The Public Charge Rule and the Threat to Public Health

February 20, 2020

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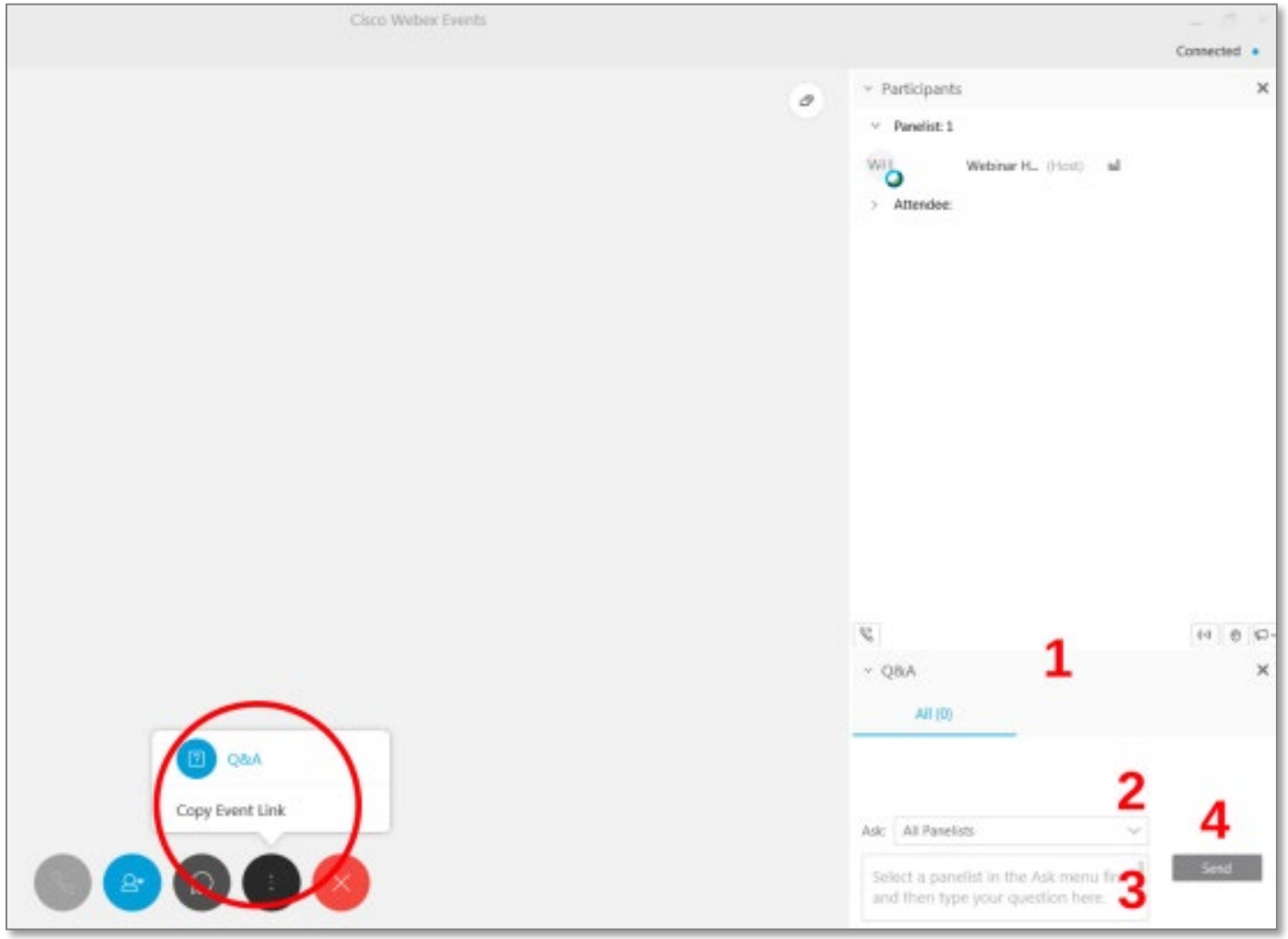

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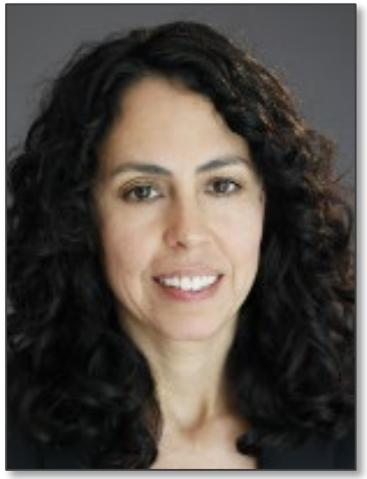

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The Public Charge Rule and the Threat to Public Health

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February 20, 2020

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What is a "Public Charge"?

Under the Immigration and Nationality Act (INA): an individual who applies for admission or an adjustment of status is inadmissible if she is "likely at any time to become a public charge."

- **A "public charge" is ineligible to become legal permanent resident and will be denied a green card.**
  - **A public charge finding can have serious consequences for an applicant and the applicant's family.**
  - **Many individuals applying for green cards do so via family-based immigration (*i.e.*, the spouse, child, or parent of a U.S. citizen)**
- **The U.S. has had some type of "public charge" exclusion for over 100 years**

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"Public Charge" 1999 - February 24, 2020

<u>1999 "Public Charge" Definition</u>: An individual likely to become primarily dependent on the government for subsistence, as demonstrated by: (1) receipt of public cash assistance *for income maintenance*; or (2) *institutionalization for long-term care* at government expense. (Adopted from the 1999 Field Guidance on Deportability and Admissibility on Public Charge Grounds)

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Final Rule: Legal Evolution

- October 10, 2018: DHS publishes the proposed Final Rule
- October 15, 2019: The Final Rule initially set to go to into effect
- October 2019: District courts in CA, WA, MD, IL, and NY issue various state & nationwide preliminary injunctions temporarily blocking the Final Rule before it takes effect
- December 2019-January 2020: The U.S. Court of Appeals for the Ninth & Fourth Circuit stay the injunctions issued in their respective lower courts; the Second Circuit declines to do so
- January 27, 2020: The U.S. Supreme Court stays the last nationwide preliminary injunction
- February 24, 2020: Final Rule applies to applications/petitions submitted on or after 2/24/20 (except IL*)

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The Final Rule: "Public Charge"

"Public Charge" Means: An individual who receives one or more designated *public benefits* for more than 12 months in the aggregate within any 36-month period (such that, receipt of two benefits in one month counts as two months).

The Final Rule expansively redefines the meaning of "public charge" to include use of *non-cash benefits* relating to food & nutrition, healthcare, and housing.

SNAP Supplemental Nutrition Assistance Program

Medicaid

A Comparison of "Benefits"

Benefits Considered

1999 Field Guidance	"Public Benefits" Final Rule
▪ SSI	✓ SSI
▪ TANF	✓ TANF
▪ Federal, state, & local cash benefit programs for income maintenance (general assistance programs)	✓ Federal, state & local cash benefit programs for income maintenance
▪ Institutionalized long term-care at the government's expense	✓ Institutionalized long term-care at the government's expense
	▪ SNAP
	▪ Most forms of Medicaid (not emergency medical, children under 21, pregnant women including 60 days after pregnancy)
	▪ Housing subsidies (*i.e.*, Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance)

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Totality of the Circumstances Test

Is it more likely than not that the applicant will become a public charge at any time in the future?

<u>At minimum the following factors are considered</u>:

1. Age (18-61?)

2. Health (medical condition interfering with ability to work?)

3. Family status (household size?)

4. Assets, resources, and financial status (annual gross household income at least 125% of FPG? resources to cover reasonably foreseeable medical costs? financial liabilities? applied for/received "public benefits" since rule's implementation?)

5. Education and Skills (history of employment? HS diploma or higher? proficient in English? primary caregiver?)

<u>The following may also be considered</u>:

- **An affidavit of support (generally required for family-based immigration; sponsor affirms ability to maintain the applicant at an income of at least 125% of FPG)**
- **All factors bearing on the applicant's ability or potential to be self-supporting**

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Final Rule's Heavily Weighted Factors

Heavily Weighted Positive Factors

- **At least 250% of FPG** (household income, assets, or resources)
- **At least 250% of FPG** (annual income from employment)
- **Private health insurance** (excluding insurance obtained with ACA tax subsidies)

Heavily Weighted Negative Factors

- **Unemployed (and not a student)** Authorized to work but lacking a job, work history, or reasonable prospect of employment
- **Approved/Receipt of Public Benefits** (within 3 years prior to application for adjustment of status)
- **Medical condition:** (1) likely requiring extensive treatment, institutionalization, or interferes with applicant's ability to provide for herself; and (2) no insurance or resources to pay for reasonably foreseeable medical costs
- **Previous Public Charge finding** (inadmissible/deportable)

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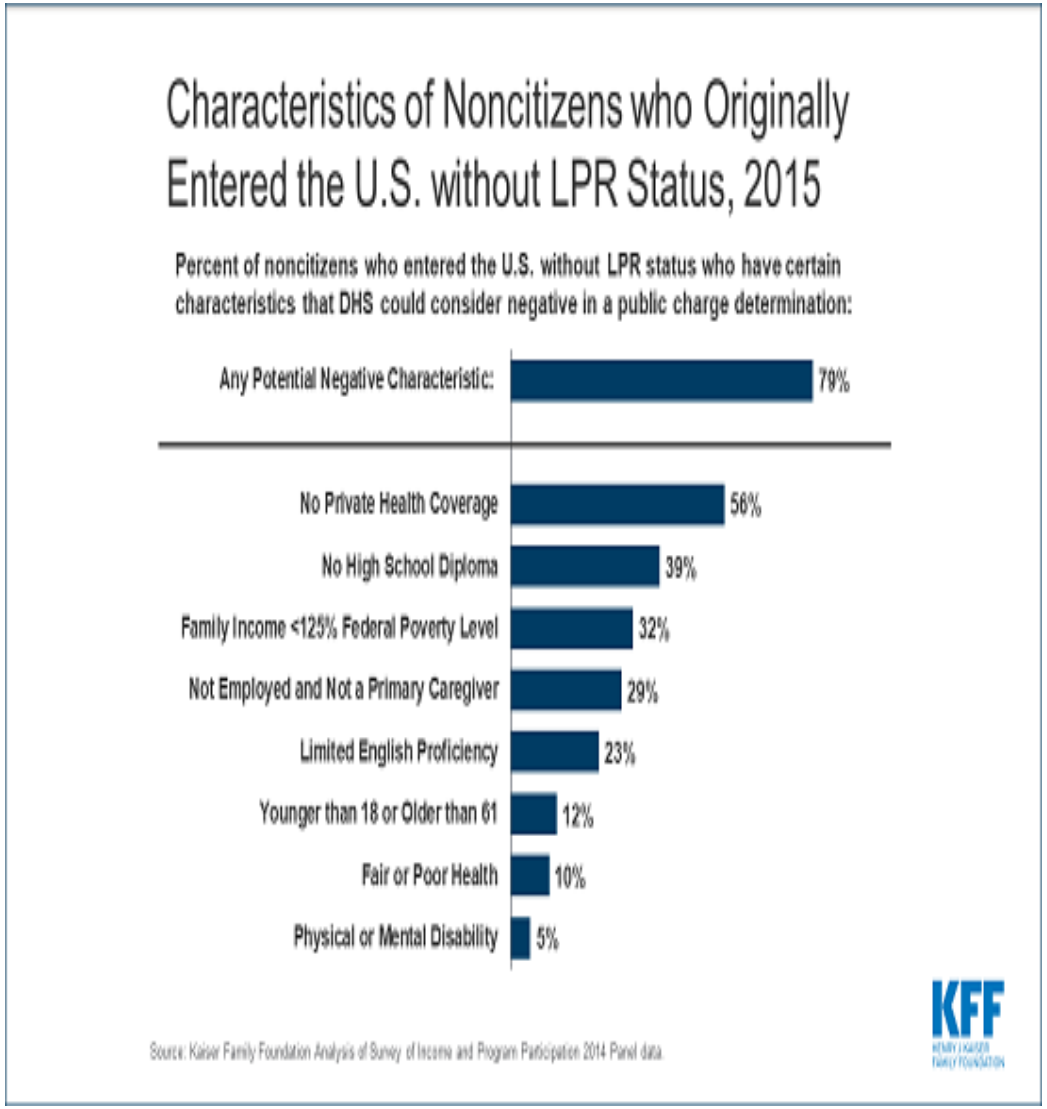
Final Rule's Potential Impact: Building a Picture



"*Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore, send these, the homeless, tempest-tost to me. I lift my lamp beside the golden door!*"

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Final Rule's Potential Impact: Some Concerns

A. Discriminatory:

- **Disability**
- **People of color**
- **Elderly, children, and women[1]**

B. "Chilling Effect":

- **On the use of public benefits by U.S. Citizens and LPRs, including children**
- **On the use of public benefits by exempt individuals (*i.e.*, refugees, VAWA self-petitioners)**

C. Health Related Impacts

- **Undermines health insurance coverage (disenrollment)**
- **Decreases utilization of preventative services (disenrollment)**
- **Overburdens other non-designated benefit programs (disenrollment)**
- **Increases food & housing insecurity (disenrollment)**
- **Increases costs associated with uncompensated care (disenrollment)**

[1] Randy Capps et al., *Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, Migration Policy Institute, https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration (site last visited February 13, 2020).

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Common Myths

Myth #1: Green card applicants will be largely impacted because they are currently using designated "public benefits"

- **False: The majority of green card applicants are ineligible for the designated "public benefits" identified in the Final Rule. (PRWORA restrictions)**

Myth #2: The Final Rule Applies to all green card applicants

- **False: Refugees, Asylees, T-Visa holders/applicants (trafficking victims), U-Visa holders/applicants (crime victims), VAWA self-petitioners (family abuse), Special Immigrant Juveniles (parental abuse/neglect), and others specified in the Final Rule are exempt.**

Myth #3: The Final Rule applies to use of any free or low-cost food & nutrition, housing, or health benefit

- **False: The Final Rule only applies to the designated "public benefits" identified in the rule. Additionally, the Final Rule specifically lists benefit programs that are not included in the public charge analysis, including: Children's Health Insurance Program (CHIP); School related nutrition programs; National school lunch/breakfast programs; Vaccines provided by local health centers & state departments offered on a sliding scale fee; Supplemental Nutrition Program for Women, Infants, and Children (WIC); and Medicaid funded services/benefits provided under the IDEA.**

Myth #4: The Final Rule applies to anyone applying for U.S. Citizenship & current LPRs

- **False: The Final Rule does not apply to those applying for citizenship and generally does not apply to current LPRs**

Supporters

The Network for Public Health Law is a national initiative of the Robert Wood Johnson Foundation.

Documenting Harm from the DHS Public Charge Rule: Service Provider Accounts

Holly Straut-Eppsteiner, Ph.D.

February 20, 2020

Background

26 million people could be chilled from seeking health, nutrition, and housing programs (Manatt)

Survey: **21 percent of adults** in low-income families reported that someone in their family avoided benefits (Urban Institute)

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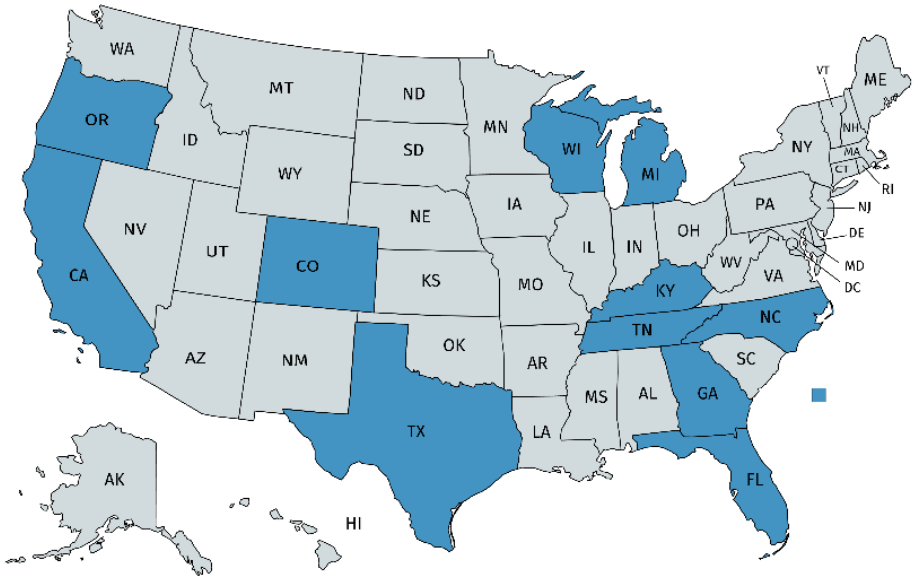
About the study

- In-depth interviews with 24 service providers in 11 states
- Conducted between November 2018 – September 2019

  Proposal – finalization of the DHS rule



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Findings

1. Groups not included in the DHS rule are still chilled from services/benefits
2. The health and wellbeing of immigrants and their families are at stake
3. People are making unnecessary choices because they are afraid.
4. Public charge is creating burdens for providers who work with immigrant communities.

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I. Groups not included in the DHS rule are still going without services/benefits.

- Lawful permanent residents (green card holders)
- U.S. citizens; esp. children of undocumented parents
- Survivors of human trafficking & other crimes (U and T visa holders)

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I. Groups not included in the DHS rule are still going without services/benefits.

*The sad part of all this is that mainly, **all these consumers are already green card holders.** They are already residents so some of them will apply for citizenship in a few years, some of them… have been given the green card… we have to explain, "You are already a resident, you won't have any problem…"*

Luz*, Navigator (Marketplace/Medicaid), North Carolina

**All names are pseudonyms*

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II. The health and wellbeing of immigrants and their families are at stake.

I had a lady who told me, "I pay the rent or I buy food." And with $150 that she receives every month (from SNAP), she was able to provide a decent meal for her kids. And when she canceled those benefits because of fear, she was looking for another job.

That would be the third job, she already had two. *So I think that it's taking away from the kids, time from parents because they have to go out and find another job to be able to provide for that and for food.*

Carmen, Advocate for survivors of domestic violence, Wisconsin

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III. People are making unnecessary choices because they are afraid

We're hearing the clients say, "Yeah, I'm good. I don't want to do food stamps. I want to actually close it.'"…

They're like, "Look, ***I prefer to have Medicaid over food stamps because Medicaid is so much more expensive****. And I don't want to get caught in a situation. I'd rather feed my kid tortillas for dinner."*

Amanda, Benefits Enrollment/Outreach Coordinator, Georgia

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IV. Public charge is creating burdens for providers who work with immigrant communities.

- Time burdens
- Overcoming misinformation
- Emotional burdens

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IV. Public charge is creating burdens for providers who work with immigrant communities.

*You don't have to do just the application; you have to educate them and explain to them and.. have, like, proof… **It's taking more time** because you have to bring all the information from online, bring the information together from your training… **you have to like, basically, convince that person** they're not going to have this situation in their cases like other people.*

Arturo, Enrollment supervisor for health clinic, California

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Implications

- Disconnect between the rule as written and perception on the ground
- Interconnectedness of public charge with broader, restrictive policy environment
- Onus of federal immigration policy falls on community organizations, hospitals, and health clinics
- Community education needs/specific areas advocates can address

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For up-to-date information, visit protectingimmigrantfamilies.org

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health law advocates

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Because we all should have a say in decisions that affect our health

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NYIC

New York Immigration Coalition

Florida Health Justice Project

NoHLA

Northwest Health Law Advocates

children's defense fund california

Maine Immigrants' Rights Coalition

charlotte center for legal advocacy

Public Health Law Watch

Health in Justice Action Lab

Northeastern University School of Law

MAHP

Massachusetts Association of Health Plans

AN INITIATIVE OF THE GEORGE CONSORTIUM

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is inadmissible.

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

(B) Factors to be taken into account

(i) In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—

(I) age;

(II) health;

(III) family status;

(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

(4) Public charge

(A) In general

Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

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(IV) assets, resources, and financial status; and

(V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph.

immigrant classes enumerated in this section, the provisions of this chapter relating to ineligibility to receive visas and the removal of aliens shall not be construed to apply to nonimmigrants—

(1) within the class described in paragraph (15)(A)(i) of section 1101(a) of this title, except those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraph (15)(A)(i), and, under such rules and regulations as the President may deem to be necessary, the provisions of subparagraphs (A) through (C) of section 1182(a)(3) of this title;

(2) within the class described in paragraph (15)(G)(i) of section 1101(a) of this title, except those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraph (15)(G)(i), and the provisions of subparagraphs (A) through (C) of section 1182(a)(3) of this title; and

(3) within the classes described in paragraphs (15)(A)(ii), (15)(G)(ii), (15)(G)(iii), or (15)(G)(iv) of section 1101(a) of this title, except those provisions relating to reasonable requirements of passports and visas as a means of identification and documentation necessary to establish their qualifications under such paragraphs, and the provisions of subparagraphs (A) through (C) of section 1182(a)(3) of this title.

(June 27, 1952, ch. 477, title I, §102, 66 Stat. 173; Pub. L. 100–525, §9(b), Oct. 24, 1988, 102 Stat. 2619; Pub. L. 101–649, title VI, §603(a)(2), Nov. 29, 1990, 104 Stat. 5082; Pub. L. 102–232, title III, §307(i), Dec. 12, 1991, 105 Stat. 1756; Pub. L. 104–208, div. C, title III, §308(d)(4)(B), Sept. 30, 1996, 110 Stat. 3009–617.)

REFERENCES IN TEXT

This chapter, referred to in introductory provisions, was in the original, "this Act", meaning act June 27, 1952, ch. 477, 66 Stat. 163, known as the Immigration and Nationality Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1101 of this title and Tables.

AMENDMENTS

1996—Pub. L. 104-208 substituted "removal" for "exclusion or deportation" in introductory provisions.

1991—Pars. (1) to (3). Pub. L. 102-232 substituted "subparagraphs (A) through (C) of section 1182(a)(3) of this title" for "paragraph (3) (other than subparagraph (E)) of section 1182(a) of this title".

1990—Pars. (1) to (3). Pub. L. 101-649 substituted "(3) (other than subparagraph (E))" for "(27)" in pars. (1) and (2), and "paragraph (3) (other than subparagraph (E))" for "paragraphs (27) and (29)" in par. (3).

1988—Par. (2). Pub. L. 100-525 substituted "documentation" for "documentation".

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-208 effective, with certain transitional provisions, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Pub. L. 104-208, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-232 effective as if included in the enactment of the Immigration Act of 1990, Pub. L. 101-649, see section 310(1) of Pub. L. 102-232, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-649 applicable to individuals entering United States on or after June 1, 1991, see section 601(e)(1) of Pub. L. 101-649, set out as a note under section 1101 of this title.

DENIAL OF VISAS TO CERTAIN REPRESENTATIVES TO UNITED NATIONS

Pub. L. 101-246, title IV, §407, Feb. 16, 1990, 104 Stat. 67, provided that:

"(a) IN GENERAL.—The President shall use his authority, including the authorities contained in section 6 of the United Nations Headquarters Agreement Act (Public Law 80-357) [Aug. 4, 1947, ch. 482, set out as a note under 22 U.S.C. 287], to deny any individual's admission to the United States as a representative to the United Nations if the President determines that such individual has been found to have been engaged in espionage activities directed against the United States or its allies and may pose a threat to United States national security interests.

"(b) WAIVER.—The President may waive the provisions of subsection (a) if the President determines, and so notifies the Congress, that such a waiver is in the national security interests of the United States."

§1103. Powers and duties of the Secretary, the Under Secretary, and the Attorney General

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

(2) He shall have control, direction, and supervision of all employees and of all the files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

(4) He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service.

(5) He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper.

(6) He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

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U.S. Department of Justice, Immigration and Naturalization Service

May 20, 1999.

Memorandum for All Regional Directors

From: Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations

deportation. That rule proposes that "public charge" means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." Institutionalization for short periods of rehabilitation does not constitute such primary dependence.

IIRIRA and the recent welfare reform laws have sparked public confusion about the relationship between the receipt of federal, state, local public benefits and the meaning of ``public charge'' under the immigration laws. Accordingly, the Service is taking two steps to ensure the accurate and uniform application of law and policy in this area. First, the Service is issuing this memorandum which both summarizes longstanding law with respect to public charge and provides new guidance on public charge determina tions in light of the recent changes in law. In addition, the Service is publishing a proposed rule for notice and comment that will for the first time define "public charge" and discuss evidence relevant to public charge determinations. Although the definition of public charge is the same for both admission/adjustment and deportation, the standards of public charge is the same for both admission/adjustment and deportation, the standards applied to public charge adjudications in each context are significant ly different and are addressed separately in this memorandum. After discussing the definition and standards for public charge determinations, the memorandum goes on to discuss exceptions from public charge determinations and particular types of benefits that may and may not be considered for public charge purposes, in addition to other issues.

I. Definition of "Public Charge"

The Service is publishing a rule for notice and comment that defines "public charge" or purposes of both admission/adjustment and deportation. That rule proposes that "public charge" means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense." Institutionalization for short periods of rehabilitation does not constitute such primary dependence.

The Service is adopting this definition immediately, while allowing the public an opportunity to comment on the proposed rule. Accordingly, officers should not initiate or pursue public charge deportation cases against aliens who have not received public cash benefits for income maintenance or who have not been institutionalized for long-term care. Similarly, officers should not place any weight on the receipt of non-cash public benefits (other than institutionalization) or the receipt of cash benefits for purposes other than for income maintenance with respect to determinations of admissibility or eligibility for adjustment on public charge grounds. Supplementary guidance will be issued, as necessary, in conjunction with publication of a final rule.

PROTECTING IMMIGRANT FAMILIES

Definition

A person who is considered "likely to become primarily dependent on the government for subsistence."

Benefits Considered

Only two types of benefits considered:

1. **Cash** assistance for income maintenance
2. Institutionalization for **long-term care** at government expense

PROTECTING IMMIGRANT FAMILIES

Definition of public charge

Currently

An immigrant "likely to become primarily dependent on the government for subsistence"

As Proposed

An immigrant "who receives one or more public benefits"

PROTECTING IMMIGRANT FAMILIES

1. New definition of “public charge”
2. Totality of circumstances test has new detailed negative factors that make it harder for low and moderate income people to pass
3. Additional public benefits included

PROTECTING IMMIGRANT FAMILIES

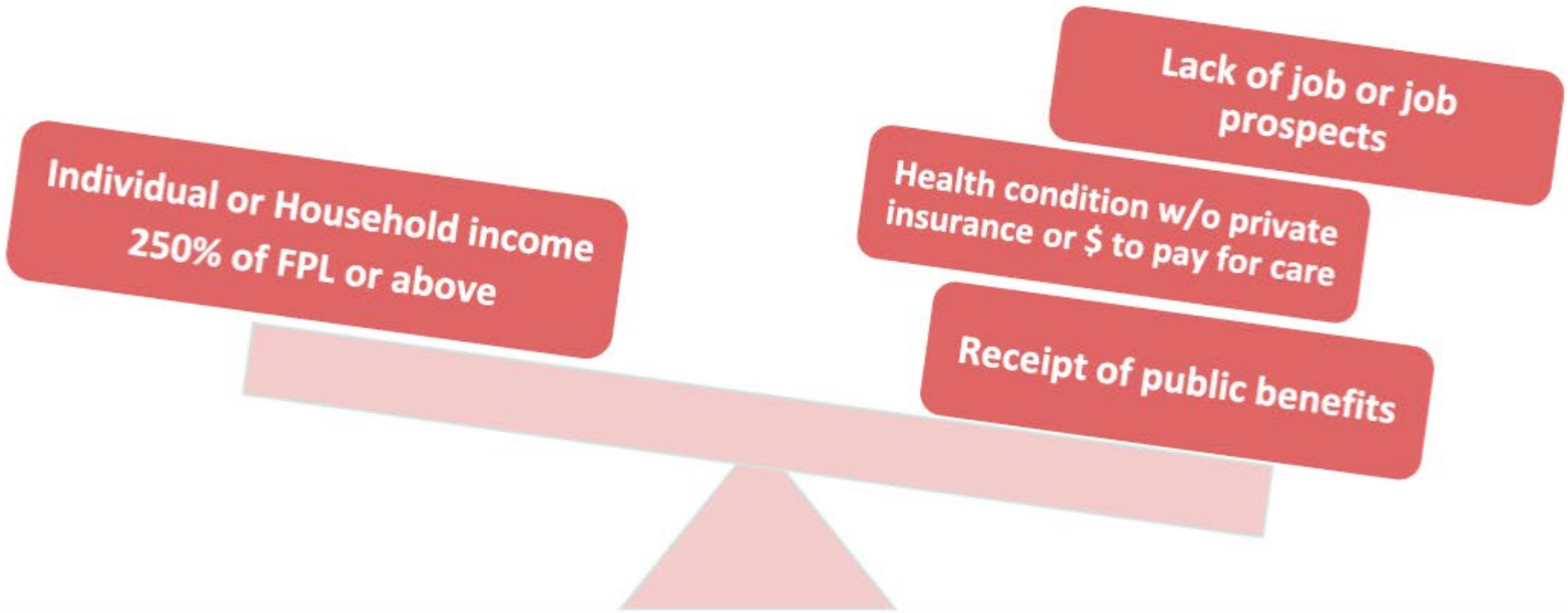
Totality of Circumstances Test: Factors

- Age
- Health
- Family Status
- Income and Financial Status
- Education and Skills
- Affidavit of Support

PROTECTING IMMIGRANT FAMILIES

Totality of Circumstances Test:
Heavily Weighed Factors

Heavily Weighed **Positive Factor**	Heavily Weighed **Negative Factors**



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Public benefits included

*Cash Support for Income Maintenance	*Long Term Institutional Care at Government Expense	**Most Medicaid Programs
Supplemental Nutrition Assistance Program (SNAP or Food Stamps)	Medicare Part D Low Income Subsidy	Housing Assistance (Public Housing or Section 8 Housing Vouchers and Rental Assistance)

* Included under current policy as well

** Exceptions for emergency Medicaid & certain disability services offered in school.

PROTECTING IMMIGRANT FAMILIES

Who is exempt from public charge determination?

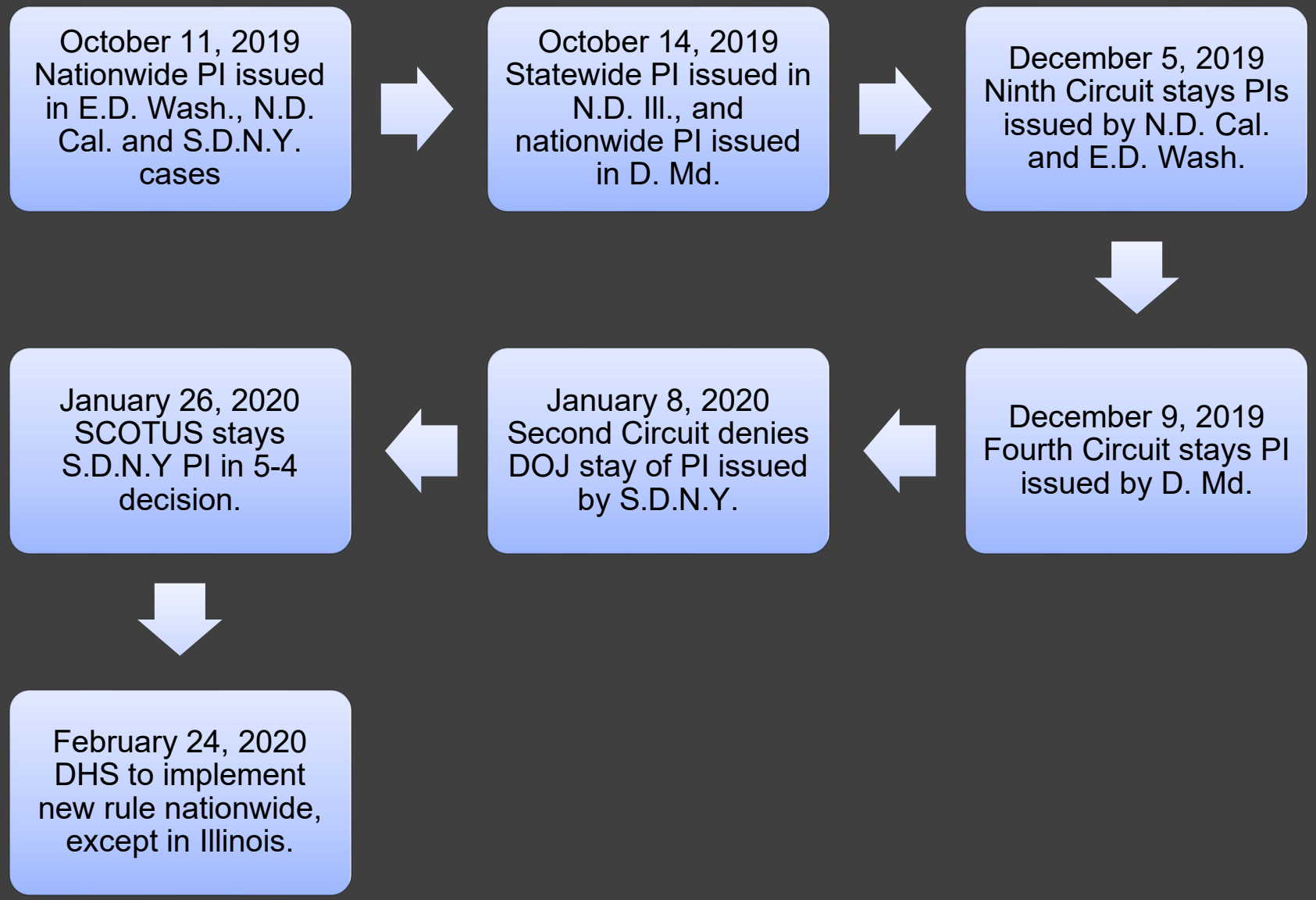
Public charge does NOT apply to:

- Lawful Permanent Residents applying for citizenship
- Refugees and Asylees
- VAWA self-petitioners
- Survivors of Domestic Violence, Trafficking, or other Serious Crimes (Applicants/ recipients of U or T visa)
- Special Immigrant Juveniles
- Certain Parolees, and several other categories of non-citizens

“Most immigrants who are on the path to a green card don’t have access to these benefits, or if they do, then they are in an immigrant category that is exempt from public charge.”

https://www.ilrc.org/public-charge

2nd Circuit (Nos. 19-3591, 3595)	• State of New York, et al. v. U.S. Dep't of Homeland Security, et al., No. 1:19-cv-7777 (S.D. N.Y.) • Make The Road, et al. v. Cuccinelli, et al., No. 1:19-cv-7993 (S.D. N.Y.)
4th Circuit (No. 19-2222)	• Casa de Maryland, et al. v. Trump, et al., No. 8:19-cv-2715 (D. Md.)
7th Circuit (No. 19-3169)	• Cook County, et al. v. McAleenan, et al., No. 1:19-cv-6334 (N.D. Ill.)
9th Circuit (No. 19-17213)	• State of Washington, et al. v. U.S. Dept. of Homeland Security, et al., No. 4:19-cv-05210 (E.D. Wash.) • State of California, et al. v. U.S. Dept. of Homeland Security, et al., No. 3:19-cv-04975 (N.D. Cal.) • La Clinica De La Raza, et al. v. Trump, et al., No. 3:19-cv-04980 (N.D. Cal.) • City and County of San Francisco, et al. v. U.S. Citizenship and Immigration Services, et al., No. 3:19-cv-04717 (N.D. Cal.)


October 11, 2019
Nationwide PI issued in E.D. Wash., N.D. Cal. and S.D.N.Y. cases
October 14, 2019
Statewide PI issued in N.D. Ill., and nationwide PI issued in D. Md.
December 5, 2019
Ninth Circuit stays PIs issued by N.D. Cal. and E.D. Wash.
December 9, 2019
Fourth Circuit stays PI issued by D. Md.
January 8, 2020
Second Circuit denies DOJ stay of PI issued by S.D.N.Y.
January 26, 2020
SCOTUS stays S.D.N.Y PI in 5-4 decision.
February 24, 2020
DHS to implement new rule nationwide, except in Illinois.

Administrative Procedure Act

Step 1:

Has Congress "directly spoken to the precise question at issue?"

Chevron U.S.A., Inc., at 842-843.

Is Congress's intent "clear" and "unambiguously expressed?"

If so, Congressional intent controls.

Administrative Procedure Act

Step 2:

If ambiguous, is the agency's interpretation "permissible," (aka "reasonable in light of the underlying law?") Chevron U.S.A., Inc., at 843.

If reasonable, the agency interpretation will be upheld

even if the Court would have chosen an alternative interpretation.

Step 1: Has Congress "directly spoken to the precise question at issue?" Chevron U.S.A., Inc., at 842-843.

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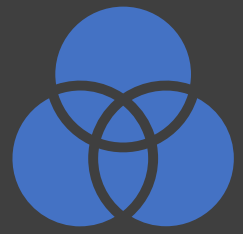

Administrative Procedure Act

Chevron Step 1: Clear and Unambiguous

Contrary to INA, IIRIRA, PRWORA, Sec. 504 of the Rehabilitation Act of 1973, SNAP

Chevron Step 2: Arbitrary and Capricious

Inadequate justification, inadequate cost benefit analysis, failure to consider comments

Chevron Step 1: Clear and Unambiguous

π

- "an indigent. A person whom it is necessary to support at public expense by reason of poverty alone or illness and poverty"

Black's Law Dictionary (6th ed. 1990)

- A public charge "is not limited to paupers or those liable to become such, but includes those who will not undertake honest pursuits, or who are likely to become periodically the inmates of prisons."

Δ

- "Public charge means any maintenance, or financial assistance, rendered from public funds"

Arthur Cook et al., Immigration Laws of the U.S., § 285 (1929)

Chevron Step 1: Conflicts with Law

π – Conflicts with Other Congressional Action

- Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)
- Rehabilitation Act
- Congress rejected similar attempts to define "Public Charge":
  - ICFA (1996)
  - House bill leading up to IIRIRA
  - 2013 proposed amendment to BSEOIMA

Δ - Congress' Inaction ≠ Withdrawal of delegation

- Congress intended to delegate to DHS the authority to define "Public Charge"
- Congressional inaction is not a withdrawal of delegation

Chevron Step 2: Arbitrary and Capricious

π – Rule is arbitrary and capricious

1. The Rule doesn't reduce immigration incentives
2. The Rule doesn't promote self-sufficiency.
3. Evaluation system of weighted factors is irrational, vague and unpredictable.
4. DHS did not consider chilling effect
5. The Rule fails to adequately address comments.

Δ - Rule is not arbitrary and capricious

1. Arbitrary and capricious review is "highly deferential."
2. The Rule reduces incentives by reducing benefits for immigrants.
3. DHS considered comments and potential harms and is entitled to deference.
4. DHS is permitted to prioritize government interest.

9th Circuit Decision

Step 1:

1. INA vests discretion in the Secretary of Homeland Security.

2. "Public Charge" is not a self-defining term of art – it is ambiguous under *Chevron.*

9th Circuit Decision

Step 1:

"In short, we do not read the text of the INA to unambiguously foreclose DHS's action." p. 36.

"Unlike the district courts, we are unable to discern one fixed understanding of "public charge" that has endured since 1882." p. 46.

"…[T]he failure of Congress to compel DHS to adopt a particular rule is not the logical equivalent of forbidding DHS from adopting that rule." p. 49.

9th Circuit Decision

Step 2:

Rule easily satisfies requirement that agency regulation be "reasonable—or 'rational and consistent with the statute.'" p. 52.

"[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." Fox Television Stations, 556 U.S. at 515.

SCOTUS Decision

Stays S.D.N.Y. Preliminary Injunction

5-4 Decision

Justices Roberts, Alito, Gorsuch, Kavanaugh, and Thomas grant the application.

Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.

SCOTUS Decision

Gorsuch Concurrence

The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of "nationwide," "universal," or "cosmic" scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case.

pp. 2-3.

112(b)(1), determining what constitutes self-sufficiency for purposes of the public-charge assessment is well within DHS's authority.[16]

* * *

In short, Congress has not spoken directly to the interpretation of "public charge" in the INA. Nor did it unambiguously foreclose the interpretation articulated in the Final Rule. Instead, the phrase "public charge" is ambiguous under *Chevron*. DHS has the authority to interpret it and "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863–64. Indeed, "the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible

[16] The Eastern District of Washington also held that, because the states have a "central role in formulation and administration of health care policy," DHS "acted beyond its Congressionally delegated authority" when it adopted the Final Rule. *Washington*, 2019 WL 5100717, at *18; *see also id.* ("Congress cannot delegate authority that the Constitution does not allocate to the federal government in the first place . . . . ."). Congress, of course, has plenary authority to regulate immigration and naturalization. U.S. CONST. art. I, § 8, cl. 4. Pursuant to that authority, Congress adopted the "public charge" rule, which no one has challenged on constitutional grounds. Further, Congress has authorized DHS to adopt regulations. 8 U.S.C. § 1103(a)(3). DHS thus did not overstep its authority by promulgating the Final Rule. Indeed, under the district court's analysis, even the *1999 Field Guidance* might be unconstitutional. But neither the district court nor the States question the lawfulness of the *1999 Field Guidance*. We see no meaningful difference between INS's authority to promulgate the *1999 Field Guidance* and DHS's authority to adopt the Final Rule.

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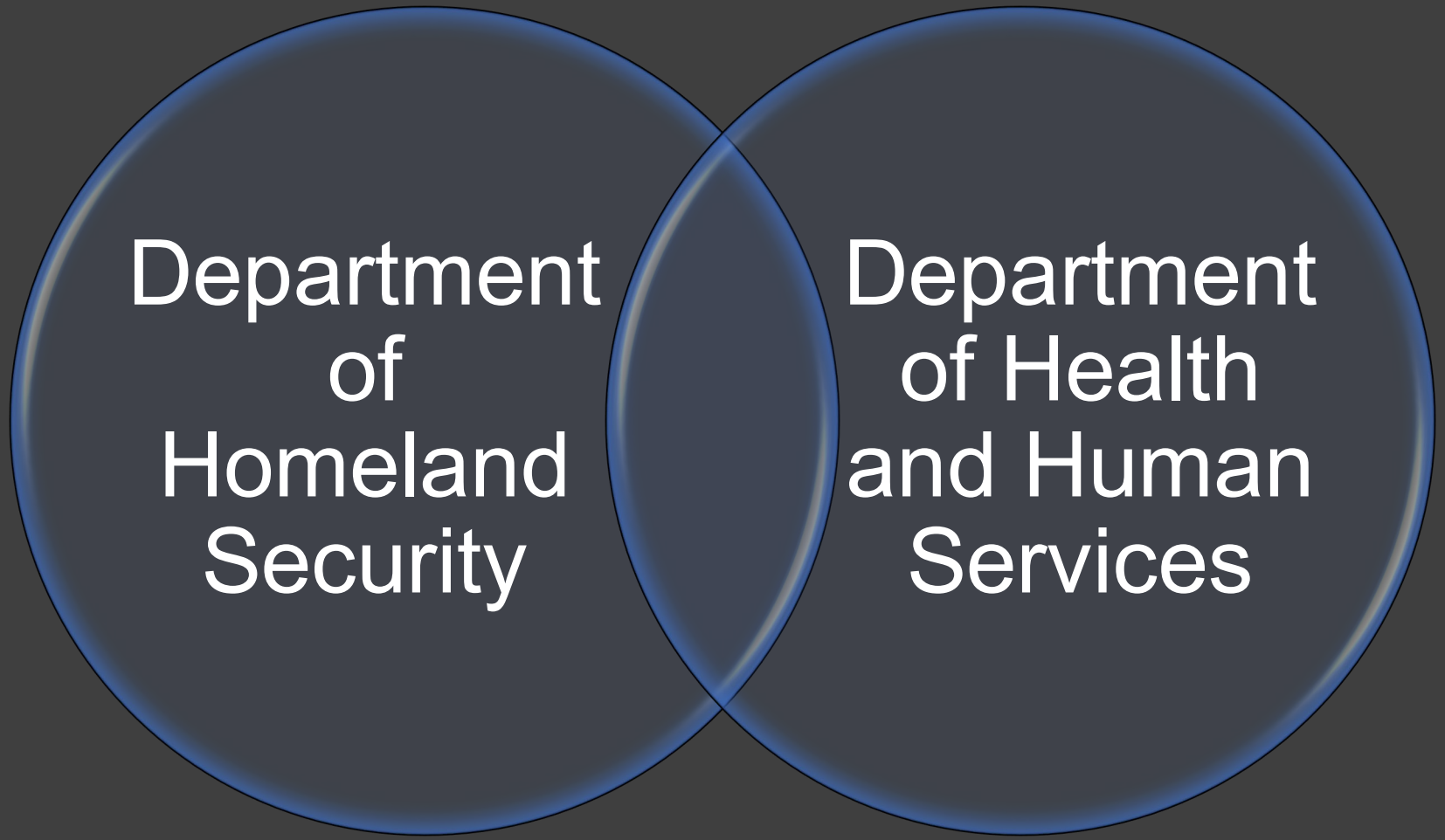
51

Department of Homeland Security


Department of Homeland Security
Department of Health and Human Services

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)

Agency Authority

- Food, Drug and Cosmetic Act grants the FDA the authority to regulate "drugs" and "devices."
- In 1996, the FDA asserts jurisdiction to regulate tobacco products because nicotine is a drug.
- Tobacco company challenges FDA's rulemaking

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)

Agency Authority

- "In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years." *Id.* at 143.
- "Congress has enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health." *Id.*
- "In adopting each statute, Congress has acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco…" *Id.* at 144.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)

Agency Authority

- “In fact, on several occasions over this period… Congress considered and rejected bills that would have granted the FDA such jurisdiction.” *Id.* at 144.
- “Under these circumstances, it is evident that Congress' tobacco-specific statutes have effectively ratified the FDA's long-held position that it lacks jurisdiction under the FDCA to regulate tobacco products. Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.”

"[The Secretary] shall establish such regulations…as he deems necessary for carrying out his authority under this chapter…"

- PRWORA (extending health benefits to qualified immigrants)

- ACA (defining lawfully present for purposes of enrolling in ACA qualified health plans);

- HHS approval of § 1115 state Medicaid waivers

- Multiple reaffirmations of prior definition of "Public Charge"

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Lawyers Fighting for Health Care Justice

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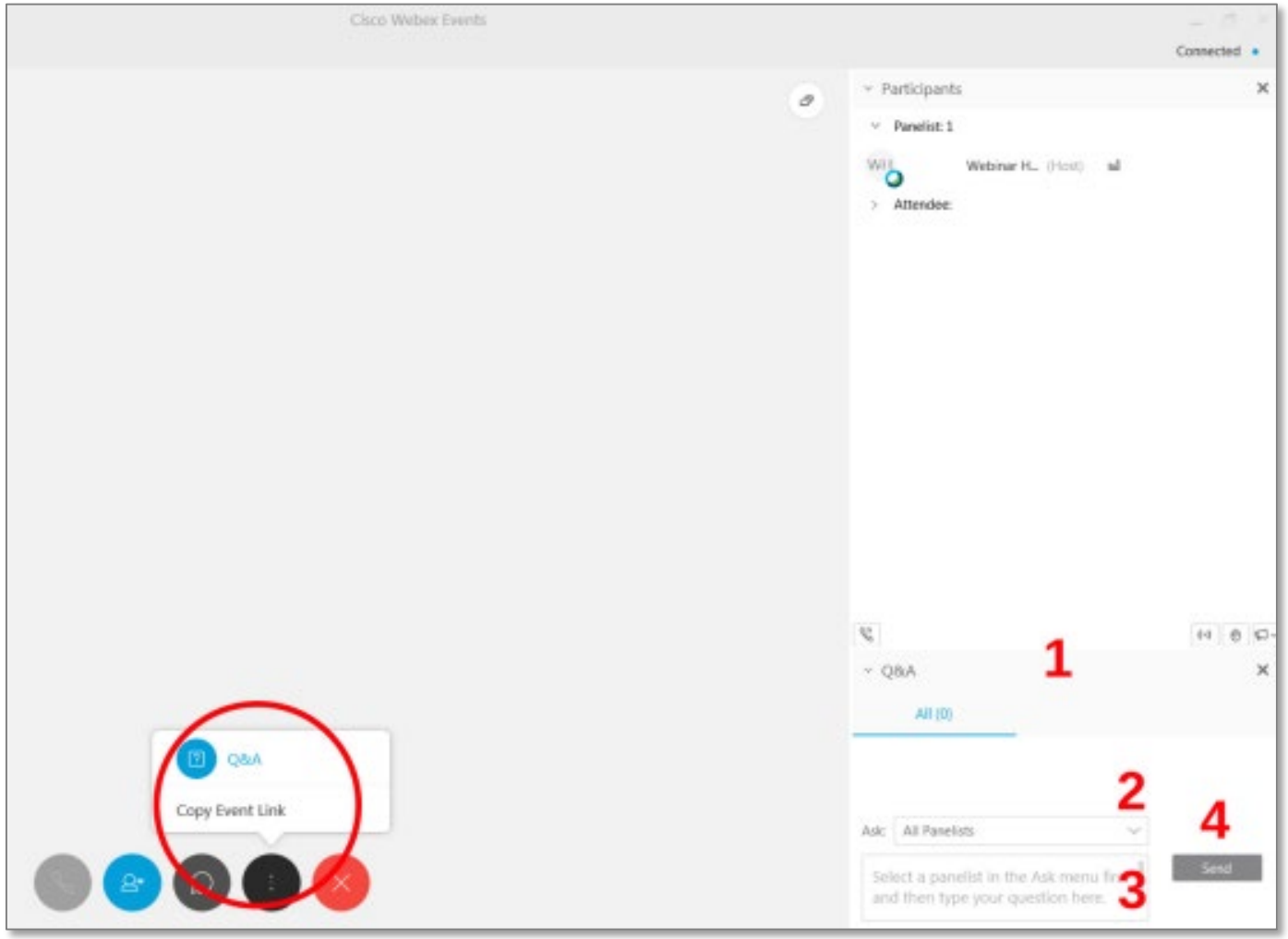

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Facilitated Discussion on the Public Charge Rule for MLPs
March 4 | 3:30 p.m. EST

2020 Public Health Law Conference
Building and Supporting Healthy Communities for All
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