



## **New Immigration Policy Change:**

### **“Public Charge” Final Rule – What You Need to Know**

On August 14, 2019, the Department of Homeland Security (DHS) published its final rule on Inadmissibility on Public Charge Grounds (the “Public Charge rule”) in the [Federal Register](#). **The rule went into effect on February 24, 2020.**<sup>1</sup> This fact sheet summarizes the rule, its potential impact on farmworkers and their family members, and ongoing education and litigation efforts related to the rule. FJ’s statement on the final public charge rule can be found on our [website](#).

Public charge is an assessment under immigration law that is made when certain persons who are not citizens of the U.S. apply to enter the U.S. and when a person applies to become a Lawful Permanent Resident (LPR). It does not apply to applications to become a citizen. Under the Immigration and Nationality Act, the government may deny an application for immigration status to a person who “is likely at any time to become a public charge.”

The new rule drastically changes the factors used to determine whether a person is “likely” to become a public charge in the future. It also changes the definition of “public charge.” The consequences are that many immigrants who contribute to our economy and support their families will be deemed unfairly to be a “public charge” and denied immigration status.

Public charge does not apply to all categories of immigrants. Many immigrant and nonimmigrant statuses are exempt from the public charge determination, including refugees, asylees, and U- and T-visa applicants, among others. H-2A and H-2B temporary foreign workers **are** subject to the public charge determination when they apply for their visas at U.S. consulates.

### **Definition of “public charge”**

In determining whether a person is likely to become a “public charge,” DHS will use a new definition of that term.

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<sup>1</sup> On January 27, 2020, the U.S. Supreme Court overturned a lower court’s nationwide preliminary injunction that had prevented the public charge rule from going into effect. The U.S. Supreme Court lifted a statewide preliminary injunction for Illinois on February 21, 2020. Litigation on the merits of the rule, including a case in which Farmworker Justice is a plaintiff, continues to proceed through the courts. The rule was originally intended to go into effect on October 15, 2019.

- ***Current definition – someone who will become primarily dependent on the government for support***
- ***New definition – someone who receives one or more public benefits for more than 12 months in the aggregate within any 36 month period (such that, for instance, receipt of two benefits in one month counts as two months)***

Public charge is a future-looking test. Applicants’ perceived future use of public benefits will be assessed based on their totality of circumstances. A public charge determination is highly discretionary and likely to be unpredictable in many cases. As will be seen below, this definition will lead to the denial of many immigration applications that for decades until now would have been approved.

### **What is considered a public benefit?**

In the past, the public charge determination narrowly defined public benefits as cash assistance for income maintenance and government-funded long-term institutional care. Starting **February 24**, additional programs will be considered to be public benefits under the rule, including SNAP (formerly Food Stamps), housing assistance, and Medicaid.<sup>2</sup>

Under the final rule, public benefits include the following:

- Cash assistance from federal, state, local or tribal programs (including TANF, SSI, and General Assistance)
- Supplemental Nutrition Assistance Program (SNAP, formerly known as the Food Stamp Program)
- Housing assistance (including Section 8 rental housing assistance and public housing)<sup>3</sup>
- Medicaid (*except – emergency Medicaid, Medicaid for children under 21, Medicaid for pregnant women and postpartum care for 60 days*)

**Only the benefits listed above will be considered in a public charge determination.** Enrollment in the Affordable Care Act (ACA) marketplaces and the receipt of ACA tax credits and subsidies are NOT considered public benefits. Programs that are entirely funded by the state, county, or city (except cash assistance) will NOT be considered in a public charge determination. **Only the receipt of benefits for which the applicant is the beneficiary will be considered.** Applicants will not be penalized for benefits

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<sup>2</sup> Receipt of SNAP, housing assistance, and Medicaid before February 24, 2020 will not be considered in a public charge determination.

<sup>3</sup> This rule does not include Section 515 rural housing and Section 514/516 farm labor housing as public benefits. Further, under 20 CFR 655.122(d)(4), if public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing’s management. DHS would not consider such housing under the definition of public benefit as the employer is required by regulation to pay for any associated costs. (Fed. Reg. Vol. 84, No. 157, p. 41377)

used by their family members, including U.S. citizen children. Immigrants can apply on behalf of an eligible family member without being penalized as long as they are not the beneficiary.

### **“Totality of Circumstances” test applies factors in addition to public benefit use**

The final rule also defines and weighs a variety of factors in determining whether someone, even if they are not using or plan to use the benefits listed above, is likely to become a public charge. The factors are part of a “totality of circumstances” test, in which factors are assigned positive and negative values. These factors include:

- Age
- Health
- Family status (household size)
- Assets/resources/financial status
- Receipt of public benefits
- Education and skills
- Prospective immigration status and expected period of admission
- Affidavit of support

Depending on the applicant’s circumstances, the factors above may be positive or negative. If the applicant is between 18 and 62 years old, that will be seen as a positive. But, if the applicant is under 18 or over 62, that will be seen as a negative. Similarly, limited English proficiency is a negative factor as is the lack of high school education. Employment history and skills related to employment are positive. It is a negative factor if household income is below 125% of the Federal Poverty Level (FPL) but a person can overcome that factor by having assets of at least five (5) times the difference between the applicant’s income and 125% of the FPL. For a family of four, 125% FPL is a household income of \$32,750.<sup>4</sup>

Some factors are heavily weighted as positive and negative. The heavily weighted negative factors include: the receipt of any of the defined public benefits listed above for more than 12 months in the aggregate within a 36-month period; diagnosis of a medical condition that will require extensive medical treatment or interfere with ability to work/attend school and lack of insurance or financial resources to pay for medical costs; and authorization to work but inability to demonstrate current employment or prospect of future employment. The heavily weighted positive factors include: income above 250% of the FPL (\$65,500 for a family of four)<sup>5</sup> and private unsubsidized health insurance

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<sup>4</sup> 2020 Federal Poverty Guidelines, available at <https://aspe.hhs.gov/2020-poverty-guidelines>

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coverage. Health insurance obtained through the health insurance marketplace but paid for with Advanced Premium Tax Credits is NOT considered a heavily weighted positive factor.

## **H-2A guestworkers are assessed for public charge when applying for their visas at U.S. consulates**

In October 2019, the U.S. Department of State (DOS) published an interim final rule to align the Foreign Affairs Manual (FAM) with the DHS public charge rule. The DOS rule went into effect on February 24, 2020.<sup>6</sup>

*Temporary foreign workers under the H-2A or H-2B programs are subject to the public charge determination at U.S. consulates.* They will be assessed based on the totality of circumstances, discussed above. H-2A and H-2B workers who apply to extend their nonimmigrant temporary work visas in the U.S. will not be subject to the future-looking public charge assessment. Instead, DHS will consider whether they received the designated public benefits for more than an aggregate of 12 months within a 36-month period since obtaining their nonimmigrant status.

## **The final public charge rule will make it more difficult for farmworkers to adjust their status or enter the United States due to the rule's treatment of the totality of circumstances factors**

- *Family and financial status:* Farmworkers' average household income ranges from \$20,000 to \$24,999, well below the threshold of 125% of the FPL in the new rule's factors.<sup>7</sup> An estimated 33% of farmworkers have a family income below 100% of the FPL<sup>8</sup> (\$26,200 for a family of four).<sup>9</sup> Many farmworkers are supporting family members in the U.S. and abroad. The average farmworker household has two minor children. Many farmworker families have few assets and those assets (such as a car) often are of very limited value.<sup>10</sup>
- *Health Insurance:* Cost is one of the biggest barriers to health care access. Approximately 47% of farmworkers have health insurance but only 18% of workers reported that their employer offered comprehensive health insurance.<sup>11</sup> Due to the expense of health insurance and their low wages, few farmworkers are able to afford private health insurance. Yet they are at high risk for a number of chronic conditions, including heart disease, diabetes, and cancer.

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<sup>6</sup> CLINIC and other organizational plaintiffs filed a lawsuit against DOS in the Southern District of New York challenging the interim final rule, the 2018 changes to the FAM, and the presidential proclamation requiring immigrant visa applicants to have health insurance. More information about this litigation can be found on [CLINIC's website](#)

<sup>7</sup> U.S. Department of Labor, Findings from the National Agricultural Workers Survey 2014-2016 (NAWS), published January 2018, available at [https://www.doleta.gov/news/research/docs/NAWS\\_Research\\_Report\\_13.pdf](https://www.doleta.gov/news/research/docs/NAWS_Research_Report_13.pdf).

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<sup>9</sup> 2020 Federal Poverty Guidelines, available at <https://aspe.hhs.gov/2020-poverty-guidelines>

<sup>10</sup> U.S. Department of Labor, Findings from the National Agricultural Workers Survey 2014-2016 (NAWS), published January 2018, available at [https://www.doleta.gov/news/research/docs/NAWS\\_Research\\_Report\\_13.pdf](https://www.doleta.gov/news/research/docs/NAWS_Research_Report_13.pdf).

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- *Education and skills:* Foreign-born farmworkers on average have an 8<sup>th</sup> grade education.<sup>12</sup> Sixty-two percent of farmworkers reported low or limited English proficiency.<sup>13</sup>

In addition to obstructing access to immigration status, the rule will discourage farmworkers and their family members from participating in programs for which they are eligible, even those that will not impact immigration applications, and that were created to help low-wage workers improve their quality of life. While few farmworkers who would apply to enter the U.S. or to adjust their status are eligible to enroll in the public benefits in the public charge definition, many workers have eligible family members who may disenroll or decline enrollment due to fear about potential immigration consequences.

It is important that farmworker communities have accurate information about the changes in public charge so they can make informed decisions about the use of public benefits and understand the impact their financial status will have on immigration applications.

Farmworker Justice is working with national, state, and local partners, including the [Protecting Immigrant Families campaign](#), to share information about the public charge rule. Farmworker Justice was also one of the organizational plaintiffs in the California lawsuit, filed in the Northern District of California. If you have any questions or for more information, contact Alexis Guild, Director of Health Policy and Programs, at [aguild@farmworkerjustice.org](mailto:aguild@farmworkerjustice.org).

*Published February 25, 2020*

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