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## The Fate of the Public Charge Rule Following a Covid-19 Era

Jacquelyn Sicilia\*

Dating back to the nineteenth century, the American Dream insighted an explosion of migration to the United States. Migrants came to the U.S. hoping to create a successful and prosperous life from their hard work. Unfortunately, in the 1800s, the government made that Dream a bit more difficult. Congress enacted a statute making aliens inadmissible “if they are unable to care for themselves without becoming public charges.”<sup>1</sup> Although this is in-line with the basic principle of self-sustainability that the American Dream has promised, it ironically tells aliens that they need to be self-sustaining before they can even get access to the American Dream.

The Public Charge Rule gives the U.S. government the power to declare an alien who is seeking permanent admission as inadmissible if he likely will be a burden on the U.S. government.<sup>2</sup> “Public Charge” has never been defined by a statute, but a general understanding of its meaning has formed over the years.<sup>3</sup> Though it was a law since the 1800s, inadmissibility on public charge grounds was rarely used.

On February 24, 2019, the Department of Homeland Security (“DHS”) implemented what is known as the Public Charge Grounds Final Rule (“Final Rule”) and officially defined a public charge. A person is a public charge if he is “primarily or wholly dependent on the government, usually because of an inability to work or support oneself” for more than twelve months within any thirty-six month period.<sup>4</sup> An individual’s “(I) age; (II) health; (III) family status (IV) assets, resources, and financial status; and (v) education and skills . . . .” are all considered to determine if the individual

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<sup>1</sup> *Public Charge*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge> (last updated Sep. 22, 2020) [hereinafter *Public Charge*].

<sup>2</sup> Immigration and Nationality Act § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2018).

<sup>3</sup> Anna Shifrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363, 1364 (2020).

<sup>4</sup> *Id.*

will have to rely on public benefits in the future.<sup>5</sup> Public benefits that are considered include:

Supplemental Security Income; Temporary Assistance for Needy Families; . . . cash benefit programs for income maintenance . . . ; Supplemental Nutrition Assistance Program (formerly called food stamps); Section 8 Housing Assistance under the Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance including Moderate Rehabilitation); Public Housing (under the Housing Act of 1937, 42 U.S.C. 1437 et seq.); and Federally funded Medicaid (with certain exclusions).<sup>6</sup>

Previously, the Rule did not apply to food stamps, Medicaid, federal housing, or rental assistance.<sup>7</sup> As it currently stands, the Final Rule applies to aliens seeking either admission or adjustment of status to a lawful permanent resident as well as applicants seeking extensions or change of status on their nonimmigrant stay.<sup>8</sup> The Final Rule does not apply to aliens seeking temporary stays, refugees, asylees, special immigrants, and certain crime victims.<sup>9</sup> The changes expanded the inadmissibility based on public charge; now the application evaluates whether the individual will rely on government support for “any use of public benefits,” no matter how minuscule.<sup>10</sup>

The Final Rule went into effect for a short amount of time until COVID-19 invaded the U.S.<sup>11</sup> Shortly after the Final Rule was implemented, numerous

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<sup>5</sup> 8 U.S.C. § 1182(a)(4)(B).

<sup>6</sup> *Public Charge Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/news/public-charge-fact-sheet> (last updated Sep. 27, 2020) [hereinafter *Fact Sheet*].

<sup>7</sup> *Id.*

<sup>8</sup> *Public Charge*, *supra* note 1; see also Berkley International Office, *Nonimmigrant vs. Immigrant Status*, U.C. BERKELEY, <https://internationaloffice.berkeley.edu/immigration/nonimmigrantvsimmigrant-status> (last visited Mar. 6, 2021) (explaining the difference between immigrant versus nonimmigrant status).

<sup>9</sup> *Public Charge*, *supra* note 1.

<sup>10</sup> Medha D. Makhoul & Jasmine Sandhu, *Immigrants and Interdependence: How the COVID-19 Pandemic Exposes the Folly of the New Public Charge Rule*, 115 NW. U.L. REV. ONLINE 146, 149 (2020).

<sup>11</sup> *Id.*

lawsuits were filed against DHS attempting to halt its implementation.<sup>12</sup> In early 2020, the issue reached the Supreme Court when parties to the lawsuits in the lower courts sought preliminary injunctions to stop the Final Rule's implementation.<sup>13</sup> The Court stayed the injunctions, ultimately granting DHS the right to implement the Final Rule while litigation continued amid the pandemic.<sup>14</sup> Aliens seeking admission or adjustment of status were forced to choose between disenrolling from public benefits that provided health care or risk being denied permanent status in the U.S.<sup>15</sup> With thirteen and a half million noncitizens enrolled in Medicaid or a similar program, many aliens were facing this choice.<sup>16</sup> The Trump administration did, however, amend the Final Rule to clarify that seeking medical care for COVID-19 would not be considered in the public charge assessment, but Medicaid still would be considered.<sup>17</sup>

DHS implemented the Final Rule until the summer of 2020 when, in light of the public health emergency imposed by the pandemic, a district court granted an injunction on the Final Rule.<sup>18</sup> At that time, the previous, less stringent, public charge guidance was used.<sup>19</sup> However, less than two months later, the U.S. Court of Appeals for the Second Circuit stayed the district court's national injunction.<sup>20</sup> Next, the Northern District of Illinois vacated the Final Rule, rendering enforcement impossible.<sup>21</sup> One day later, the Seventh Circuit issued a stay that allowed applications for permanent status to be considered as long as they were postmarked by February 24,

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 151.

<sup>14</sup> *Id.*

<sup>15</sup> Makhlof, *supra* note 10, at 151.

<sup>16</sup> *Id.*

<sup>17</sup> Jose F. Figueroa, et al., *The Trump Administration's 'Public Charge' Rule and COVID-19: Bad Policy at the Worst Time*, STAT (Aug. 21, 2020), <https://www.statnews.com/2020/08/21/the-trump-administrations-public-charge-rule-and-covid-19-bad-policy-at-the-worst-time/>.

<sup>18</sup> Makhlof, *supra* note 10, at 151; *Public Charge*, *supra* note 1.

<sup>19</sup> *Inadmissibility on Public Charge Grounds Final Rule: Litigation*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/inadmissibility-on-public-charge-grounds-final-rule-litigation> (last updated Nov. 5, 2020).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

2020.<sup>22</sup> In December 2020, the Ninth Circuit upheld an injunction on the Final Rule in almost twenty states.<sup>23</sup>

When President Biden took office on January 20, 2021, the Final Rule was still being implemented in most states. Two weeks into his presidency, President Biden issued an Executive Order to promote “[f]aith in our legal immigration systems and [to] [s]trengthen[] [i]ntergration and [i]nclusion [e]fforts for [n]ew Americans.”<sup>24</sup> The Executive Order, *inter alia*, demanded an immediate review of the existing public charge rule to “consider and evaluate” effects of the rule and possible changes “to reduce fear and confusion among impacted communities.”<sup>25</sup> Twenty days after the Executive Order, the Supreme Court agreed to hear the government’s appeal against the Final Rule.<sup>26</sup>

As anticipated, the cases did not last on the Supreme Court’s docket for long after the Executive Order. Only a few short weeks after the Supreme Court granted certiorari, DHS announced it would “no longer defend” the Final Rule following President Biden’s requested review.<sup>27</sup> DHS stated the Final Rule was not in the interest of the public and continuing to defend it would waste “limited government resources.”<sup>28</sup> Consequently, the Department of Justice dismissed its pending appeals.<sup>29</sup>

So, what does this mean for the Public Charge Rule going forward? DHS has “filed a public inspection” for the Federal Register to officially remove the Final Rule from the Code of Federal Regulations—the final step in

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<sup>22</sup> *Id.*

<sup>23</sup> *Ninth Circuit Reinstates Bar on Public Charge for Several States; Government Response Awaited*, FRAGOMEN, <https://www.fragomen.com/insights/alerts/ninth-circuit-reinstates-bar-public-charge-several-states-government-response-awaited> (last visited Mar. 6, 2021).

<sup>24</sup> Exec. Order No. 14012, 86 C.F.R. 8277 (2021).

<sup>25</sup> *Id.*

<sup>26</sup> Matthew Vadum, *Supreme Court to Consider Trump-Era Public Charge Rule That Biden May Dump*, EPOCH TIMES (Feb. 24, 2021), [https://www.theepochtimes.com/supreme-court-to-consider-trump-era-public-charge-rule-that-biden-may-dump\\_3709229.html](https://www.theepochtimes.com/supreme-court-to-consider-trump-era-public-charge-rule-that-biden-may-dump_3709229.html).

<sup>27</sup> *DHS Secretary Statement on the Public Charge Rule*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 9, 2021), <https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

vacating the proposed rule.<sup>30</sup> As a result, the 1999 version of the Public Charge Rule that was in place prior to the Final Rule will be used to assess inadmissibility on public charge grounds.<sup>31</sup> However, the Secretary of Homeland Security did state that DHS will continue to improve the legal immigration system consistent with President Biden's "vision," possibly signaling more changes to the Public Charge Rule.<sup>32</sup> Legally immigrant families can now seek medical care for COVID-19 without it affecting their application; practically, the fear held by millions of applicants seeking permanent resident status and the effects of the Public Charge Rule during the COVID-19 era might not come and go as quickly as the law itself.

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<sup>30</sup> *2019 Public Charge Rule Vacated and Removed; DHS Withdraws Proposed Rule Regarding the Affidavit of Support*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Mar. 11, 2021), <https://www.dhs.gov/news/2021/03/09/dhs-secretary-statement-2019-public-charge-rule>.

<sup>31</sup> *Id.*; see also *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28,689 (May 21, 1999) (explaining the 1999 Public Charge Rule that is now in effect).

<sup>32</sup> See *DHS Secretary Statement*, *supra* note 27.