

KINGSTON, MARTINEZ & HOGAN, LLP

ABBE ALLEN KINGSTON*
www.kmhimmigration.com
kingston@kmhimmigration.com

HELENE M. GRADOW
gradow@kmhimmigration.com

TANYA A. AHLMAN*
tanya@kmhimmigration.com

ANDREA M. ANAYA
andrea@kmhimmigration.com

* CERTIFIED SPECIALIST IMMIGRATION LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

ATTORNEYS AT LAW
1300 SANTA BARBARA STREET
SANTA BARBARA, CALIFORNIA 93101
(805) 963-9585
FAX (805) 963-2774

BRUCE W. HOGAN
bhogan@101freeway.com
www.santabarbaracollectionlaw.net
JOSEPH A. MARTINEZ, (1945-2011)

“Give me your tired, your poor. . . who can stand on their own two feet, and who will not become a public charge”

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Introduction

A bronze plaque at the base of the Statue of Liberty contains the now-famous poem “The New Colossus” by Emma Lazarus which says: "Give me your tired, your poor, your huddled masses yearning to breathe free. . ." While the poem by Emma Lazarus has become part of the ethos of the United States, the current administration is increasingly restricting immigration by instituting policies to keep individuals who are the most marginalized groups from being able to immigrate to the U.S. As most recently stated by Ken Cuccinelli, acting director of U.S. Citizenship and Immigration Services, the poem etched on the Statue of Liberty welcoming immigrants to America should include a line qualifying that they be able to “stand on their own two feet.”¹

The notion of a public charge is arguably one of the oldest aspects of U.S. immigration law today. The concept of public charge in immigration law can be traced back to colonial times, when British colonial authorities introduced “poor laws” to the Americas. After the United States gained independence, state and municipal governments inherited the exclusionary practice, which later became known as public charge. The implementation of the rule became more pronounced during the 19th century, when the United States began receiving large numbers of immigrants, especially Irish Catholics and other immigrants from southern and eastern Europe.

The public-charge rule was included in the Immigration Act of 1882, the first comprehensive immigration reform bill in U.S. history. The law, adopted by the same Congress that enacted the Chinese Exclusion Act, required barring entry for “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.” Nowhere did Congress define the term “public charge,” so consequently it was quickly utilized by anti-immigrant administrations to keep out individuals deemed to be undesirable, particularly immigrants from non-Western European countries.

¹ *New York Times*, ‘Huddled Masses’ Meant Europeans, Official Says. Aug. 14, 2019, Section A, Page 19 of the New York edition.

Historically, this test has been used to discriminatorily exclude certain groups of people, such as women, children, elderly individuals, and people from countries perceived as poor, based on the idea that they were incapable or unwilling to work to support themselves.² During the Great Depression, the State Department leaders directed consular officers to use the public charge provision to limit immigration. The State Department continued using the public charge provision for decades to bar gay men, lesbians and the disabled from getting immigrant visas.

Public Charge Ground of Inadmissibility

For the last twenty years, the term “public charge” has been used to define 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.”³ Individuals applying for lawful permanent residence (green card) are subject to the public charge ground of inadmissibility unless they fall under certain statutorily exempted categories. All immigrants requesting permanent residence through a family-based petition are subject to the public charge test. There are a number of groups of people who are either exempt from public charge requirements or may apply for a waiver of the public charge ground such as Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), and applicants for humanitarian forms of relief, such as victims of crime, human trafficking, and domestic violence.

To meet the public charge test, applicants are currently required to show that they are not likely to become primarily dependent on the government for support. Primary dependence refers to reliance on cash-aid for income support or long-term care paid for by the government. To decide whether an individual is likely to become a public charge, immigration officers are required to consider the totality of multiple factors specified in the Immigration and Nationality Act, such as the person’s age, health, family status, assets, resources, financial status, education, and skills, in addition to an affidavit of support.⁴ An affidavit of support is a contract between the immigrant’s U.S. sponsor and the federal government, indicating that the sponsor will reimburse the government should the immigrant require aid. This affidavit of support offers strong evidence that the immigrant will not become primarily dependent on the government. A healthy person “in the prime of life” cannot ordinarily be considered likely to become a public charge, “especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency.”⁵ Thus, in most cases before USCIS, the affidavit of support requirement ensures the applicant will not be found to be a public charge. Use of publicly funded health care (Covered California), nutrition (WIC), and housing programs (Section 8) are not currently a bar for purposes of public charge.

² See, e.g., Matter of Harutunian, 14 I. & N. Dec. 583, 589–90 (BIA 1974)

³ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999)

⁴ 7 INA § 212(a)(4)(B); see also Matter of Perez, 15 I. & N. Dec. 136, 137 (BIA 1974)

⁵ Matter of Martinez-Lopez, 10 I. & N. Dec. 409, 421–22 (BIA 1962)

New Public Charge Policy

On August 14, 2019, the Department of Homeland Security (DHS) published a new rule related to public charge in the Federal Register. This rule is not scheduled to take effect until October 15, 2019, but will likely be delayed due to pending litigation. The new rule (which is over 800 pages long) is a drastic change from longstanding policy. The new rule reinterprets a provision of the Immigration and Nationality Act (INA) pertaining to inadmissibility. INA § 212(a)(4) states that a person is not admissible to the U.S. if they are likely to become a public charge. While the test for whether someone is likely to become a public charge will still be prospective as required by the statute, the new rule changes the definition of a public charge. Now, instead of assessing whether an applicant is likely to become primarily dependent on the government for income support, the new rule looks to see if a person has received any number of public benefits over the past 36-month period of time.

The new rule creates a set of “heavily weighted negative factors” and a couple of “heavily weighted positive factors.” A heavily weighted negative factor is the receipt of more than 12 months of public benefits in the aggregate over the 36-month period of time before submitting the application for adjustment or admission. Each benefit used counts toward the 12-month calculation. For instance, if an applicant receives two different benefits in one month, that counts as two-months’ use of benefits.

The new rule also expands the list of publicly funded programs that immigration officers should consider when deciding whether someone is likely to become a public charge. Under the new rule, Medicaid, the Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps), Section 8 housing assistance and federally subsidized housing will also be used to demonstrate that an applicant is inadmissible under the public charge ground. The final rule also states that all use of any cash aid - including not just Temporary Assistance to Needy Families (TANF) and SSI, but also any state or local cash assistance program - could make an individual inadmissible under the public charge ground.

The new rule also elaborates on criteria for considering financial status, size of family, age, education, skills and employment, among others. The rule allows immigration officers to consider English proficiency (or lack thereof), medical conditions and availability of private health insurance, and past use of immigration fee waivers.

The new rule does contain certain exemptions, such as benefits received by other family members, Medicaid received by applicants while under age 21, and medical care during pregnancy. In addition, the proposal does not change long-standing policies that allow immigrants to access emergency medical care and disaster relief without public charge repercussions.

Disproportionate Impact of New Public Charge Policy

Redefining the public charge ground is causing public-benefit effects and will have immigration effects. The immigration effects will occur once this legislation is enacted and the administration denies applications for lawful permanent residency. The public-benefits impact has already started. In November, when non-partisan Migration Policy Institute researchers in a study applied the then-

proposed public charge test to immigrants who had received permanent residence in the past five years, they found 69 percent had at least one factor that could negatively impact their immigration prospects. The public charge rule, the researchers found, could have a “disproportionate effect on women, children and the elderly” and “shift legal immigration away from Latin America and towards Europe in particular.”

While most undocumented immigrants do not qualify for federal public benefits (including Medicaid and Section 8 Housing), U.S. citizen children of undocumented immigrants are eligible for assistance. Non-citizens make up only a fraction of those getting Medicaid and food assistance (6.5 percent and 8.8 percent, respectively, according to the Associated Press). Of the over 17 million children enrolled in Medicaid and Children’s Health Insurance Programs (CHIP), a study published in the Journal of the American Medical Association Pediatrics estimated that 8.3 million children who are currently enrolled in Medicaid, CHIP, and Supplemental Nutrition Assistance Program (SNAP) are at risk of forgoing benefits. The study said the initial proposed rule would likely cause parents to disenroll between 800,000 and 1.9 million children with specific medical needs from public health and nutrition benefits.

Millions of people in immigrant households (both citizens and noncitizens) who qualify for public benefits are fearful of receiving public benefits because of this new policy. Individuals in need of government assistance have started disenrolling from or have refrained from applying for benefits for themselves and other family members because of fear that receipt of benefits will have negative immigration consequences. Out of fear, parents (including naturalized and permanent resident parents) are opting out of benefits for U.S. citizen children that include services at school, Medicaid, financial aid for college, and food stamps. A national survey found that 13.7% of adults in immigrant families declined to participate in non-cash benefits when this rule was initially proposed in 2018 for “fear of risking future green card status.” The rate was even higher, at 20.7%, for low-income families, according to the Urban Institute’s 2018 Well-Being of Basic Needs Survey.⁶ A follow-up report found that SNAP and Medicaid were the services most commonly avoided.

Due to the lack of clear guidance and widespread fear, individuals who would not be subject to the public charge rule are withdrawing from services for their children. A study by the UCLA Center for Health Policy Research said the new rule could have a chilling effect on up to 2.2 million Californians in immigrant families who might disenroll from Medi-Cal and CalFresh, the food stamps program, most of whom would not actually be legally subject to the proposed new public charge test.

By targeting public benefits, such as SNAP and housing assistance, immigrant children will be significantly affected. The public charge regulation threatens denial of permanent residence for using government programs that provide low-income families with health care, nutrition, and other basic support. It imposes an untenable choice for immigrants and their families between disenrolling from these safety net programs or jeopardizing their future immigration status.

Disabled children often require and receive government benefits to assist with their education. Parents fear that receiving benefits for disabled children will prevent the parents and children from

⁶ Well-Being and Basic Needs Survey by Urban Institute, December 2018

gaining permanent residency. Immigrant parents of children with disabilities who receive special services at school have removed or are considering removing these children from school. Some parents even worry about signing a portion of an Individualized Education Plan (IEP), which allows a school district to get Medi-Cal reimbursements for services a child receives.

This new policy disproportionately affects already marginalized individuals. Members of marginalized groups already face significant hurdles in terms of employment and housing as a direct result of discrimination which impacts their ability to meet the public charge test. The multiple and intersectional identities of marginalized immigrants mean greater risk for a lifetime of discrimination that restricts educational, employment, and other opportunities. The intersection of multiple marginalized identities (such as woman, person of color, transgender, etc.) exponentially increases the risk of discrimination, making these individuals more likely to use some of these government programs designed to help working families with health care, nutrition, and other basic family supports.

Immigrants with disabilities will be disproportionately affected. Federal health care programs are vital for people with disabilities who require long-term services, like an in-home nursing attendant. Federal health care programs also lower the cost of buying wheelchairs and other medical equipment, services that often aren't covered by private insurance plans and can be prohibitively expensive for people paying for them out of pocket. Before this new rule, immigrants on Medicaid were only considered a "public charge" if government services were used to pay for institutional, long-term care. Now, disabled immigrants who receive federal assistance or subsidies would be ineligible. Even if an immigrant with disabilities makes the difficult decision to forgo Medicaid, they could still be penalized based upon their income. People living with disabilities face higher barriers to finding stable housing and employment. The income test itself will disproportionately impact people with disabilities because disabled individuals earn less and incur a higher cost of living (such as costs for accessible housing and transportation that people without disabilities don't have to face).

The proposed rule would empower USCIS to deny permanent residence to immigrants living with serious ongoing medical conditions, such as HIV/AIDS. The new public charge policy undermines the ability of immigrants living with HIV/AIDS to meet their health care needs and encourages immigrants living with HIV/AIDS to discontinue treatment. Medicaid is the single largest source of insurance coverage for people with HIV, estimated to cover more than 40 percent of people with HIV.⁷ While the proposed rule doesn't explicitly list the AIDS Drug Assistance Program (ADAP) or the Ryan White Programs for consideration in public charge determination, HIV/AIDS patients are reportedly forgoing access to life-saving medications due to their fear that their permanent residence application could be rejected. The Trump administration's expansion of the public charge rule puts HIV-positive individuals in a heartbreaking position of choosing between receiving life-saving treatment or keeping their family together. The rule also singles out "communicable disease[s] of public health significance" as negative factor in public charge determinations. Therefore, individuals who receive government assistance to treat HIV/AIDS would potentially have two significant negative factors for permanent residence. The fear of being

⁷ Kaiser Family Foundation. *Assessing the Impact of the Affordable Care Act on Health Insurance Coverage of People with HIV*. January 2014, <https://www.kff.org/hiv/aids/issue-brief/assessing-the-impact-of-the-affordable-care-act-on-health-insurance-coverage-of-people-with-hiv/>

labeled as having a communicable disease and being unable to receive the support necessary to treat the disease will prevent immigrants from accessing HIV prevention services supported by federal programs, as well as discourage regular HIV testing (which increases the likelihood of contracting HIV).

Current State of Litigation

The day after the new public charge policy was published, representatives for Santa Clara County and San Francisco filed a lawsuit seeking a temporary injunction in the District Court for the Northern District of California. The next day, thirteen states, led by the Washington Attorney General, sued the Department of Homeland Security over the new rule. These states include Colorado, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico and Rhode Island. According to the Attorney General of Washington, “[t]he Trump Administration’s message is clear: if you’re wealthy you’re welcome, if you’re poor, you’re not.”

On August 16, 2019, California (joined by Maine, Oregon, Pennsylvania, and the District of Columbia) also sued the Trump administration, challenging the legality of the new public charge rule, with the State Attorney General stating that “this cruel policy would force working parents and families across the nation to forgo basic necessities like food, housing and healthcare out of fear. That is simply unacceptable.”

Conclusion

The new public charge rule is an act of discrimination in regulatory form that further marginalizes immigrants, particularly targeting the poor, disabled, and people of color. It invokes the anti-immigrant sentiments from the 1930s used to keep out immigrants perceived as undesirable. It unjustly penalizes people who are legally entitled to apply for benefits. The new public charge rule was designed to create fear in immigrant families. As stated by Marielena Hincapie, Executive Director of the National Immigration Law Center, “This pernicious regulation would create a byzantine structure designed to send one message and one message only: If you are not white and wealthy, you are no longer welcome in this country, the land of opportunity.”

Authored by Tanya A. Ahlman, Esquire
California State Bar Immigration & Nationality Specialist
KINGSTON, MARTINEZ & HOGAN LLP