

**Preliminary Summary of the Department of Homeland Security's
Final Public Charge Rule
Adding Public Housing, Vouchers, and Project-Based Rental Assistance**

National Low Income Housing Coalition

August 14, 2019

The U.S. Department of Homeland Security (DHS) published its [final “public charge” rule](#) in the *Federal Register* on August 14. Public housing, Housing Choice Vouchers, and Section 8 Project-Based Rental Assistance provided at private, multifamily housing are now on the list of “public benefits” that could lead someone to be considered a potential “public charge,” someone who is now defined as not self-sufficient and therefore who could be denied a green card or visa. A proposed rule was issued in October 10, 2018 (see *Memo*, [10/1/18](#) and [10/9/18](#)). DHS received 266,077 comments on the proposed rule, the vast majority of which opposed the rule.

Noncitizens seeking admission to the U.S. and those applying for lawful permanent resident status (green card) have long been subject to a review to determine whether they are, or might become, a public charge. A 1999 guideline defined “public charge” as someone who might become “primarily dependent on the government.” A 1999 guideline defined “public charge” as someone who might become “primarily dependent on the government.”

The new rule will make it far more difficult for people to convince officials at the U.S. Citizenship and Immigration Service (USCIS) that they are not and will not become a public charge. The rule is one more brick in the Trump administration’s invisible wall designed to harm immigrants. Another brick is HUD’s proposed “mixed-status” rule (see *Memo*, [5/13](#)).

As Diane Yentel, NLIHC president and CEO wrote last week (see *Memo*, [8/14](#)), “For the first time ever, an applicant for a visa or green card would be denied if they need support for safe and affordable housing, food assistance, or health care. And as she wrote on August 14 in a [joint statement](#) with other organizations, “The administration designed this latest policy to do the greatest harm to low-income immigrants and their children by severely restricting their ability to access critical and life-saving benefits including food, health, and housing assistance. As low-income immigrant families lose access to needed housing assistance, they will face increased risk of eviction and homelessness, with tremendous personal and societal costs from poorer health, lowered educational attainment, and lessened lifetime earnings that will result.”

The rule does not go into effect until October 15. Ironically, the official 60-day period for the rule to go into effect is October 14, but that is a federal holiday – “Columbus” Day, which recognizes the arrival of the first immigrants to what would later be called the Americas.

Advocates are urged to ask their member of Congress to co-sponsor [H.R. 3222](#), the “No Federal Funds for Public Charge Act of 2019.” The bill was introduced by Representative Judy Chu (D-CA) and currently has 61 co-sponsors. The bill would prevent federal funds to be used to carry out DHS’s public charge rule. Thank your member of Congress if they have already signed on as a co-sponsor. The fiscal year 2020 spending bill for DHS also includes an amendment that would block the implementation of the rule.

The [Protecting Immigrant Families \(PIF\)](#) campaign has a variety of materials, including messaging to fight fear with facts. Advocates are encouraged to use the PIF resources and check their website periodically as new materials will continue to be added in the days ahead.

Plans are underway to stall or stop implementation of the rule through the courts. The City of San Francisco and County of Santa Clara already filed suit on August 13 (an advance version of the final rule was posted on the *Federal Register's* Public Inspection Page on August 12.)

Housing Assistance, SNAP, and Medicaid Added to List of “Public Benefits”

The final rule adds to the list of previous “public benefits,” public housing, Housing Choice Vouchers, and Section 8 Project-Based Rental Assistance (PBRA) which is used to subsidize private, multifamily housing. Also added by the new rule is the Supplemental Nutrition Assistance Program (SNAP), formerly known as food stamps, and most forms of Medicaid. New in this rule, Medicaid benefits received by someone under the age of 21 are not treated as a public benefit, nor are Medicaid benefits for a woman who is pregnant or for 60 days after giving birth. [§212.21(b), page 805] In the preamble to the rule, DHS states that the housing and SNAP programs are added “to better ensure that aliens...are self-sufficient.”

[Page numbers here refer to the [large format version of the rule](#).]

The preamble to the final rule states that other housing programs are not “public benefits,” specifically referencing the Low-Income Housing Tax Credit (LIHTC) and Rural Development Section 515 and Section 514/516 programs. [page 320] Also, because certain programs do not cost much, they are not included in the list of public benefits: Section 202 for elderly, Section 811 for people with disabilities, Housing Opportunities for Persons with AIDs (HOPWA), Family Self-Sufficiency (FSS), and Rural Development Rental Assistance. [pages 322, 323, and 324] Because other programs such as HOME tenant-based rental assistance or state and local rental assistance are not specifically listed in the rule, immigration experts interpret that to mean those programs could not be considered public benefits.

Housing programs that provide mortgage assistance or credits will not be considered in the public charge inadmissibility determination. [page 318] Nor does DHS consider the Housing Choice Voucher Homeownership program a public benefit. [page 322]

Under the *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* of 1999, public benefits only included Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI) primarily for people with disabilities, and state or local cash assistance such as “General Assistance.” That *Guidance* interpreted “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.”

None of the public benefits listed in the text of the rule will be considered if someone is enlisted in or is serving in active duty or in the Ready Reserve of the Armed Forces, or is the spouse or child of one of these individuals. [§212.21(b)(7), page 806] Also exempt are several categories of children of citizens, such as a child who is adopted. [§212.21(b)(9), page 807]

In response to many comments that temporary access to the public services help people transition to better conditions, DHS replies that it “does not believe that Congress intended for DHS to administer [the Immigration and Nationalization Act (INA)] in a manner that fails to account for alien’s receipt of food, medical, and housing benefits so as to help aliens *become* self-sufficient.” (emphasis in original). “DHS believes that it will ultimately strengthen public safety, health, and nutrition through this rule by denying admission or adjustment of status to aliens who are not likely to be self-sufficient.” [page 88]

Definition of “Public Charge” [§212.21(a), page 805]

The 1999 *Guidance* defined “public charge” to mean someone who is “primarily dependent on the government for subsistence.” The new rule redefines “public charge” to mean “an alien who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period.” The rule explains that, for instance, receipt of two benefits [such as a voucher and SNAP] in one month counts as two of the 12 months. DHS refers to this as the public charge “threshold.”

Whether someone is “likely at any time” to become a public charge, USCIS has to consider “the totality of the alien’s circumstances by weighing all factors relevant to whether the alien is more likely than not at any time in the future to receive one or more public benefits for more than 12 months in the aggregate within any 36-month period.”

The preamble states that although reaching the threshold “will not necessarily be dispositive in the inadmissibility determination...[it] will be considered a heavily weighted negative factor in the totality of the alien’s circumstances.” [page 247]

Applying for a public benefit is not the same as actually receiving a public benefit, “although it may suggest a likelihood of future receipt.” [§212.22(a), page 810] DHS states in the preamble that consideration will be given to past receipt of public benefit below the threshold when weighing the totality of the circumstances. This would not apply to receipt of housing assistance, SNAP, or Medicaid before October 15, but would apply to receipt of TANF and other cash assistance before October 15. After October 15 all public benefits would be considered. [page 23]

Defending the threshold, “DHS believes that receipt of these public benefits alone for more than 12 months in the aggregate within any 36-month period suggests a lack of self-sufficiency...” [pages 91 and 252] DHS also “believes that it is appropriate to aggregate the 12 months, inasmuch as the aggregation ensures that aliens who receive more than one public benefit (which may be more indicative of a lack of self-sufficiency) reach the 12-month limit faster.” [page 259]

Factors that Might Make Someone “Inadmissible” [§212.22(b), page 811]

The Immigration and Nationality Act (INA) indicates that in determining whether someone is “inadmissible,” an administering agency must consider a person’s age, health, family status, assets, resources and financial status, and education and skills. To that end, the new rule elaborates on those five factors for assessing the totality of someone’s circumstances. As an example, the preamble to the rule considers a person’s age younger than 18 or older than 61 to be a negative factor.

The final rule elaborates on the seven minimum factors, including:

1. **Age.** Age is an indication of someone’s ability to work. Therefore, a factor is whether a person’s age is between 18 and the minimum early retirement age set by Social Security.
2. **Health.** Has the person been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the person’s ability to provide for themselves or attend school or work?
3. **Family status.** Will household size make it more likely that someone will become a public charge?
4. **Assets, resources, and financial status.** The rule would assess whether:
 - a. Household income is less than 125% or at least 125% of the federal poverty guide (125% of the federal poverty guide in 2019 is \$32,188 for a four-person family);
 - b. Resources are adequate to cover foreseeable medical costs;
 - c. Financial liabilities exist; and
 - d. The person has applied for, been certified to receive, or has received public benefits.
5. **Education and skills.** Does the person have adequate education and skills to obtain and keep employment with an income sufficient to avoid being more likely than not to become a public charge? The rule would assess:
 - a. The person’s employment history;
 - b. Whether the person has a high school diploma or equivalent, or has a higher degree;
 - c. Whether the person has occupational skills, certifications, or licenses; and,
 - d. Whether the person is proficient in English, or is proficient in other languages in addition to English.
 - e. Whether the person is not employed or not employed full time because they are a primary caregiver.

DHS will consider as a negative factor assistance received before the new rule goes into effect, including cash assistance from TANF, SSI, or state or local General Assistance, or medical assistance such as Medicaid that supports the person with long-term care. [§212.22(d), page 820]

Heavily Weighted Factors [§212.22(c), page 818]

In addition, the rule adds a list of four negative and three positive “heavily weighted factors.” One example of a heavily weighted negative factor is an inability to demonstrate current employment, a recent employment history, or a reasonable prospect for future employment. However, the preamble indicates that a single heavily weighed negative (or positive) factor will not on its own create a presumption that someone is likely to become a public charge.

The final rule describes four **heavily weighted negative factors** that will indicate that someone is likely at any time in the future to become a public charge. See next page.

The final rule describes four **heavily weighted negative factors** that will indicate that someone is likely at any time in the future to become a public charge. Three of those are:

1. The person is not a full-time student and cannot demonstrate current employment, recent employment history, or a reasonable prospect of future employment.
2. The person has received, or been certified or approved to receive, one or more public benefits for more than 12 months in the aggregate within any 36-month period.
3. The person:
 - a. Has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the person’s ability to provide for themselves, attend school, or work; and
 - b. Is uninsured and does not have the prospect of obtaining private health insurance or the resources to pay for foreseeable medical costs.

There are three **heavily weighted positive factors** that will indicate that someone is not likely to become a public charge:

1. The person has income, assets, or resources worth at least 250% of the federal poverty guideline (250% of the federal poverty guide in 2019 is \$64,375 for a four-person family);
2. The person is employed with an income of at least 250% of the federal poverty guideline; or
3. The person has private health insurance, and this insurance does not include premium tax credits under the Patient Protection and Affordable Care Act.

People Exempt from the Public Charge Rule [§212.23, page 820]

There is a long list of categories of people for whom the public charge rule does not apply. The primary categories are refugees, people seeking asylum, and Violence Against Women Act (VAWA) self-petitioners. The many other categories refer to obscure statutes.

DHS Admits Potential Adverse Consequences

DHS issued a [Regulatory Impact Analysis](#) (RIA), but buried it amidst 85 other “supporting documents.” Interestingly, DHS did not directly use data provided by HUD to estimate the number of households that might stop using or might not apply for federal housing assistance; DHS used data from the Center on Budget and Policy Priorities. On page 109 of the RIA DHS admits that a number of consequences could occur as people exit public benefit programs or decide not to apply for assistance. The list of “non-monetized” potential consequences include:

- Worse health outcomes, especially for pregnant and breastfeeding women, infants, or children;
- Increased use of emergency rooms as a primary method of health care due to delayed treatment;
- Increased prevalence of communicable diseases;
- Increased rates of poverty and housing instability; and
- Reduced productivity and educational attainment.

Select Observations from the Preamble

Housing Related Observations.

In response to a variety of objections to including the housing programs, DHS replies, “DHS has determined that considering housing programs such as Section 8 Vouchers, Section 8 Rental Assistance, and public housing in the rule is important in ensuring that aliens are self-sufficient and rely on their own capabilities and the resources of their families, their sponsors, and private organizations. These programs have high expenditure and relate to the basic living need of housing, and therefore the receipt of such housing related public benefit suggests a lack of self-sufficiency.” [page 317]

Commenters wrote that many people receiving housing assistance are working. In reply, “DHS recognizes that people receiving public benefit may nonetheless be working, but as they are seeking public benefits, such aliens are not self-sufficient.” [page 321]

In response to comments that the rule is contrary to the antidiscrimination provisions of the Fair Housing Act, DHS replies that the Fair Housing Act “prohibits discrimination by lenders, property sellers, and others covered by that law.” DHS’s curious defense is that the public charge rule merely requires someone to establish that they are admissible. [page 322]

Children and People with Disabilities

In response to the many potential adverse consequences on children, DHS states that “this rule is aimed at better ensuring that aliens who are subject to the public charge ground of inadmissibility are self-sufficient.” DHS adds that “Congress did not exclude children from the public charge ground of inadmissibility unless the child is seeking status as expressly exempted...” [page 297]

In response to the many potential adverse impacts on people with disabilities, DHS indicates that it “understands that individuals with disabilities receive public benefits that are listed in the rule. Congress did not specifically provide for a public charge exemption for individuals with disabilities and in fact included health as a mandatory factor in the public charge inadmissibility consideration. Therefore, DHS will retain the designation of Medicaid and SNAP as public benefits, notwithstanding the potentially outsized impact of such designation on individuals with disabilities.” [pages 284 and 285]

Discriminatory Effects

Other commenters noted the negative impact the rule would have, including in the receipt of housing assistance, for infants, women and single mothers, large low-income families, Latinos, people of color, Asian American/Pacific Island people, the LGBTQ community, elderly, and disabled people. [page 288] DHS replied that it “recognizes that some people currently in the United States do in fact depend on the government to meet their needs, and that this rule is likely to result in negative consequences for some of those people and people like them. Such negative consequences are, to some extent an inevitable consequence of more rigorous application of a statutory ground of inadmissibility that is targeted towards people who receive public benefits to meet their basic needs.” [page 289]

Although not raised in the context of the housing programs specifically, commenters asserted that the rule would have a discriminatory effect on many of the protected classes under civil rights law, such as race, national origin, age, disability, and gender. [page 67] DHS acknowledges that the rule “may result in negative outcomes for certain groups,” but that the rule is intended to better ensure that aliens subject to this rule are self-sufficient.” [page 68] DHS adds, “to the extent that this rule specifically or disproportionately affects those of a particular age or those with lower incomes, less education, limited English proficiency, or poor health, DHS notes that Congress requires DHS to consider among other factors, an applicant’s age, assets, resources, financial status, education, and skills as part of the public charge inadmissibility determination.” [page 69]

The official *Federal Register* version of the public charge rule is at: <https://bit.ly/2yY3rzd>

An easier to read advance version of the public charge rule, the source of page references in this article, is at: <https://bit.ly/2N1Nxfg>

The DHS Regulatory Impact Analysis is at: <https://bit.ly/2KBg2Pf>

H.R. 3222, “No Federal Funds for Public Charge Act of 2019,” is at: <https://bit.ly/31EJp96>

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

Slides from a PIF webinar are at: <https://bit.ly/2KOMVXG> and a recording of that webinar are at: <https://bit.ly/2MilqJ8>

The joint statement made by NLIHC, the Center on Law and Social Policy, Center on Budget and Policy Priorities, Housing California, National Housing Law Project, the National Immigration Law Center, and Non-Profit Housing Association of Northern California is at: <https://bit.ly/33FIZRA>