

ADVISORY
**How Will ‘Public Charge’ Proposed Policy Changes
Impact Immigrant Survivors of Crime?**

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

The Department of Homeland Security (DHS) is planning to propose regulations that discard longstanding policy about the meaning and application of the “public charge” provisions of immigration law.¹ Under current policy, certain non-U.S. citizens who are seeking to enter the U.S. or to obtain lawful permanent resident (LPR) status must show, that based on all their circumstances, they are not likely *in the future* to rely on the government for subsistence. A person deemed likely to become a “public charge” can be denied admission to the U.S. or the ability to become a lawful permanent resident. In very rare circumstances, a person who has become a public charge can be deported.²

A leaked version of the Notice of Proposed Rulemaking (NPRM) was published in the media on February 8, 2018.³ Based on the leaked draft, as well as a review of recent changes to the U.S. State Department’s Foreign Affairs Manual (FAM)⁴, which provides instructions to U.S. consulates and embassies to make decisions about whether to allow foreign nationals to enter the U.S., it is likely that DHS will significantly expand the benefits that could be considered in deciding whether someone is likely to become a public charge. It is likely that applicants’ utilization of many more benefits related to health, housing and education, as well as those used by family members, including U.S. citizen children, could be considered in deciding whether to deny admission to the country or for lawful permanent residence.

¹ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AA22>.

² 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.

³ https://cdn.vox-cdn.com/uploads/chorus_asset/file/10188201/DRAFT_NPRM_public_charge.0.pdf

⁴ <https://fam.state.gov/FAM/09FAM/09FAM030208.html>. The changes to the FAM modify longstanding “public charge” policy by modifying how sponsors’ affidavits of support and the use of non-cash benefits by applicants, sponsors, and family members are to be considered. The changes to the FAM only affect those who go through consular processing in their home countries before entering the U.S., and do not affect the public charge determination for those already in the U.S. who apply to adjust their status to permanent residence.

Current Law

In 1999, the government clarified that using services such as health coverage or nutrition assistance would **not** be considered in determining whether someone is a public charge.⁵ In determining whether someone is a public charge, U.S. Citizenship and Immigration Services (CIS) takes into account a person's entire circumstances. Positive factors, such as the affidavit of support filed by a person's sponsor, can outweigh negative factors in determining whether the person is likely to rely on cash assistance, or long-term care in the future.

Existing policy allows officials to consider only two types of public benefits in making public charge determinations: cash 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. In making a public charge determination, the government must consider many factors, and the final decision must look at the "totality of circumstances" (past vs. current vs. future situation; age, family, health status, employment, etc.).

It is important to note that **some immigrants are not subject to the public charge rules.** These include refugees; asylees; survivors of trafficking and other serious crimes (those with T & U visas); "qualified" abused spouses or children and self-petitioners under the Violence Against Women Act; special immigrant juveniles; and certain people who have been paroled into the U.S.⁶ These exceptions are part of the immigration statute and cannot be changed by regulation or department policy.

Because some survivors of domestic violence or sexual assault may not fall into these specific immigration categories, it is important to determine whether the public charge exclusion applies in their situation. In addition, future changes may have an impact on family members of survivors who are attempting to regularize their immigration status.

Public charge is not a factor in naturalization applications. LPRs applying for citizenship do not undergo a public charge test.

Expected Changes to the Public Charge Exclusion

If the regulations are adopted as drafted in the Notice of Proposed Rulemaking (NPRM), DHS and consular officials could consider whether immigrants seeking admission or LPR status or any of their dependent family members, **including U.S. citizen children**, had received or even applied for, almost any public benefit or service. Benefits that could be considered in a public charge determination would include benefits, such as Medicaid,

⁵ <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet>

⁶ 8 U.S.C. 1182(a)(4).

CHIP, SNAP, WIC, Section 8 housing vouchers, the Low-Income Home Energy Assistance Program, Head Start, transportation vouchers, and financial assistance provided through the health insurance marketplaces established under the Affordable Care Act.

The NPRM also lays out negative and positive factors to be “heavily weighted” in determining public charge. Negative factors include receiving public benefits for a total of more than six months during the two years before seeking LPR status or admission to the United States. There are some public benefits that would be exempt from consideration of public charge, including benefits that are “earned”, i.e., connected to work or military service, loans, and emergency and disaster assistance, most likely, including short-term domestic violence emergency shelter, or food and water supplies following a natural disaster. Services that are available to communities rather than to specific individuals are also exempt from consideration under the NPRM, e.g., public schools, libraries, or police assistance.

The NPRM states that noncash benefits previously excluded from the public charge determination will be considered only if those benefits are **received after the effective date of the final rule**. In addition, the draft provides an option for certain individuals to post a bond or cash deposit, starting at \$10,000, against being considered a public charge, but this option is not available to anyone receiving a public benefit and it is unclear how it would be implemented.

What’s Next?

Before the NPRM can take effect, DHS will have to publish the proposed regulations for public comment in the Federal Register, and the public is provided an opportunity to comment on the proposed rules. DHS indicated that the NPRM will be published in July 2018, but it is possible the notice could be published earlier.

Policies such as those outlined in the draft proposed rule, are having,⁷ and will continue to have a significant detrimental impact on survivors of domestic violence and sexual assault by deterring immigrant families, including those with U.S.-citizen children, from seeking help when they need it. Safety net benefits can help victims recover and escape from abuse and play a significant role in preventing future harm.⁸

It is critical to educate policy makers and community leaders about the pivotal role that access to health care, housing, food assistance, and other safety net benefits have in helping victims overcome domestic violence and sexual assault. When the rule is published, it will be important for victim advocates to weigh in and share their insights on the impact of these proposals on survivors and their families. For updates on developments regarding

⁷ See, e.g., <https://www.nytimes.com/2017/06/26/health/undocumented-immigrants-health-care.html>

⁸ 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>

the public charge rules and to participate in a campaign supporting immigrant families, go to <http://bit.ly/PIFCampaign>.

For more on public charge and access to public assistance for immigrant families, go to www.nilc.org/wp-content/uploads/2015/12/public-charge-overview-2013-10-01.pdf; www.nilc.org/exec-orders-and-access-to-public-programs/.

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