PRACTICE UPDATE:
CHANGES TO THE “PUBLIC CHARGE” DEFINITION

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Roadmap

• Snapshot of U.S. Immigrant Population
• History of the Public Charge Rule
• How it currently works
• How it would change under the Proposed Rule
• Likely adverse effects if the Proposed Rule becomes law
• Legal Challenges to the Rule
• Summary/Conclusions
Immigrants in the U.S., Number and Percent, 1900-2016
Plus Census Bureau Projections to 2060

Census Bureau: In 2023 the immigrant share of population will hit its highest level in U.S. history (14.8%), and continue to rise.

Share of Population

Number of Immigrants in Millions

Source: Decennial census for 1900 to 2000, American Community Survey for 2010 and 2016. For 2020 to 2060, see Census projections through 2060.
FIGURE 5.2

From Europe and Canada to Latin America and Asia: A Dramatic Shift in Immigrant Origins

% of U.S. immigrants born in...

1960

- Europe/Canada: 84%
- Other Latin America: 4%
- South/East Asia: 4%
- Other: 6%

2013

- Mexico: 28%
- Europe/Canada: 14%
- South/East Asia: 26%
- Other Latin America: 24%
- Other: 8%

Source: Pew Research Center tabulations of 1960 U.S. decennial census data and 2013 American Community Survey (IPUMS)

Pew Research Center
Figure 2
Uninsured Rates among Nonelderly Adults by Immigration Status, 2017

Note: All non-citizen percentages shown are statistically significantly different from the respective citizen percentage at the p<0.05 level. Includes nonelderly adults ages 19-64.
Source: Kaiser Family Foundation analysis of 2017 American Community Survey (ACS), 1-Year Estimates.
Figure 3
Uninsured Rates among Children by Immigration Status and Parent Immigration Status, 2017

- Citizen Children with Citizen Parents: 4%
- Citizen Children with a Noncitizen Parent: 7%
- Lawfully Present Immigrant Children: 19%
- Undocumented Immigrant Children: 31%

Note: All percentages shown are statistically significantly different from citizen children with citizen parents at the p<0.05 level. Includes children ages 0-18. Source: Kaiser Family Foundation analysis of 2017 American Community Survey (ACS), 1-Year Estimates.
History of the Public Charge Exclusion

Immigration Act of 1882:
Excluded “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge”

Immigration Act of 1891:
expanded inadmissibility to include “persons likely to become a public charge.”
History of the Public Charge Exclusion

• Current text of the Immigration and Nationality Act:

Section 212(a)(4) an individual seeking admission to the United States or seeking to adjust status to that of an individual lawfully admitted for permanent residence (Green Card) is inadmissible if the individual, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge." (emphasis added)
History of the Public Charge Exclusion

Notable Facts:

• Rarely used. In 1916, only about 10,000 individuals were excluded as public charges (1% of all arrivals).

• Generally applied only to those who were public charges from causes preceding arrival in U.S.

• Enforcement reflected bias (Women; Jews; South Asians; Mexicans).
Who decides inadmissibility?

Applying to a U.S. consulate abroad

• Decisions governed by Department of State’s Foreign Affairs Manual (FAM)
• Change to public charge grounds in FAM effective January 2018

Applying to a U.S. immigration agency

• Decisions governed by Department of Homeland Security (DHS) regulations
• Proposed rule to change public charge grounds published October 10, 2018
• No finalized rule yet
Public charge determinations are made when noncitizens

1. Initially apply to enter the U.S.
2. Apply to become a permanent resident
3. Reenter the U.S. as permanent residents after more than 6 months outside the country
4. Apply for a nonimmigrant visa
5. Apply for an extension of status
6. Apply for a change in status
Noncitizens exempt from public charge determinations

• When applying for citizenship
• Green card renewals
• Refugees, asylees, VAWA self-petitioners, special immigrant juveniles, and noncitizens who have received a U or T visa, humanitarian parole, or Temporary Protected Status, and other miscellaneous categories of noncitizens
Public Charge Test: Totality of the Circumstances, INA 212(a)(4)(B)

- Age
- Health
- Family Status
- Assets, Resources, and Financial Status
- Education and Skills
- Affidavit of Support
Public Benefits Included in Proposed Public Charge Rule

**CURRENT**
- SSI*
- CalWORKS/ TANF*
- Cash assistance programs*
- Public assistance for long-term institutional care*

**PROPOSED ADDITIONS**
- CalFresh (SNAP)
- Medicaid/Medi-Cal
- Medicare Part D Low-Income Subsidy Program
- Section 8 (Housing Voucher & Rental Assistance programs)
- Subsidized Public Housing

*Benefits included in current rule (per Inadmissibility and Deportability on Public Charge Grounds, 1999)
Use of public benefits as a negative factor

• Combination of monetized benefits if the total value is greater than $1,821 (15% of the Federal Poverty Guidelines (FPG) for a household of one) within 1 year.

• Combination of non-monetized benefits for more than 12 months in a 3 year period.

• Combination of monetized benefits below the 15% threshold + non-monetized housing for 9 months within a 3 year period.
**Figure 1. Public Charge Rule**

Proposal Would Affect Some Seeking Entry to the U.S. and Many Who Are Already Here

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**Included in the Rule:**

**YES**
- Immigrants applying for green card or entry to the U.S.

**NO**
- Asylees
- Legal permanent residents
- Refugees
- Undocumented immigrants
- U.S. citizens

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**Likely Affected by the Rule:**

- Families with at least one non-citizen.
  - Past experience suggests that policy changes targeting the use of public benefits by some immigrants have spillover effects on others and their families

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**Colorado Health Institute**

**James H. Binger Center for New Americans**

University of Minnesota Law School
Effects of the Proposed Rule

- Effects on vulnerable populations
- Effects on public health
- Effects on the economy
- Effects on families
Effects on Vulnerable Populations

• The proposed rule will disproportionately affect vulnerable populations, such as:
  • Children
  • People with disabilities
  • People of color
  • Pregnant women
“Disenrollment or foregoing enrollment in public benefits program by aliens otherwise eligible for these programs could lead to . . . [w]orse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children.” DHS, Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51270 (Oct. 10, 2018).
Effects on Public Health

- The proposed rule will lead to worse health outcomes, including:
  - More communicable diseases
  - Long-term health problems
  - More mental health issues

"Disenrollment or foregoing enrollment in public benefits program by aliens otherwise eligible for these programs could lead to . . . [i]ncreased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated." Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51270 (Oct. 10, 2018).
Effects on the Economy

- The proposed rule will negatively impact the economy in several ways:
  - Increase in uncompensated care
  - Reduced revenues for healthcare providers and medical supplies manufacturers
  - Lower levels of self-sufficiency long term
  - Negative effects on local economies and small businesses
  - More poverty and housing instability

“Disenrollment or foregoing enrollment in public benefits program by aliens otherwise eligible for these programs could lead to . . . Increases in uncompensated care in which a treatment or service is not paid for by an insurer or patient; and [i]ncreased rates of poverty and housing instability.” Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51270 (Oct. 10, 2018).

“[T]he rule might result in reduced revenues for healthcare providers participating in Medicaid, pharmacies that provide prescriptions to participants in the Medicare Part D Low Income Subsidy (LIS) program, companies that manufacture medical supplies or pharmaceuticals, grocery retailers participating in SNAP, agricultural producers who grow foods that are eligible for purchase using SNAP benefits, or landlords participating in federally funded housing programs.” Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51118 (Oct. 10, 2018).
The Effects on Families

- The proposed rule will have several negative impacts on families:
  - Mixed-status families are disenrolling citizen children from benefit programs.
  - Family size is indirectly a negative factor.
  - Mixed-status families could be torn apart.

![Pie chart showing population and children by citizenship status.](chart.png)
POSSIBLE IMPACTS OF CHANGES TO "PUBLIC CHARGE" TEST

Proposed changes to current immigration laws could cost California billions of dollars and thousands of jobs, particularly from the health care sector and food-related industries.

Under the changes:

- an estimated 765,000 immigrants in California could disenroll from nutrition assistance and health care programs.
- the state could lose up to $1.67 billion in federal benefits.
- the state could ultimately lose $2.8 billion and as many as 17,700 jobs.

- up to 70 percent of those being children
- 47 percent of the job losses would come from the health care sector
- 10 percent of the job losses would come from the state’s food-related industry

State Department Foreign Affairs Manual

The **Foreign Affairs Manual** (FAM) and associated **Handbooks** (FAHs) are a single, comprehensive, and authoritative source for the Department's organization structures, policies, and procedures that govern the operations of the State Department.

(US Department of state website [https://fam.state.gov/](https://fam.state.gov/) )
In January of 2018, the Trump Administration made changes to the FAM, unlike the public charge proposal, the FAM changes took effect immediately.

<table>
<thead>
<tr>
<th>Grounds for Refusal Under the Immigration and Nationality Act</th>
<th>Immigrant</th>
<th>Nonimmigrant</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018 212(a)(4) Public Charge</td>
<td>13,450</td>
<td>120</td>
</tr>
<tr>
<td>2017 212(a)(4) Public Charge</td>
<td>3,237</td>
<td>51</td>
</tr>
<tr>
<td>2016 212(a)(4) Public Charge</td>
<td>1,076</td>
<td>33</td>
</tr>
<tr>
<td>2015 212(a)(4) Public Charge</td>
<td>897</td>
<td>35</td>
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</table>

(U.S. Dept of State, Table XX Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2018,

Four Claims by the City of Baltimore, Regarding FAM changes

• Violation of the APA, 5 U.S.C. § 706(2)(A)
  • arbitrary/capricious/abuse of discretion

• Violation of the APA, 5 U.S.C. § 706(2)(A)
  • otherwise not in accordance with law (retroactive)

• Violation of the APA, 5 U.S.C. § 706(2)(D)
  • Proper rulemaking procedures not followed

• Violation of the Fifth Amendment - Equal Protection, U.S. Const. amend. V
  • Discrimination on the basis of race, national origin, nationality, income, receipt of public benefits, motivated by animus, and motivated by discriminatory and baseless stereotypes concerning the receipt of public benefits by immigrants, particularly immigrants from Latin American, African, and Asian countries.
Timeline of Litigation

- Complaint filed in District of Maryland: 11/11/2018
- D. Ct. denies government’s motion to stay in light of gov’t shutdown: 1/16/2019
- Gov’t files motion to dismiss: 1/25/2019
Major Challenges at Motion to Dismiss Stage

- Claim is nonjusticiiable because unripe
- Lack of cognizable injury sufficient to confer standing
- Agency action not final
- APA does not authorize claims against the President
Available Challenges to Final Rules

- Constitutional
- Statutory
- Arbitrary and Capricious (5 U.S.C. 706(2)(A))
- Agency Failed to Comply with Procedural Requirements
  - Notice Requirement (5 U.S.C. 553(b))
  - Comment Requirement (5 U.S.C. 553(c))
  - Logical Outgrowth (Shell Oil v. EPA)
  - Disclosure of Data Sustantially Relied Upon (Portland Cement)
- Cogent Materiality (Nova Scotia)
Arbitrary & Capricious Challenge

- Alleged in Baltimore lawsuit
- Likely to be alleged in future challenges to final rule
APA-Based Procedural Challenges

- Notice - 5 U.S.C. 553(b)
  - Logical Outgrowth Requirement
  - Data Disclosure

- Concise Statement of Basis & Purpose - 5 U.S.C. 553(c)
  - Required response to comments of “cogent materiality”
Significant Comments & Likely Litigation

National Foundation for American Policy (NFAP)

- Challenging flawed methodology for making public charge determinations
- Failure to consider degree to which rule would reduce legal immigration
- Use of administrative process to circumvent legislative agenda that should go through Congress
VOLUNTEER OPPORTUNITIES

Translation and Interpretation Project
The Center seeks volunteers to be on-call for the Translation and Interpretation Project. Volunteers work with practicing immigration attorneys and law students and serve as an integral part of the interviewing team. No prior legal experience or knowledge of immigration law is required. Training provided. There is a particular need for volunteers who are fluent in Spanish, Karen, French, Arabic, Somali, Oromo, Amharic, or Kisii. Email Kjerstin at kjyager@umn.edu for more information.

Human Rights Defender Project
This project is a collaboration of The Advocates for Human Rights, the University of Minnesota Law School James H. Binger Center for New Americans and Robins Kaplan LLP.

Pro Bono Bond Representation
Pro Bono Bond Representation works with volunteer lawyers interested in representing detained immigrants in custody redetermination proceedings. Volunteers shadow attorneys from the Minnesota Detention Project before taking on a case. Learn more about the Pro Bono Bond Representation opportunity.

Court Observation
Court Observation volunteers bring transparency and accountability to the immigration system. Volunteer court observers attend hearings and report on issues of concern, including access to counsel, family and community support, and interpretation; the manner of arrest; and the ability of individuals to raise defenses to deportation. Get Involved with the Court Observation opportunity.

Visit our website to get involved: https://www.law.umn.edu/james-h-binger-center-new-americans/volunteer-opportunities

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