



THE NEW PUBLIC CHARGE IMMIGRATION RULE AND ITS IMPACT

By Tania Morris Diaz and Marie S. Nelson



At a Glance

A new immigration regulation has greatly expanded the ability of the federal government to exclude immigrants based on their likelihood of becoming a “public charge.” This rule will impact low- and moderate-income immigrants the hardest and shape the future of the U.S. immigrant population.

Authors' note: Since the writing of this article, the public charge rule was later enjoined nationwide during a declared national emergency related to the COVID-19 pandemic on July 29, 2020. On September 11, 2020, the U.S. Second Circuit Court of Appeals granted the government's motion to lift the July injunction nationwide. On November 2, 2020, a federal district court vacated the new rule nationwide. One day later, the Seventh Circuit Court stayed the order vacating the new rule. On December 2, 2020, the Ninth Circuit Court enjoined the new rule in a handful of states; it remains in effect elsewhere.

History of public charge

The U.S. has historically denied the entry of “undesirable” immigrants.¹ One category of undesirables includes people that the government deems likely to become a public charge. The concept of public charge takes root in Colonial-era poor laws restricting who could enter and reside in states such as New York and Massachusetts.² It is also reminiscent of antebellum slave codes that conditioned manumission on the slave owner posting a bond to ensure the enslaved person would not become a public charge.³ The term “public charge” was introduced in federal legislation in 1882.⁴ It evolved into a basis for excluding those “likely to become a public charge”⁵ and deporting those who do.⁶

Public charge survives today with its inclusion in modern comprehensive federal legislation.⁷ However, no legislation defines “public charge.” Consequently, enforcement was primarily “prophetic judgement”⁸ on factors such as age, health, family status, assets, resources, financial status, education, and skills.⁹ Financial sponsorship became an additional factor when, in 1996, Congress created a legally enforceable affidavit of support required by sponsors of all family-based green card applicants demonstrating the capability of maintaining the immigrant at an income level not less than 125 percent of the poverty level (Form I-864).¹⁰ In 1999, the Immigration and Naturalization Service published field guidance for adjudicators making public charge determinations in considering the above factors cumulatively in the “totality of circumstances.”¹¹ The guidance defined public charge to be anyone likely to become “primarily dependent on government for subsistence.”¹² The only types of public benefits relevant to a public charge determination were past use or potential future use of “public cash assistance for income maintenance” such as Supplemental Security Income and Temporary Assistance for Needy Families and “institutionalization for long-term care at government expense.”¹³ In practice, however, the greatest weight was placed on the existence of financial sponsorship. This field guidance would remain the basis for a public charge determination for the next 20 years.

Recent changes to public charge

In February 2018, a draft of a proposed rule altering the public charge definition was leaked to the press.¹⁴ The proposed rule greatly expanded the types of public benefits considered under the public charge analysis. The government previously declined to consider the use of non-cash assistance in a public charge analysis, recognizing that “participation in such noncash programs is not evidence of poverty or dependence.”¹⁵ However, the leaked draft indicated that the government will begin to consider the use of non-cash benefits including non-emergency Medicaid, food stamps, and Section 8 housing benefits.

In October 2018, the Department of Homeland Security (DHS) released the final proposed version of the rule and allowed 60 days for public comment. During that period, more than 266,000 comments were submitted, an astonishing number for a technical administrative regulation. The government acknowledged that the “vast majority of comments” opposed the rule.¹⁶ Despite the overwhelming public response from state and local governments, health care providers, private citizens, and a constellation of immigration, public health, and economic justice advocates, DHS published the final rule in August 2019.¹⁷ DHS summarily brushed off the thousands of comments opposing the rule as outweighed by the government’s interest in the self-sufficiency of immigrants. A slew of lawsuits immediately followed and, despite a series of temporary injunctions, the Supreme Court eliminated the last injunction in a January 2020 decision. The new public charge rule officially went into effect on February 24, 2020.¹⁸

The final rule contained some modest improvements from earlier drafts—such as excluding from consideration public benefits use by an immigrant’s U.S. citizen family members—but it retained its original framework. Under the new regulation, the legal definition of “public charge” changed. An individual would be considered a public charge if he or she were likely to use public benefits for “more than 12 months in the aggregate in any 36-month period” at any point in the future. The new regulation also expanded public benefits under consideration to include non-emergency Medicaid (with exceptions), Section 8 housing vouchers and rental assistance, public housing, and food stamps.

To determine whether an applicant would meet this definition of public charge, immigration officers were now to apply an expanded “totality of circumstances” test. Though financial sponsorship was previously sufficient for most applicants to overcome the public charge ground, the new rule requires immigration officers to go over an applicant’s personal history with a microscope. Among other things, immigration officers are expected to inspect an applicant’s credit reports, “English proficiency,” health insurance policies, medical histories, household size, debts and liabilities, appraisals of real and personal property, employment histories, occupational skills, educational level, past applications for public benefits, the applicant’s relationship to his or her financial sponsor, the financial health of the sponsor, and a 20-page form that each applicant must submit. Immigration officers are then instructed to “balance” these factors at their discretion to determine whether an applicant is likely to use public benefits, at any time, for more than 12 months in the aggregate in any 36-month period.

This incredibly convoluted test foisted upon immigration officers at a time of historic processing delays will inevitably lead to inconsistent and discriminatory outcomes.¹⁹ The government bizarrely emphasizes in its own guidance regarding the new rule that the public charge test is a “subjective,



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discretionary assessment” based on “the opinion of” the adjudicating officer and that, consequently, “determinations will vary.”²⁰

Impact analysis

Chilling effect

Even before the rule was implemented, the leaked draft created a chilling effect. Not an unprecedented outcome, since research documented a sharp decline in benefit program participation among immigrant families following the 1996 legislation on immigrants’ eligibility for public benefits.²¹ More than a year before the public charge rule was even finalized, public health analysts predicted that a combination of fear and confusion among the immigrant community would lead to decreased participation in programs such as Medicaid, even for U.S. citizens in mixed immigrant status

families. Public policy analysts warned that the long-term impacts of individuals needlessly forgoing benefits would be particularly acute for pregnant women and children.

The public benefits focus of the new rule is largely a red herring as eligibility for most federal public benefits is limited to those who *already have their green card*. A public charge determination primarily occurs for those *applying for a green card* through a family member. Research has shown that fewer than one percent of noncitizens in the United States could be ineligible for a green card based on past public benefits use alone under the new rule since few applicants would have ever been eligible.²²

As a result, the chilling effect has reached far beyond the legal effect. In fact, a 2018 survey by the Urban Institute revealed that one in seven adults in low-income immigrant families avoided non-cash public benefits for either their own use or their family members, which included eligible children.²³ A study by the National Immigration Law Center highlighted the example of an individual exempt from a public charge determination who stopped receiving cancer treatment covered by Medi-Cal out of fear it would endanger her immigration status.²⁴ The most common program for which a chilling effect was reported was food stamps, followed by Medicaid and the Children’s Health Insurance Program.²⁵ However, the chilling effect reaches far beyond the immigrant community. Disenrollment of benefits could lead to consequences such as a loss of

federal funds, a negative ripple effect on the economy, and potential jobs lost.²⁶ In Michigan, the estimated economic loss to the state was calculated at \$267 million if only 15 percent of those experiencing the chilling effect disenroll.²⁷

Public benefits

By making public benefits the centerpiece of the public charge definition, the rule plays up the false narrative that immigrants utilize a disproportionate amount of public benefits and the notion that immigrants come to the United States to utilize public benefits.²⁸ Though the rule puts a focus on examining past use of benefits to the extent that it has added a full page of questions regarding past public benefits use to several immigration forms, *most immigrants impacted by this new rule will never have been eligible for public benefits in the United States*.²⁹

The government is considering an individual a public charge—i.e., dependent on the government—if the immigrant may use public benefits for a short period of time at any point in the future. Though the government has drawn the line at individuals who use public benefits for 12 months out of a 36-month period, using more than one benefit in the same month is counted concurrently. For example, using Medicaid and food stamps for six months counts as 12 months of public benefits.

On a definitional level, the idea that use of public benefits for six months over an entire lifetime makes an individual a constructive ward of the state is misleading. As an example, food stamps on average offer \$127 a month per recipient, or approximately \$1,500 per year.³⁰ These modest sums demonstrate that public benefits such as food stamps are intended to be *supplements* to income. As put quite eloquently in the past by the same agency now implementing this rule, non-cash benefits “are by their nature supplemental” and “benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient.”³¹ Study after study confirms the government’s spot-on observation, finding that non-cash assistance, even for a limited period of time, can be a critical supplement to income, contributing to the long-term self-sufficiency of recipients and their children.³²

Additionally, relevant research demonstrates that the stereotypical association between immigrants and welfare use is erroneous. A study by the Center on Budget and Policy Priorities found that by conservative estimate, one in three Americans would be considered a public charge based on past benefits use alone under this new rule compared to fewer than one percent of noncitizens.³³ A systematic review of immigrant health care expenditure studies revealed that immigrants, regardless of lawful status, paid more toward medical expenses than they withdrew and essentially subsidize U.S. health insurance markets.³⁴ A study funded by the National Institutes of Health demonstrated that average health care expenditures were highest for native-born U.S. citizens, almost twice the amount of expenditures incurred by noncitizens. The study also noted the “total, and publicly funded, share of healthcare consumption by immigrants was much lower relative to their population size.”³⁵ A study by the CATO Institute found that “[l]ow-income . . . non-citizen children and adults utilize Medicaid, SNAP, cash assistance, and SSI at a generally lower rate than comparable low-income native-born citizen children and adults, and the average value of public benefits received per person is generally lower for non-citizens than for natives.”³⁶

Accordingly, the rationales and objectives of the government in promulgating this public charge rule are murky at best. The government cites no evidence to buttress its claim

that its rule will promote self-sufficiency. Contrastingly, available evidence demonstrates that temporary public benefits use can play a critical part in achieving long-term self-sufficiency and, in any event, immigrants utilize federal public benefits at a lower rate than native-born U.S. citizens.

The public charge rule reframes an archaic category of “undesirables” and attaches to it a subset of undesirable qualities. How these factors will be applied in practice is still relatively unknown, but the factors themselves seem to be overwhelmingly disadvantageous to low- and middle-skilled immigrant workers.³⁷ The Migration Policy Institute analyzed how the negative factors would have impacted those who had recently obtained a green card and found that children, the elderly, and women disproportionately had at least two to three negative factors.³⁸ As the senior vice president for the Poverty to Prosperity Program at the Center for American Progress noted, the new public charge rule seems to require immigrants to have “inherited wealth” or the “education necessary to work a high-tech job in Silicon Valley” and to basically “have already achieved the American dream” as a prerequisite to receive a green card through a family member.³⁹ ■



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ENDNOTES

1. E.g., Page Act of 1875, Pub L No 43-141, 18 Stat 477.
2. E.g., Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (New York: Oxford University Press, 2017), pp 390–393.
3. E.g., Klebaner, *American Manumission Laws and the Responsibility for Supporting Slaves*, 63 Virginia M of History and Biography 443, 443 (1955).
4. Immigration Act of 1882, PL 48-376, 2 Stat 214.
5. Immigration Act of 1891, PL 51-551, 26 Stat 1084.
6. Immigration Act of 1907, PL 59-96, 34 Stat 898 and Immigration Act of 1917, PL 64-301, 29 Stat 874.

7. Immigration and Nationality Act of 1952, PL 82-414, 66 Stat 163 and 8 USC 1182(a)(4).
8. Gordon, Mailman, & Yale-Loehr, *Immigration Law and Procedure* (Vol 5) (Newark: Matthew Bender & Co, 2008), 2–281.
9. 8 USC 1182(a)(4)(B).
10. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PL 104-208, 110 Stat 3009.
11. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds. 64 FR 28,689 (March 26, 1999).
12. *Id.* at 28,689.
13. *Id.* at 28,690.
14. Torbati, *Exclusive: Trump administration may target immigrants who use food aid, other benefits*, Reuters (February 8, 2018) <<https://www.reuters.com/article/us-usa-immigration-services-exclusive/exclusive-trump-administration-may-target-immigrants-who-use-food-aid-other-benefits-idUSKBN1FS2ZK>>. All websites cited in this article were accessed November 7, 2020.
15. Field Guidance on Deportability and Inadmissibility at p 28,692, Par 6.
16. Inadmissibility on Public Charge Grounds, 84 Fed Reg 41,292, 41,297 (August 14, 2019).
17. *Id.* at 41,292.
18. *Dept of Homeland Security v New York*, 140 S Ct 599; 206 L Ed 2d 115 (January 27, 2020).
19. AILA Policy Brief: *Crisis Level USCIS Processing Delays and Inefficiencies Continue to Grow*, American Immigration Lawyers Ass'n (February 26, 2020) <<https://www.aila.org/advo-media/aila-policy-briefs/crisis-level-uscis-processing-delays-grow>> [<https://perma.cc/4XEM-V6FR>].
20. US Citizenship and Immigration Services, *Chapter 4: Prospective Determination Based on Totality of Circumstances*, USCIS Policy Manual (October 15, 2020), available at <<https://www.uscis.gov/policy-manual/volume-8-part-g-chapter-4>> [<https://perma.cc/ZK9C-CX2T>].
21. Batalova, Fix, & Greenberg, *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, Migration Public Institute (June 2018), p 14, available at <<https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impacHegal-immigrant-families>> [<https://perma.cc/Q8KQ-KACJ>].
22. Capps, Gelatt, & Greenberg, *The Public-Charge Rule: Broad Impacts, But Few Will Be Denied Green Cards Based on Actual Benefits Use* (March 2020) <<https://www.migrationpolicy.org/news/public-charge-denial-green-cards-benefits-use>> [<https://perma.cc/PL3V-6WQU>].
23. Bernstein et al, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefits Programs in 2018*, Urban Institute (May 22, 2019), available at <<https://www.urban.org/research/publication/one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018>> [<https://perma.cc/PU6H-W5K7>].
24. Straut-Eppsteiner, *Documenting Through Service Provider Accounts Harms Caused by the Department of Homeland Security's Public Charge Rule*, NILS (February 2020), p 5, available at <<https://www.nilc.org/issues/economic-support/documenting-harm-caused-by-the-department-of-homeland-securitys-public-charge-rule/>> [<https://perma.cc/Y4ML-WB3G>].
25. *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefits Programs in 2018* at p 7.
26. Crouse, *The dangerous chilling effect of the proposed public charge rule*, MLPP (February 19, 2019), available at <<https://mlpp.org/immigration-issues/the-dangerous-chilling-effect-of-the-proposed-public-charge-rule/>> [<https://perma.cc/5HQP-LMCP>].
27. *Id.* at 2.
28. Inadmissibility on Public Charge Grounds at p 41,294, Sect I.A.
29. *Id.* at 41,313, Sect III.D.5.
30. *Chart Book: SNAP Helps Struggling Families Put Food on the Table*, Center on Budget and Policy Priorities, (November 7, 2019) <<https://www.cbpp.org/research/food-assistance/chart-book-snap-helps-struggling-families-put-food-on-the-table>> [<https://perma.cc/Y9T4-ZNRC>].
31. Field Guidance on Deportability and Inadmissibility at p 28,692, Par 6.
32. Sherman & Mitchell, *Economic Security Programs Help Low-Income Children Succeed Over Long Term, Many Studies Find*, Center on Budget and Policy Priorities (July 17, 2017), available at <<https://www.cbpp.org/research/poverty-and-inequality/economic-security-programs-help-low-income-children-succeed-over#:-:text=Government%20economic%20security%20programs%20such,do%20better%20in%20school%20and>> [<https://perma.cc/E7FE-94WZ>] and Schanzenbach & Thorn, *Food Support Programs and Their Impacts On Very Young Children*, Health Affairs (March 28, 2019) <<https://www.healthaffairs.org/doi/10.1377/hpb20190301.863688/full/>> [<https://perma.cc/V7UW-LGX8>].
33. *One-Third of U.S.-Born Citizens Would Struggle to Meet Standard of Extreme Trump Rule for Immigrants* Center on Budget and Policy Priorities (September 27, 2018) <<https://www.cbpp.org/blog/one-third-of-us-born-citizens-would-struggle-to-meet-standard-of-extreme-trump-rule-for>> [<https://perma.cc/Z5B2-DU49>].
34. Flavin et al., *Medical Expenditures on and by Immigrant Populations in the United States: A Systematic Review*, 48 Int'l J of Health Services 601, 601–602 (2018), available at <http://www.pnhp.org/docs/ImmigrationStudy_IJHS2018.pdf> [<https://perma.cc/8NA6-5AH9>].
35. Tarrat et al., *Medical expenditures among immigrant and nonimmigrant groups in the United States: findings from the Medical Expenditures Panel Survey (2000–2008)*, 50 Medical Care 233,233 (2012), available at <<https://www.jstor.org/stable/pdf/23216298.pdf>>.
36. Ku & Bruen, *Poor Immigrants Use Public Benefits at a Lower Rate than Poor Native-Born Citizens*, Cato Institute (March 4, 2013) <<https://www.cato.org/publications/economic-development-bulletin/poor-immigrants-use-public-benefits-lower-rate-poor>> [<https://perma.cc/N83H-9V9Q>].
37. Capps et al., *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, Migration Policy Institute (November 2018), available at <<https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>> [<https://perma.cc/F3P4-XQUS>].
38. *Id.*
39. Boteach et al, *Trump's Immigration Plan Imposes Radical New Income and Health Tests*, Center for American Progress (July 19, 2018) <<https://www.americanprogress.org/issues/poverty/reports/2018/07/19/453174/trumps-immigration-plan-imposes-radical-new-income-health-tests/>> [<https://perma.cc/V4NV-N2XY>].