

Trump's Predictably Cruel Attack on Lawful Immigrants Receiving Public Benefits



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The Department of Homeland Security (DHS) recently proposed regulatory changes that threaten to drastically alter the rules for which immigrants are considered “public charges” – a categorization that decides if a person is likely to become overly reliant on public benefit programs. If implemented, these new rules would bar legal immigrants from entering the country and stop some who are already here from applying for permanent residency. The proposed changes are a solution in search of a problem, as even immigrants who are in the country legally are already ineligible for most federally-funded public programs.

This memo explains how the “public charge” rules currently work, the ways in which immigrants are already restricted from accessing public support programs, and how the Trump Administration plans to upend this system for no reason other than to fan the political fever of its base.

1. What is a “Public Charge”?

When a person applies for a visa to the U.S., or applies to change his or her immigration status from a non-immigrant

visa to lawful permanent residency (a green card), he or she in most cases must undergo a public charge determination.¹ This assessment considers whether a person is likely to be overly reliant on government safety net programs, which is what the government calls a “public charge.” U.S. Citizenship and Immigration Services (USCIS) specifically defines a public charge as a person who “is likely to become primarily dependent on the government for subsistence, as demonstrated either by receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.”²

Officials weigh a number of factors in this process, and the decision is based on the totality of the circumstances. A single element alone is not determinative. They must consider a person’s age, health, family status, assets, resources, financial status, education, and skills.³ Additionally, the official is permitted to take into account whether or not a person has received a public cash benefit such as Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), or Medicaid (if used for long term care).⁴

Being deemed a public charge has significant consequences for an immigrant. A person who is applying for a visa from abroad is denied entry into the U.S. if they are found at risk of becoming a public charge.⁵ Immigrants who are already here on a temporary visa and are found to be a public charge are barred from applying to become a lawful permanent resident.⁶ And even after a person receives a green card, a public charge determination carries significant risks. Being found to be a public charge is grounds for deportation for a lawful permanent resident for up to five years from their arrival in the U.S.⁷

Who is Covered?

The public charge requirements apply to the vast majority of people entering the U.S., either on non-immigrant (temporary) visas or immigrant visas (like a green card). It also applies to those who have been in the U.S. for years and

are applying to adjust their status from a non-immigrant visa to an immigrant visa. In practice, this covers most legal immigrants in the country.

In contrast, the immigrant groups exempted from the public charge requirements encapsulate a minute proportion of the total immigrant population, and they are usually individuals who are escaping conflict or who have been victims of crimes. The exempted categories of immigrants include:

- Refugees;
- Asylum applicants;
- Amerasian Immigrants (children of U.S.-citizen fathers, but born in Cambodia, Korea, Laos, Thailand, or Vietnam from 1950 – 1982);
- Individuals granted relief under the Cuban Adjustment Act (CAA), Nicaraguan and Central American Relief Act (NACARA), or Haitian Refugee Immigration Fairness Act (HRIFA);
- T Visa (Victims of Human Trafficking) applicants and holders seeking green cards;
- U Visa (Victims of Crimes) applicants and holders seeking green cards;
- Temporary Protected Status (TPS) applicants; and,
- Some applicants under the LIFE Act Provisions (immigrants who were granted legal status in the 1980s).⁸

Overall these exempted immigrants make up an exceptionally small proportion of the total number of lawful immigrants to the U.S. For example, in 2016, the U.S. admitted 84,994 refugees, while 1,183,505 people became lawful permanent residents.⁹ And T and U Visas accounted for less than 1% of the non-immigrant visas issued in 2017.¹⁰

And there is good reason for exempting refugees, asylees, and TPS recipients from the public charge requirements. These groups are fleeing conflicts and natural disasters, and they are beginning to rebuild their lives. Exempting them is the moral and humanitarian thing to do. But as a general rule, if a person wants to immigrate to the U.S., he or she will almost certainly have to prove that he or she will not become a public charge.

2. What Public Support Programs Can Immigrants Access Now?

Broadly speaking, immigrants are already heavily restricted in their access to public assistance programs. Since the enactment of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, most immigrants have been prohibited from receiving support under the major federal safety net programs. Immigrants in the U.S. are typically ineligible for at least five years to receive:

- Medicaid;
- Temporary Assistance for Needy Families (TANF);
- Supplemental Security Income (SSI);
- Children's Health Insurance Program (CHIP); and,
- Supplement Nutrition Assistance Program (SNAP).¹¹

These programs make up a sizable portion of federal support for low-income people. Medicaid, SSI, CHIP, and SNAP alone cover 71% of federal means-tested benefits, and immigrants are usually prohibited from accessing them until they have been a green card holder for five years or naturalize as citizens. And even after an immigrant becomes eligible for these programs after years of living and paying taxes in the U.S., receiving many of them can still be factored into a public charge determination.

Are There Exceptions?

Similar to the public charge requirements, a small number of the total immigrant pool are exempted from the restrictions on these safety net programs. Exempted groups are typically refugees, asylees, and victims of human trafficking or certain other crimes.¹² Like the public charge determination exemptions, U.S. immigration policy makes exceptions for these groups on humanitarian grounds.

3. How Would the Trump Administration's Rule Change the System?

A new proposed DHS rule change would upend this existing system. While the alterations would not modify the categories of immigrants who are exempted from a public charge determination, they significantly increase the number of federal benefit programs that can be considered in a public charge determination, change the factors in public charge determinations, and substantially increase the minimum cost of public charge surety bonds.

Expanding the Programs that Count

If implemented, the new regulations would problematically increase the scope of federal programs that trigger a public charge determination. The proposed rule sets out two distinct categories of supports that would be considered: monetizable and non-monetizable ones. The monetizable category includes programs that are currently considered (like TANF and SSI), as well as newly added ones such as the Supplemental Nutritional Assistance Program (SNAP) and Section 8 Housing vouchers and rental assistance.¹³

The inclusion of non-monetizable supports marks a drastic departure from past practices, as the current system only focuses on a limited number of programs where a person receives a cash benefit from the government. Newly-added programs like premium and cost-sharing subsidies in Medicaid Part D or subsidized housing under the Housing Act have never been previously considered.¹⁴ Their inclusion

marks a clear effort to increase the number of potential or lawful immigrants who can be denied entry or a change in their immigration status.

It is also critical to emphasize that many of the programs added to the Trump Administration's public charge determination overlap with those which legal immigrants are already prohibited from receiving during their first five years in the United States. That means that a legal immigrant would almost certainly not have access to them without first paying into the program via taxes, but could then be punished for receiving them later once they had paid in.

Changing the Determination Process

Currently a public charge determination based on use of public safety net programs requires a person to be primarily dependent on government assistance, meaning they are 50 percent or more reliant on government programs for their subsistence.¹⁵ The rule change troublingly shifts the definition of a public charge to, "a person who receives one or more public benefits..."¹⁶ This effectively turns the public charge standard into a bright-line rule. If you receive a covered monetizable benefit in the amount of 15% of the federal poverty guidelines (\$1,821 as of 2018), your ability to adjust your immigration status is imperiled under these new rules, regardless of the circumstances.¹⁷ Additionally, use of non-monetizable supports in the previous three years will likely trigger a public charge finding if a person has a total of twelve months of benefit usage during that period, or nine months if the person used both categories.¹⁸ **Use of these programs will also be held against the individual even if the he or she is no longer using them at the time of the public charge test.**¹⁹

Moreover, the regulatory changes alter the weight of using a benefit in the overall public charge determination. Federal law requires DHS to consider "totality of the circumstances" in public charge determinations.²⁰ The Administration can't change that law with via regulations, but it can modify how severely it considers certain factors. The new rules list current

or past use of safety net programs in the above categories under a newly created list of “heavily weighted negative factors.” But problematically, it is unclear how exactly the government will weigh negative factors against ones they consider positive. Given that ambiguity, it is entirely possible that use of a single program could outweigh any countervailing positive factors in the public charge determination.

In addition to the changes in the balance of factors to consider, other newly specified factors create further pitfalls for immigrants. For example, while public charge determinations have always considered a person’s income level as part of a wholesale review, the new regulations outline specific bright-line thresholds: above 250% of the federal poverty guidelines for a heavily weighted positive and below 125% for a heavily weighted negative. Under this system, an immigrant in a family of four whose household income is under \$62,750 will thus trigger increased scrutiny in his or her public charge determination—whether or not they are using any government support programs. That means someone earning close to most recent median household income figures from 2017 (\$61,372) will be face intense examination, regardless of whether he or she ever received a public benefit at any point.

Similarly, other aspects within the public charge determination have been given specific standards which could be used by the Administration to reject certain immigrants. Family size is now a specific consideration for if a person is likely to become a public charge, whereas family status was just broadly considered before. And when considering if a person’s education and skills are sufficient to pass a public charge determination, the regulation directs officials to now explicitly examine proficiency in English.

Immigration officials have long had substantial discretion in their public charge findings, but everything in the proposed rules signals a draconian intent to move from a genuine inquiry about whether someone might be likely to use public

programs to a mechanism that will substantially restrict lawful immigration.

Supersizing Public Charge Bonds

The new rules would also allow DHS to collect a minimum \$10,000 surety bond from those found likely to become a public charge. The most likely case for use of such a bond would be if an individual could not show enough financial resources to prove he or she would not rely on safety net programs upon entry to the U.S. The bond would then be held as collateral by DHS until the individual leaves the U.S. permanently or becomes a citizen, though an immigrant may have it cancelled and returned after five years if he or she can show he or she did not become a public charge within that time period.

DHS currently has discretion to accept these types of bonds, but it does not impose a \$10,000 minimum. In fact, DHS currently reports that these types of bonds are rarely used. Instead, immigrants can receive an affidavit of support from a relative in the U.S., which guarantees that the signing person will support the immigrating individual if he or she becomes destitute. It is unclear how the new rule would interact with the current affidavit system, but increasing the minimum cost of the bonds is an undeniable signal that the Administration is intending to make it more difficult for legal immigrants to come here unless they have substantial personal wealth.

Conclusion

Since its first day in office, the Trump Administration has been systematically attempting to hamper immigration to the United States. And while it has meekly claimed it is not anti-legal immigration, the newly released public charge regulations flatly refute that. The Administration's changes explicitly target lawful immigrants who are already severely restricted in their access to federal programs. The intent of the rule changes is clear: to create further grounds under

which immigrants who are following all the rules can be denied a green card to the United States.

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ENDNOTES

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