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

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Background

The Department of Homeland Security (DHS) is proposing a new rule that put longstanding policy about the meaning and application of the “public charge” provisions of immigration law into regulation form.¹ The current public charge policy² has been in effect since March 2021, reverting to prior (then INS) interim field guidance from 1999, following the settlements in ongoing 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

Key Features of the Proposed Rule

The February 24, 2022 proposed rule primarily reverts to the features of the 1999 interim field guidance, which defines someone who is “likely at any time to become a public charge”

¹ 87 Fed. Reg. 10570 (Feb. 24, 2022); <https://www.dhs.gov/publication/dhs-proposes-fair-and-humane-public-charge-rule>

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.

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 proposed rule specifically lays out which categories of immigration status are **not subject to 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 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 into these specific, exempt immigration categories, 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 proposed rule (and the current guidance) 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. They can also consider whether a person has been primarily dependent on certain listed public benefits in the past (see below). Positive factors, such as an affidavit of support 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 proposed 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 benefits in a public charge test:

⁸ 8 U.S.C. 1182(a)(4). For a more complete list of categories exempt from application of the public charge rule, see: <https://www.federalregister.gov/documents/2022/02/24/2022-03788/public-charge-ground-of-inadmissibility>

- 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,
- COVID-related supports, such as Pandemic Electronic Benefits Transfer (P-EBT), stimulus payments, child tax credits, emergency rental assistance, and more,
- Other state-based, non-cash assistance programs,
- Cash benefits based on work or earnings, including Social Security, retirement, pensions, veterans benefits,
- 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).

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.

What’s Next?

Before the Proposed Rule can become permanent, the public has an opportunity to comment on them. The proposed rule was published February 24, 2022, at <https://www.federalregister.gov/documents/2022/02/24/2022-03788/public-charge-ground-of-inadmissibility>, and the deadline to provide comments is April 25, 2022. Following the comment period, DHS will review the feedback received and likely issue a final regulation.

The last published Public Charge Rule⁹ has 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 Islander families continued to believe that “applying for assistance programs

⁹ See, https://protectingimmigrantfamilies.org/wp-content/uploads/2022/01/PIF-Research-Documents_Public-Charge_COVID-19_Jan2022.pdf

could cause immigration problems,”¹⁰ and were unaware of the March 2021 reversal of the 2019 rule.

Survivor advocates can help illustrate the impact of the public charge rule on immigrant survivors, and explain how access to safety net benefits can help victims recover and escape from abuse and play a critical role in preventing future harm.¹¹

¹⁰ See, https://www.nokidhungry.org/sites/default/files/2021-12/NKH_Public%20Charge_Micro-Report_English_0.pdf

¹¹ 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>