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How Do Recent ‘Public Charge’ Policy Changes Impact Immigrant Survivors of Crime?

Grace Huang, J.D., Asian Pacific Institute on Gender-Based Violence

Background

The Department of Homeland Security (DHS) issued a final rule interpreting the meaning and application of the “public charge” provisions of immigration law.¹ The rule strengthens public charge policy² which had been in effect since March 2021, following the settlements in litigation³ where various judicial decisions invalidated or enjoined enforcement of the prior Administration’s 2019 public charge rule.⁴

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.”⁵ A person that is determined to be likely to become a “public charge” can be denied admission to the U.S. or the ability to become a lawful permanent resident (LPR).⁶ In very rare circumstances, a person who has become a public charge can be deported.⁷

¹ 87 Fed. Reg. 55471 (Sept. 9, 2022), retrieved from <https://www.govinfo.gov/content/pkg/FR-2022-09-09/pdf/2022-18867.pdf>

² <https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf>

³ <https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility>

⁴ <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds>. This halted regulation had significantly expanded the definition of public charge to mean someone who’d received public benefits, and expanded the types of benefits to be considered in a public charge determination.

⁵ 8 U.S.C. 1182(a)(4)(A).

⁶ https://cdn.vox-cdn.com/uploads/chorus_asset/file/10188201/DRAFT_NPRM_public_charge.0.pdf

⁷ This might, in rare circumstances happen if someone would have been considered “likely to become a public charge” at the time they were admitted but possibly had not disclosed all relevant information.

Key Features of the Final Rule

The September 9, 2022 final rule, which takes effect on December 23, 2022, puts into regulation form the definition of public charge from the 1999 interim field guidance, as someone who is “likely at any time to become a public charge” as someone “likely at any time to become *primarily dependent on the government for subsistence*, as demonstrated by either receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.

If immigration officials determine that a person is likely to become a public charge in the future, they can deny that person permission to come to the U.S. or deny their application for a green card, which is formally called lawful permanent resident status (LPR). Public charge is **not** a factor in naturalization applications, so those who already have legal residency who are applying for citizenship do not undergo a public charge test.

The final rule specifically lays out which categories of immigration status are **not subject to (i.e., exempt from) the public charge rules**. These include refugees; asylees; survivors of trafficking and other serious crimes (those applying for, or with T & U visas); “qualified” abused spouses or children of U.S. citizens or LPR’s, and self-petitioners under the Violence Against Women Act, special immigrant juveniles; and certain people who have been paroled into the U.S.⁸ VAWA self-petitioners, and those who applied for or were granted T or U status are *exempt from a public charge assessment, even if they* adjust status through another path, such as employment or family sponsorship. In these instances, however, those granted T or U status must still have valid T or U status in order to continue to be exempt from application of the public charge rule. These exceptions are part of the immigration statute and cannot be changed by regulation or department policy. Nor does the public charge rule apply to family members of the person seeking admission or status, if they are not also applying for admission or immigration status (such as an applicant’s US citizen children.)

Because some survivors of domestic violence or sexual assault may not fall within an exempt immigration category, it is important to determine whether the public charge exclusion applies in their situation. In addition, even if the rule doesn’t apply directly to the survivor, it may have an impact on their family members who are attempting to regularize their immigration status.

In making a public charge determination, the final rule directs immigration officials to consider all of a person’s circumstances, including, but not limited to, their age, income, health, education or skills, family situation, and their sponsor’s affidavit of support or contract. No one factor is determinative. They can also consider whether a person has been primarily dependent on certain listed public benefits in the past (see below), and in doing so, can consider the duration, amount, how recently the benefits were received, and weigh that receipt against any positive factors. Positive factors, such as an affidavit of support

⁸ 8 U.S.C. 1182(a)(4). For a more complete list of categories exempt from application of the public charge rule, see: 87 Fed. Reg. 55637 (Sept. 9, 2022).

filed by a person's sponsor, can outweigh negative factors in determining whether the person is likely to become primarily dependent on government support in the future.

The final rule allows officials to consider only two types of public benefits in making public charge determinations: cash assistance for income maintenance, such as Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), or state/local General Assistance, and institutionalization for long-term care at government expense.

DHS will **not** consider the following cash or institutionalization benefits in a public charge test:

- **Special purpose or supplemental cash**, e.g. for child care, energy assistance, disaster relief, pandemic assistance, or other specific purposes.
- Cash benefits based on work or earnings, including Social Security, retirement, unemployment compensation, pensions, veterans benefits.
- Tax credits, like federal child tax credits also don't count.

If a program typically does not provide the primary source of income, or does not have income-based eligibility rules, it will not be considered in making a public charge determination.⁹

With respect to **long-term institutionalization** at government expense, the rule **does not include home and community-based services**, institutionalization for short periods of rehabilitation, incarceration, or unlawful institutionalization.

In addition, DHS will not consider the following:

- Medicaid, Emergency Medicaid, Children's Health Insurance Program (CHIP), state and locally-based health care programs (for services other than long-term care), and other health coverage, including subsidies for insurance purchased through Healthcare.gov and other healthcare exchanges,
- Nutrition programs, such as Supplemental Nutrition Assistance Program (SNAP), Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), school lunch programs, and food banks,
- Victim supports, including crime victims' compensation, transitional housing, sexual assault forensic exams and related care,
- Subsidized housing programs, such as Section 8 and Public Housing,
- Other state-based, non-cash assistance programs,
- Any public benefits received while the individual was in the U.S. in an immigration category that is exempt from the public charge ground of inadmissibility, or any benefits available for refugees, even if the individual is not classified as a refugee (such as benefits for unaccompanied children, trafficking survivors, Afghan/Iraqi Special Immigrant Visa holders, Afghan/Ukrainian parolees, Cuban/Haitian entrants and others).

⁹ 87 Fed. Reg. 55523-55530.

- **Benefits used by family members or dependents** (e.g. TANF, SSI, or other cash benefits used by U.S. citizen child not considered in parent's application).

For survivors who are not exempt from the public charge rule, for example, who may have had to access cash assistance, evidence of access to community based programs, such as work training, counseling, financial literacy programs, and other community based supports intended to help survivors overcome the trauma they've experienced can be helpful in demonstrating that they won't become primarily dependent on government supports.

If an immigration officer is going to deny an individual's immigration case based on public charge, they must articulate the specific reasons for the denial.

What's Next?

As USCIS prepares to implement the final public charge rule in December of 2022, the agency has indicated that it will issue additional guidance on the following topics:

- **Benefits not considered in a public charge determination**, such as cash benefits that are not income maintenance.
- **Institutionalization** at public expense, including more guidance about the definition of "long-term." In collaboration with HHS, USCIS will also develop guidance to help assess evidence of institutionalization.
- **Totality of Circumstances**-how identified factors may affect likelihood that a noncitizen will become primarily dependent on the government for subsistence at any time as informed by an empirical analysis of the best-available data.
- **Age:** DHS intends to issue guidance as appropriate that will clarify considerations that are relevant to considering a child's receipt of public benefits in the totality of the circumstances.

In addition, USCIS plans to revise the I-485 Application to Register Permanent Residence or Adjust Status form to reflect the public charge rule changes, including updating the form questions and instructions related to factors relevant to the assessment of public charge.

The last published Public Charge Rule¹⁰ had a significant impact on survivors of domestic violence and sexual assault by deterring immigrant families, including families that include U.S. citizen children, from seeking help when they need it. As recently as September 2021, over 40% of respondents in a survey of over 1000 primarily Latinx, Asian, and Pacific

¹⁰ See, https://protectingimmigrantfamilies.org/wp-content/uploads/2022/01/PIF-Research-Documents_Public-Charge_COVID-19_Jan2022.pdf

Islander families continued to believe that “applying for assistance programs could cause immigration problems,”¹¹ and were unaware of the March 2021 reversal of the 2019 rule.

Survivor advocates can help inform survivors and their families about the changes to the public charge rule, and support survivors in accessing safety net benefits so they can recover and escape from abuse.¹²

¹¹ See, https://www.nokidhungry.org/sites/default/files/2021-12/NKH_Public%20Charge_Micro-Report_English_0.pdf

¹² 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>