



CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

**WRITTEN TESTIMONY OF
THE IMMIGRATION & NATIONALITY LAW COMMITTEE AND THE SOCIAL
WELFARE LAW COMMITTEE**

**NEW YORK CITY COUNCIL COMMITTEE ON IMMIGRATION,
COMMITTEE ON GENERAL WELFARE AND COMMITTEE ON HEALTH
OVERSIGHT HEARING: THE IMPACT OF THE
NEW “PUBLIC CHARGE” RULE ON NYC**

September 3, 2019

Good afternoon, my name is Sarika Saxena and I am a member of the Immigration and Nationality Law Committee of the New York City Bar Association.¹ I would like to thank Council Member Menchaca, Chair of the Immigration Committee for holding this important hearing. As has been described this afternoon, a new rule limiting immigration into the United States based on income-level and need for public benefits has been published and will go into effect this October. Through this new rule, the Trump Administration is signaling that it no longer welcomes the “tired,” “poor,” “masses yearning to breathe free,” as we have done for centuries. The Trump Administration, as explicitly stated by the Acting-Director of the U.S. Citizenship and Immigration Services (“USCIS”) Ken Cuccinelli, has changed our immigration laws to favor those who can “stand on their own two-feet.”²

The City Bar is opposed to the new rule, which broadens the public charge ground of inadmissibility published by the U.S. Department of Homeland Security (“DHS”) on August 14,

¹ In addition to the Immigration and Nationality Law Committee, to date the following City Bar committees have signed on to an earlier City Bar statement which opposed broadening the public charge ground of inadmissibility: Social Welfare Law; Bioethical Issues; Children and the Law; Civil Right to Counsel Task Force; Civil Rights; Council on Children; Disability Law; Domestic Violence; Enhance Diversity in the Profession; European Affairs; Family Court & Family Law Committee; Federal Courts; Health Law; Housing Court; Housing and Urban Development; International Human Rights; Labor and Employment Law; Legal Problems of the Aging; Lesbian, Gay, Bisexual, Transgender and Queer Rights; Mental Health Law; Pro Bono and Legal Services; Sex and Law; United Nations. *See* Statement Opposing Proposed Changes to Broaden “Public Charge” Rule, Oct. 24, 2018, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/statement-opposing-proposed-changes-to-broaden-public-charge-rule>.

² Sasha Ingber & Rachel Martin, *Immigration Chief: ‘Give Me Your Tired, Your Poor Who Can Stand On Their Own 2 Feet,’* NPR (Aug. 13, 2019 10:38 AM), available at <https://www.npr.org/2019/08/13/750726795/immigration-chief-give-me-your-tired-your-poor-who-can-stand-on-their-own-2-feet> (all websites last visited Aug. 28, 2019).

2019 in the Federal Register.³ This rule will disproportionately impact low-income communities, primarily communities of color. The changes will force immigrant families to make impossible choices between life-saving benefits and future immigration options, including the ability to remain in the U.S. permanently with their families.⁴ It will also change the face of immigrants who are allowed to enter our country and obtain permanent residence here. In fact, the new rule could even impact long-time lawful permanent residents who have already been granted residency and are entering the country after a lengthy absence. There are some low-income immigrants who will not be affected by this rule, namely asylees, refugees, and trafficking and crime victims; this rule, however, introduces a significant, insurmountable hurdle for thousands of immigrant and mixed-status families across the U.S. who are already struggling. The final rule will go into effect on October 15, 2019 unless it is halted through litigation. As you may know, a number of organizations and governmental entities, including the New York State Attorney General's Office, have filed lawsuits to challenge the rule from being implemented.⁵

“Public charge” has long been a feature of U.S. immigration law as a ground of inadmissibility that applies to non-citizen visa holders entering the U.S. and applicants for adjustment to lawful permanent resident (“green card”) status. It applies primarily to those who are seeking admission or adjustment based on their relationship to a family member already in the U.S. In the past, public charge has been defined narrowly to mean only those applicants for admission or adjustment who were assessed to be “primarily dependent” on government cash assistance or long-term institutional care for subsistence.⁶ “In-kind” benefits such as Medicaid and Supplemental Nutrition Assistance Program (“SNAP”, or food stamps) have not counted towards the public charge assessment and having a financially sound sponsor has been enough to overcome an applicant’s low income. Under the old definition, relatively few non-citizens have been denied admission or prevented from adjusting to green card status on public charge grounds.⁷

³ See Dept. of Homeland Security, Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. 103; 8 C.F.R. 212; 8 C.F.R. 213; 8 C.F.R. 214; 8 C.F.R. 245; 8 C.F.R. 248), available at: <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds>.

⁴ For further information about the changes to the rule, see CLINIC Legal, *The Public Charge Final Rule: FAQs for Immigration Practitioners*, available at: <https://cliniclegal.org/resources/public-charge-final-rule-faqs-immigration-practitioners>.

⁵ Attorney General James Announces Lawsuit Against Trump Administration Over Public Charge Rule, NYS ATTORNEY GENERAL (Aug. 20, 2019), available at: <https://ag.ny.gov/press-release/attorney-general-james-announces-lawsuit-against-trump-administration-over-public>.

⁶ See 64 Fed. Reg. 28,689, available at: bit.ly/2KLNdfw; 8 USC § 1182(a)(4) (providing for public charge ground of inadmissibility); see also USCIS, Public Charge, available at: <https://www.uscis.gov/greencard/public-charge>.

⁷ While DHS does not publish annual statistics on reasons that applications for LPR status are denied when applied for within the United States, the U.S. Department of State (DOS) does publish these statistics for those applying for LPR status from abroad. For the fiscal year that ended in 2016, DOS initially found 1,076 applicants were inadmissible, but 912 of these applicants were able to overcome the finding. See Department of State, *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act), Fiscal Year 2016*, available at: <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXX.pdf>. By way of contrast, in the fiscal year ending in 2017, DOS initially found 3,237 applicants were inadmissible on public charge grounds and 2,016 were able to overcome the denial, a more than 700% increase in denials since the implementation of the public charge rule at the U.S. Consulates abroad. See *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act), Fiscal Year 2017*, available at:

The new rule shifts the focus of the public charge determination away from the ability of a sponsor to provide financially for the applicant⁸ to focus almost exclusively on the applicant for admission or adjustment. For the first time, use of in-kind health and nutrition benefits will count against the applicant. The new rule also raises the bar for those who will be excluded by analyzing whether the applicant is “more likely than not” to use public benefits, as opposed to the old rule which only penalized those who might become primarily dependent. DHS’s examination will focus on factors such as: health, education, skills, credit score, English-language proficiency, family size, having physical or mental health conditions that could affect ability to work, or simply being too young or too old to work. Having a financially-eligible sponsor willing to complete a binding affidavit of support is merely one of many factors, instead of being practically determinative, as it properly is today. The rule also adds new public benefits programs that will now be considered a negative factor: Medicaid; food stamps; Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and public housing. Individuals in receipt of or likely to receive any of these benefits after October 15, 2019 for more than 12 months in the aggregate within any 36-month period will be deemed a public charge.

The new rule states that an applicant’s medical condition that requires extensive medical treatment or otherwise interferes with the person’s ability to work or attend school will be taken into account. In this way, the rule gives preference to applicants who are able-bodied. Applicants with medical conditions must also show that they have access to private health insurance. Not having the means to pay for private unsubsidized health insurance and relying on state-funded insurance will constitute a heavily weighted negative factor and likely result in a finding of public charge. This rule forces sick New Yorkers to choose between their well-being and staying with their families. The new rule makes it very difficult for low-income, low-skilled, under-educated, elderly, or disabled applicants to overcome a public charge finding and thus become permanent residents and/or come out of the shadows to regularize their immigration status.

One of the only heavily-weighted positive factors a non-citizen applying for admission or adjustment can demonstrate, is having an income or resources ample enough to not only cover his or her own expenses but also those of his or her entire family, regardless of their immigration status, at a level over 250 percent of the federal poverty guidelines; that is nearly \$63,000 per year for a family of four. For those immigrants entering from abroad, this rule would measure their income based on their salary and income in their home country, a determination which will be skewed in favor of immigrants from wealthier, predominantly European nations. Even meeting this standard is not determinative under the final rule, however. Regardless of the income of the applicant at the time of admission or adjustment, his or her past receipt of SNAP, Medicaid, federal housing assistance and public housing would still be negative factors that may result in denial of the application for admission or lawful permanent residence.

<https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf>.

⁸ Family-based applications for LPR status require the applicant to file a binding affidavit of support by the family member sponsor and, if necessary, by a joint sponsor. See USCIS, Instructions for Affidavit of Support available at: <https://www.uscis.gov/sites/default/files/files/form/i-864instr.pdf>

The new public charge rule has brought public charge assessments back to a much darker past, when it was first asserted as a tool of racial and ethnic discrimination. In the 1800s, not becoming a public charge was a condition imposed on African-Americans seeking freedom from slavery.⁹ Public charge was later used as a justification to deny admission to low-income Irish immigrants¹⁰ and to Jews fleeing Nazi persecution.¹¹ Under DHS's new rule, low-income non-citizens of color will again face a barrier to entry and green card status.

The final rule is due to go into effect on October 15, 2019. The rule is not retroactive, meaning that it will not penalize affected noncitizens for accessing benefits before that date. However, those who have public benefits and who will be applying for permanent residency in the future may be advised to dis-enroll, after consulting with a trusted attorney. Medical experts warn that these changes to the public charge rule will result in decreases in Medicaid enrollment, increased emergency room medical care, and increased patient costs incurred by both patients and hospitals.¹² Even though emergency medical care will not be counted against applicants, there will be increased paranoia and rumors not to use such assistance. Thus, it is important now more than ever to invest in programs like ActionNYC and other citywide outreach efforts to battle the misinformation that will spread throughout our city, especially when it comes to programs that are exempt, like emergency care. We must make sure that families across our neighborhoods have access to accurate information from reliable sources. Given the complexity of the new rule, it is also crucial that your constituents who cannot otherwise afford attorneys have access to high-quality, free legal advice. It is imperative that the City Council and affected city agencies strengthen their partnerships with community-based organizations as well. Lastly, beyond outreach and awareness, the City Council must consider the very real gap in medical access that will be a result of this new rule in low-income, communities of color.

This expansion of the public charge rule will have a devastating impact on children, families, and communities. If concerns about any receipt of public benefits in the household, even for U.S. citizen children to whom the rule changes do not apply, cause households to forego access to nutrition supports under SNAP, the entire family will suffer from increased food insecurity. Similarly, loss of health care will not only make the entire household more susceptible to increased illness but will also undermine overall public health and safety for all individuals in the United States, regardless of immigration status. Children, people with disabilities and the elderly will be

⁹ Melissa Boteach, Shawn Fremstad, *et. al.*, *Trump's Immigration Plan Imposes Radical New Income and Health Tests*, CENTER FOR AMERICAN PROGRESS (Jul. 19, 2018), available at: <https://www.americanprogress.org/issues/poverty/reports/2018/07/19/453174/trumps-immigration-plan-imposes-radical-new-income-health-tests/>.

¹⁰ Hidetaka Hirota, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (Oxford University Press) (2017).

¹¹ Barbara L. Bailin, *The Influence of Anti-Semitism on United States Immigration Policy with Respect to German Jews During 1933-1939* (CUNY Academic Works) (2011), available at: http://academicworks.cuny.edu/cc_etds_theses/262.

¹² "Proposed Changes to 'Public Charge' Policies for Immigrants: Implications for Health Coverage," Henry J. Kaiser Family Foundation (September 24, 2018), available at: <https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage/>. *See also*, "Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid," Henry J. Kaiser Family Foundation (October 11, 2018), available at: <https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/>.

particularly affected. This rule may further erode non-citizens' trust in public institutions, even those that are not implicated by the rule change. This is a cause for concern for all city agencies and their community partners. The City Bar supports proposed Council Resolution T2019-4985, which will require the Department of Education to distribute educational materials to students and parents. The Council should also consider a public education campaign to get crucial information to students and parents.

Ultimately, one of the worst impacts will be the way in which this rule will tear families apart. Many of the persons who will be impacted by this rule are those seeking admission or adjustment to lawful permanent resident status through immediate family members: U.S. citizen spouses, parents, and children. One recent report estimates that this rule could result in the separation of at least 200,000 married couples annually as applications for lawful permanent residence by immediate family members are denied.¹³

New York City has over 3.3 million foreign-born residents¹⁴ and the new rule could negatively affect tens of thousands of New Yorkers.¹⁵ The changes to the public charge rule not only prioritize wealthy, able-bodied, English-speaking immigrants from wealthy nations above other immigrants, including those with sound financial sponsors, but will also force immigrant families to choose between receiving government assistance and improved immigration status. No family members should have to choose between life-sustaining benefits and possible family separation. The diversity of our immigrant community members is a strength of our City and an abiding strength of our nation. For these reasons, the City Bar supports the proposed Council Resolution T2019-4981, which urges the United States Congress to pass, and the President to sign, legislation to prohibit the enactment of the federal rule entitled "Inadmissibility on Public Charge Grounds." The new rule changes how noncitizen and citizen New Yorkers will utilize public benefits, including vital supports for nutrition and healthcare. Thus, the City Bar also supports proposed Council Resolutions T2019-4982, T2019-4983, and T2019-4984, which respectively, require resources to be made available to city employees to understand the new rule and guide individuals impacted by the changes reflected in the new public charge inadmissibility rule.

Immigration and Nationality Law Committee
Victoria F. Neilson, Chair

Social Welfare Law Committee
Katharine Deabler, Chair

¹³ Boundless, *Looming Immigration Directive Could Separate Nearly 200,000 Married Couples Each Year*, Sep. 24, 2018, <https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/>; see also, Jeanne Batalova, et. al, Migration Policy Institute, *Through the Back Door: Remaking the Immigration System via the Expected "Public-Charge" Rule*, Aug. 2018, <https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule>.

¹⁴ New York City Comptroller, "Our Immigrant Population Helps Power NYC Economy" (Jan. 11, 2017), available at: <https://comptroller.nyc.gov/reports/our-immigrant-population-helps-power-nyc-economy/>.

¹⁵ Corey Johnson and Carlos Menchaca, *Fight this immigration rule with all we've got: The 'public charge' regulation would do tremendous damage to New York*, THE NEW YORK DAILY NEWS, Oct. 11, 2018, <http://www.nydailynews.com/opinion/ny-oped-fight-this-immigration-rule-with-all-weve-got-20181011-story.html> (estimating that the public charge rule could lead to the denial of immigration benefits to 75,000 New Yorkers.)