



## Proposed Federal Rule on Immigrants and Public Charge

### Overview

In late September 2018, the U.S. Department of Homeland Security released a proposed rule to change the factors affecting “public charge” determinations for immigrants to the U.S. The proposed rule represents a dramatic shift in immigration policy and could prevent many low-income immigrants from reuniting with their families in the U.S.

Under federal law, an individual seeking admission to the U.S., or seeking to become a permanent resident (obtain a green card), is “inadmissible” if the individual at the time of application for admission or adjustment of status, is found to be likely at any time to become a “public charge” which includes, among other factors, whether they are likely to rely on public benefits for subsistence in the U.S.

Under the proposed rule, as outlined below, immigration officials must consider specified public health and social services in a public charge determination. Importantly, based on a preliminary review of the proposed rule, the rule does not include as relevant public benefits the Medi-Cal services undocumented immigrants are currently eligible to receive, including federally supported emergency Medi-Cal and state-funded comprehensive Medi-Cal coverage for undocumented children.

This issue brief outlines existing federal law related to public charge and health care programs, the proposed changes, and the specific impacts on immigrant access to health care programs in California.

### Current Federal Law on Public Charge and Public Benefits

The Immigration and Nationality Act (INA) identifies groups of immigrants that are ineligible to enter the U.S. or obtain lawful permanent resident (LPR) status if they are determined to be a “public charge.”<sup>1</sup> The INA outlines the minimum factors immigration officials must consider to determine whether an immigrant is likely to become a public charge. As part of a public charge assessment, an immigration officer must consider an applicant’s

- Age;
- Health;
- Family Status;
- Assets, resources, and financial status; and
- Education and skills.

Existing Immigration and Naturalization Service (INS) rules require immigration officers to examine all the applicant’s circumstances and state that the existence or the absence of any one factor cannot result in a finding that an individual is likely to become a public charge. For example, an immigration official could not deny lawful entry to a low-income immigrant as a public charge based solely on income. INS would also need to review the immigrant’s history of employment, resources, education, etc. The existing rule requires the “totality of the individual’s circumstances” to be considered in a prospective evaluation.<sup>2</sup>

***Current Policy on Public Charge and Public Benefits.*** In 1999, INS issued interim *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*. This guidance sought to alleviate growing public confusion over the meaning of the term “public charge” and its relationship to the receipt of federal, state, or local public benefits. Under the 1999 policy guidance, INS defined public charge to mean “the likelihood of a foreign national becoming primarily dependent on the government for subsistence.” The guidance listed two public benefits as evidence of an immigrant’s likelihood of becoming a public charge:

1. Receipt of public cash assistance for income maintenance; or
2. Institutionalization for long-term care at government expense.”<sup>3</sup>

Under the guidance, immigration officers are required to consider past use of these two public benefits, and only these two public benefits, in a public charge determination. Immigration officials must also consider all other circumstances, not just the use of these two public benefits, in determining whether an individual may become a public charge.

## **Immigrants Excluded from Public Charge Determinations**

Under existing law, several groups of immigrants are not subject to public charge determinations, including

- Naturalized citizens,
- Refugees,
- Asylees,
- Survivors of trafficking or domestic violence, and
- Most LPRs.

## **Summary of the Proposed Rule**

The proposed rule adds to the list of public health care programs and benefits that must be considered in a public charge determination.

The proposed rule specifies that cash aid and noncash medical care, housing, and food benefit programs must be considered along with other factors in a public charge determination, including:

- Receipt of public cash assistance for income maintenance;
- Institutionalization for long-term care at government expense;
- Supplemental Nutrition Assistance Program;
- Section 8 Project-Based Rental Assistance;
- *Non-emergency Medicaid; and*
- *Medicare Part D Premium and Cost Sharing Subsidies.*

Under the proposed rule, an immigrant’s reliance on the listed public benefits must meet specific thresholds to impact a public charge determination. For example, an immigrant needs to receive non-emergency Medicaid benefits for more than 12 months in the aggregate within a 36-month period for this to be relevant to a public charge determination.

The proposed rule specifies that the premium and cost sharing subsidies for Medicare Part D (the optional prescription drug benefit in Medicare) are to be included in public charge determinations.

Under Part D, eligible beneficiaries who have limited income can qualify for a related federal program to help pay Medicare Part D premiums and cost sharing.

**Public Health Programs Excluded in a Public Charge Determination.** The proposed rule *excludes* the following benefits from a public charge determination:

- Direct receipt of public benefits by the child of an immigrant applicant;
- Emergency Medicaid services;
- Services funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA), a program providing free and appropriate public education to eligible children with disabilities;
- Medicaid benefits provided to foreign-born children of U.S. parents in the adoption process; and
- Any non-cash benefit (or medical program) that is not listed in the proposed rule.

The proposed rule excludes from a public charge determination public benefits excluded under the 1999 policy guidance, if received before the effective date of the final rule.

**Types of Immigrants Affected by the Proposed Rule.** The proposed rule primarily impacts undocumented immigrants applying for lawful residency status through the sponsorship of family members. These immigrants are subject to public charge determinations under existing law. In addition, LPRs that leave the U.S. for more than six months and reenter the U.S. may be subject to a public charge determination.

Under the proposed rule, additional groups would be subject to public charge determinations for the first time, including certain non-immigrants seeking to extend their current period of authorized stay in the U.S. or those seeking to transition to another non-immigrant status. For example, an individual authorized to study in the U.S. and then return to their country of origin, if their studies take longer than anticipated, this individual may seek an extension of their stay and would be subject to a public charge determination under the proposed rule.

**Impacts of the Proposed Rule.** Immigrants subject to public charge determinations are generally ineligible to receive the health benefits that would qualify them as a public charge. Most undocumented immigrants are ineligible for federally-funded Medicaid services; except for emergency Medicaid services. Therefore, it is unlikely the proposed inclusion of non-emergency Medicaid in public charge assessments will have a significant impact on immigrants seeking to legalize their status. Similarly, unauthorized immigrants subject to public charge determinations are not eligible for Medicare Part D.

The proposed rule may apply to LPRs that leave the U.S. for more than six months and then reenter the U.S. For these immigrants, prior enrollment in non-emergency Medicaid and use of low-income subsidy programs in Medicare Part D may be included in a public charge determination. The National Immigration Law Center is reviewing the impact of the proposed rule on the few immigrant categories subject to public charge determinations and who are eligible for federally funded, non-emergency Medicaid, Medicare Part D low-income subsidies, and other impacted programs.

**State Funded Medi-Cal Programs.** Currently, California provides comprehensive Medi-Cal coverage to low-income undocumented children up to age 19, using primarily state-only funding, offset in part by federal funds used to cover emergency Medi-Cal services for undocumented children. The proposed rule does not allow for the inclusion of Medi-Cal coverage for undocumented children in a public charge

determination for either the parent or the child. First, the proposed rule states that immigration officials will not consider direct receipt of public benefits by the child of an applicant as a factor in a public charge determination. Therefore, Medi-Cal coverage for undocumented, lawfully residing, or U.S. citizen children will not be considered in a parent's public charge determination. Second, the proposed rule states that the term "public charge" would only include receipt of any non-cash benefit specifically listed in the proposed rule. State-funded medical programs are not listed in the proposed rule; therefore, these programs will not be included in a public charge determination.

Under the proposed rule, if California were to expand Medi-Cal using state-only funds to undocumented adults, as proposed in the 2017-18 legislative session, the receipt of Medi-Cal by undocumented adults would not be included in a public charge determination.

***Health Status and Private Health Insurance Programs.*** While health is a factor in public charge determinations under existing law, the proposed rule changes how this factor is considered. Under the proposed rule, immigration officials will consider in a public charge determination any medical condition, including a disability, that effects an immigrant's ability to attend school or work, or otherwise care for him or herself. The proposed rule also adds an evaluation of an immigrant's financial status as part of the evaluation of health and requires officials to evaluate the potential costs of treatment for the medical condition and whether an applicant has the resources to cover the anticipated future medical needs.

As part of an assessment of assets, resources, and financial status, the proposed rule includes, for the first time, private health insurance or the financial resources to pay for medical costs as a heavily weighted positive factor in a public charge determination. Conversely, the lack of private health insurance or the lack of financial resources to pay for medical costs would be a negative factor under the proposed rule.

## **Next Steps in the Rulemaking Process**

After the proposed rule is officially published in the Federal Register, which according to the Department of Homeland Security (DHS) will occur in the next several weeks, the public will have 60 days to provide comments on any part of the proposed rule.

In the rule, the Department of Homeland Security (DHS) has specifically asked the public to comment on the following:

- Mechanisms to administer public charge determinations for immigrant children who receive benefits while under the age of majority. DHS specifically requests comments on whether, and to what extent, past or current receipt of benefits should be weighed in a child's public charge determination, as a potential indicator of likely future receipt of public benefits.
- Whether the Children's Health Insurance Program should be added to the list of non-cash public benefits in the determination of public charge.
- Whether the proposed 12-month threshold applicable to non-cash public benefits, including Medicaid, is an appropriate threshold or whether a different threshold should be assigned if an immigrant receives two or more non-cash public benefits for less than the proposed 12-month threshold.

- Whether receipt of public benefits, other than those included in this rule should be included in a public charge assessment.
- Who should be counted as members of a household, and whose income, assets, and resources should be reviewed in a public charge assessment.

DHS is required to respond to all substantive public comments prior to finalizing the rule.

Several organizations in California, including the National Immigration Law Center, are reviewing the proposed rule and preparing comments. ITUP will add links to resources to this publication as they become available.

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<sup>1</sup> Section 212 of the Immigrant and Nationality Act (INA), Title 8 United States Code Section (U.S.C.) 1182.

<sup>2</sup> Title 8 Code of Federal Regulations (CFR) 245a.3

<sup>3</sup> 64 Federal Register 28689, (May 26, 1999)

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## About ITUP

Insure the Uninsured Project (ITUP) is a Sacramento-based nonprofit health policy institute that for more than two decades has provided expert analysis and facilitated convenings for California policymakers and decisionmakers focused on health reform.

*The mission of ITUP is to promote innovative and workable policy solutions that expand health care access and improve the health of Californians, through policy-focused research and broad-based stakeholder engagement.*

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