The Public Charge Rule and the Threat to Public Health

February 20, 2020

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The Public Charge Rule and the Threat to Public Health

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February 20, 2020
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
1999 “Public Charge” Definition: 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)
Final Rule: Legal Evolution

- **October 10, 2018**: DHS publishes the proposed Final Rule
- **October 15, 2019**: The Final Rule initially set to go 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*)
“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.
**Benefits Considered**

<table>
<thead>
<tr>
<th>1999 Field Guidance</th>
<th>“Public Benefits” Final Rule</th>
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<td>▪ SSI</td>
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<td>▪ TANF</td>
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<td>▪ Federal, state, &amp; local cash benefit programs for income maintenance (general assistance programs)</td>
<td>✓ Federal, state &amp; local cash benefit programs for income maintenance</td>
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<td>▪ Institutionalized long term-care at the government’s expense</td>
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<td>▪ SNAP</td>
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<td>▪ Most forms of Medicaid (not emergency medical, children under 21, pregnant women including 60 days after pregnancy)</td>
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<td>▪ <strong>Housing subsidies</strong> <em>(i.e., Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance)</em></td>
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Is it more likely than not that the applicant will become a public charge at any time in the future?

At minimum the following factors are considered:

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?)

The following may also be considered:

- 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
### 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)
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!

Final Rule’s Potential Impact: Building a Picture

Characteristics of Noncitizens who Originally Entered the U.S. without LPR Status, 2015

Percent of noncitizens who entered the U.S. without LPR status who have certain characteristics that DHS could consider negative in a public charge determination:

- Any Potential Negative Characteristic: 74%
- No Private Health Coverage: 56%
- No High School Diploma: 39%
- Family Income <125% Federal Poverty Level: 32%
- Not Employed and Not a Primary Caregiver: 29%
- Limited English Proficiency: 23%
- Younger than 18 or Older than 54: 12%
- Fair or Poor Health: 10%
- Physical or Mental Disability: 5%

Source: Kaiser Family Foundation Analysis of Survey of Income and Program Participation (SIPP) Panel data
Final Rule’s Potential Impact: Some Concerns

A. Discriminatory:
- Disability
- People of color
- Elderly, children, and women

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)

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

- Time burdens
- Overcoming misinformation
- Emotional burdens
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
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
For up-to-date information, visit protectingimmigrantfamilies.org
health law advocates
Lawyers Fighting for Health Care Justice
(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 118a of this title for purposes of exclusion under this paragraph.
§ 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 other laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department, 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 all files and records of the Service.

(3) He shall establish such regulations; prescribe such forms of bond, reports, 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.
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.
**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
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”
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
Totality of Circumstances Test: Factors

- Age
- Health
- Family Status
- Income and Financial Status
- Education and Skills
- Affidavit of Support
Totality of Circumstances Test: Heavily Weighed Factors

Heavily Weighed Positive Factor
- Individual or Household income 250% of FPL or above

Heavily Weighed Negative Factors
- Lack of job or job prospects
- Health condition w/o private insurance or $ to pay for care
- Receipt of public benefits
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.
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
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<th>Circuit</th>
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<td>Make The Road, et al. v. Cuccinelli, et al., No. 1:19-cv-7993 (S.D. N.Y.)</td>
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<td>7th Circuit</td>
<td>Cook County, et al. v. McAleenan, et al., No. 1:19-cv-6334 (N.D. Ill.)</td>
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<td>La Clinica De La Raza, et al. v. Trump, et al., No. 3:19-cv-04980 (N.D. Cal.)</td>
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<td>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.)</td>
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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.

**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.
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”


• 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.”

∆

• “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

\( \pi \) – 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

\( \Delta \) - 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

\[ \pi \Rightarrow \text{Rule is arbitrary and capricious} \]

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.

\[ \Delta \Rightarrow \text{Rule is not arbitrary and capricious} \]

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.
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.
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.
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.
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.30

* * *

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

30 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.
Department of Homeland Security

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

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