 85 FR 62457.

immigrants granted an immigration benefit in cases where the intending immigrant is unable to obtain a sponsor who can meet the new requirements under this proposed rule."[58]

The Department also fails to consider the combined impact of this proposed affidavit of support rule and DHS's new public charge rule, [59] two rules proposed by the same agency on overlapping topics and which directly relate to one another. The affidavit of support is one of the factors that must be considered as part of the public charge inadmissibility analysis and the *only* factor which is dispositive; lack of a qualifying affidavit of support where required will lead to a finding of public charge inadmissibility although no single other factor may be dispositive. By simply requiring a sponsor to divulge bank account information, an officer can obliterate an otherwise qualified individual from obtaining lawful permanent residence. This proposed rule on the affidavit of support will also effectively lead to an increase in public charge denials because if an affidavit of support is found insufficient under these onerous new requirements and standards, this will lead to the intending immigrant being inadmissible under the public charge ground. Together, these rules will greatly increase the number of immigrants who are rejected on public charge grounds and thus unable to immigrate. By failing to consider the combined impact of these rules, DHS either failed to consider an important aspect of the problem or reached a conclusion that chose to ignore this issue.[60] Apart from noting DHS's new public charge inadmissibility rule, in the "Background & Purpose" section of the proposed rule, there is no other mention of how this proposed rule on the affidavit of support and the harsh new public charge rule interrelate, with an extremely detrimental result for immigrant applicants.

## VII. The Costs Are Not Justified by the Benefits

The costs imposed by the proposed rule's changes are not justified by the benefits. Costs identified in the proposed rule include possible "decrease [in] disposable income and increase [in] the poverty of certain families and children, including U.S. citizen children";[61] "reduction in the number of immigrants granted an immigrant benefit";[62] and individuals forgoing enrollment or dis-enrolling from needed public benefits to avoid being unable to sponsor a family member in the future,[63] as well as staggering added time and money costs to meet the proposed additional affidavit of support requirements, including collecting evidence that sponsors must pay to obtain such as credit scores and IRS certified copies of tax returns. These substantial costs are not outweighed by the very minimal cost savings of eliminating Form I-864W, Intending Immigrant's Affidavit of Support Exemption, or vague pronouncements that the proposed rule's benefits outweigh the costs, with no data or analysis to back these conclusions.

Advocates and immigration legal service providers will also incur great cost through the added advisals and work to prepare a case for lawful permanent residence. These harsh requirements on the sponsor will make it more difficult for families to agree to the process and for intending immigrants to obtain the necessary affidavits of support. In addition, support centers like the ILRC will incur significant costs in training time and materials to support the field. Explaining and detailing how to comply with an arbitrary rule such as this one often takes more time, because the proposed rule is so incomprehensible and baseless. At a minimum, the ILRC will need to re-write several training modules on the affidavit of support, public charge, and family-based immigration, provide case support to over 100

[58] 85 FR 62435 (Table 1, estimated impact of proposed provision).
[59] *See* 84 FR 41292.
[60] *See Fox*, 556 U.S. at 537.
[61] 85 FR 62474.
[62] 85 FR 62468.
[63] 85 FR 62435.

service providers on implementation of the new rule, offer new trainings, and update several manuals, including *Families & Immigration: A Practical Guide*, *Public Charge and Immigration Law*, and *Inadmissibility & Deportability*.

## VIII. Conclusion

The proposed rule will suppress legal, family-based immigration by discouraging, deterring, or flat-out disqualifying U.S. citizens and U.S. permanent residents from immigrating their loved ones, compounding the harmful effects of the new public charge rule implemented earlier this year. It will also cause families to forgo needed public programs for which they are eligible and that help keep our communities healthy and safe, another dangerous side-effect that we have already seen play out with the new public charge rule during a global pandemic. The proposed changes will make the affidavit of support process more costly and burdensome for U.S. citizen and U.S. permanent resident sponsors, non-profit legal service providers and other organizations such as the ILRC assisting with and providing guidance on applications for permanent residence, the IRS, and USCIS adjudicators. At the same time, the proposed rule is devoid of data or other reasoned analysis supporting changes that would exact such detrimental and excessive costs on so many. Absent adequate justification for these policy shifts, many of which contradict previous findings, the Department should withdraw this proposed rule on the affidavit of support. The ILRC respectfully urges DHS to rescind the proposed rule and withdraw it from consideration.

Sincerely,

Peggy Gleason
Senior Staff Attorney
Immigrant Legal Resource Center

Ariel Brown
Staff Attorney
Immigrant Legal Resource Center

Sarah Lakhani
Skadden Fellow
Immigrant Legal Resource Center