

NEWLY REVISED ADVISORY
Following Publication of Rulemaking by DHS

How Will ‘Public Charge’ Policy Changes Impact Immigrant Survivors of Domestic Violence and Sexual Assault?

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Background

The Department of Homeland Security (DHS) released a final rule, published in the Federal Register on August 14, 2019, which significantly changes longstanding policy about the meaning and application of the “public charge” inadmissibility provisions of immigration law.¹ According to DHS, this is to ensure that non-citizens “who are admitted to the United States, seek extension of stay or change of status, or apply for adjustment of status will be self-sufficient, i.e., will rely on their own financial resources, as well as the financial resources of the family, sponsors, and private organizations.”

Under U.S. Immigration Laws: The Immigration and Nationality Act states that an individual seeking admission to the U.S. or seeking to adjust status to lawful permanent residence (“LPR status”) is inadmissible if the individual “...at the time of application for admission or adjustment of status, is likely at any time *to become* (emphasis added) a public charge.”² The language from the immigration law “to become” is important because it implies that the public charge exclusion is about **future** dependence on the government and therefore, past or current receipt of benefits should not **automatically** preclude an individual from admission or adjustment of status.

Under the August 14 rule interpreting the immigration code, non-U.S. citizens who are seeking to enter the U.S. or to obtain lawful permanent resident (LPR) status: (a) must show, that based on all their circumstances, they are not likely *in the future* to rely on the government for subsistence. (b) Further, the law generally requires a prospective “totality of circumstances” test so that someone who may have received benefits in the past but is now self-sufficient should not automatically be determined to be a public charge. (c) A

¹ <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds>

² 8 U.S.C. 1182(a)(4)(A).

person deemed likely to become a “public charge” can be denied admission to the U.S. or the ability to become a lawful permanent resident. (d) In rare circumstances, a person who has become a public charge can be deported.³

Changes Expanding the Definition of Who is a Public Charge: The August 14, 2019 final rule⁴ changes the guidelines about how the public charge inadmissibility ground will be determined by:

- Expanding the definition of who is a public charge;
- Setting out positive and negative factors that will be considered in determining if someone is a public charge, and
- Expanding the types of public benefits that could be considered in deciding whether someone is likely to become a public charge. In addition to those considered under the earlier guidelines, i.e., cash for income maintenance and long-term care programs, the rule also identifies benefits federal health, housing, and food assistance received after the effective date (**October 15, 2019**) as benefits that will be considered.

The practical effect of the rule is that immigrant survivors will be deterred from using vital benefits for themselves or their families including children and/or elderly relatives to escape from or overcome domestic violence and sexual assault, even if they are not subject to a public charge test. Survivors and their families are likely to forego critical food, health, and housing programs they need to remain safe and healthy. Immigrant families are already withdrawing from assistance programs due to fear, even though the proposed rule does not take effect until October 15, 2019,⁵ and only applies to immigration applications *filed* after that date.

Key Features of the Rule

The proposed rule significantly changes how DHS will make determinations about who is likely to become a public charge. The guiding framework that has been in place since 1999 regarding which public services an individual used, the level of income or assets one is required to show, and how a sponsor’s income could be counted in order to overcome a public charge determination is replaced by new definitions and standards.

How is Public Charge Defined?

Unlike previous guidelines, which defined public charge as an individual who is primarily dependent on public benefits, the final rule defines “public charge” as an individual “who receives one or more public benefits, as defined in [the rule] **for more than 12 months in the aggregate within any 36-month period** (such that, for instance, receipt of two benefits in one month counts as two months).⁶

³ 8 U.S.C. 1227(a)(5)

⁴ Many changes were made in 2018 to the U.S. State Department’s Foreign Affairs Manual (FAM), available at <https://fam.state.gov/FAM/09FAM/09FAM030208.html>, modifying longstanding “public charge” policy by modifying how sponsors’ affidavits of support and the use of non-cash benefits by applicants, sponsors, and family members are to be considered. The changes to the FAM only affect those who go through consular processing in their home countries before entering the U.S., and do not affect the public charge determination for those already in the U.S. who apply to adjust their status to permanent residence.

⁵ The implementation of the rule will be subject to any pending litigation.

⁶ 8 C.F.R. § 212.21(a) (emphasis added).

Individuals Subject to the Public Charge Test: Most commonly, public charge decisions impact family members coming to the U.S. to reunite with relatives living in the U.S, such as spouses, children, parents, and siblings of U.S. citizens, and spouses and children of lawful permanent residents. In addition, individuals coming to the U.S. for temporary work and their family members will also be impacted, both when they initially apply to come to the U.S., and if they seek permanent residency.

Individuals Not Subject to the Public Charge Determination: It is important to note that some individuals who are seeking immigration status or entry into the U.S. are *not subject* to the public charge determination. These exceptions are part of the immigration statute and cannot be changed by regulation or department policy. They include refugees, asylees, survivors of trafficking and other serious crimes (those with T & U visas), “qualified” abused spouses or children and self-petitioners under the Violence Against Women Act, special immigrant juveniles, certain people who have been paroled into the U.S., and others.⁷ The final rule also contains an exemption for military families.⁸ Specifically, they will not be penalized for receiving public benefits. This applies both if the applicant for immigration status is a service member, as well as if the applicant is the spouse or child of a service member.

In addition, public charge is not a factor in naturalization applications. Legal Permanent Residents renewing their LPR cards, or those applying for citizenship do not undergo a public charge test.

DV/SA Survivors That May Be Subject to the Public Charge Test: However, certain domestic violence/sexual assault survivors do not fall into these specific immigration categories, thus it is important to determine whether the public charge proposed rule will apply in their situation. Such individuals include: those immigrating through family or employment sponsorship, certain non-immigrants like foreign students or temporary workers (or their spouses or dependents), or diversity visa applicants,⁹ or survivors who are permanent residents who have left the United States for over six months. In addition, even if the proposed rule does not directly impact survivors themselves, their family members who may be seeking admission or permanent residence, such as those sponsored by the survivor or those living in their households, will be impacted. Examples might be a parent or a sibling of a survivor who obtained status in an exempt category, and is being sponsored through the family visa process, or a parent of a U.S. citizen victim, who is seeking admission through employment or other process.

Factors in Public Charge Determination: In making a public charge determination, the rule reiterates that the government must consider many factors, and the final decision must look at the “totality of circumstances” and consider age, family status, assets and resources, financial status (including past receipt of public benefits), health status,

⁷ 8 U.S.C. 1182(a)(4); 8 C.F.R. 212.23.

⁸ 8 CFR 212.21(b)(7).

⁹ This list is not exhaustive

education and skills, the type of immigration status being sought and period of planned admission, and the affidavit of support.

Regardless of whether a survivor applies for, or receives public assistance, these factors will be weighed and could result in a determination that the survivor is likely to become a public charge. The proposed rule describes the following circumstances to be considered:

- **Age:** Whether applicants for admission able to work, including whether they are over 18, or below minimum retirement age (being a child or a senior would be weighed negatively).
- **Health:** Whether applicants for admission have a medical condition that could affect their ability to work, attend school, care for themselves, or require expensive care. (This would be weighed heavily against applicants if they cannot show they have private insurance or resources available to cover that care).
- **Family Size:** If an applicant has a large number of children or other dependent family members (like aging parents), this would weigh negatively.
- **Financial Status:** A new income test for the applicant for admission: earning less than 125% of the federal poverty level (\$32,188 for a family of four during Fiscal Year 2019) would be weighed negatively. Previously, this income test applied to the sponsor, not the applicant for admission. The applicant's ownership of assets, credit history or score, debt, or past use of public benefits, could also be weighed.
- **Education and Skills:** Whether the applicant for admission has sufficient education and skills to get or maintain employment with sufficient income to not become a public charge. For applicants who serve as primary caregivers of children or individuals with disabilities, the lack of employment history should not be weighed negatively.¹⁰ Limited English proficiency would be weighed negatively.
- **Status Being Sought and Duration of Status:** Whether the applicant is seeking permanent residence or admission for a shorter duration.
- **Affidavit of Support:** Whether a sponsor would actually provide sufficient financial support.

Heavily Weighted Factors

Survivors of domestic violence and sexual assault are likely to be significantly impacted by the rule's heavily weighted factors. Perpetrators of domestic violence and sexual assault cause significant physical, emotional, and often, financial injury to their victims, which increases the likelihood of the public charge ground of inadmissibility being applied. The proposed rules identify specific circumstances that would weigh "heavily" in a public charge determination. None of these factors, by itself, is supposed to be dispositive.

The proposed rules identify four circumstances as heavily weighted *negative* factors:

- 1) The applicant for admission is not a full-time student and is authorized to work, but is unable to demonstrate current employment, and has no employment history or no reasonable prospect of future employment;

¹⁰ 8 CFR 212.21(f)

- 2) The applicant for admission is receiving public benefits, is currently “certified or approved” to receive public benefits, or has received one or more public benefits for more than 12 months within the 36 months immediately preceding applying for a visa, admission, or adjustment of status;
- 3) The applicant for admission has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with his or her ability to provide for him- or herself, attend school, or work; and does not have, or is unlikely to have private health insurance, or the ability to pay for reasonably foreseeable medical costs; or
- 4) The applicant for admission has previously been found inadmissible or deportable on public charge grounds.

Heavily-weighted *positive* factors include:

- 1) The applicant for admission has household assets, resources, “and support” of at least 250% of the Federal Poverty Guidelines (FPG);¹¹
- 2) The applicant for admission has work authorization and is currently employed at or above 250% FPG for her/his household size; or
- 3) The applicant for admission has private, health insurance that is not subsidized by tax credits under the Patient Protection and Affordable Care Act (ACA).

Consideration of Public Benefits Utilization

The final rule expressly ties a “public charge” determination to the receipt of public assistance. Prior policy provided that officials consider only two types of public benefits in making public charge determinations: (1) cash income maintenance, such as Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), or state/local General Assistance, and (2) institutionalization for long-term care at government expense. In the past, health coverage or nutrition assistance would **not** have been considered in determining whether someone is a public charge.

The new rule significantly expands the types of benefits to be considered in a public charge determination. Under the new rule, the programs to be considered include: cash assistance programs for income maintenance, such as SSI, TANF, and other Federal, State, local, or tribal benefit programs (i.e., general assistance), and non-cash benefits such as Supplemental Nutrition Assistance Program (SNAP), Public Housing, Section 8 Housing Assistance under the Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, including housing supported by the Moderate Rehabilitation program, and non-emergency Medicaid programs.

Emergency Medicaid, Medicaid Benefits provided under the Individuals with Disabilities Education Act (IDEA), the Child Health Insurance Program (CHIP), certain school-based benefits and Medicaid benefits received by children and pregnant women are excluded from consideration for public charge under the proposed rule.

¹¹ <https://www.federalregister.gov/documents/2019/02/01/2019-00621/annual-update-of-the-hhs-poverty-guidelines>

The rule considers the public charge ground to apply if the applicant is enrolled in a listed public benefits program for any **12 months** within any 36-month period. If an applicant is enrolled in two programs for a given month, that counts as two months of enrollment towards the 12-month maximum during that 36-month period.

Under the rule, the applicant **will not** be penalized by the usage of benefits by U.S. citizen children or other family members, unless she or he is specifically listed as a beneficiary of the benefit, and non-cash benefits previously excluded from the public charge determination will be considered only if those benefits are **received after October 15, 2019, the effective date of the final rule.**

Public Benefits Not Counted for Public Charge Purposes

The rule specifies that public benefits that are not listed in the rule will not be counted for public charge determinations. These may include, but are not limited to include earned benefits, such worker's compensation, Social Security Retirement and Veteran's Benefits, and non-cash benefits that provide education, child development, and employment and job training. A state, local or tribal public benefit that is not cash assistance for income maintenance, institutionalization for long-term care at government expense, or another public benefit program not specifically listed in the regulation, would not be included in the definition of the term "public charge."

Overcoming a Public Charge Determination

The rule provides an option for certain individuals, who don't have a heavily weighted negative factor against them, to post a bond or cash deposit, starting at \$8,100 (adjusted annually for inflation), along with processing fees, to overcome a determination of public charge. Offering a public charge bond for applicants for permanent residence would generally only occur in limited circumstances, and does not apply to situations where the applicant for admission is receiving a public benefit. A public charge bond would remain in effect until the USCIS grants a request to cancel it; i.e., after an immigrant naturalizes or otherwise obtains U.S. citizenship, has been a lawful permanent resident for over five years, permanently departs the U.S., or dies, until the bond is substituted with another bond, or until it is otherwise cancelled by DHS.

What Now? Action Steps and Resources

Evaluate Continuing to Receive Critical Benefits: First, keep in mind that this is a rule does not take effect until 60 days after the effective date, **October 15, 2019**. It is possible that implementation of the rule may be paused, depending on the outcome of legal challenges. It is critical for survivors (and the advocates assisting them) to be informed about the status of the effective date of the rule. In addition, survivors and advocates

should be informed about the specific housing, health, and food assistance programs in their communities to determine whether the public charge rule is implicated so that they can best support their safety and well-being. Those with questions about the impacts on their individual situations should consult with an immigration attorney.

Monitor the Impact of the Rule: Before the proposed rule can take effect, it is highly likely that the rule will be challenged in federal litigation. The changes to public charge policies as outlined in the rule are having,¹² and will continue to have, a significant detrimental impact on survivors of domestic violence and sexual assault. They will deter immigrant families, including survivors who qualify for abuse related to immigration status, from seeking help when they need it. Safety net benefits can help victims recover and escape from abuse and play a significant role in preventing future harm.¹³

Victim Advocates Have Unique Insights About the Impact on Immigrant DV/SA Survivors: Victim advocates have important information to share with DHS, state and local policy makers, and community leaders about the pivotal role and the contexts, i.e., the “totality of circumstances” that access to health care, housing, food assistance, and other safety net benefits have in helping victims overcome domestic violence and sexual assault. It is important to weigh in along with others advocating for the rights of immigrant communities.

Resources & Comment Submission:

[Protecting Immigrant Families](#), a national campaign co-chaired by the National Immigration Law Center (NILC) and Center for Law and Social Policy (CLASP) with 200+ partner organizations have:

- More background information on the proposed rule and its impacts
- Resources for developing comments to submit to DHS
- A portal to submit written comments
- Updates on public charge rules and national campaign: <http://bit.ly/PIFCampaign>.

This advisory was developed using foundation grant awards.

¹² See, e.g., <https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html>

¹³ See, e.g., Centers for Disease Control (2017). Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs, Policies, and Practices. Available at <https://www.cdc.gov/violenceprevention/pdf/ipv-technicalpackages.pdf>