What is a "Public Charge" and Does Receipt of Health Benefits Impact It?

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The purpose of this issue brief is to provide background information about "public charge" in light of a potential Executive Order that could redefine longstanding policies. Even the rumor of a potential Executive Order has raised concerns and fear in immigrant communities about accessing health care programs and services. Unless and until an Executive Order is issued, however, current policies remain in place.[1]

1. What is a "public charge"?

Public charge is an immigration term. A person may be determined a "public charge" if the person is likely to become "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash for income maintenance, or institutionalization for long-term care at government expense."[2] A public charge determination is made when an individual applies to enter the U.S. or to adjust to lawful permanent resident status (*e.g.*, green card holder). Lawful permanent residents who are applying for citizenship are **not** subject to a public charge determination.

Congress first enacted a public charge exclusion in 1882.[3] At this time, federal and state governments offered few public health benefits or programs. Rather, the government supported almshouses – most of them in deplorable conditions – in which people with physical disabilities, abandoned children, drifters, petty criminals, and a growing number of immigrants who were poor were housed.[4] An immigrant who was a public charge was essentially an immigrant who was likely to end up in an almshouse.

2. What does the law require?

The Immigration and Nationality Act (INA) states that an individual seeking admission to the U.S. or seeking to adjust status to lawful permanent residence (green card) is inadmissible if the individual:

at the time of application for admission or adjustment of status, is likely at any time ***to become*** a public charge.[5] (emphasis added)

The language "to become" implies a future state such that receipt of benefits should not automatically preclude one from admission or adjustment of status. 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.

3. How have federal agencies interpreted the INA?

As federal and state governments began offering a range of benefits to citizens and immigrants, USCIS (U.S. Citizenship and Immigration Services, formerly the Immigration and Naturalization Service or INS) and the Department of State were forced to consider how to take such benefits into account in determining whether an individual was likely to become a public charge. Congress provided no guidance in this matter. Although public charge determinations were referenced in several sections of the INA (*e.g.*, with respect to deciding whom to exclude from entry), Congress never identified specifically which types of government support may be considered in a public charge determination.

After enactment of the Immigration Reform and Control Act (IRCA) in 1986 – the last comprehensive immigration reform law – INS confirmed that the determination as to whether an immigrant is likely to become a public charge must be based on the totality of circumstances at the time of the individual's application. INS would make a prospective "determination of financial responsibility" based on the individual's "age, health, income, and vocation."[6] In this case, if an individual's advanced age, poor health, lack of significant income, or lack of any foreseeable vocation indicated to INS that the individual may become completely destitute and reliant on the state for complete or primary support, the individual would be considered "likely to become a public charge."[7]

The last congressional actions occurred in the mid-1990's during debates on welfare and immigration reform. The only amendment Congress made to the public charge provision was to codify the longstanding "totality of the circumstances" test already in use.[8] This requires, at a minimum, consideration of an applicant's age; health; family status; assets, resources and financial status; and education and skills.[9] Instead of broadening the scope of public charge, Congress denied most immigrants eligibility for a range of benefits for the first five years they legally reside in the U.S. Congress also implemented broader "sponsor deeming"[10] rules and adopted a stricter affidavit of support which requires sponsors of immigrants to repay federal or state governments for benefits received by an immigrant.[11]

4. **Does public charge exclude any immigrant who has or might use public benefits from entering the U.S.?**

No. The basic purpose of the public charge exclusion was **not** to exclude every immigrant who might use some government funded benefits. Rather, the purpose was to exclude only those who would become completely destitute and dependent on the government. In making a public charge determination, USCIS or a consular officer uses a "totality of the circumstances" test so receipt of public benefits must be weighed against other factors.

5. **Why did federal agencies issue policies regarding public charge?**

After restrictions on immigrants' eligibility for benefits were enacted in 1996, concerns about public charge had a significant chilling effect on immigrants' receipt of benefits and particularly access to health care programs and services. Many immigrants were fearful of not just applying for benefits for which they or their children were eligible but feared even going to the doctor or the hospital. Immigrants found themselves unable to ascertain what would be considered in a public charge determination.

To alleviate the confusion, the Department of Justice (DOJ) took efforts to clarify which federal programs would – and more importantly would not – lead to a public charge determination. As noted in a 1999 proposed rule from DOJ:

> By defining "public charge," the Department seeks to reduce the negative public health consequences generated by the existing confusion and to provide [immigrants] with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.[12]

6. **Under current policies, which benefits are considered in a public charge determination?**

Receipt of only the following types of benefits could result in a public charge determination:

- cash benefits for income maintenance (*e.g.*, TANF or state-funded cash assistance);
- Supplemental Security Income; and
- institutionalization for long-term care at government expense.[13]

But even receipt of these benefits would not automatically result in a public charge determination since the evaluation must be prospective based on the totality of the circumstances.[14]

7. **Under current policies, what health programs are excluded in making a public charge determination?**

Receipt of the following benefits or services has **not** been included in a public charge determination:

- Medicaid, including Vaccines for Children;
- CHIP;
- state-funded health insurance;
- other health insurance;
- health services – including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases;
- use of health clinics;
- pre-natal care;
- emergency medical services; and
- short-term rehabilitation.[15]

8. **Why were these benefits excluded?**

When DOJ issued the proposed rule, their consensus was that noncash benefits provide **supplemental** support and do not lead to complete subsistence on the government. Indeed, receipt of these supports can help ensure that workers remain productive and self-reliant. According to the Department of Health and Human Services:

> it is extremely unlikely that an individual or family could subsist on a combination of non-cash support benefits or services alone. . . . HHS is unable to conceive of a situation where an individual, other than someone who permanently resides in a long-term care institution, could support himself or his family solely on non-cash benefits so as to be primarily dependent on the [G]overnment.[16]

9. **Are many immigrants currently affected by public charge determinations if they receive public benefits?**

Most lawfully present immigrants should not be determined to be a public charge because they are barred from receiving many public benefits for the first five years they are in the U.S.[17] And because of the "totality of the circumstances" test, even past receipt of benefits would not automatically lead to a determination of public charge.[18]

10. Can an Executive Order (EO) change the INA?

No. Unless Congress changes the law, a public charge determination must still consider the totality of the circumstances. For immigrants applying to enter the U.S. or adjust their status, the public charge determination must be prospective rather than retrospective (for deportations, the evaluation can determine whether the individual has become a public charge).

11. What can an Executive Order do to change current policies?

An EO can direct a federal agency – in this case U.S. Citizenship and Immigration Services and the Department of State – to expand the types of benefits that may be considered part of a public charge determination. Since the regulation defining public charge was proposed but never finalized, agencies likely will not have to follow normal procedural requirements to change a final regulation. Instead, they could issue new guidance (or propose regulations) with their interpretation of which benefits are included in a public charge determination. The guidance would still have to comply with the restrictions set forth in the statute.

12. If health programs are added to the public charge determination, will immigrants automatically be found ineligible for entry or adjustment?

No. The statute requires consideration of a number of factors in the "totality of the circumstances." So if receipt of Medicaid is considered, it could lead to a public charge determination **only if** the totality of the circumstances leads to the conclusion that the individual would be likely to become a public charge. But the chilling effect will preclude many immigrants from securing health care programs or services.

13. Can someone be deported as a public charge?

Yes, although this provision has been implemented only a few times in over 100 years. Deportations on public charge grounds have been rare since deportation standards are strict. Under the Immigration and Nationality Act, an immigrant is deportable if he or she becomes a public charge within five years after the date of entry into the U.S. for reasons that did not arise after entry.[19] Since most immigrants are barred from receiving Medicaid, CHIP and other public benefits for their first five years in the U.S., this is unlikely to occur (although some states have opted to provide benefits during the five years pursuant to the Immigrant Children's Health Improvement Act or with state funding). Further, the mere receipt of a public benefit within five years of entry does not make an immigrant deportable as a public charge. An immigrant is deportable only if:

- the state or other government entity that provides the benefit has the legal right to seek repayment from the individual or another obligated party (for example, a sponsor under an affidavit of support);
- the responsible program official makes a demand for repayment; and
- the immigrant or other obligated party, such as the immigrant's sponsor, fails to repay.[20]

Deportation cases from the 1940's through 1970's involved immigrants who were in government-funded mental institutions.

14. From a policy perspective, should a public charge determination be made based on receipt of public benefits?

No. The programs potentially affected by the proposed EO are essential, not only for immigrants and their family members, but for the health and well-being of the broader community. The broader fear generated by this EO already threatens to undermine public health, as well as to ensure healthy pregnancies, development of newborns, and children's growth and learning.

Many reasons exist as to why immigrants may access public benefits the U.S. As noted in a recent interview of a visiting assistant professor at City College of New York, expanding the public charge ground of inadmissibility would exacerbate the discrimination rooted in our immigration laws:

> The "likely to become a public charge" clause—poverty-based immigration control—can be really dangerous, precisely because it seems racially and ethnically neutral. Historically, the clause allowed racial and religious bigotry to flourish by giving too much power to law enforcers. [21]

ENDNOTES

[1] For additional resources on "public charge," see materials from the National Immigration Law Center, https://www.nilc.org/get-involved/community-education-resources/pubcharge/.
[2] *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999).
[3] In the Immigration Act of 1882, Congress authorized certain state officials to "go on board and through any . . .ship or vessel" arriving at state ports, examine the passengers, and deny landing permission to any passenger who was a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." 22 Stat. 214, Section 2.
[4] See David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, at 198-200, 290-221 (1971).
[5] *Id.*
[6] 8 C.F.R. § 245a.4(i).
[7] A specific statutory provision for immigrants seeking legalization under IRCA establishes a special rule for such individuals even if they are found, under the totality of the circumstances test, to be public charges. 8 U.S.C. § 1225a(d)(2)(B)(iii). This special rule focuses on a prospective determination that includes the "past acceptance of public cash assistance within a history of consistent employment." *Id., see also* 8 C.F.R. § 245a.3(g)(4)(iii). Non-cash benefits were explicitly excluded from this assessment. 8 C.F.R. § 245a.1(i).
[8] 8 U.S.C. § 1182(a)(4)(B).
[9] 8 U.S.C. § 1182(a)(4).
[10] Immigrants who have sponsors – generally via family or an employer – have the sponsor's income "deemed" available to the immigrant. Adding a sponsor's income and resources to that of an immigrant will often disqualify the immigrant as over-income for many federal programs.
[11] 8 U.S.C. §1183a.
[12] *Proposed Rule: Inadmissibility and Deportability on Public Charge Grounds,* 64 Fed. Reg. 28676 (May 26, 1999).This rule was not finalized. DOJ also issued guidance that currently governs public charge determinations which clarified longstanding policy and practice. *See,* Department of Justice, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999), *available at* https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html.
[13] *Id.*
[14] Proposed 8 C.F.R. § 212.106.
[15] Proposed 8 C.F.R. § 212.105. *See also,* U.S. Citizenship and Immigration Services, *Public Charge Fact Sheet*, *available at* https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet.
[16] 64 Fed. Reg. 28676, 28686 (May 26, 1999), Letter to INS Commissioner Doris Meissner from HHS Deputy Secretary Kevin Thurm, dated March 25, 1999.
[17] If a lawful permanent resident leaves the U.S. for more than six months and seeks to reenter, the immigrant would be subject to a public charge determination.
[18] 8 U.S.C. § 1182(a)(4).
[19] 8 U.S.C. § 1227(a)(5). Immigrants may also be deported for other reasons such as inadmissibility at time of entry or adjustment of status, criminal offenses, failure to register and falsification of documents, security and related groups, and unlawfully voting.
[20] 8 U.S.C. § 1183A. The benefit granting agency must seek repayment within 5 years of the immigrant's entry into the United States, obtain a final judgment, take all steps necessary to collect on that judgment, and be unsuccessful in those attempts. Even if these conditions are met, the immigrant has the opportunity to show that the reasons he or she became a public charge arose after the immigrant's entry into the U.S. An immigrant who can make such a showing is not deportable as a public charge.
[21] Emma Green, *First, They Excluded the Irish* (Feb. 2, 2017), *available at* https://www.theatlantic.com/politics/archive/2017/02/trump-poor-immigrants-public-charge/515397/.