



DHS' Final Rule: Impact of Public Charge on Health Care and Benefits

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The Department of Homeland Security's "public charge" rule went into effect on February 24, 2020. The rule is a drastic expansion of public charge, and effectively implements a wealth test in our immigration system.¹ This issue brief provides background information about public charge with a focus on the implications and impacts of the DHS final rule in the health care context (although the rule also applies to receipt of other public benefits). This analysis includes three primary sections:

- [Overview of Recent Litigation and Policy Changes to the DHS Public Charge Rule](#)
- [Changes Under the DHS Final Rule](#)
- [Potential Impacts of the Final Rule](#)

A. [Overview of Recent Litigation and Policy Changes to the DHS Public Charge Rule](#)

On August 12, 2019, the Department of Homeland Security (DHS) released a [final rule](#) redefining the term "public charge." The rule makes fundamental changes to the longstanding application of public charge to the receipt of public benefits for certain immigrants. Nine lawsuits were filed challenging the rule.² Federal judges issued preliminary injunctions in several of the cases, including three nationwide orders that prevented the rule from going into effect on the scheduled date of implementation, October 15, 2019.³

In early December 2019, two of the nationwide preliminary injunctions were reversed by the Ninth and Fourth Circuit Courts of Appeal, and the Trump Administration made a request to the

¹ For additional resources on "public charge," see materials from the Protecting Immigrant Families campaign, www.protectingimmigrantfamilies.org.

² For additional information and status updates about the cases, see Protecting Immigrant Families Campaign, *Public Charge Litigation Tracker*, <https://docs.google.com/spreadsheets/d/e/2PACX-1vTIHxPL3tRDeRYEG3ORXRvZkk11MZrtkM-HszfAs7l8D02KO5T5T3qeM1j4lFvWEPRK2KAAy8uvd2Vj/pubhtml?widget=true&headers=false>.

³ *Id.*

U.S. Supreme Court to “stay” (i.e. set aside) all of the nationwide injunctions. The Court granted the stay on January 27, 2020, allowing the federal government to move forward with implementation of the final rule in all states except Illinois.⁴ Subsequently, DHS announced it would begin implementing the rule on February 24, 2020.⁵ The Justices did not decide on the “merits” of the lawsuit (where the Court makes a decision based on the facts and legal rights at issue). Rather, the Court only ruled on whether the district courts should have decided to grant the nationwide preliminary injunctions. On February 21, 2020, the U.S. Supreme Court granted an additional stay allowing the DHS public charge regulation to go into effect in Illinois.⁶

All of the lawsuits are continuing to make their way through the courts. The district courts will now move on to consider the facts of each case but their review will take some time. NHeLP and other advocates are tracking these cases and other related policy developments, and will continue to provide updates on any changes.

1. Is the current public charge policy the same for immigrants with applications processed inside vs. outside of the U.S.?

The DHS final public charge rule only applies to applications for a visa, admission, or adjustment of status processed in the United States. Some applications are processed at consulates abroad, including for immigrants who apply in their country of origin before entering the U.S., and green card applicants who are sent abroad to apply for status. This application process is called consular processing and follows the Department of State’s (DOS) public charge rules.

On October 11, 2019, the DOS released an [interim final rule](#) to align its definition of public charge with the DHS final rule. On February 11, 2020, the DOS announced it will implement its interim final rule starting February 24, 2020. The DOS interim final rule replaces the Foreign Affairs Manual (FAM) guidance from January 2018, which is used by consular officials to make public charge assessments from outside of the U.S. DOS also recently updated the FAM to

⁴ A limited, statewide injunction of the rule remained in effect for Illinois after the Jan. 27, 2020 ruling. *Cook County, IL and Il. Coalition for Immigrant and Refugee Rights v. McAleenan, et al.*, 1:19-cv-06334, 2019 WL 5110267 (N.D. IL October 14, 2019).

⁵ U.S. Citizenship and Immigration Services, USCIS Announces Public Charge Rule Implementation Following Supreme Court Stay of Nationwide Injunctions (Jan. 20, 2020), <https://www.uscis.gov/news/news-releases/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-nationwide-injunctions>.

⁶ *Wolf v. Cook County, IL, et al.*, 589 U.S. ____ (2020).

reflect the changes in the interim final rule.⁷ The January 2018 FAM guidance and the interim final rule are facing legal challenges.⁸

2. Is the President’s Proclamation on Health Care related to public charge?

On October 4, 2019, the president issued a [proclamation](#) “on the Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System.” The proclamation sought to impose a new requirement separate from public charge that would restrict immigration to the U.S. by people who are uninsured and cannot pay the costs of their health care. A federal court blocked the proclamation from taking effect on November 2, 2019.⁹ Thus, the proclamation is currently not in effect.

If implemented, the proclamation would deny entry to people seeking admission to the U.S. via consular processing, including some family members of citizens and LPRs, who are unable to show that they will have certain kinds of health coverage within 30 days after entering the U.S. or the financial resources to pay for “reasonably foreseeable medical expenses.” Only certain kinds of insurance will qualify, including: *unsubsidized* marketplace plans (i.e. qualified health plans purchased without premium tax credits or cost-sharing reductions), employer-sponsored health plans, catastrophic plans, Medicare plans, and others. Many immigrants are exempt from the proclamation.¹⁰

B. [Changes Under the DHS Final Rule on “Inadmissibility”](#)

The public charge final rule went into effect on [February 24, 2020](#). The rule is not retroactive, therefore an individual’s application for, certification or approval to receive, or receipt of certain public benefits (other than cash assistance or long-term care at government expense) before February 24, 2020, will not be considered in a public charge assessment.

⁷ For more information about the FAM, visit <https://www.nilc.org/issues/economic-support/public-charge-changes-to-fam/>. The current FAM has broader public charge rules that counts non-cash benefits received by family members. DOS made amendments to these sections of the FAM without prior notice or an opportunity for public comment in January 2018. See U.S. State Dept., 9 FAM 302.8 to view the current FAM guidance on public charge

⁸ *Mayor and City of Baltimore v. Trump et al*, 1:18-cv-03636, 2019 WL 4598011 (D.MD. Sept. 20, 2019).

⁹ *Doe, et a. v. Trump, et. al.*, 3:19-cv-1743-SI, 2019 WL 6050111 (D. OR. Nov. 26, 2019).

¹⁰ For more information, see Nat’l Immigration Law Center, *President’s Proclamation Requiring Immigrants to Have Health Insurance Summary* (Oct. 10, 2019), <https://www.nilc.org/issues/health-care/health-insurance-proclamation-oct2019/>.

3. Under the final rule, what health programs will DHS consider in making a public charge determination?

The final rule expands the types of public benefit programs that DHS can consider in a public benefit determination. New public benefits that will be considered include non-emergency, federally-funded Medicaid, with some exceptions listed in Question 4.

Beyond health programs, the final rule also includes consideration of other public benefits—e.g. Supplemental Nutrition Assistance Program (SNAP or food stamps); some federal housing assistance programs; and federal, state, local, or tribal cash benefits for income maintenance (TANF or state-funded cash assistance, Supplemental Security Income).¹¹ The final rule removed long-term institutionalization at government expense as a listed benefit that was included in the prior rule. This is because most long-term institutionalization is largely paid for by Medicaid, therefore adding the broader category of federally-funded Medicaid encompassed the prior consideration of institutionalization at government expense.

Depending on how long an individual receives Medicaid or any of the included benefits, receipt of those benefits will be counted as a heavily-weighted negative factor or plain negative factor under the final rule. See Question 9 for more info.

4. Under the final rule, what health programs and services are excluded from consideration as a public benefit?

The rule does not consider receipt of certain Medicaid services as a public benefit and excludes the following:

- Emergency Medicaid;
- School-based Medicaid, including services provided under the Individuals with Disabilities Education Act;
- Medicaid programs that are fully state, county, or locally funded;
- Receipt of Medicaid services by a child or young adult under 21 years of age;
- Receipt of Medicaid services during pregnancy and up to 60 days after pregnancy; and
- Receipt of public benefits (including Medicaid) by an active duty member of the U.S. Armed Forces and their families.¹²

¹¹ *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292-41508 (Aug. 17, 2019) [hereinafter “DHS Final Rule”], <https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17142.pdf> (adding 8 C.F.R. §§ 212.21(b)(2)-(5)).

¹² DHS Final Rule, *supra* note 11, adding 8 C.F.R. § 212.21(b)(5)(iv).

Further, any other state, local, or tribal public benefit that is not cash assistance for income maintenance, or another public benefit program not specifically listed in the regulation will not be considered a public benefit under the rule. Some examples of benefits not included in a public charge determination include:

- Children’s Health Insurance Program (CHIP);
- Medicare, including Part D;
- Qualified health plans purchased through the federal or state marketplaces, including those purchased with financial assistance such as premium tax credits;
- Employer health insurance;
- Fully state-, county-, or locally-funded health programs;
- Other health insurance including VA and TRICARE;
- Ryan White HIV/AIDS Program;
- Title X-funded programs;
- Public health services including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases;
- Use of health clinics;
- Short-term rehabilitation; and
- Special Supplemental Nutrition Program for Women, Infants and Children program (WIC).

5. If an individual received benefits before February 24, 2020, will receipt of those benefits count in a public charge determination?

Public charge is a forward-looking test and is not retroactive. Receipt of Medicaid or other non-cash public benefits (except Medicaid long-term care) before February 24, 2020 will not be considered. Only benefits that are considered under the prior rule—federal, state, local, or tribal cash benefits for income maintenance (such as TANF, Supplemental Security Income, state-funded cash assistance) and institutionalization for long-term care at government expense—would be included in a public charge determination prior to February 24, 2020. Note that receipt of cash benefits or Medi-Cal long-term care prior to February 24, 2020 will still count as a negative factor in the totality of circumstances test. (See Question 9 for a fuller explanation of the totality of circumstances test.)

6. If an individual receives a service that is excluded from consideration as a public benefit under the final rule, does that mean they are also exempt from the public charge test?

Unfortunately, no. Public benefits receipt is not the only negative factor in the DHS public charge rule. Under a “totality of the circumstances test,” DHS can declare an applicant a public

charge even without ever receiving public benefits. (See Question 9 for an explanation of the totality of circumstances test.)

The final rule exempts public benefits received by active duty members of the U.S. Armed Forces, their spouse, or child(ren). DHS also exempts use of Medicaid services by children or young adults under 21 years of age, and Medicaid services received during pregnancy and 60-days postpartum from being counted as public benefits. These groups, however, will still be subject to a public charge determination under the totality of circumstances test even though receipt of certain public benefits will not be counted in their determination. Some immigrant groups are exempt from public charge altogether (see Question 8).

7. Who is subject to public charge under the final rule?

Any individual applying for admission to the U.S. or adjustment of status are subject to the public charge ground of inadmissibility unless they are in an immigrant category that is exempt from public charge. In general, individuals subject to this public charge test are already in the U.S. applying for an immigrant visa or permanent resident status through a family- or employer-based petition. The final DHS rule applies a similar test to individuals with a non-immigrant visa applying to extend their visa or adjust their visa to a different non-immigrant status (e.g., from a student visa to an employment visa).

Individuals who seek admission from outside the U.S. at an embassy or consular office abroad are subject to a public charge assessment guided by the Foreign Affairs Manual (FAM). The FAM was updated to incorporate changes that were made to DOS' interim final rule, which closely reflect the DHS public charge final rule. DOS' interim final rule and updated FAM guidance went into effect on February 24, 2020.

Green card holders are not subject to a public charge determination when they apply for naturalization or renew their green card. However, green card holders who leave the United States for a continuous period in excess of 180 consecutive days are subject to the grounds of inadmissibility and thus could be questioned as to their likelihood of becoming a public charge when they seek reentry at a port of entry.

8. Who is exempt from public charge?

Many immigrants are exempt from public charge, even when they apply for a green card, because they are exempt by law. These include asylees, refugees, Special Immigrant Juvenile Status, VAWA self-petitioners, U and T visa holders, and other protected groups. There are also some immigrants who are in an immigration status where public charge does not apply—such as Temporary Protected Status and DACA recipients and renewals—but may apply later

if they seek to adjust their status. For a complete list of exemptions, see 8 C.F.R. § 212.23 in the DHS final rule.¹³ Importantly, the same groups of people excluded from the public charge rule in the U.S. are also excluded from a public charge assessment if applying from abroad.

9. How will DHS evaluate whether receipt of Medicaid or other benefits makes an individual likely to become a public charge?

The statute requires consideration of a number of factors in evaluating whether someone is likely to be a public charge, looking at the “totality of the circumstances” of the individual. Even if an individual received Medicaid or other specified public benefits, an immigration official must still consider a number of factors in light of the totality of that person’s circumstances before making a public charge determination. These factors are:

- Age;
- Health;
- Family status;
- Assets, resources, and financial status;
- Education and skills;
- Affidavit of support; and
- Any other factor or circumstance that may warrant consideration.¹⁴

If the negative factors outweigh the positive factors, then the individual will be deemed “inadmissible” as likely to become a public charge, and unable to obtain a green card. If the positive factors outweigh the negative factors, then the immigrant will not be found inadmissible and may continue with their application or adjustment of status process.

The factors in the totality of circumstances test cannot be changed through agency rulemaking, however DHS created new standards to assess these factors. The final rule gives more weight to certain positive and negative considerations in assessing whether an individual is likely to become a public charge. For example, receipt of non-emergency Medicaid or other public benefits listed in Question 3 for an aggregate of 12 months within any 36 month period prior to the date of application will be counted as a “heavily weighted” negative factor. Receipt of two benefits in one month will count as two means. Although it won’t be given heavily negative weight, the rule does consider any application for, approval for, and receipt of a countable benefit starting on February 24, 2020, even if an individual only received the benefit for less than 12 months.

An individual with a medical condition that could require extensive treatment or could affect a person’s ability to work, attend, school, or care for oneself could also be considered a heavily

¹³ DHS Final Rule, *supra* note 11, at 41504-41505.

¹⁴ See 8 C.F.R. § 212.22(b)-(c).

weighted negative factor if the individual does not have private health insurance or the financial resources to pay for treatment.¹⁵

“Heavily weighted” positive factors include:

- Having unsubsidized, private health insurance (i.e. enrollment in a health insurance plan that is not supported by ACA premium tax credits, including advance premium tax credits);
- Having an income of over 250 percent of the federal poverty level (\$64,375 for a family of 4 in 2020); and
- Other factors listed in the final rule.¹⁶

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

The final rule describes a process where DHS may accept a “public charge bond” to overcome a determination of public charge. The final rule establishes a minimum bond amount of \$8,100 (adjusted annually for inflation), processing fees for the bond, and specific conditions under which a public charge bond is breached or cancelled.

The 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 United States, dies, until the bond is substituted with another bond, or until the bond is otherwise cancelled by DHS. There is no right to posting a public charge bond; the decision to allow submission of a public charge bond is a discretionary one made by DHS.

C. Potential Impacts of the Final Rule

11. Who will be the most affected by the changes to the final rule?

The individuals most affected by the public charge ground of inadmissibility are those seeking lawful permanent resident (LPR, also known as “green card”) status based on a family relationship. These include the spouses, unmarried children under the age of 21 years old, and

¹⁵ 8 C.F.R. § 212.22(c)(1)(iii).

¹⁶ 8 C.F.R. § 212.22(c)(2).

unmarried adult sons and daughters of a U.S. citizen or LPR and the parents, siblings, and married sons and daughters of a U.S. citizen. Approximately two-thirds of the one million non-citizens who obtain LPR status every year base it on a family relationship.¹⁷ The majority of immigrants who gain lawful status through a family relationship are from Mexico and countries in Central America, South America, Asia, the Caribbean, and Africa.

18. How does public charge impact individuals with disabilities or chronic health conditions?

Since health is one of the mandatory factors in the public charge test, an individual with a disability or chronic condition may face additional barriers to overcoming a negative public charge determination. DHS says it will consider an individual's disability because it may affect the individual's ability to work, attend school, or otherwise care for themselves. 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 (ADA). The final rule states:

An [immigrant's] health is not outcome determinative – that is, an alien's health cannot be the sole basis for a finding that an alien is inadmissible as likely to become a public charge... As with any other medical condition identified in the alien's application and supporting documentation, the alien's disability will be considered in the totality of the circumstances framework.¹⁸

Plaintiffs in some of the cases challenging the final public charge rule included claims that the rule violates the Rehabilitation Act and the ADA.¹⁹

19. How many immigrants will be subject to a public charge determination if they receive public benefits?

The final rule is expected to have both direct and indirect impacts on immigrants and their families. Directly, many immigrants, and particularly family-based immigrants, will be subject to the expanded definition of public charge that could preclude their formal admission to the U.S.

¹⁷ DHS, Office of Immigration Statistics, *Annual Flow Report Lawful Permanent Residents: 2017* (Aug. 2018), Table 2,

https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2017.pdf.

¹⁸ DHS Final Rule, *supra* note 11, at 41410.

¹⁹ See *State of New York et al., v. U.S. Department of Homeland Security et al.*, 1:19-cv-07777-GDB (S.D. N.Y. Oct. 11, 2019); *State of Washington et al., v. U.S. Department of Homeland Security et al.*, 4:19-cv-05210-RMP (E.D. WA Oct. 11, 2019); and *City and County of San Francisco, et al. v. U.S. Citizenship and Immigration Services, et al.*, 4:19-cv-04975-PJH (Oct. 11, 2019 N.D. CA).

or ability to obtain a green card. The rule also expands the types of immigrants who will be subject to public charge considerations. Certain non-immigrant visa holders seeking to change their status or file an extension of stay will be affected (see Question 7 for more information).

The indirect impact of the proposed rule will likely be even greater as many immigrants and their families (including both immigrant and U.S. citizen family members) will likely forego receipt of benefits for fear of real or perceived consequences on their ability to apply for lawful permanent residency. In the 1990's, many immigrants and their family members were confused about what benefits would be considered and whether they would be subject to a public charge determination, resulting in disenrollment from public benefit programs including Medicaid. Similarly, there is already evidence of the “chilling effects” of the DHS rule even before it was finalized.²⁰ States have reported immigrants and family members who are not subject to the rule have disenrolled from Medicaid and SNAP. In addition, there is evidence of the “spillover effects” of the rule in other public benefit programs that are not considered in the rule such as WIC.²¹

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

No. The programs affected by the final rule are essential, not only for immigrants and their family members, but for the health and well-being of the broader community. The broad fear generated by earlier leaked versions of the public charge rule as well as when the final rule was released already threatens to undermine public health, healthy pregnancies, newborn development, 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 reinforces the discriminatory intent and impact of 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.

²⁰ For the results of a national survey on chilling effects of the proposed changes to the public charge rule, see Hamutal Bernsteing, Urban Institute, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (May 22, 2019), <https://www.urban.org/research/publication/one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018>.

²¹ Helena Bottemiller Evich, Politico, *Immigrants, fearing Trump crackdown, drop out of nutrition programs* (Sept. 3, 2018), <https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292>.

Historically, the clause allowed racial and religious bigotry to flourish by giving too much power to law enforcers.²²

For more information, please contact NHeLP or visit the website of the Protecting Immigrant Families campaign, www.protectingimmigrantfamilies.org.

²² Emma Green, *First, They Excluded the Irish* (Feb. 2, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-poor-immigrants-public-charge/515397/>.