Draft: For Review Purposes Only

An Overview of Proposed Justice Department Regulations and Field Guidance Regarding Public Charge Determinations

Sara Rosenbaum, J.D.

Harold and Jane Hirsh Professor of Health Law and Policy
The George Washington University Medical Center
School of Public Health and Health Services

June, 1999

Resource Id#: 5088

An Overview of Proposed Justice Department Regulations and Field Guidance Regarding Public Charge Determination

Introduction

On May 26, 1999, the Department of Justice, Immigration and Naturalization Service, published a proposed rule (64 Fed. Reg. 28676-28688) regarding the meaning of the term "public charge," as well as the types of programs and benefits whose receipt *may be considered as evidence* that an individual is a public charge. The rule is nationwide in scope and applies to all states and all programs covered by the rule.

This issue brief provides an overview of the proposed rule and field guidance. Following a description of the public charge doctrine, the issue brief describes the key elements of the proposed rule and field guidance and their rationale. It concludes with a discussion of the steps that health centers and PCAs might consider as a means of promoting full implementation of these standards.

In Brief

Read in its entirety, the proposed rule (which is accompanied by "field guidance" to all INS officials that takes effect immediately and which is reprinted at 64 Fed. Reg. 28689-28693) provides as follows:

> *1.Other than cash assistance representing primary income maintenance (such as basic TANF payments, SSI or state or county welfare payments), and long term institutional care services funded by Medicaid and related programs, no other public benefits are relevant evidence in a public charge determination.* ***Health center services and all Medicaid and CHIP services other than long term institutional care are completely safe.***
>
> *2. The use of even non-exempt benefits (e.g., cash assistance for income maintenance) by other family members will not be considered relevant evidence in any public charge determination, unless the individual whose public charge status is the subject of the determination is dependent on the benefit for income maintenance.*
>
> *3. Even though cash assistance for income maintenance and long term institutional care at government expense may be relevant evidence in a public charge determination, the fact that an*

individual whose public charge status receives such benefits is not itself conclusive proof that the individual is a public charge. The question of whether a person is a public charge is a factual one that depends on the totality of the circumstances, not on the receipt of certain benefits alone.

Taken together, the proposed rules mean that:

- Otherwise-eligible non-citizens can use nearly all forms of publicly funded health, nutrition, housing, education, child care, social services and other forms of publicly funded "in kind" services without fear that use of these programs will be considered evidence of public charge status.

- in families containing both eligible citizens and non-citizens (e.g., immigrant parents who have citizen children), citizen members can use the non-exempt benefits (i.e., cash assistance primarily for income maintenance and long term institutional care) without triggering a public charge determination for alien family members, unless the individual who is subject to a public charge determination relies on the cash benefits as a primary means of income maintenance.

- benefits that are not relevant evidence for public charge purposes also do not affect the right of immigrants to be sponsors of other immigrants under an affidavit of support. This is important for family members who wish to sponsor other entering family members.

- even if individuals subject to a public charge determination do use non exempt benefits (i.e., cash assistance that is a primary source of income maintenance or long term institutional benefits) receipt of such assistance, while relevant to a public charge determination, does not lead to an automatic determination of public charge status.

The Administration indicates that it has taken the highly unusual step of issuing immediate, binding field instructions in advance of a final rule for two reasons: the potential "negative public health consequences" created by the "existing confusion" over which benefits non-citizens may receive; and the need to "provide aliens with better guidance regarding

which types of public benefits will and will not be considered in public charge determinations."[1]

Background and Overview

The "public charge" concept has been part of U.S. immigration law for more than a century.[2] An alien who is likely at any time to become a public charge cannot be admitted into the U.S. and is ineligible to become a legal permanent resident of the U.S. [3] In addition, an alien can be deported if he or she becomes a public charge within five years of entering the U.S. "from causes that existed prior to entry." [4]

Whether or not an individual is a "public charge" is an issue that depends on the totality of circumstances and facts regarding an individual's case.[5]

According to the Justice Department, the receipt of any form of publicly supported assistance alone – cash or in-kind – has never been considered definitive evidence of public charge status. In the Preamble to the proposed rule, the Department states that

> [i]t has never been [INS] policy that the receipt of any public service or benefit must be considered for public charge purposes. The nature of the program is important. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, such as WIC, obtaining immunizations, and receiving public emergency medical care typically do not make a person inadmissible or deportable. Non-cash benefits, such as these and others, are by their nature supplemental and frequently support the general welfare.[6]

The INS reports that actual deportations on public charge grounds have been rare.[7] However, as a matter of law, the threat has been a real

---

[1] Id at p. 28689.
[2] U.S. I.N.S. Fact Sheet (May 25, 1999) http//www.ins.usdoj.gov/public_affairs/news-release/public_cfs.htm.
[3] Id.
[4] Id.
[5] 64 Fed. Reg., 28675, 28679.
[6] 64 Fed. Reg. 28675, 28678.
[7] Id.

one, since there was no written standards that either defined the term "public charge" succinctly and definitively or that identified which public benefits could be considered in an evidentiary public charge review. As a practical matter, therefore, all public benefits could be considered off limits both for non-citizens and for citizen children whose alien parents might be considered public charges were their dependent children to use public benefits. Moreover, even if there were few actual deportations on public charge grounds, widespread evidence suggests that the doctrine was being used frequently to bar entry or reentry.

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) did not alter the public charge doctrine. However, the Act triggered a new and important round of debate over the matter, because of its provisions relating to the availability of public benefits for non-citizens. PRWORA added new restrictions on otherwise-qualified non-citizens' eligibility for "public benefits." At the same time, the Act left both "qualified aliens" and "non-qualified aliens" eligible for many classes of public benefits.[8]

---

[8] 64 Fed. Reg. 28675, 28676. The PRWORA divided non-citizens into two classes: "qualified aliens" and "non-qualified aliens." "Non-qualified aliens" may obtain services from any program (including health centers) that is not defined as a "public benefit" and therefore restricted to citizens and "qualified aliens". Under HHS rules promulgated in 1998, the following HHS programs are defined as public benefits and thus restricted to "qualified aliens": Adoption assistance; Administration on Developmental Disabilities (ADD)– State Developmental Disabilities Councils (direct services only); ADD – Special Projects (direct services only); ADD — University Affiliated Programs (clinical disability assessment services only); Adult programs/Payments to Territories; Agency for Health Care Policy and Research Dissertation Grants; Child Care and Development Fund; Clinical Training Grant for Faculty development in Alcohol and Drug Abuse; Foster care; Health Professions Education and Training Assistance; Independent Living Program; Job Opportunities for Low Income Individuals; Low Income Home Energy Assistance Program (LIHEAP); Medicare; Medicaid (non-emergency care); Mental Health Clinical Training Grants; Native Hawaiian Loan Program; Refugee cash assistance; Refugee medical assistance; Refugee preventive health services program; Refugee Social Services Formula Program; Refugee Social Services Discretionary Program; Refugee Targeted Assistance Discretionary Program; Refugee Unaccompanied Minors Program; Refugee Voluntary Agency Matching Grant Program; Repatriation Program; Residential Energy Assistance Challenge Option (REACH); Social Services Block Grant; State Child Health Insurance Program (CHIP); and Temporary Assistance for Needy Families (TANF). Only "qualified aliens" if eligible, may receive SSI benefits. Otherwise-eligible "non-qualified aliens" may obtain emergency Medicaid coverage as well as services at health centers, public health agencies, and other agencies and entities, since the grants that support these services are not on the HHS list of public benefit programs and thus are not restricted to "qualified aliens. "

"Qualified aliens" who entered the U.S. after August 22, 1996 face restrictions for the first five years following their entry that long-term "qualified alien" residents do not face.

This decision on the part of Congress to preserve "qualified aliens" eligibility for many public benefits ran directly into the fact that if non-citizens actually used the benefits for which they were eligible (either as "qualified aliens" or "non-qualified aliens"), they could face severe sanctions under the decades-old "public charge" doctrine. The proposed rule is a response to this paradox. It is perhaps ironic that the very Act that was designed to place limitations on access to public benefits by non-citizens instead succeeded in heightening public attention to the "public charge" problem and ultimately resulted in the issuance of new standards that strictly limit application of the doctrine.

Key Elements of the Proposed Rule and Field Guidance

Public Charge Defined: In its rule, the Justice Department proposes to define the term "public charge" for purposes of admissibility and adjustment of status to mean

> an alien who is likely to become primarily dependent on the Government for subsistence, as demonstrated by (i) the receipt of public cash assistance for income maintenance purposes, or (ii) institutionalization for long term care at Government expense (other than imprisonment for conviction of a crime. [9]

The Department notes that this definition does not include institutionalization for short periods of rehabilitation, since short rehabilitation stays do not constitute "primary" dependence.[10]

Programs that May Be Considered in a Public Charge Case: The rule's definition of public charge means that in making a determination of public charge status, the federal government can consider as relevant evidence only the receipt of certain program benefits. These are "public cash assistance programs for income maintenance" furnished by governments[11] and long term institutional care paid at government expense.

For example, recently arrived "qualified aliens," even if eligible, may not obtain Medicaid other than for emergency purposes.

9 8 C.F.R. §212.102(a). The phrase "institutionalization for long term care" is not defined.

10 8 C.F.R. §212.102(a)(2); 64 Fed. Reg. 28675, 28677. The term "short rehabilitation stays" is not defined.

11 The term "government" includes federal, state and local government. Cash assistance includes not only cash funds but also funds received by check, money order, wire transfer, electronic funds transfer, direct deposit or any other form that can be legally

The public benefits that fall into the definition of "cash assistance for income maintenance" are SSI, (with certain important exceptions discussed below) TANF, and state and local cash assistance programs for income maintenance (e.g., the New York State Home Relief program).[12]

Certain forms of public cash assistance are not considered to be evidence of public charge and thus may not be considered by the government. These are as follows:

1. Cash benefits that are "supplemental in nature" and "not intended for income maintenance".

Examples in the rule are as follows:[13]

- the Low Income Home Energy Assistance Program (LIHEAP);
- the Child Care and Development Block Grant Program;
- Food stamps;
- certain education benefits;
- "non-recurrent, short term crisis benefits;"
- supplemental cash benefits paid for by state TANF programs that are excluded from the definition of "assistance" under federal TANF rules;[14]
- supplemental TANF cash benefits that are excluded from TANF's definition of "assistance" and
- non-cash benefits and services funded through TANF.

2. Cash benefits that have been earned.

The proposed rule offers the following examples of such earned income: [15]

converted to currency, but only if "the funds are for the purpose of maintaining your income." 8 C.F.R. §212.102(b)(1) and (2).

[12] 8 C.F.R. §212.103(a).

[13] 8 C.F.R. §212.103 (a) and (c).

[14] The TANF regulations define "assistance" as **complete** 45 C.F.R. §260.31.

[15] 8 C.F.R. §212.103(d).

- Social Security Old Age Survivors and Disability Insurance Payments;
- Pension benefits; and
- Veterans' benefits

The proposed rule does not indicate how unemployment insurance would be treated. Unemployment benefits could be considered "earned" (in the sense that an individual cannot obtain them without having worked) and thus exempt; on the other hand they could be considered cash assistance for income maintenance. On the other hand, they are not individually vested benefits as is the case with Social Security or pension benefits.

Key Factors in Determining Public Charge Status: Receipt of cash assistance for income maintenance or long term institutional care at government expense does not automatically mean that an individual is a public charge. Age, health, family status, assets, resources, financial status, education and skills, as well as the Affidavit of Support filed by a sponsor, are all admissible evidence.[16] In other words, receipt of either cash assistance for income maintenance or long term institutional care is only one factor in the public charge decision process under the proposed rules. The rules indicate that the only evidence that automatically leads to a finding of a public charge status is the lack of a sufficient Affidavit of Support.[17]

The proposed rule sets forth a specific test for determining whether an individual is inadmissible or ineligible to adjust status on public charge grounds:

> After consideration of [the]case in light of all of the minimum factors ***, any Affidavit of Support ***, and any other facts that may be relevant, the immigration officer, consular

[16] 8 C.F.R. §212.104 (a); 8 C.F.R. §212.106(a) and (b). The rule notes that "the length of time during which you previously received benefits or were institutionalized at government expense, as well as the distance in time from your current application for admission or adjustment, are significant to the decision. Public cash benefits received in the recent past are more predictive of your likelihood to become a public charge in the future than benefits received in the distant past. Similarly, public cash benefits received for longer time periods are more predictive than benefits received in the past for shorter periods." 8 C.F.R. §212.106(b).

[17] Id. Certain groups, including widows, widowers, battered spouses, and children of U.S. citizens and lawful permanent residents are exempt from filing an affidavit of support. 8 C.F.R. §212.108.

> officer, or immigration judge determines that it is likely that [the individual] will become primarily dependent for *** subsistence on the government at any time, as demonstrated by (1) receipt of public cash assistance, or (2) institutionalization for long term care (other than imprisonment for conviction of a crime) at government expense.[18]

In its May 25th, 1999 letter to state Medicaid programs regarding charge issue, the Health Care Financing Administration underscores the fact that receipt of long term institutional care alone will not automatically result in a public charge determination but is only evidence for consideration. The letter also raises an important additional point regarding the issue of whether an individual ever can be considered a public charge in a case in which the benefit received is part of the individual's entitlement and there is no debt to repay. Under longstanding government practice, owing, and not repaying, a debt for support is a critical element of the public charge test.[19] The HCFA letter also clarifies that Medicaid agencies are prohibited from releasing information to the INS or any other immigration official except under narrow circumstances where repayment may be relevant:

> The NPRM [clarifies] that the receipt of Medicaid or CHIP benefits will not be considered in making a public charge determination, except in the case of an alien who is primarily dependent on the government for subsistence as demonstrated by institutionalization for long-term care at government expense. This exception will not include short term rehabilitation stays in long term care facilities. The INS guidance also states that receipt of Medicaid or CHIP benefits does not prevent immigrants from becoming sponsors under the new affidavit of support.
>
> Since the receipt of Medicaid or CHIP benefits, with the one exception of institutionalization for long term care, cannot be considered in making a public charge determination, a major barrier to

[18] 8 C.F.R. §212.104 (a) and (b).

[19] The proposed rules do not address how this element of the test would apply in cases in which an individual uses benefits to which he or she is entitled (e.g., Medicaid long term institutional care) and no debt is therefore created.

> enrollment of immigrant children and families in Medicaid and CHIP is removed. ***
>
> With respect to institutionalization for long term care, these benefits may not be the sole factor in making a public charge determination. The NPRM *** [states] that INS and State Department officials must consider the totality of circumstances in determining whether the individual meets the public charge definition ***.
>
> For cases where institutionalization for long term care is considered *** the policy announced by INS does not change the policy in [HCFA Medicaid Directors letter dated December 17, 1997] regarding release of information to INS or the state Department regarding receipt of Medicaid benefits. In that letter we indicated that Section 1902 (a)(7) of the Social Security Act requires states to safeguard information regarding applicants and recipients and prohibits disclosure of that information to an outside entity unless it is directly connected to the administration of the state plan. *We have determined that the INS and public charge determinations would not be connected to the administration of the state plan, unless such determinations will directly assist the state in recovering outstanding debts from an alien (most commonly involving overpayments or fraud).*[20] States are encouraged to adopt similar restrictions under separate CHIP programs.[21]

Which Programs are Not Relevant to the Issue of Public Charge: As noted, other than cash assistance for income maintenance and long term

---

[20] An individual cannot be deemed a public charge unless there has been a demand for repayment of the debt in question. Since eligible individuals are entitled to Medicaid as a matter of law, there is no "debt" to be repaid unless the benefit was fraudulently obtained or constitutes an overpayment. Thus, for example, if an immigrant child needs long term institutional care, the Justice Department rules suggest that receipt of such care would be relevant and admissible evidence in a public charge hearing . However, the fact of the receipt of institutional care would appear to be irrelevant in the child's case, since the child is entitled to the benefit and it is a debt that does not have to be repaid.

[21] Letter from Sally Richardson to State Medicaid Directors, May 26, 1999 (http://www.hcfa.gov/init/ch052699.htm). Emphasis added.

institutional care, the proposed rule indicates that individuals may use virtually all other public programs without concern that they would be considered relevant evidence in a public charge hearing. The proposed rule lists numerous programs that are **irrelevant to a public charge determination:**[22]

- Food stamps
- Medicaid (other than payments for long term institutional care)
- Health insurance and health services (other than public benefits for the cost of long term institutional care)
- Nutrition programs including WIC, the National School Lunch Act, the Child Nutrition Act, and the Emergency Food Assistance Act
- Emergency disaster relief
- Housing benefits
- Child care services
- Energy benefits
- Foster care and adoption benefits
- Transportation vouchers or other non-cash transportation services
- Education programs and head start
- Non-cash benefits and services under TANF
- Job training programs
- State and local supplemental non-cash benefits that serve purposes similar to those of the federal programs listed in the rule
- Any other federal, state or local public benefit program, under which benefits are provided in kind, through vouchers, or any other medium

[22] The rule also notes that an individual can still be a public charge even though receipt of these benefits is not relevant to the determination if it is determined under the totality of the circumstances that the person is or may be likely to become a public charge. 8 C.F.R. §212.105(c). This disclaimer actually serves to underscore that use of any of these programs alone does not trigger questions of public charge.

of exchange other than cash assistance for income maintenance to the eligible person.[23]

Public charge determinations in families in which a relative is determined to be a public charge: The proposed rule clarifies that the fact that one family member is found to be a public charge is inadmissible in the case of another family member. The rule also states that

> Public cash benefits for income maintenance received by your relatives will not be attributable to you for admission or adjustment purposes unless they also represent your sole support.[24]

This latter provision is extremely important, since it appears to mean that an alien parent can apply for SSI for a disabled citizen child without risking the possibility that the child's receipt of SSI will be imputed to the parent for public charge purposes, so long as the parent has other means of financial support (e.g., a job).

Individuals to Whom the Public Charge Ground Does Not Apply for Admissibility Purposes: The proposed rule indicates that the public charge doctrine does not apply to refugees and asylees at the time of admission and adjustment of status, Amerasian immigrants at admission, Cuban and Haitian entrants at adjustment, and other groups.[25] The doctrine is also inapplicable to persons who entered prior to January 1, 1972 and who meet other conditions relevant to lawful permanent residence and individuals who have been previously admitted for lawful permanent residence and who re-enter the U.S., since they are not applicants for admission any longer. However, there are no waivers of the public charge ground of inadmissibility with the exception of certain aged, blind and disabled persons.[26]

What Health Centers and Primary Care Associations Can Do

These proposed rules and field guidance represent an extraordinary development of great importance for non-citizens. These standards are **national** and do not vary by state (although state and county-funded public programs that fall into the federally exempt categories will have to be identified locally). States have the discretion under the rule (and arguably the duty) to classify their own programs into exempt and non-exempt categories (i.e., those programs that are

[23] 8 C.F.R. §212.105(b).
[24] 8 C.F.R. §212.109(b).
[25] 8 C.F.R. §212.110(a).
[26] 8 C.F.R. §212.111.

cash assistance for income maintenance and those that represent long term institutional care).[27] However, **states do not have the authority to decide not to apply these new standards to their programs.** In other words, as a matter of federal law, Medicaid (other than benefits for long term institutional care) constitutes an exempt program under the Justice Department rules; a state cannot elect to classify Medicaid as a program that is relevant to a public charge determination.

Because the rules are national in scope, it is possible for all health centers and PCAs to carry out active, coordinated, and unified outreach to affected individuals and families on a nationwide basis at all health centers. Because of where they are located and whom they serve, health centers will play an essential role in publicizing the rule to their patients.

The following are suggested steps for PCAs and health centers:

- PCAs and health centers may want to consider preparing for distribution in all health centers in a state easy-to-read signs and flyers regarding the new policies that are translated into the languages spoken by health center patients. Signs and materials can be prominently displayed, with outreach workers and staff on site to answer questions. At a minimum the materials should:
    - list all of the programs that individuals and families can use that are identified in the proposed rules, including sources of cash income that are not classified as "cash assistance for maintenance;"
    - work with state, county and local agencies to identify those health, nutrition, housing, social service and other family support programs that fall into the permissible categories listed in the rule, so that programs can be identified by name.
    - indicate that the use of these programs will not raise public charge questions either for the individual who uses the service or for other family members (e.g., children in the house);
    - indicate that the use of allowable services and programs will not affect the ability of individuals to be sponsors of other entering individuals; and

[27] In the absence of a federal definition regarding what constitutes long term institutional care, the classification appears to be a matter of state discretion, at least with respect to those state programs (such as inpatient psychiatric care for persons with serious mental illness) that are funded out of state and local revenues.

- provide information on where and how to apply for services.

- PCAs may want to consider meeting with state health, welfare, social service, employment and other agencies to identify all programs – health care and otherwise – that are available to individuals and families under the new rule. Programs will need to be identified by name.

- Health centers that are outstationed enrollment sites for Medicaid, WIC, and other assistance should consider working with their state agencies to secure additional resources so that they can provide one-on-one outreach services to eligible patients who have not yet applied for benefits and assist them in doing so.

- Finally, health center and PCA staff and board members, together with state and local advocacy and service organizations that work with affected families and communities might consider offering to speak to local civic, religious, business organizations and gatherings and should make maximum use of community media outlets such as newspapers, cable television, radio and other communication means, to promote broad awareness of the new rules.