

“Mixed Status” and “Public Charge” Rules: Attacks on Immigrants’ Access to Housing

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Under the Trump Administration, several agencies, including HUD, the Department of Agriculture (USDA), the Department of Homeland Security (DHS), and the Department of Justice (DOJ), introduced changes to current policy that would harm low-income immigrant families. Advocates mobilized to oppose these changes by holding meetings with the Office of Management and Budget (OMB), submitting comments on proposed rules, working with members of Congress on legislative actions, and supporting litigation (for more information, see “Introduction to the Federal Regulatory Process” in Chapter 2). These regulatory changes would not help expand resources for U.S. citizens and others with eligible immigration statuses but would have served to prevent immigrants from accessing vital health, nutrition, and housing assistance. These changes would have impacted U.S. citizens who are children and elderly due to burdensome recertification requirements and fear from family members of varied immigration status. The COVID-19 pandemic has magnified the threats facing low-income immigrant families, placing an additional burden on families subject to the harmful regulations that were enacted under the Trump Administration. While these rules have recently been vacated/withdrawn, they have had a significant negative impact on families eligible for those targeted federal programs. Research has confirmed that the lead-up to and the rollout of Trump-era rules created a pronounced and persistent “chilling effect,” with immigrants and their family members disenrolling from or failing to enroll in critical health, nutrition, housing, and economic supports. NLIHC opposes proposals that deter eligible immigrant families from seeking housing benefits or that force immigrant families currently receiving housing benefits to forego that assistance or face eviction.

CHANGES TO THE DEFINITION OF “PUBLIC CHARGE”

Background

The “public charge” test is a long-standing component of U.S. immigration policy used to determine if an individual is likely to depend on government benefits as their main source of support. If someone is deemed likely to become a “public charge,” the federal government can deny admission to the U.S. or deny an application for lawful permanent resident status (a “green card”). Permanent residents applying to become U.S. citizens are not subject to the public charge test. The current policy under *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* of 1999 defined public charge to mean a person “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.” When making public charge determinations, immigration officials look at the use of federal, state, or tribal cash assistance, such as Temporary Assistance for Needy Families (TANF) and Supplemental Security Income (SSI), in addition to the individual’s circumstances, including age, income, education and skills, health, family size, and support from friends or family in the U.S. All these factors are considered as part of the public charge test so that positive factors can help overcome negative factors.

The Trump Administration proposed expanding the list of benefits considered as part of the public charge test, which would make it easier for immigration officials to deny entry or permanent resident status to low-income immigrants because they use, or might in the future use vital health, nutrition, or housing assistance programs. Decisions about applications for admission or lawful permanent resident status inside the U.S.

are made by the U.S. Citizenship and Immigration Services (USCIS) within DHS; applications for admission or green cards outside the U.S. at embassies or consular offices abroad are reviewed by the Department of State. Each agency has its own regulations, but the Administration worked to align the policies.

Refugees, asylees, survivors of trafficking and other serious crimes, certain people who have been paroled into the U.S., self-petitioners under the “Violence Against Women Act (VAWA),” special immigrant juveniles, and several other categories of noncitizens are exempt from the public charge rule.

DHS and DOS Final Public Charge Rule on Inadmissibility

On August 14, 2019, DHS published the final version of its Rule on Inadmissibility on Public Charge Grounds (Public Charge Rule). The agency released its proposed rule in October 2018, which garnered more than 266,000 public comments during the 60-day comment period. The final rule was set to go into effect on October 15, 2019, but several courts blocked the rule from implementation until the lawsuits are settled. Two of the three national injunctions were later lifted after appeals by the Administration.

The final rule expands the public benefits included as part of the public charge test to include Housing Choice Vouchers, public housing, Section 8 Project-Based Rental Assistance (PBRA), the Supplemental Nutrition Assistance Program (SNAP), and most forms of Medicaid (with some exceptions) in addition to cash assistance programs. Receipt of any of these programs for a combined total of 12 months in a 36-month period will be a heavily weighed negative factor against applicants. The use of two benefits in the same month, such as receiving both SNAP and Medicaid, would count as two of the 12 months. Neither receipt of benefits by family members nor Medicaid for pregnant women or individuals under 21 would be considered. The use—or potential use based on other circumstances like education, income, and age—of any of these programs would be

considered a negative factor in the public charge test.

Tenants of Public Housing and Section 8 programs must already meet immigration status eligibility requirements established under Section 214 of the “Housing and Community Development Act.” Only some immigrants eligible for this federal housing assistance would also potentially be subject to the public charge test: parolees, immigrants granted withholding of removal, and those lawfully admitted pursuant to Section 141 of the Compacts of Free Association with the Marshall Islands, the Federated States of Micronesia, and Palau (COFA). Since family members’ use of benefits is not counted against an applicant, individuals subject to public charge living in a mixed-status immigrant household can continue living with family members receiving housing assistance without harming their own immigration case.

On October 24, 2019, DOS published an interim final rule to the *Federal Register* to align DOS’s public charge standards in cases decided at U.S. consulates and embassies abroad to those of DHS.

Both the DHS and DOS public charge rule went into effect on February 24, 2020. These rules have increased fear and confusion in immigrant communities, deterring eligible immigrant families from applying for needed housing, health, and medical assistance.

USCIS did not consider the testing, treatment, nor preventative care (including vaccines if a vaccine becomes available) related to COVID-19 are not part of a public charge inadmissibility determination. However, research has shown that low-income immigrant families are avoiding COVID-19 relief programs because of concerns brought by these public charge regulations and others proposed by the Trump Administration.

Legislative Action and Lawsuits

Following the publication of the final Public Charge Rule, state, county, and city governments joined nonprofits and individuals in suing the Trump Administration in a total of nine cases. Three courts ordered national injunctions,

preventing DHS from implementing the rule until a final decision is made. These orders were eventually lifted by the Supreme Court and USCIS began implementing the rule on February 24, 2020.

Representative Judy Chu (D-CA) and an additional 117 House Democrats sponsored the “No Federal Funds for Public Charge Act of 2019” (H.R. 3222), which would prevent DHS from using funds to implement the Public Charge Rule. A companion bill, the “Protect American Values Act” (S. 2482)—was also introduced by the Senate. The House Appropriations Committee adopted similar language included in an amendment offered by Representative David Price (D-NC) in the Fiscal Year 2020 bill.

Advocates across the United States have frequently engaged in litigation against the public charge rule with mixed results in 2020.

A court order temporarily blocked both the DHS and DOS public charge rules. The court order barred the implementation, application, and enforcement of the rule nationwide so long as there is a declared national emergency related to the COVID-19 pandemic. This order was eventually narrowed so that the DHS public charge rule was only subject to an injunction in states that are under the jurisdiction of the United States Courts of Appeals for the 2nd Circuit (Connecticut, New York, and Vermont). The injunction on the DHS rule was eventually lifted and USCIS has since reimposed the DHS Public Charge Rule.

The United States District Court for the Northern District of Illinois found that the DHS public charge rule violated the “Administrative Procedures Act” and granted the plaintiffs, Cook County of Illinois, and the Illinois Coalition for Immigrant and Refugee Rights a summary judgment which would have vacated the final rule. However, a day after, the United States Court of Appeals for the Seventh District stayed this decision, halting the vacatur order.

The United States Court of Appeals for the Ninth Circuit affirmed a decision made in the lower court that granted a preliminary injunction on

the DHS Public Charge rule. The ruling would have blocked the rule from being implemented in 18 plaintiff states and the District of Columbia. However, the Ninth Circuit granted DHS a delay on the effective date of the preliminary injunction until the U.S. Supreme Court determines if it will hear other Public Charge Rule challenges currently seeking review. The implementation of the Public Charge Rule resumed on January 22nd, 2021.

Supreme Court Dismisses Appeals, Public Charge Rule No Longer in Effect Nationwide

On March 9, 2021, the Supreme Court agreed to dismiss litigation on the previous Administration’s Public Charge Rule at the request of the Biden Administration. This allowed the Seventh Circuit to dismiss the appeal of the lower court’s final order, therefore the Northern District of Illinois’s final judgment entered on Nov 2, 2020, which vacated the Public Charge Rule nationwide is now in effect. DHS has announced in a statement that DHS and USCIS will follow the policy in the 1999 Interim Field Guidance, the policy that was in place before the 2019 rule. Under this policy, DHS will not consider a person’s receipt of Medicaid, public housing, or Supplemental Nutrition Assistance Program (SNAP) benefits as part of the public charge inadmissibility determination. This means it will be safe for immigrants and their families to access health, nutrition, and housing programs that they are eligible for without fear of being considered a “public charge”. USCIS has recently updated its website also stating that they will no longer be applying the August 2019 Public Charge Final Rule.

President Biden Executive Order on Public Charge Rule

President Joe Biden signed three Executive Orders (EO) on immigration reform on February 2, 2021 including an order on “[Inadmissibility on Public Charge Grounds](#),” which sets into motion changes to the previous Administration’s harmful Public Charge Rule. The Executive Order “[Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and](#)

Inclusion Efforts for New Americans” directs agencies to develop strategies that promote integration, inclusion, and citizenship.

In the EO regarding public charge, Section 4 (Immediate Review of Agency Actions on Public Charge Inadmissibility) orders the Secretary of State, Attorney General, Secretary of Homeland Security, and heads of other relevant agencies to review all agency actions related to the implementation of the Public Charge Rule and examine the effects of the previous Administration’s harmful changes to the rule. The EO further orders that they consult with the heads of relevant agencies, including the Secretary of Agriculture, Secretary of Health and Human Services, and Secretary of HUD in considering the effects and implications of public charge policies.

DOS, DOJ, and DHS were ordered to submit a report to the President within 60 days identifying appropriate agency actions to address concerns about the current public charge policy’s effect on the integrity of the nation’s immigration system and public health, along with recommended steps agencies can take to communicate current public charge policies and proposed changes to reduce fear and confusion among impacted communities.

Led by the National Immigration Law Center and the Center for Law and Social Policy, the Protecting Immigrant Families (PIF) Campaign of over 1,500 organizations nationwide has organized opposition to the Public Charge Rule and is working to ensure that immigrant communities know their rights. PIF has consistently kept advocates up to date with the latest research on the impacts of the Public Charge Rule, updates on litigation, fact sheets and “Know Your Rights!” messages for community members, and guidance and additional resources for immigration lawyers. PIF members have been involved in legal battles against the Public Charge Rules over the last four years and were leaders during the public comment campaign. Lawyers and advocates affiliated with PIF were instrumental in the aforementioned cases and

their contributions led to the Public Charge Rule finally being suspended.

On March 15, 2021, USCIS published the final rule, “Inadmissibility on Public Charge Grounds; Implementation of Vacatur,” to the *Federal Register*. This rule removed regulatory language from the harmful 2019 Public Charge Rule from the previous Administration. The rule also made it so that immigrant families applying for admission to the country, Lawful Permanent Resident, or for extension of nonimmigrant stay or change no longer need to provide information or evidence that is solely related to the 2019 Public Charge Rule. This includes information provided on Form I-944, which was also discontinued by this rule.

EXCLUSION OF MIXED-STATUS FAMILIES FROM FEDERALLY SUBSIDIZED HOUSING

Background

Residents of certain federally subsidized units are subject to immigration status restrictions under Section 214 of the “Housing and Community Development Act of 1980” (Section 214). HUD programs under Section 214 include public housing, Section 8 Housing Choice Vouchers, Section 8 PBRA, Section 235 Home Loan Program, Section 236 Rental Assistance Program, and the Rent Supplement Program. Section 214 also governs the Section 542 Rural Development Voucher program, Section 502 Guaranteed Rural Housing Loans, the Section 504 Home Repair program, and Section 521 Rental Assistance for the Section 515 and Section 514/516 programs operated by the U.S. Department of Agriculture’s Rural Housing Service (RHS).

Under Section 214, individuals with the following immigration status are eligible for federal housing assistance programs: U.S. citizens and nationals, lawful permanent residents, VAWA self-petitioners, asylees and refugees, parolees, persons granted withholding of removal, victims of trafficking, individuals residing in the U.S. under COFA and immigrants admitted for lawful temporary residence under the “Immigration Reform and Control Act of 1986.” Being ineligible

for housing assistance is not equivalent to being undocumented. Immigrants with student visas, Temporary Protected Status, U nonimmigrant status, and other statuses are also not eligible for federal housing subsidies.

Currently, families with at least one U.S. citizen or eligible immigrant are allowed to live in a HUD-subsidized housing unit. These families are referred to as “mixed-status” and receive prorated assistance so that the subsidy amount is decreased to only cover family members with eligible immigration status. Family members applying for assistance must have their immigration status verified; ineligible family members can choose not to contend eligibility, which allows the family to receive prorated assistance. Noncitizens 62 years old or older are only required to provide a signed declaration of eligible immigration status and a document proving their age.

RHS does not prorate assistance for mixed-status families. The agency attempted in 2004 to implement Section 214 for all residents of Sections 515 and 514/516 housing, but the proposed regulation failed to properly follow the law. The 2004 rule ignored the full list of eligible immigration statuses listed in Section 214, required all residents of Sections 515 and 514/516 units be citizens or legal permanent residents even if they were not receiving Rental Assistance, and did not allow for proration. After advocacy organizations threatened the agency with litigation, RHS indefinitely postponed the rule with respect to the Section 515 program but failed to widely publish this change. Given the inconsistent guidance, some owners enforce the requirements of the 2004 rule and others do not.

HUD Proposed Mixed-Status Families Rule

On May 10, 2019, HUD released a proposed rule that would further restrict eligibility for federal housing assistance based on immigration status by prohibiting mixed-status families from living in subsidized units subject to Section 214. The rule would force impacted households to choose between separating as a family to keep their subsidy or facing eviction and potentially

homelessness. According to HUD’s own analysis, the proposed rule would effectively evict 25,000 immigrant families from their homes, including 55,000 children eligible for housing assistance. In fact, two-thirds of people in mixed-status families are already U.S. citizens, the majority of them children.

Additionally, the proposed rule would eliminate the option to not contend eligibility in order to receive prorated assistance. Instead, the immigration status of all household members under the age of 62 would need to be verified through DHS’s Systematic Alien Verification for Entitlements (SAVE) system. Those aged 62 years or older would also be subject to new documentation requirements. The additional documentation requirements would create a substantial administrative burden for housing authorities and could force them to divert resources away from property maintenance and other services.

HUD claims that the new policy will address the public housing waiting list, but the agency’s own analysis found that the proposed rule would result in fewer families receiving housing assistance. Since mixed-status families do not receive housing assistance for ineligible family members, taking assistance away from these households would require HUD to provide full subsidies for additional, non-mixed-status families, costing the government at least \$193 million. HUD admits that the agency could be forced to reduce the quality and quantity of assisted housing to cover these additional costs.

In response to the proposed rule, the National Low Income Housing Coalition, the National Housing Law Project (NHLP), and other partners launched the Keep Families Together campaign to mobilize opposition. During the public comment period, individuals and organizations submitted over 30,450 comments; the previous time a HUD proposal garnered significant public attention resulted in just over 1,000 public comments. An NHLP analysis of these comments found that more than 95% of the comments opposed the rule.

The final rule was never published under the Trump Administration and will likely not be published under the Biden Administration. At the time of this writing, the proposed rule has yet to be rescinded.

Legislative Action

Representative Sylvia R. Garcia (D-TX) and 14 other House Democrats sponsored the “Keeping Families Together Act of 2019” (H.R. 2763), which would prohibit HUD from implementing the proposed rule. Senator Kirsten Gillibrand (D-NY) introduced a companion bill in the Senate (S. 1904), and similar language was included in the House version of the fiscal year 2020 and 2021 spending bill.

RHS Rule on Mixed-Status Families

The Office of Information and Regulatory Affairs at the Office of Management and Budget cleared RHS’s proposed rule “Implementation of the Multi-Family Housing U.S. Citizenship Requirements” and was included in its Spring Regulatory Agenda. The summary of the rule notes that the agency will align its immigration eligibility requirements with those at HUD. Given RHS’s inconsistent implementation of Section 214, the exact impact of a rule similar to HUD’s will be difficult to determine. The rule was never published to the *Federal Register* under the Trump Administration and was withdrawn by the current Administration.

FORECAST FOR 2022

The vacatur and withdrawal of these harmful rules were due in part to the efforts of advocates and litigation partners in recent years. This year already presents more opportunities to expand resources to immigrant families and combat the chilling effects from the previous Administration’s anti-immigrant regulations.

DHS published an advanced notice of proposed rulemaking (ANPRM) on the Public Charge Rule titled “Public Charge Ground of Inadmissibility” on August 23, 2021. DHS published this ANRPM to seek broad public feedback on the public charge ground as they are preparing a regulatory proposal that would be consistent with law; that will reflect empirical evidence to

the extent relevant and available; that carefully considers public comments; that will be clear, fair, and comprehensible for officers as well as for noncitizens and their families; that will lead to fair and consistent adjudications and thus avoid unequal treatment of similarly situated individuals; that will not otherwise unduly impose barriers for noncitizens seeking admission or adjustment of status in the United States. The ANPRM is the first of three steps in the larger reform process that would lead to a final rule and DHS also intends to ensure that any regulatory proposal does not unduly interfere with the receipt of public benefits by applicants and their families, particularly in light of the COVID-19 pandemic and the resulting long-term public health and economic impacts in the United States. DHS requested information on the following topics:

- Purpose and definition of public charge.
- Prospective nature of the Public Charge Inadmissibility Determination.
- Statutory factors.
- Affidavit of support under section 213A of the INA.
- Other factors to consider.
- Public benefits considered.
- Previous rulemaking efforts.
- Bond and bond procedures.
- Specific questions for state, territorial, local, and tribal benefit granting agencies and nonprofit organizations.

In response to the ANPRM, PIF submitted a comment letter that urged DHS to implement common-sense reforms, including:

- Clearly and narrowly defining “public charge,”
- Affirm that qualifying immigrant families can use almost all safety net programs without triggering a public charge determination, and
- Direct immigration officers to consider affidavits of support as sufficient to overcome statutory considerations like age, disability, and income.

This comment letter was also signed by 630+ organizations from 46 states and the District of Columbia, representing diverse sectors ranging from faith to nutrition to housing and reproductive health groups. The Keep Families Together Campaign also created a comment template and submitted comments urging the Administration and DHS to ensure that critical housing programs remain not under consideration for Public Charge purposes as written in the 1999 field guidance and that communication of this policy be increased so that immigrant families know that they have access to these benefits without fear of retaliation.

DOS has also issued an interim final rule which reopened their public comment period titled “Visas: Ineligibility Based on Public Charge Grounds”. PIF and the Keep Families Together Campaign will provide resources to help advocates reply during this comment period as well.

Representatives Pramila Jayapal (D-WA) and Tony Cárdenas (D-CA) introduced on September 10 H.R. 5227, “Lifting Immigrant Families Through Benefits Access Restoration Act of 2021,” or the “LIFT the BAR Act.” The legislation would restore access to public programs for lawfully present immigrants by removing the five-year waiting period and other restrictions to accessing federal public benefits. Affected programs would include Medicaid, CHIP, SNAP, TANF, SSI, certain housing assistance, and other important services. NLIHC supports this legislation. The bill would also align Section 214 of the “Housing and Community Development Act of 1980” with the changes made in the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996” would expand and make consistent eligibility requirements for recipients of Deferred Action for Childhood Arrivals (DACA), immigrants who are granted Special Immigrant Status (SIJS), and any other non-citizens federally authorized to be present in the United States. Such a change would allow access to federal housing programs such as public housing, Housing Choice Vouchers, Section 8 project-based rental assistance, and some rural housing programs.

HOW ADVOCATES CAN TAKE ACTION

Advocates should speak to lawmakers with the message that:

- Blaming struggling families will not fix the long waitlist for housing assistance or the affordable housing crisis. Congress should instead make significant new investments in affordable housing resources to ensure that every family, regardless of immigration status, who is eligible for HUD assistance has access to one of the most basic of human rights: a safe, accessible, and affordable place to call home.
- The previous Administration rules have directly impacted thousands of immigrant families’ access to housing and have had a chilling effect on children’s ability to receive essential health, food, and housing federal assistance. This country is already facing an affordable housing crisis and limiting access for more people will only exacerbate the problem.
- Human needs do not change based on immigration status. It is simply impractical, dangerous, and inhumane to only allow citizens to access critical, lifesaving benefits such as housing assistance. Members of Congress should work to restrict or halt the implementation of these harmful rules.
- Ensuring mixed-status families and immigrant families have access to affordable, secure, and safe housing will allow these families to safely isolate and prevent contracting the coronavirus.

Urge Legislators to:

- Work to address the needs of low-income immigrant families.
- Work to pass essential immigration reform legislation such as the “LIFT the Bar Act” of 2021.

Urge DHS/DOS/HUD/RHS to:

- Align HUD and RHS policy when addressing mixed-status families to limit confusion.

- Issue clear guidance and resources to community members on the policy changes to limit the chilling effect these rules have had on families pursuing public benefits.

National Housing Law Project: <https://www.nhlp.org/initiatives/immigrant-rights/>.

Protecting Immigrant Families campaign: <https://protectingimmigrantfamilies.org/>.

Urge the Biden Administration to:

- Adequately address the needs of low-income immigrant families and undue the alterations made to immigration policy by the Trump Administration.
- Fully implement the Executive Order “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans” and work to address recent harm to immigrant families.

FOR MORE INFORMATION

DHS’s (formerly Immigration and Naturalization Service) 1999 “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds” final rule: <http://bit.ly/3vizXYy>

DHS’s “Inadmissibility on Public Charge Ground” Final Rule: <https://bit.ly/38zU9K6>.

DOS’s “Ineligibility Based on Public Charge Grounds” Interim Final Rule: <https://bit.ly/2IsP3HE>.

DHS’s “Public Charge Ground of Inadmissibility” ANPRM: <https://bit.ly/3DrBcrz>.

DOS’s “Visas: Ineligibility Based on Public Charge Grounds”: <https://bit.ly/3lKknSt>.

HUD’s “Housing and Community Development Act of 1980: Verification of Eligible Status” Proposed Rule: <https://bit.ly/2YGfu07>.

A summary of USDA’s proposal, “Implementation of the Multi-Family Housing Citizenship Requirements,” was in the 2020 Spring Regulatory Agenda at: <https://bit.ly/3jZ2FbC>.

Executive Order “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans”: <http://bit.ly/3rkGdfW>.

Keep Families Together campaign: <https://www.keep-families-together.org/>.