DEPARTMENT OF STATE

22 CFR Part 40

[Public Notice: 11921]

RIN 1400–AE87

Visas: Ineligibility Based on Public Charge

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State (''Department'') has decided not to finalize the regulatory amendments made by the 2019 interim final rule entitled ''Visas: Ineligibility Based on Public Charge Grounds'' published in the **Federal Register** on October 11, 2019 (''2019 IFR''). The 2019 IFR implemented such amendments based on an intention to more closely align with the standards then applied by the U.S. Department of Homeland Security (''DHS'') to determine inadmissibility on public charge grounds. In 2022, DHS published a new Final Rule (''2022 DHS Final Rule''). As such, the 2019 IFR no longer meets the policy aim of consistency with DHS standards. In declining to finalize the regulatory amendments made by the 2019 IFR, the Department will instead revert to regulatory text that was in place prior to the publication of the 2019 IFR and will continue to apply the guidance set out in the Foreign Affairs Manual (''FAM''). This regulatory text, together with the existing FAM guidance, more closely aligns with the current DHS standards, and the Department anticipates that it will subsequently initiate new notice-and-comment rulemaking in light of the 2022 DHS Final Rule.

DATES: This final rule is effective October 5, 2023.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Legal Authority

Under section 212(a)(4) of the Immigration and Nationality Act (''INA''), 8 U.S.C. 1182(a)(4), a noncitizen is inadmissible to the United States, and therefore ineligible for a visa, if, in the opinion of the consular officer at the time of the application for a visa, the applicant is likely at any time to become a ''public charge.'' [1] The Department implements the public charge ground of inadmissibility with respect to visa ineligibility through regulations at 22 CFR 40.41.

B. The Department's 2019 Interim Final Rule

On August 14, 2019, DHS issued a final rule amending standards in its regulations for determining inadmissibility under public charge grounds. *See* Inadmissibility on Public Charge Grounds, 84 FR 41292, as amended on October 2, 2019, 84 FR 52357 (''2019 DHS Final Rule''). Among other changes to these regulations, the 2019 DHS Final Rule expanded DHS's definition of ''public charge'' and designated certain factors or factual circumstances that could be weighted positively or negatively, and some that would be ''heavily'' weighted, either positively or negatively, to consider whether an applicant was likely at any time to become a public charge.

On October 11, 2019, the Department issued the 2019 IFR, which amended Department regulations at 22 CFR 40.41 to modify its standards for when a consular officer would determine that a noncitizen is ineligible for a visa under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), because they are likely at any time to become a public charge.[2] The Department issued the 2019 IFR largely to avoid situations when a consular officer would evaluate an applicant's circumstances and conclude that the applicant is not likely to become a public charge, only for DHS to evaluate the same applicant when seeking admission to the United States on a visa issued by the Department, and find that the applicant is inadmissible on public charge grounds under the same facts. Though the 2019 IFR included minor deviations from the 2019 DHS Final Rule, its purpose was to align the Department's approach with that of DHS's.[3]

While the term ''public charge'' is not defined in the INA, the definition set forth in the 2019 IFR and the 2019 DHS Final Rule differed significantly from the definition applied for decades previously, and most notably from the 1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (''1999 Interim Field Guidance'')[4] issued by the former Immigration and Naturalization Service and related FAM guidance issued by the Department, as further described below. Similar to the 2019 DHS Final Rule, the 2019 IFR defined public charge to mean a noncitizen who receives one or more public benefits, as defined in the 2019 IFR, for more than 12 months in the aggregate within any 36-month period. Receipt of two benefits in one month would count as two months' worth of benefits.[5] Public benefits under the 2019 IFR included any Federal, State, local, or Tribal cash assistance for income maintenance (other than tax credits), the Supplemental Nutrition Assistance Program, 7 U.S.C. 2011 *et seq.,* the Housing Choice Voucher Program, as authorized under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f), Project-Based Rental Assistance (including Moderate Rehabilitation) authorized under section 8 of the United States Housing Act of 1937, Medicaid (with enumerated exclusions), and Public Housing under section 9 of the U.S. Housing Act of 1937 (42 U.S.C. 1437g).[6] Further, the 2019 IFR included certain factors and factual circumstances that weighed heavily in determining whether a visa applicant was likely to become a public charge, including negative and positive factors.

On July 29, 2020, the U.S. District Court for the Southern District of New York granted a preliminary injunction against implementation of the 2019 IFR, holding that the plaintiffs were likely to succeed in their claim that the 2019 IFR did not comply with the requirements of the Administrative Procedure Act.[7] The government filed a notice of appeal from this preliminary injunction, but the appeal was later dismissed at the government's request.[8]

Following the preliminary injunction against enforcement of the 2019 IFR, the Department issued FAM guidance to

[1] DHS also applies section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), to noncitizens seeking admission to the United States at or between ports of entry, or in reviewing applications for adjustment of status. Additionally, the Department of Justice (''DOJ'') applies this statute with respect to noncitizens in immigration court proceedings before the Executive Office for Immigration Review, a DOJ agency. This final rule does not apply to the public charge inadmissibility standards applied by DHS or DOJ. This final rule will use the terms inadmissible to the United States and ineligible for a visa interchangeably.

[2] 84 FR 54996 (Oct. 11, 2019).

[3] *See id.* at 55002 (''The Department notes that this approach deviates somewhat from the [2019 DHS Final Rule], in that the Department's approach focuses on the alien's intended household in the United States, rather than any members of his foreign household he or she will leave behind. This difference in effect aligns the two Departments' approaches.'').

[4] *Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,* 64 FR 28689 (May 26, 1999).

[5] 84 FR 54996, 55014.

[6] *Id.*

[7] *Make the Road N.Y.* v. *Pompeo,* 475 F. Supp. 3d 232, 262 (S.D.N.Y. 2020).

[8] *Make the Road N.Y.* v. *Pompeo,* No. 20–3214 (S.D.N.Y. July 6, 2021), ECF No. 118.

consular officers [9] regarding compliance with the court order. The FAM guidance generally instructed consular officers adjudicating visas to apply the standards that had been in place prior to the 2019 IFR, standards which were based on the 1999 Interim Field Guidance.

C. Purpose of Not Finalizing the Regulatory Standards in the 2019 IFR

There have been significant developments related to the public charge ground of inadmissibility since the publication of the 2019 IFR. On February 2, 2021, President Biden issued Executive Order 14012, Restoring Faith in Our Legal Immigration System and Strengthening Integration and Inclusion Efforts for New Americans (''E.O. 14012'').[10] E.O. 14012 directed the Secretary, along with the Attorney General, the Secretary of Homeland Security, and other relevant agency heads, to ''review all agency actions related to implementation of the public charge ground of inadmissibility . . . and the related ground of deportability.'' [11] The President ordered each of the agencies to submit a report ''identify[ing] appropriate agency actions, if any, to address concerns about the current public charge policies' effect on the integrity of the Nation's immigration system and public health'' and ''recommend[ing] steps that relevant agencies should take to clearly communicate current public charge policies and proposed changes, if any, to reduce fear and confusion among impacted communities.'' [12]

On November 17, 2021, the Department published a notice in the **Federal Register**, 86 FR 64070 (''Public Comment Reopening''), soliciting public comment on the 2019 IFR for an additional 60-day period, noting significant changes in circumstances since publication of the 2019 IFR.[13] As described in the Public Comment Reopening, the changes in intervening circumstances included public health and economic conditions arising from the COVID–19 pandemic; a court's vacatur of the 2019 DHS Final Rule on a nationwide basis; and DHS's publication on August 23, 2021, of an Advance Notice of Proposed Rulemaking, soliciting public feedback on the DHS interpretation of the public charge ground of inadmissibility to inform a future rulemaking on the issue. In light of those developments, in the Public Comment Reopening, the Department specifically sought public feedback on whether: (1) the 2019 IFR should be rescinded or revised; and (2) if so, what final rule should be adopted regarding visa ineligibility on public charge grounds.

As detailed below, following receipt of a range of public comments in response to the 2019 IFR and the 2021 Public Comment Reopening, the Department has decided not to finalize the regulatory amendments made by the 2019 IFR. Instead, the Department is removing from 22 CFR 40.41 the regulations promulgated in the 2019 IFR and restoring the regulatory text as it appeared prior to the issuance of the 2019 IFR (''Prior Rule'').[14] The Prior Rule was published in 1997, and, with non-substantive changes,[15] remained in place until the publication of the 2019 IFR. The subsequently published 1999 Interim Field Guidance set forth a public charge rule substantially similar to the Prior Rule. The majority of public comments opposed the 2019 IFR or recommended substantial revisions, noting an array of public harms that they attributed to the overall public charge policy reflected in the 2019 IFR, including a measurable decline in enrollment in assistance programs by children in families with noncitizen members, far more than the decline of enrollment in assistance programs by children in families with no noncitizen members.

In 2022, DHS promulgated the 2022 DHS Final Rule in which it explained why it believed its 2019 Final Rule did not represent the best interpretation of the public charge statute.[16] The 2022 DHS Final Rule adopts a significantly different standard for determining whether an individual is likely at any time to become a public charge than the standard reflected in DHS's 2019 Final Rule and the Department's 2019 IFR. The 2022 DHS Final Rule promulgated a rule governing the public charge grounds of inadmissibility, which, while not identical, is substantially similar to the 1999 Interim Field Guidance.

Accordingly, the 2019 IFR no longer meets the policy aim of consistency with DHS standards, which was the Department's principal reason for adopting the 2019 IFR. The Department therefore will not finalize the provisions in the 2019 IFR, which have been subject to a preliminary injunction since July 2020, and will instead return to the Prior Rule pending further rulemaking. The standards contained in the Prior Rule, together with the associated FAM guidance, align better with the 2022 DHS Final Rule than the 2019 IFR. After the instant rule is finalized, the Department anticipates that it will initiate new notice-and-comment rulemaking in light of the 2022 DHS Final Rule to pursue any further amendments to the Department's regulatory text on public charge ineligibility, as appropriate.

D. Alternatives Considered

The Department considered alternatives to this final rule. For example, the Department considered promulgating a final rule, following the 2019 IFR, but taking into account comments received, that would amend significantly the standards of the 2019 IFR to more closely align with the 2022 DHS Final Rule. The Department declined to pursue this alternative, because, despite the two periods of public comment on the 2019 IFR, it would not provide the public an opportunity to provide comment on the new standards, in the context of the Department's rulemaking. For that reason, the Department believes it is appropriate not to finalize the 2019 IFR with revised standards and instead to undertake new notice-and-comment rulemaking in light of the 2022 DHS Final Rule.

The Department also considered publishing a proposed rule with new standards for visa ineligibility based on the public charge ground of inadmissibility, without first removing changes to the regulations promulgated under the 2019 IFR. The Department determined that this alternative would not best achieve the Department's policy objective of consistency in administration of the public charge grounds of inadmissibility with DHS, because amendments from the 2019 IFR would remain in Department regulations while the new standards underwent public notice and comment. Because the 2019 IFR was principally designed to align with the standards of the 2019 DHS Final Rule, the 2019 IFR, if applied now, would create a pronounced inconsistency with the standards in the 2022 DHS Final Rule, and the Department determined that

[9] *See* 9 FAM 302.8—PUBLIC CHARGE—INA 212(A)(4), *https://fam.state.gov/FAM/09FAM/09FAM030208.html* (last visited June 14, 2023).

[10] Executive Order 14012, 86 FR 8277 (Feb. 5, 2021).

[11] *See* Exec. Order No. 14012, sec. 4, 86 FR 8277, 8278 (Feb. 5, 2021).

[12] *Id.* § 4(a).

[13] *See* Visas: Ineligibility Based on Public Charge Grounds, 86 FR 64070 (Nov. 17, 2021).

[14] Visas: Public Charge, 62 FR 67563 (Dec. 29, 1997).

[15] *See* Immigrant Visas; Change in the Schedule of Fees for Consular Services, 65 FR 78094 (Dec. 14, 2000); Nomenclature Changes Reflecting Creation of Department of Homeland Security, 71 FR 34519 (Jun. 15, 2006).

[16] *See* Public Charge Ground of Inadmissibility, 87 FR 55472 (Sept. 9, 2022).

neither retaining nor finalizing the regulatory amendments made by the 2019 IFR while it undertook further rulemaking was appropriate.

The Department also considered whether there might be policy alternatives to amending the 2019 IFR or removing changes to regulations from the 2019 IFR. The Department determined that there are no such viable alternatives because the standards promulgated under the 2019 IFR are entirely inconsistent with the standards implemented by DHS in the 2022 DHS Final Rule with respect to inadmissibility under the public charge grounds.

E. Consideration of Reliance Interests

In preparing this final rule, the Department also considered whether there were any serious reliance interests that would be harmed by removing the 2019 IFR and returning to the Prior Rule.

While no comments submitted in response to the 2019 IFR or Public Comment Reopening directly or indirectly identified reliance interests of any individuals or public or private entities that have relied on the policy articulated in the 2019 IFR, the Department's regulations, which can affect the interests of individuals and entities in the United States, could have potentially engendered degrees of reliance. The 2019 IFR may have engendered such an interest, for example, by individuals or public or private entities. For instance, public entities such as state or local governments may assert reliance on the enjoined rule given potential effects on noncitizens obtaining public benefits in the United States. The Department has considered those potential interests and taken them into consideration in formulating this final rule.

The Department concludes that the reasons not to finalize the regulatory amendments made by the 2019 IFR outweigh any such reliance interests, which appear minimal, in light of a number of factors, including: (1) the limited period in which this policy was in effect prior to the preliminary injunction, as any reliance interests have been significantly reduced as compared to a longstanding rule or agency policy; (2) the significant time during which the Department has been enjoined from implementing the policy; (3) the Department's notice to the public in the Public Comment Reopening that it was considering removing the regulations promulgated under the 2019 IFR, and solicitation of public comments on whether to adopt, revise, or rescind it; (4) the explicitly ''interim'' nature of the 2019 IFR itself; and (5) the significant policy interests articulated in this rule that support removal of the regulations, specifically the interest in ensuring that the Department and DHS do not apply significantly different public charge standards to determine a given individual's visa eligibility and eligibility for admission to the United States.

In reverting to the Prior Rule and in continuing to apply the FAM guidance, consular officers will continue to apply the Department's policy of implementing the public charge ground of inadmissibility consistently with current DHS standards and the Department's FAM guidance. As the nationwide preliminary injunction has been in place since July 2020, the Department has in practice reverted to the Prior Rule since that time. Compared with the standards set forth in the 2019 IFR, the Prior Rule more closely aligns with the standards articulated by DHS in the 2022 DHS Final Rule.

F. Comments Received in Response to 2019 IFR and 2021 Public Comment Reopening

1. Summary of Comments

In the 2019 IFR, the Department solicited public comments on the rule for a 30-day period following publication on October 11, 2019. During that period, the Department received 199 comments from individuals, local and state governments, public officials, and non-governmental organizations. The Department reviewed these comments, of which 4 expressed support for the 2019 IFR; 19 were non-responsive to the 2019 IFR; and 34 did not clearly reflect support or opposition to the 2019 IFR. The remaining 142 comments expressed opposition to the 2019 IFR.

The Public Comment Reopening solicited public comments on the IFR for an additional 60-day period following publication of the notice on November 17, 2021. In response, the Department received 32 comments [17] from individuals, local and state governments, public officials, and non-governmental organizations. The Department reviewed these comments, of which 3 expressed support for the 2019 IFR and 29 opposed the 2019 IFR and suggested rescission or substantial revision of the 2019 IFR on a variety of bases, discussed below.

The below table provides a summary of the total comments received:

TABLE 1—TOTAL COMMENTS RECEIVED

Support for the 2019 IFR	7
Opposition to 2019 IFR	171
Neither Clearly Supporting nor Opposing	34
Nonresponsive	19
Total	231

The summary and discussion of comments below reflects the comments received in response to the 2019 IFR, including those received in response to the Public Comment Reopening. Of those comments expressing opposition to the 2019 IFR, the most common reasons expressed were opposition to policies first articulated in the 2019 DHS Final Rule; harmful effects of the overall public charge policy reflected in the 2019 IFR on immigrant families; that the interpretation of the public charge ground of inadmissibility in the 2019 IFR was unlawful; that the 2019 DHS Final Rule was enjoined; and that the overall public charge policy reflected in the 2019 IFR had a chilling effect that deterred families from receiving public benefits to which they were eligible. As detailed in Table 3, other comments in opposition to the 2019 IFR included objections to the rule's circumstantial eligibility factors and concerns that calculations related to the statutory factors were arbitrary. Several commenters opined that the 2019 IFR was discriminatory against immigrants from particular regions or that it would unduly burden the U.S. national economy. The two tables below describe the categories of comments submitted by the public both in favor of and in opposition to the 2019 IFR, noting that some comments expressed more than one basis for support or opposition to the rule.

TABLE 2—COMMENTS IN SUPPORT OF 2019 IFR, BY CATEGORY

Reduce Overall Immigration	3
Immigrants Should be Self-Sufficient	2
Immigrants Should Not Go on Welfare	1
Immigrant Communities are Already Self-Sufficient	1
Total	7

TABLE 3—COMMENTS IN OPPOSITION TO 2019 IFR, BY CATEGORY [18]

Oppose 2019 DHS Public Charge Rule	105
IFR is Unlawful	80
2019 Harmful to Immigrant Families	86
DHS Rule and IFR were under Injunction	65

[17] There were 33 total comments submitted, but one was an identical comment submitted by the same commenter. As the substance of the comments was identical, the Department considers both comments as one comment.

TABLE 3—COMMENTS IN OPPOSITION TO 2019 IFR, BY CATEGORY [18]—Continued

Chilling Effect to Deter Receipt of Public Benefits	65
IFR is Discriminatory or Racist	41
Oppose Circumstantial Eligibility Factors	39
Economically Burdensome on Families	39
Unfair Calculations under IFR	34
Oppose Definition of Public Charge in IFR	31
Private Health Insurance Concern	19
Other	40

2. Comments Expressing Support for Finalizing the 2019 IFR

Comment: Three commenters expressed support for the 2019 IFR, because, in the commenters' opinion, levels of immigration to the United States are too high and finalizing the 2019 IFR would have the effect of restricting or lowering immigration levels overall.

Response: The INA governs the standards regarding a noncitizen's admissibility to the United States, and the Department seeks to faithfully implement the statutory public charge ground of inadmissibility. The Department will continue to apply the public charge ground of inadmissibility to nonimmigrant and immigrant visa applicants in classifications that are subject to this ground, noting that, by statute, the ground does not apply to certain nonimmigrant visa classifications.[19] The INA sets out worldwide levels of immigration for each fiscal year for certain family-sponsored, employment-based, and diversity immigrants, while excluding certain immigrants (notably the immediately relatives of U.S. citizens) from numerical limitations. Most nonimmigrant visa classifications are not subject to numerical limitations. Between FY 2016 and 2019, DOS issued approximately 543,000 immigrant visas and 9,458,000 nonimmigrant visas annually (on average). Considering the overall demand for visas and pre-pandemic trends in visa issuance, the Department does not expect that the 2019 IFR or this final rule would change the overall level of immigration.

This conclusion is supported by the immigrant and nonimmigrant visa statistics available for fiscal year 2020, which covers the time period when the 2019 IFR was in effect.[20] In fiscal year 2020, consular officers made 6,541 inadmissibility findings based on public charge grounds when adjudicating immigrant visas, and 6,175 were overcome. For nonimmigrants, the Department made 343 inadmissibility findings based on public charge grounds, and 193 were overcome. When compared to the overall volume of immigrant and nonimmigrant visa issuances, the number of noncitizens found inadmissible who did not overcome that finding while the 2019 IFR was in effect was negligible. Consequently, the Department does not believe that reversion to the prior regulatory text will affect worldwide levels of immigration.

Comment: Two commenters expressed support for the 2019 IFR, stating that immigrants should be self-sufficient, and that visas should not be issued to individuals who will not be able to support themselves.

Response: Even after the publication of this final rule, consular officers will continue to apply the public charge ground of inadmissibility to applicants for nonimmigrant and immigrant visas in classifications that are subject to this ground of inadmissibility. A consular officer who finds that an applicant for a visa is likely at any time to become a public charge is required to refuse the applicant's application on that basis.[21] However, this refusal may be overcome by presenting additional evidence to the consular officer that the inadmissibility no longer applies, or by posting a ''suitable and proper bond or undertaking.'' [22]

Additionally, federal law generally prevents noncitizens who are subject to the public charge ground of inadmissibility from taking advantage of means-tested benefits programs by generally excluding them from participation for the five years after admission to the United States or adjustment of status.[23]

Consular officers shall apply the grounds in accordance with the regulatory text that was in place prior to the publication of the 2019 IFR. Additionally, they will be advised to continue applying FAM guidance that implements the public charge ground of inadmissibility, which generally is aligned with the current DHS standards. After the instant Final Rule takes effect, the Department anticipates that it will undertake new notice-and-comment rulemaking in light of the 2022 DHS Final Rule.

Comment: One commenter expressed support for the 2019 IFR, stating that visa applicants should be vetted to ensure they will not overstay their visas, have children in the United States, and then apply for welfare.

Response: All visa applicants undergo a thorough screening and vetting process, and must establish to the satisfaction of the consular officer that they are eligible to receive a visa in accordance with U.S. law. Just as the Department will continue to faithfully administer the public charge ground of inadmissibility, it will also continue to administer the other wide-ranging grounds of inadmissibility in section 212(a) of the INA, 8 U.S.C. 1182(a), that apply to nonimmigrant and immigrant visa applicants. However, whether an applicant is likely to overstay their visa within the United States or have children is outside the scope of a review of an applicant's admissibility on public charge grounds.

Comment: One commenter expressed support for the 2019 IFR because, in the commenter's view, it would reduce levels of unauthorized presence of noncitizens in the United States. The commenter expressed their belief that many immigrants in the United States ''refuse to assimilate.''

Response: Levels of unauthorized presence and ''assimilation'' are outside the scope of this rule. Consular officers apply the public charge ground of visa ineligibility with respect to visa applicants, and specifically those who are likely to become a public charge. This rule and policy have no direct bearing on whether noncitizens remain in lawful status in the United States.

Comment: One commenter expressed support for the 2019 IFR, stating that according to some statistics, immigrants to the United States are more highly educated and seek public benefits less often than citizens born in the United States. For that reason, the commenter stated that finalizing the 2019 IFR would not harm immigrant communities.

Response: The Department's policy goal of consistency with DHS standards

[18] Several commenters expressed multiple reasons for opposition; each reason listed in this table shows the primary reasons for opposition to the IFR. Additionally, there may be some overlap between arguments raised by some commenters.

[19] Several classifications of nonimmigrant and immigrant visa applicants are expressly exempted from the public charge grounds of visa ineligibility. Such visa classifications include, without limitation, Special Immigrant Visa applicants who were Afghan or Iraqi nationals employed by or on behalf of the U.S. Government, and applicants for A–1, A–2, C–2, C–3, G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–6, T, and U (with a limited exception) nonimmigrant visas. Applicants for S nonimmigrant visas may also obtain a waiver of the public charge grounds of visa ineligibility. A full list of exemptions and waivers from the public charge grounds of inadmissibility is contained in the 2022 DHS Final Rule, 87 FR 55472, 55637–39 (Sept. 9, 2022).

[20] Department of State, Annual Report of the Visa Office 2020, Table XIX, *https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport-Table%20XIX.pdf.*

[21] *See* 9 FAM 302.8—PUBLIC CHARGE—INA 212(A)(4), *https://fam.state.gov/FAM/09FAM/09FAM030208.html* (last visited June 14, 2023).

[22] 8 U.S.C. 1183.

[23] Public Law 104–193 tit. IV, 8 U.S.C. 1601 *et seq.*

in applying the public charge ground of inadmissibility weighs against finalizing on a permanent basis amendments to regulations that were implemented as a result of the 2019 IFR.

3. Comments in Opposition to 2019 IFR

(a) Oppose 2019 DHS Final Rule

Comment: 105 commenters expressed opposition to the Department's 2019 IFR citing their opposition to the 2019 DHS Final Rule. The stated reasons for opposing the 2019 DHS Final Rule were varied and included many of the other reasons listed in Table 3 above.

Response: The Department acknowledges the opposition expressed towards the 2019 DHS Final Rule. The Department issued the 2019 IFR in part to avoid situations when a consular officer would evaluate an applicant's circumstances and conclude that the applicant is not likely to become a public charge, only for DHS to reach a different conclusion under the 2019 DHS Final Rule when the applicant sought admission to the United States. In light of DHS's removal of the regulatory text promulgated in the 2019 DHS Final Rule, as well as DHS's subsequent issuance of the 2022 DHS Final Rule in which DHS explained its decision to not again pursue the policies contained in the 2019 DHS Final Rule,[24] the Department's policy interest in ensuring that noncitizen travelers to the United States in similarly situated circumstances are subject to fair and consistent adjudications under U.S. law when applying for a visa and when seeking admission to the United States on that visa is not advanced by finalizing the regulatory amendments made by the 2019 IFR. Rather, reverting to the Prior Rule will better ensure that the Department maintains consistency with the 2022 DHS Final Rule because the Prior Rule aligns with the standards contemplated by the 1999 Interim Field Guidance, which influenced the policy reflected in the 2022 DHS Final Rule. Additionally, following reversion to the Prior Rule, consular officers will apply the FAM guidance currently in place, which generally is aligned with the current DHS standards, and avoids treating visa applicants differently from similarly situated applications for admission or adjustment of status under the 2022 DHS Final Rule.

(b) 2019 IFR Is Unlawful

Comment: Many commenters suggested that the 2019 IFR should be rescinded because it was contrary to the statute and was unlawful. Many commenters had submitted their comments stating that the 2019 IFR was unlawful before it was preliminarily enjoined by a federal district court, but after the 2019 DHS Final Rule had been found unlawful and preliminarily enjoined or vacated by federal courts. Some commenters in 2019 noted that federal district courts had issued injunctions against the 2019 DHS Final Rule. Some commenters in response to the Public Comment Reopening noted that on March 9, 2021, a federal district court order vacating the 2019 DHS Final Rule went into effect.

Response: The judicial decision regarding the 2019 IFR that enjoined its application, and the judicial decisions enjoining or vacating the 2019 DHS Final Rule were considered in the Department's decision to reopen the public comment period on the 2019 IFR.[25] In the 2019 IFR, the Department noted that, as a policy matter, coordination of the Department's and DHS's implementation of the public charge inadmissibility ground is critical to the Department's interest in preventing inconsistent adjudication standards and different outcomes between determinations of visa eligibility and determinations of admissibility at or between a port of entry or in an application for adjustment of status.[26] Given DHS's adoption of the 2022 DHS Final Rule, the Department's interest in coordinating adjudication standards no longer favors retention of the regulatory amendments made by the 2019 IFR and instead favors a return to the Prior Rule.

(c) 2019 IFR Is Harmful to Immigrant Families

Comment: Some commenters expressed opposition to the overall public charge policy reflected in the 2019 IFR because of what they alleged to be its detrimental public health effect on immigrant families.

Response: The Department understands these commenters' concerns about the relationship between public charge inadmissibility determinations under the standards set forth in the 2019 DHS Final Rule and the 2019 IFR and the willingness of immigrant families, including U.S. citizen children in immigrant families, to receive public benefits for which they were eligible. Following the reversion of regulations to those in place prior to the 2019 IFR, the public charge grounds of visa ineligibility have been and will be applied in a way that should ameliorate the concern of these commenters. This final rule will be accompanied by public outreach by the Department to ensure that immigrant communities understand this rule, including how it differs from the 2019 IFR.

(d) 2019 DHS Final Rule and 2019 IFR Were Enjoined

Comment: A large number of commenters argued that the 2019 IFR should be rescinded because the 2019 DHS Final Rule, which was consistent in substance with the 2019 IFR, was vacated by a federal district court, and preliminarily enjoined by that court and multiple other federal district courts. In response to the Public Charge Reopening, several commenters also noted that the 2019 IFR itself was preliminarily enjoined by a federal district court.

Response: As stated above, the judicial orders enjoining or vacating the 2019 DHS Final Rule were considered in the Department's decision to reopen the public comment period on the 2019 IFR.[27] For the reasons stated above, the Department is not finalizing that regulatory text, and is instead reverting to the Prior Rule and continuing to apply current FAM guidance,[28] while considering new rulemaking in light of the 2022 DHS Final Rule.

(e) 2019 IFR Is Discriminatory or Racially Biased

Comment: 41 comments stated that the 2019 IFR was either racially biased or discriminatory in how it applied the public charge ground of inadmissibility. Commenters claimed that the 2019 IFR rendered certain visa applicants inadmissible on public charge grounds due to conditions in their countries of origin.

Response: The 2019 IFR explained the Department's reasons for adopting the IFR, in particular as a means to ensure consistency with the 2019 DHS Final Rule. As noted, the Department will not finalize the regulatory amendments made by the 2019 IFR for the reasons stated previously and anticipates that it will undertake further rulemaking in light of the 2022 DHS Final Rule. In the development of any future rulemaking regarding the public charge ground of inadmissibility, the Department will continue to be faithful to the relevant statute and congressional directions, including developing a rule that can be applied fairly and consistently to applicants worldwide in a manner consistent with the laws and values of the United States.

[24] *See, e.g.,* 87 FR 55472, 55504 (Sept. 9, 2022).

[25] *See* 86 FR 64070.

[26] *See* 84 FR 54996.

[27] *See* 86 FR 64070.

[28] *See* 9 FAM 302.8—PUBLIC CHARGE—INA 212(A)(4), *https://fam.state.gov/FAM/09FAM/09FAM030208.html* (last visited June 14, 2023).

(f) Opposition to Circumstantial Eligibility Factors in 2019 IFR

Comment: 39 commenters expressed opposition to the 2019 IFR due to what were described as circumstantial eligibility factors to be considered in the totality of the circumstances analysis. The 2019 IFR listed a number of factors that an adjudicator would consider in the totality of the circumstances when determining whether a visa applicant is inadmissible on public charge grounds and listed a number of different benefits the receipt of which over a certain period of time could lead to a finding of inadmissibility. Some commenters argued that these factors were designed to increase the percentage of applicants who would be found inadmissible. Others argued that the factors were so complicated that public benefit administrators had difficulty advising potential recipients on a course of action they could take that would be consistent with the public charge policy set forth in the 2019 IFR.

Response: The Department's consular officers will continue to apply a totality of the circumstances framework for the analysis of the public charge ground of inadmissibility consistent with the statute, the Prior Rule, and guidance published in the FAM. Under the FAM guidance, in making public charge inadmissibility determinations, consular officers will look at ''many factors . . . including age, health, family status, assets, resources, financial status, education, and skills. No single factor, other than the lack of a qualifying affidavit of support, in accordance with INA 213A, if required, will determine whether an individual is a public charge.'' [29] Under this FAM guidance, these factors make up the ''totality of the circumstances'' framework that was in place prior to the publication of the 2019 IFR. This framework aligns more closely with the current DHS standards than the 2019 IFR.[30] The FAM guidance clearly notes for adjudicators and the public that the application of the public charge ground of inadmissibility differs significantly from the heavily weighted positive and negative factors set forth in the 2019 IFR. The FAM guidance is also consistent with the Prior Rule, which along with the statute will govern adjudications.

(g) 2019 IFR Is Economically Burdensome on Families

Comment: 39 commenters stated that the overall public charge policy reflected in the 2019 IFR imposed economic burdens on immigrant families and other vulnerable populations within the United States, increasing healthcare costs on an aggregate basis and increasing food insecurity.

Response: Neither the 2019 IFR nor this final rule address eligibility standards for the receipt of public benefits. However, the Department acknowledges the data provided by public commenters showing a measurable drop in receipt of public benefits by individuals who were eligible to receive such benefits during the time period after the publication of the 2019 DHS Final Rule and the 2019 IFR.[31] Following the effective date of this Final Rule, the public charge inadmissibility ground will be applied as interpreted by the Prior Rule and FAM guidance, which generally are aligned more closely with the current DHS standards than the 2019 IFR. Reverting to the Prior Rule will reduce any unintended economic burdens among immigrant populations not subject to the public charge ground of inadmissibility, while not imposing undue burdens on the public.

(h) Methods of Calculation in 2019 IFR Are Unfairly Derived

Comment: Distinct from the opposition to the ''totality of the circumstances'' framework set forth in the 2019 IFR, a number of commenters argued that its methods of calculation of factors in public charge inadmissibility determinations, both positively and negatively weighted, with certain factors being heavily weighted in either direction, were themselves unfairly derived and applied. Specifically, commenters argued that the way in which factors were heavily weighted, either positively or negatively, would result in inconsistent adjudicatory results in applying the public charge grounds of inadmissibility.

Response: Under section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), consular officers are required to consider specific factors, at a minimum, in determining whether an applicant for a nonimmigrant or immigrant visa is inadmissible because they are likely at any time to become a public charge. These factors are the applicant's age; health; family status; assets, resources, and financial status; and education and skills. Furthermore, a consular officer may also consider an Affidavit of Support Under Section 213A of the INA submitted on the noncitizen's behalf when such is required.[32] The 2019 IFR sought to ensure the Department was consistent with the policy set forth in the 2019 DHS Final Rule in how the Department considered such factors when applying the public charge ground. DHS promulgated a new rule in 2022 that departs from the 2019 DHS Final Rule and the 2019 IFR's approach to consideration of such factors. Accordingly, as explained, the Department will not finalize the regulatory amendments made by the 2019 IFR, including its approach to consideration of such factors, because doing so would create rather than avoid inconsistency with DHS. The Department is also inclined to agree with DHS's analysis regarding the issues posed by the weighing of factors in the 2019 DHS Final Rule. The Department anticipates that it will engage in further rulemaking in light of DHS's 2022 rule.

As the Department is not finalizing the regulatory amendments made by the 2019 IFR, the inadmissibility of applicants for nonimmigrant and immigrant visas subject to the public charge ground shall be reviewed on the basis of the totality of their circumstances, consistent with Department regulations and guidance in place prior to the promulgation of the 2019 IFR.

(i) Breadth of Definition of ''Public Charge'' in 2019 IFR

Comment: 31 commenters opposed the definition of ''public charge'' set forth in the 2019 IFR. Commenters stated that the definition was too broad; asserted that it was inconsistent with congressional intent, historical practice, judicial decisions, and administrative guidance; and raised other objections to the definition listed therein.

Response: While the term ''public charge'' is not defined in the text of the INA and the statute vests the Department with discretion in its administration, the Department acknowledges that the definition set forth in the 2019 IFR and the 2019 DHS Final Rule differed significantly from the definition applied for decades previously, most notably in the 1999 Interim Field Guidance and related FAM guidance issued by the Department. The 2019 IFR had

[29] *See* 9 FAM 302.8–2(B)(1)—Definition of Public Charge *https://fam.state.gov/FAM/09FAM/09FAM030208.html* (last visited June 14, 2023).

[30] 9 FAM 302.8–2(B)(2)—Public Charge—Applying INA 212(a)(4) to Immigrants, *https://fam.state.gov/FAM/09FAM/09FAM030208.html (last visited June 14, 2023).*

[31] New American Economy, *The New ''Public Charge Rule and its Negative Impact on the U.S. Economy,* Feb. 2, 2021, *https://research.newamericaneconomy.org/report/economic-impact-of-public-charge-rule/.*

[32] *See* INA sec. 212(a)(4)(B)(ii), 8 U.S.C. 1182(a)(4)(B)(ii).

implemented this definition out of a desire to more closely align with the standards then applied by DHS in determining inadmissibility on public charge grounds. In 2022, DHS published a new Final Rule, implementing different standards. In the 2022 DHS Final Rule, DHS discussed in depth the definition that it used in the 2019 DHS Final Rule, and how it will not be applied in implementing the 2022 DHS Final Rule. As such, the 2019 IFR no longer meets the policy aim of consistency with DHS standards. The Department will instead restore the Prior Rule, and after the instant rule is finalized, anticipates that it will initiate new rulemaking in light of the 2022 DHS Final Rule.

(j) Private Health Insurance Concerns

Comment: Some commenters, particularly those focused on healthcare, asserted that the overall public charge policy reflected in the 2019 IFR had an adverse effect on the private health insurance industry. In particular, commenters stated that the increased numbers of immigrants not accepting public health benefits to which they would normally be eligible caused overall healthcare costs to increase, leading to an aggregate increase in private health insurance premiums for the public.

Response: The Department appreciates these commenters' concerns about the relationship between public charge inadmissibility determinations and private health insurance. We acknowledge evidence provided by many commenters suggesting that perceptions about the overall public charge policy reflected in the 2019 IFR had unintended effects on the willingness of individuals outside the scope of the IFR, such as U.S. citizens with noncitizen family members, to enroll in health insurance programs for which they are eligible.[33] The reversion to the Prior Rule will provide applicants with a clearer understanding of the application of the public charge grounds of inadmissibility, which should mitigate unintended consequences such as disenrollment in health insurance programs by U.S. citizens with non-citizen family members.

(k) Inconsistent With Executive Order 14012

Comment: Three commenters suggested that the 2019 IFR should be rescinded because it contradicts E.O. 14012,[34] which called on government departments and agencies to review public charge policies and other current immigration policies, in order to consider their effect on the integrity of the national immigration system. E.O. 14012 also called upon government departments to consider better methods of communicating its public charge policies and proposed changes, if any, with the public.

Response: Through the instant rulemaking, the Department is declining to make permanent the regulatory amendments made by the 2019 IFR. The Department anticipates that it will engage in rulemaking in light of the 2022 DHS Final Rule, pursuant to the Executive Branch's policy as articulated in section 1 of E.O. 14012. Until a subsequent rule is developed and published, the Department will continue to instruct its consular officers to apply the public charge ground of inadmissibility consistent with the statute, Prior Rule, and guidance contained in the FAM.[35]

(l) Excessive Burden on State, Local, and Territorial Governments

Comment: Some localities and states submitted comments, arguing that the overall public charge policy reflected in the 2019 IFR constituted a burden on state, local and territorial governments' ability to administer their own public health services and other benefits.

Response: The Department acknowledges the uncertainty many state, local, Tribal, and territorial governments experienced due to the administrative changes caused by the overall public charge policy reflected in the 2019 IFR. According to a joint public comment by attorneys general from twenty states and the District of Columbia, immigrant parents of school aged children, whether citizens, LPRs, or noncitizens, were hesitant to participate in distance learning, accept loaned technology, or participate in food distribution programs such as the National School Lunch Program, School Breakfast Program, and the Summer Food Service Meal Program provided by state and local governments due to confusion regarding the overall public charge policy. Other public commenters have expressed concern that the 2019 IFR dissuaded individuals in several communities, such as U.S. citizen family members of noncitizens overseas applying for visas, from applying for, collecting or retaining public benefits for which they would have been eligible. And some commenters representing local and state governments stated that they found a decline in enrollment in public benefit programs relating to the overall change in public charge policy, which resulted in unexpected changes to program usage. Following the reversion of regulations to those in place prior to the 2019 IFR, the public charge ground of visa ineligibility has been and will be applied in a way that should ameliorate the concern of these commenters. This final rule will be accompanied by public outreach by the Department and other stakeholders to ensure that immigrant communities understand this rule, including how it differs from the 2019 IFR.

G. Contents of This Final Rule

In continuing to apply the interpretation of the public charge ground of inadmissibility that existed prior to the 2019 IFR, this final rule removes the amendments to the regulation made by the 2019 IFR and restores the regulatory text of the Prior Rule. The Department finds, following its review of the public comments and the changes in circumstances following publication of the 2019 IFR, that the Department's policy of ensuring consistency with DHS no longer supports the 2019 IFR and that the Department should conduct further notice-and-comment rulemaking in light of the 2022 DHS Final Rule.

The Public Comment Reopening solicited comments on (1) whether the 2019 IFR should be rescinded or revised, and (2) what final rule should be adopted, if any. In reviewing the public comments submitted in response to it, along with public comments provided in response to the 2019 IFR, together with E.O. 14012 and the standards set forth in the 2022 DHS Final Rule, the Department has concluded that reverting to the Prior Rule is the most appropriate path forward.

The Department is therefore not finalizing the regulatory amendments made by the 2019 IFR and is instead reverting to the Prior Rule. This does not represent any change from the policies the Department has applied since 2020, when the preliminary injunction of the 2019 IFR took effect. This final rule restores the Prior Rule, with the exception of a technical change

[33] Department of Health and Human Services, ''*Health Insurance Coverage and Access to Care for Immigrants: Key Challenges and Policy Options*'' (Dec. 17, 2021), *https://aspe.hhs.gov/sites/default/files/documents/96cf770b168dfd45784cdcefd533d53e/immigrant-health-equity-brief.pdf.*

[34] Executive Order 14012, 86 FR 8277 (Feb. 5, 2021).

[35] *See* 9 FAM 302.8—PUBLIC CHARGE—INA 212(A)(4), *https://fam.state.gov/FAM/09FAM/09FAM030208.html* (last visited June 14, 2023).

made to remove an outdated reference to a particular portion of the Schedule of Fees for Consular Services.[36]

The interpretation of the public charge ground of inadmissibility in the Prior Rule more closely aligns with the standards articulated in the 2022 DHS Final Rule. There is a significant policy interest in ensuring that similarly situated noncitizen travelers to the United States are subject to fair and consistent adjudications under U.S. law when applying for a visa and when seeking admission to the United States on that visa. While the Prior Rule differs in some respects from the 2022 DHS Final Rule (for example, while the 2022 DHS Final Rule amends an existing information collection, the Department is not implementing any changes to its information collections in reverting to the Prior Rule), the change will greatly decrease the potential for unequal treatment and undue barriers for noncitizens applying for visas.

Following publication of this final rule, the Department intends to commence new rulemaking, which will have the goal of publishing and implementing a more comprehensive public charge regulation. For the reasons discussed in this rule, the Department has removed the regulations promulgated under the 2019 IFR and reverted to the prior text of 22 CFR 40.41.

II. Regulatory Findings

A. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (''UMRA''), generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more (adjusted for inflation) by State, local, territorial, or Tribal governments, or by the private sector. This rule will generally continue consular practices that had been in place prior to 2019, and that have been applied since the 2019 IFR was preliminarily enjoined by a District Court in 2020. This rule does not require the Department to prepare a statement because it is not anticipated that it will result in an annual expenditure of $100 million or more (adjusted for inflation) by State, local, territorial, or Tribal governments, or by the private sector.[37] Additionally, this rule does not contain any Federal mandate (as defined in UMRA) because it does not impose any enforceable duty upon any level of government or private sector entity.

B. Executive Order 12866—Regulatory Planning and Review

The Department has reviewed this rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 12866. The Office of Management and Budget (OMB) has determined that this is a significant regulatory action under Executive Order 12866. As such, OMB has reviewed this regulation accordingly.

In comparison to the 2019 IFR, which was previously published and put into effect, this rule may result in new costs, benefits, and transfers. The Department does not believe there are any quantifiable new direct costs for this final rule, as the Department is not proposing to add additional information collection burdens on visa applicants. As such, visa applicants will see no increase in the time it takes to complete either the immigrant visa application or the nonimmigrant visa application or associated opportunity costs.

The Department believes that this final rule may have indirect effects on State, local, territorial, and/or Tribal governments, primarily in the form of increased transfer payments from federal, state, territorial and Tribal governments to individuals. According to OMB Circular A–4, transfer payments are payments of money from one group to another for which no goods or services are exchanged, and do not affect the total resources available to society.[38] Changes in transfer payments are considered neither costs nor benefits of a rule. While acknowledging the potential chilling effects caused by the 2019 IFR, the Department emphasizes that neither the public charge statute nor this final rule directly regulates eligibility for public benefits for any population. While the removal of the 2019 IFR from the regulations may result in increased transfer payments, the Department is unable to concretely quantify these effects. This final rule is being published after DHS published the 2022 DHS Final Rule, which may have a more significant impact on the willingness of noncitizens to accept transfer payments than the removal of the 2019 IFR.

Further, the 2019 IFR was only in effect between October 15, 2019, when it was published in the **Federal Register**,[39] and July 29, 2020, when the United States District Court for the Southern District of New York issued a preliminary injunction enjoining the Department from its application.[40] In addition, on March 20, 2020, in response to the worldwide COVID–19 pandemic the Department temporarily suspended routine visa services at all U.S. Embassies and Consulates.[41] A phased resumption of services began on July 15, 2020, just two weeks before the preliminary injunction was issued.[42]

Consistent with E.O. 12866, the Department considered the costs and benefits of available regulatory alternatives. One alternative that the Department considered was finalizing the regulatory amendments made by the 2019 IFR. However, as noted above, the Department adopted the 2019 IFR largely to conform with the 2019 DHS Final Rule, which has been supplanted by the 2022 DHS Final Rule. In publishing this final rule, the public charge grounds of inadmissibility will be applied using the Prior Rule and FAM Guidance, as they were applied prior to 2019. The Department believes that, to the extent practicable, standards for the enforcement of the public charge ground of inadmissibility should be consistent in order to ensure consistent application among similarly situated noncitizens. As such, the Department does not believe that finalizing the regulatory amendments made by the 2019 IFR would be the best course of action.

C. Executive Orders 13563 and 14094—Improving and Modernizing Regulation and Regulatory Review

Along with Executive Order 12866, Executive Order 13563 directs agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity).

[36] The Department also notes that the 2019 IFR found that the description of a procedure relating to the posting of a bond or undertaking was obsolete. See 84 FR 54996, 55010. While some of the specific steps to posting a bond, as described in 22 CFR 40.41(d), have changed since the original publication of the Prior Rule, the posting of a bond by a visa applicant is still authorized by sections 213 and 221(g) of the INA, 8 U.S.C. 1183, 1201. Revisions to this rule to update the bond procedure and other provisions would be considered in the development of any future rule governing the public charge ground of inadmissibility but are not addressed by this final rule.

[37] 2 U.S.C. 1532(a).

[38] *See* OMB, ''Circular A–4'' (Sept. 17, 2003), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.*

[39] 84 FR 54996 (Oct. 11, 2019).

[40] *See Make the Road N.Y* v. *Pompeo,* 475 F.Supp. 3d 232 (S.D.N.Y. 2020).

[41] Department of State, *Suspension of Routine Visa Services* (Mar. 20, 2020), *https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html.*

[42] Department of State, *Phased Resumption of Visa Services,* (July 15, 2020), *https://travel.state.gov/content/travel/en/News/visas-news/visa-services-operating-status-update.html.*

The Department has reviewed the final rule under Executive Order 13563 and has determined that this rulemaking is consistent with the principles therein.

Additionally, the Department has reviewed this rule to ensure its consistency with the regulatory philosophy and principles set forth in Executive Order 14094 and confirms this rulemaking is consistent with the principles therein.

D. Executive Orders 12372 and 13132—Federalism

This final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor will the final rule have federalism implications warranting the application of Executive Orders 12372 and 13132.

E. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

The Department has determined that this rulemaking will not have Tribal implications, will not impose substantial direct compliance costs on Indian Tribal governments, and will not preempt Tribal law. Accordingly, the requirements of Section 5 of Executive Order 13175 do not apply to this rulemaking.

F. Executive Order 12988—Civil Justice Reform

The Department has reviewed the rule considering sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

G. Paperwork Reduction Act

This final rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. 3501–3520. The 2019 IFR imposed a new information collection requirement. OMB subsequently granted an emergency approval for the use of a new form by the Department, DS–5540, Public Charge Questionnaire (''DS–5540'').[43] The emergency approval was granted only until August 31, 2020, and expired after that date. OMB has not approved the information collection under the DS–5540 since that time, and on March 26, 2021, the Department published a notice stating that visa applicants are not required to complete and should not present a DS–5540.[44]

H. Regulatory Flexibility Act/Executive Order 13272: Small Businesses

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* requires agencies to perform an analysis of the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. ''Small entities'' comprises small business, not-for-profit organizations that are independently owned and operated and not dominant within their fields, or governmental jurisdictions with populations under 50,000. This final rule would not regulate ''small entities'' as that term is defined in 5 U.S.C. 601(6) and as such does not have a significant economic impact on a substantial number of small entities. This final rule only applies to individual visa applicants, which are not defined as a ''small entity'' by the RFA.

I. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final rule is not a ''major rule'' as defined by Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act, 5 U.S.C. 804(2). This final rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and import markets. The Department will send this final rule to Congress and to the Comptroller General pursuant to the Congressional Review Act, 5 U.S.C. 801.

List of Subjects in 22 CFR Part 40

Administrative practice and procedure, Aliens, Foreign relations, Passports and visas.

For the reasons stated in the preamble, the Department amends 22 CFR part 40 as follows:

PART 40—REGULATIONS PERTAINING TO BOTH NONIMMIGRANTS AND IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

■ 1. The authority citation for part 40 continues to read as follows:

Authority: 8 U.S.C. 1104, 1182, 1183a, 1641.

■ 2. Section 40.41 is revised to read as follows:

§ 40.41 Public charge.

(a) *Basis for determination of ineligibility.* Any determination that an alien is ineligible under INA 212(a)(4) must be predicated upon circumstances indicating that, notwithstanding any affidavit of support that may have been filed on the alien's behalf, the alien is likely to become a public charge after admission, or, if applicable, that the alien has failed to fulfill the affidavit of support requirement of INA 212(a)(4)(C).

(b) *Affidavit of support.* Any alien seeking an immigrant visa under INA 201(b)(2), 203(a), or 203(b), based upon a petition filed by a relative of the alien (or in the case of a petition filed under INA 203(b) by an entity in which a relative has a significant ownership interest), shall be required to present to the consular officer an affidavit of support (AOS) on a form that complies with terms and conditions established by the Secretary of Homeland Security. Petitioners for applicants at a post designated by the Deputy Assistant Secretary for Visa Services for initial review of and assistance with such an AOS will be charged a fee for such review and assistance pursuant to the Schedule of Fees for Consular Services (22 CFR 22.1).

(c) *Joint sponsors.* Submission of one or more additional affidavits of support by a joint sponsor/sponsors is required whenever the relative sponsor's household income and significant assets, and the immigrant's assets, do not meet the Federal poverty line requirements of INA 213A.

(d) *Posting of bond.* A consular officer may issue a visa to an alien who is within the purview of INA 212(a)(4) (subject to the affidavit of support requirement and attribution of sponsor's income and resources under section 213A), upon receipt of a notice from DHS of the giving of a bond or undertaking in accordance with INA 213 and INA 221(g), and provided further that the officer is satisfied that the giving of such bond or undertaking removes the likelihood that the alien will become a public charge within the meaning of this section of the law and that the alien is otherwise eligible in all respects.

(e) *Prearranged employment.* An immigrant visa applicant relying on an offer of prearranged employment to establish eligibility under INA 212(a)(4), other than an offer of employment certified by the Department of Labor

[43] Notice of OMB Emergency Approval of Information Collection: Public Charge Questionnaire, 85 FR 13694 (Mar. 9, 2020).

[44] Update on Public Charge, *https://travel.state.gov/content/travel/en/News/visas-news/update-on-public-charge.html* (Mar. 26, 2021).

pursuant to INA 212(a)(5)(A), must provide written confirmation of the relevant information sworn and subscribed to before a notary public by the employer or an authorized employee or agent of the employer. The signer's printed name and position or other relationship with the employer must accompany the signature.

(f) *Use of Federal poverty line Where INA 213A not applicable.* An immigrant visa applicant, not subject to the requirements of INA 213A, and relying solely on personal income to establish eligibility under INA 212(a)(4), who does not demonstrate an annual income above the Federal poverty line, as defined in INA 213A(h), and who is without other adequate financial resources, shall be presumed ineligible under INA 212(a)(4).

Hugo Rodriguez,

Principal Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

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BILLING CODE 4710–06–P

DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 004–2023]

Privacy Act of 1974; Implementation

AGENCY: Office of Privacy and Civil Liberties, United States Department of Justice.

ACTION: Final rule.

SUMMARY: The Office of Privacy and Civil Liberties (OPCL), a component within the United States Department of Justice (DOJ or Department), is finalizing without changes its Privacy Act exemption regulations for the system of records titled, Data Protection Review Court Records System, JUSTICE/OPCL–001, which were published as a notice of proposed rulemaking (NPRM) on May 23, 2023. The notice for this new system of records, Data Protection Review Court Records System, JUSTICE/OPCL–001, was also published in the **Federal Register** on May 23, 2023. Specifically, the Department's regulations will exempt this system of records from certain provisions of the Privacy Act to protect national security and law enforcement sensitive information, preserve judicial independence, and ensure the integrity of adjudicatory records in cases before the Data Protection Review Court (DPRC). The Department received no comments on the NPRM.

DATES: This final rule is effective October 5, 2023.

FOR FURTHER INFORMATION CONTACT: Katherine Harman-Stokes, Director (Acting), Office of Privacy and Civil Liberties, U.S. Department of Justice, Two Constitution Square, 145 N St. NE, Suite 8W–300, Washington, DC 20530; email: *privacy.compliance@usdoj.gov;* telephone: (202) 514–0208; facsimile: (202) 307–0693.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, OPCL is establishing a new system of records, Data Protection Review Court Records System, JUSTICE/OPCL–001, to maintain an accurate record of the DPRC review of determinations made by the Civil Liberties Protection Officer of the Office of the Director of National Intelligence (ODNI CLPO) in response to complaints alleging violations of United States law in the conduct of United States signals intelligence activities, under the EU–U.S. Data Protection Framework established on October 7, 2022, pursuant to Executive Order (E.O.) 14086, Enhancing Safeguards for United States Signals Intelligence Activities, 87 FR 62283 (Oct. 14, 2022).

E.O. 14086 directed the Attorney General to issue a regulation establishing the DPRC as the second level of a two-level redress mechanism for alleged violations of law regarding signals intelligence activities. The Attorney General issued the regulation on October 7, 2022, ''Data Protection Review Court.'' 87 FR 628303 (Oct. 14, 2022) (codified at 28 CFR part 201).

The first level of the new redress mechanism established by E.O. 14086 is the investigation, review, and determination by the ODNI CLPO of whether a covered violation occurred and, where necessary, the appropriate remediation in response to a complaint. The complainant or an element of the Intelligence Community may seek review by the DPRC of the ODNI CLPO's determination.

Exercising the Attorney General's authority under 28 U.S.C. 511 and 512 to provide his advice and opinion on questions of law and the authority delegated to the Attorney General under E.O. 14086, the DPRC will review whether the ODNI CLPO's determination regarding the occurrence of a covered violation was legally correct and supported by substantial evidence and whether, in the event of a covered violation, the ODNI CLPO's determination as to the appropriate remediation was consistent with E.O. 14086.

The regulations require the DPRC, and OPCL in support of the DPRC, to maintain all records relating to the DPRC's review. For each application for review, OPCL shall maintain records of the information reviewed or created by the DPRC and the decision of the DPRC panel, which records shall be made available for consideration as non-binding precedent to future DPRC panels considering applications for review. 28 CFR 201.9(j), *see also* 28 CFR 201.5 through 201.15. Records of the DPRC's review will include material created by the complainant, the public authority of a designated state, ODNI CLPO, elements of the Intelligence Community, DPRC Judges and Special Advocates, and Department of Justice personnel. Most of the information in this system consists of records that are classified, including the record of review received from the ODNI CLPO.

Pursuant to 28 CFR 201.9(i), information in the system indicating a violation of any authority subject to the oversight of the Foreign Intelligence Surveillance Court (FISC) will be shared with the Assistant Attorney General for National Security, who shall report violations to the FISC as required by law and in accordance with its rules of procedure. Similarly, information in the system will be provided to the Privacy and Civil Liberties Oversight Board (PCLOB) as necessary for the PCLOB to conduct the annual review of the redress process described in section 3(e) of E.O. 14086, consistent with the protection of intelligence sources and methods.

II. Privacy Act Exemption

The Privacy Act allows Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including those that provide individuals with a right to request access to and amendment of records about the individual. If an agency intends to exempt a particular system of records, it must first issue a rulemaking pursuant to 5 U.S.C. 553(b)(1)–(3), (c), and (e).

The Department modifies 28 CFR part 16 to add a new Privacy Act exemption for the new system of records, Data Protection Review Court Records System, JUSTICE/OPCL–001. The Department adds this exemption because most of the records in this system will contain classified national security information. As such, notice, access, amendment, and disclosure (to include accounting for those records) to an individual, as well as certain record-keeping requirements, may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C.