DHS' Proposed Rule: What may Change with Public Charge?

By Mara Youdelman

The Department of Homeland Security recently released a proposed rule redefining the term "public charge." The rule proposes fundamental changes to the longstanding application of public charge to the receipt of public benefits for certain immigrants. The purpose of this issue brief is to provide background information about "public charge" in the health context although the proposed rule also applies to receipt of other public benefits. Until this rule is finalized and becomes effective, however, current policies regarding public charge remain in place.[1]

1. What does the Immigration and Nationality Act require regarding public charge?

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 (also known as a "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.[2] (Emphasis added)

The language "to become" implies a future state such that past or current 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.

2. What is a "public charge"?

Public charge is an immigration term. Under policies in effect since the 1990s, 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."[3] 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). According to the INA, lawful permanent residents who are applying for citizenship are **not** subject to a public charge determination.

Congress first enacted a public charge test in 1882.[4] 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 – that housed people with physical disabilities, abandoned children, drifters, petty criminals, and a growing number of immigrants who were poor.[5] An immigrant who was a public charge was essentially an immigrant who was likely to end up in an almshouse.

3. How have federal agencies been making a public charge determination before this proposed rule?

As federal, state, and local governments began offering a range of benefits to citizens and immigrants, the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS, 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 which specific 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 (now USCIS) confirmed that public charge determinations 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] If an individual has advanced age, poor health, lack of significant income, or lack of any foreseeable vocation indicated to INS that the individual might 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" rules and

adopted a stricter affidavit of support that requires sponsors of immigrants to repay federal or state governments for benefits received by an immigrant.[10]

4. **Why did federal agencies issue policies in the 1990's 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 applying for benefits for which they or their children were eligible and feared even going to the doctor or the hospital. Confused about what benefits would be considered in a public charge determination, many immigrants consequently disenrolled from various public programs.

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.[11]

5. **Why were certain benefits excluded in the 1990's?**

When DOJ issued its proposed rule, DOJ reasoned that noncash benefits such as health, nutrition, and housing assistance provide **supplemental** support and do not lead to complete subsistence on the government. Indeed, receipt of these supports can help ensure that immigrant 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.[12]

6. **Under current policies, which benefits does DHS consider in a public charge determination?**

Currently, and until the new proposed rule is finalized and effective, 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]

Nevertheless, 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 the proposed rule, what health programs would DHS consider in making a public charge determination?

The proposed rule includes receipt of the above benefits plus additional public programs. The new programs include the following health benefits:

- Medicaid (except for emergency Medicaid and Medicaid services provided pursuant to IDEA (Individuals with Disabilities Education Act) or to foreign-born children of U.S. citizens); and
- Premium and cost sharing subsidies for Medicare Part D.

If an individual receives any of these benefits in either the 12 months immediately before applying or for more than 12 months in the 36-month period immediately prior to applying, the receipt would be included in a public charge determination.

Beyond health programs, the proposed rule also includes consideration of other public benefits (e.g. SNAP and some housing assistance). It also differentiates between "monetizable" and "non-monetizable" benefits. Certain benefits are defined as "monetizable" which means a specific dollar amount of assistance can be quantified (*e.g.,* an individual may be approved to receive $1,800 of SNAP benefits over a year). Monetizable benefits include cash assistance, SNAP, SSI and some housing assistance.

The proposed rule defines Medicaid as a non-monetizable benefit, meaning that a specific dollar amount of assistance is not calculated. If an individual receives both monetizable and non-monetizable benefits, then DHS will consider the receipt of Medicaid (or other non-monetizable benefits) if received for more than nine months in a 36-month period immediately prior to applying in a public charge determination. The proposed rule asks for comments as to whether receipt of multiple non-monetized benefits (*e.g.,* Medicaid and certain subsidized housing) should aggregate together.

8. If an individual receives benefits before the proposed rule is finalized, do they count in a public charge determination?

The proposed rule would not consider public benefits currently excluded before the effective date of the final rule. Only those benefits listed in the answer to Q. 6 would be included in a public charge determination prior to the final effective date. Those listed in the answer to Q. 7 would still be excluded until 60 days after this proposed rule is finalized.

9. Under the proposed rule, what health programs and services are excluded in making a public charge determination?

Receipt of the following benefits or services will **not be** included in a public charge determination (although changes could be made in the final rule):

- CHIP (the proposed rule asks for comments about including CHIP);
- Special Supplemental Nutrition Program for Women, Infants and Children program (WIC);
- Premium Tax Credits (or APTCs) under the ACA;
- emergency Medicaid;
- Medicaid funded services pursuant to IDEA;
- Medicare Parts A, B and C;
- private or employer health insurance;
- fully state-funded health insurance;
- other health insurance including VA and TRICARE;
- health services including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases;
- use of health clinics;
- emergency medical services; and
- short-term rehabilitation.

Further, any other 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 is not considered.

10. Who does the proposed rule impact?

The rule affects any individual seeking to enter the U.S. or obtain a green card. The proposed rule also would apply a similar test to individuals applying for extensions of non-immigrant visas, and changes of non-immigrant status (*e.g.*, from a student visa to an employment visa). Green card holders are not subject to a public charge determination either to renew their green card or when they apply for naturalization.

Some immigrants, however, may be exempt from the public charge determination because they are exempt by law (*e.g.*, asylees, refugees, survivors of domestic violence, and other protected groups) or they are in an immigration status that cannot adjust (*e.g.*, temporary protected status). The proposed rule also excludes benefits received by active duty service members, their spouses and children. For a complete list of exemptions, see proposed 8 C.F.R. 212.23.

11. Will many immigrants be affected by public charge determinations if they receive public benefits?

This rule, if finalized, will have both direct and indirect impacts on immigrants as well as their families. Directly, many immigrants, and particularly family-based immigrants, will be subject to the expanded definition of public charge that could preclude their entry into the U.S. or ability to obtain a green card. The rule also proposes to expand the types of immigrants who will be subject to public charge considerations. Certain immigrants seeking to change their status or file an extension of stay will be affected if the rule goes into effect.

The indirect impact of the proposed rule will likely be even greater as many immigrants and their families (including both immigrant and citizen family members) will forego receipt of benefits for fear of real or perceived consequences. Just as in the 1990's, they may be confused about what benefits would be considered or whether they are subject to a public charge determination. With drafts of the proposed rule leaked earlier this year, this chilling effect has already resulted in individuals returning breast pumps to WIC offices and asking to disenroll themselves or family members from SNAP, WIC and Medicaid, among other benefits.

12. How will DHS evaluate whether receiving Medicaid or other benefits makes an individual ineligible for entry or adjustment?

The statute requires consideration of a number of factors in the "totality of the circumstances." Therefore, even if DHS considers receipt of Medicaid or other specified public benefits, it should result in 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. Yet the proposed rule will likely have a chilling effect such that many immigrants and their family members abstain from securing health care programs or services.

The proposed rule maintains the totality of circumstances test, which weighs all the positive and negative considerations related to the applying individual's:

- Age;
- Health;
- Family status;
- Assets, resources, and financial status;
- Education and skills;
- Required affidavit of support; and
- Any other factor or circumstance that may warrant consideration.

The proposed rule says that if the negative factors outweigh the positive factors, then the individual would be inadmissible or unable to obtain a green card as likely to become a public charge. If the positive factors outweigh the negative factors, then the immigrant would not be found inadmissible as likely to become a public charge.

However, the rule proposes certain factors that will be "heavily weighted" in the public charge determination. The designated "heavily weighted" negative factors include:

- Receipt of public benefits designated in the proposed rule at the date of application;
- Receipt of public benefits designated in the proposed rule within 36 months of the date of application; and
- Lack of private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the individual's ability to provide care for him or herself, to attend school, or to work.

A full description of the factors considered in the totality of the circumstances test, including positive and negative weighted factors, is described in Table 33 of the proposed rule, *Totality of Circumstances Framework for Public Charge Determinations*.

13. How does public charge affect individuals with disabilities?

Since health is one factor in the public charge determination, an individual with a disability or chronic condition may face additional barriers to enter the U.S., extend their stay, change their status, or obtain a green card. DHS says it will consider an individual's disability because it may affect an individual's ability to work, attend school, or otherwise care for him or herself. DHS states that the consideration of disability does not violate nondiscrimination requirements in federal statutes and regulations such as the Rehabilitation Act or Americans with Disabilities Act. The proposed rule states:

> . . . the [individual's] disability is treated just as any other medical condition that affects an [individual's] likelihood, in the totality of the circumstances, of becoming a public charge. Under the totality of the circumstances framework, an [individual] with a disability is not being treated differently, or singled out, and the disability itself would not be the sole basis for an inadmissibility finding. *See* Proposed Rule at p. 175.

While DHS notes that an applicant's disability could not be the sole basis for a public charge inadmissibility finding, the proposed rule would count having a disability or chronic health condition as a negative factor. If a person does not have private insurance that would cover all the foreseeable medical costs of the disability or chronic condition, the proposed rule would count that as a "heavily weighted" negative factor. Because many services that people with disabilities need to live and participate in the community are only available through Medicaid and not covered by private insurance, this factor could impact many people with disabilities.

14. If someone is found likely to be a public charge, do they have any options?

Yes. The proposed rule describes a process where DHS may accept a "public charge bond" to overcome a determination of public charge. The proposed rule establishes a new minimum bond amount of $10,000 (adjusted annually for inflation), processing fees for the bond, and specific conditions under which a public charge bond is breached or cancelled.

The proposed rule states that the purpose of the public charge bond is to allow DHS to admit an immigrant who is inadmissible as likely to become a public charge but who warrants a favorable exercise of discretion. Offering a public charge bond in the adjustment of status context would generally only occur in limited circumstances in which the immigrant has no heavily weighed negative factors. A public charge bond would remain in effect until the immigrant naturalizes or otherwise obtains U.S. citizenship, permanently departs the U.S., or dies, until the bond is substituted with another bond, or until the bond is otherwise cancelled by DHS. For more on public charge bonds, see Proposed Rule, Section O.

15. From a policy perspective, should receipt of public benefits be considered in a public charge determination?

No. The programs potentially affected by the proposed rule 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 earlier leaked versions of the proposed rule 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 in the U.S. As noted in an 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. [15]

If you have concerns about the proposed rule, you can consider submitting comments during the public comment period, once the proposed rule is published in the Federal Register. For more information, please contact National Health Law Program or visit the website of the Protecting Immigrant Families campaign, www.protectingimmigrantfamilies.org.

ENDNOTES

[1] For additional resources on "public charge," see materials from the Protecting Immigrant Families campaign, www.protectingimmigrantfamilies.org.
[2] *Id.*
[3] *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999).
[4] 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.
[5] See David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, at 198-200, 290-221 (1971).
[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. 8 U.S.C. §1183a.
[11] *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.
[12] 64 Fed. Reg. 28676, 28686 (May 26, 1999), Letter to INS Commissioner Doris Meissner from HHS Deputy Secretary Kevin Thurm, dated March 25, 1999.
[13] *Id.*
[14] 8 C.F.R. § 212.106 (as proposed in 1999). The new proposed rule, however, rescinds the prior proposed rule so this provision would no longer be in effect but newly proposed 8 C.F.R. § 212.22(d) continues to consider receipt of these benefits and 8 C.F.R. § 212.21(b) includes these benefits in the definition of public charge.
[15] 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/.