

STATEMENT OPPOSING PROPOSED CHANGES TO BROADEN “PUBLIC CHARGE” RULE

The New York City Bar Association is opposed to the proposed changes to broaden the public charge ground of inadmissibility published by the U.S. Department of Homeland Security (DHS) on October 10, 2018 in the Federal Register.¹ If effectuated, these rules would disproportionately impact low-income communities, primarily communities of color. The proposed changes would force immigrant families to make impossible choices between life-saving benefits and future immigration options, including the ability to remain in the U.S. permanently with their families.² A sixty-day comment period will close on December 10, 2018.

“Public charge” has long been a feature of U.S. immigration law as a ground of inadmissibility that applies to non-citizen visa holders entering the U.S. and applicants for adjustment to lawful permanent resident (“LPR”) status, primarily those who are seeking admission or adjustment based on their relationship to a family member already in the U.S. Public charge has been defined narrowly to mean only those applicants for admission or adjustment who were assessed to be “primarily dependent” on government cash assistance or long-term institutional care for subsistence.³ “In-kind” benefits such as Medicaid and Supplemental Nutritional Assistance Program (“SNAP”, or “Food Stamps”) have not counted towards the public charge assessment, and having a financially sound financial sponsor has been enough to overcome an applicant’s low income. Under this current definition, relatively few non-citizens have been denied admission or prevented from adjusting to LPR status on “public charge” grounds.⁴

¹ See Final Proposed Rule, Department of Homeland Security, Inadmissibility on Public Charge Grounds, available at: <https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds> (all websites last visited Oct. 23, 2018).

² For further information about the proposed changes, see CLINIC Legal, DHS Proposes Vast Changes to Public Charge Definition, available at: <https://cliniclegal.org/resources/uscis-proposes-vast-changes-public-charge-definition>.

³ See 64 FR 28689, available at: bit.ly/2KLNdfW; 8 USC § 1182(a)(4) (providing for public charge ground of inadmissibility); see also USCIS, Public Charge, available at: <https://www.uscis.gov/greencard/public-charge>.

⁴ While DHS does not publish annual statistics on reasons that applications for LPR status are denied when applied for within the United States, the U.S. Department of State (DOS) does publish these statistics for those applying for LPR status from abroad. For the fiscal year that ended in 2016, DOS initially found 1,076 applicants were inadmissible, but 912 of these applicants were able to overcome the finding. See Department of State, Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act), Fiscal Year 2016, available at: <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXX.pdf>. By way of contrast, in the fiscal year ending in 2017, DOS initially found 3,237 applicants were

The new rule would shift the focus of the public charge determination away from the ability of the sponsor to provide financially for the applicant⁵ to focus almost exclusively on the applicant for admission or adjustment. For the first time, use of in-kind health and nutrition benefits would count against the applicant. DHS's examination proposes to focus on factors such as: limited English proficiency, family size, having physical or mental health conditions that could affect ability to work, or simply being too young or too old to work and credit score. Having a financially-eligible sponsor willing to complete a binding affidavit of support would merely be one of many factors, instead of being practically determinative as it properly is today.

One of the only heavily-weighted positive factors a non-citizen applying for admission or adjustment could demonstrate under the proposed new rules is having an income or resources ample enough to not only cover his or her own expenses but his or her entire family (regardless of their immigration status) at a level over 250 percent of the federal poverty level,⁶ or nearly \$63,000 per year for a family of four. Even meeting this standard would not be determinative under the proposed rules, however. Regardless of the income of the applicant for admission or adjustment, his or her receipt of SNAP, Medicaid, federal housing assistance and Medicare Part D subsidies could still be negative factors which may result in denial of the application for admission or lawful permanent residence.⁷

The proposed regulation would bring public charge assessments to a much darker past, when it was asserted as a tool of racial and ethnic discrimination. In the 1800s, not becoming a public charge was a condition imposed on African-Americans seeking freedom from slavery.⁸ Public charge was later used as a justification for federal and state agencies to deny admission to low-income Irish immigrants,⁹ and to Jews fleeing Nazi persecution.¹⁰ Under DHS's proposed rule, low-income non-citizens would again face a barrier to entry and lawful permanent resident status, one based largely on economic status and rooted in discriminatory bias.

inadmissible on public charge grounds and 2,016 were able to overcome the denial, a more than 700% increase in denials since the implementation of the public charge rule at the U.S. Consulates abroad. *See* Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act), Fiscal Year 2017, available at:

<https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf>.

⁵ Family-based applications for LPR status require the applicant to file a binding affidavit of support by the family member sponsor and, if necessary, by a joint sponsor. *See* USCIS, Instructions for Affidavit of Support available at: <https://www.uscis.gov/sites/default/files/files/form/i-864instr.pdf>

⁶ *See* proposed regulations, *supra*, note 1.

⁷ *See* proposed regulations, *supra*, note 1.

⁸ Center for American Progress, Trump's Immigration Plan Imposes Radical New Income and Health Tests (Jul. 19, 2018), available at: <https://www.americanprogress.org/issues/poverty/reports/2018/07/19/453174/trumps-immigration-plan-imposes-radical-new-income-health-tests/>.

⁹ Hidetaka Hirota, *EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* (Oxford University Press) (2017).

¹⁰ Barbara L. Bailin, *The Influence of Anti-Semitism on United States Immigration Policy with Respect to German Jews During 1933-1939* (CUNY Academic Works) (2011), available at: http://academicworks.cuny.edu/cc_etds_theses/262.

The final proposed rule will not go into effect while the notice and comment period is still underway -- a process that will not be completed for several months. However, the rule is already causing even those non-citizens who are exempt from public charge consideration, such as refugees and asylees, to fear applying for or continuing to receive benefits that they are eligible for, including health and nutrition benefits.¹¹ Medical experts warn that these changes to the public charge rule will result in decreases in Medicaid enrollment, increased emergency room medical care, and increased patient costs incurred by both patients and hospitals.¹²

Expansion of the public charge rule will have a devastating impact on children, families and communities. If concerns about any receipt of public benefits in the household, even for U.S. citizen children to whom the rule changes do not apply, cause households to forego access to nutrition supports under SNAP, the entire family will suffer from increased food insecurity. Similarly, loss of health care will not only make the entire household more susceptible to increased illness, but will also undermine overall public health and safety for all individuals in the United States, regardless of immigration status. Children, people with disabilities and the elderly will be particularly affected. This rule may further erode non-citizens' trust in public institutions, even those that are not implicated by the proposed rule change.

Ultimately, one of the worst impacts will be the way in which this rule could tear families apart. Many of the persons seeking admission or adjustment to lawful permanent resident status are doing so through immediate family members: U.S. citizen spouses, parents, and children. One recent report estimates that this rule could result in the separation of at least 200,000 married couples annually as applications for lawful permanent residence by immediate family members are denied.¹³

New York City has over 3.3 million foreign-born residents.¹⁴ The proposed changes to the public charge regulation would not only prioritize wealthy, able-bodied, English-speaking immigrants above other immigrants, including those with sound financial sponsors, but will also force immigrant families to choose between receiving government assistance and improved immigration status. No family members should have to choose between life-sustaining benefits and possible family separation. The diversity of our immigrant community members is a strength

¹¹ "Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use," Migration Policy Institute, (June 2018), available at: <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>.

¹² "Proposed Changes to 'Public Charge' Policies for Immigrants: Implications for Health Coverage," Henry J. Kaiser Family Foundation (September 24, 2018), available at: <https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage/>. *See also*, "Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid," Henry J. Kaiser Family Foundation (October 11, 2018), available at: <https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/>.

¹³ "Trump Plan Could Break Up Nearly 200,000 Married Couples," Houston Chronicle (Oct. 9, 2018), available at <https://www.houstonchronicle.com/opinion/outlook/article/Trump-administration-threatens-to-break-up-nearly-13293747.php>. *See also* "Through the Back Door: Remaking the Immigration System via the Expected 'Public Charge' Rule," Migration Policy Institute (Aug. 2018), available at: <https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule>.

¹⁴ New York City Comptroller, "Our Immigrant Population Helps Power NYC Economy" (Jan. 11, 2017), available at: <https://comptroller.nyc.gov/reports/our-immigrant-population-helps-power-nyc-economy/>.

of our City and an abiding strength of our nation. For these reasons, the City Bar staunchly opposes this rule and urges its swift reconsideration.

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October 2018

* Indicates a committee that signed on in support after the initial issuance of this statement. Updated as of Jan. 11, 2019.