

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

October 22, 2021

U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue NW  
Washington, DC 20529-2140

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

## **Re: DHS- Docket No. USCIS-2021-0013; Comments on Public Charge Ground of Inadmissibility**

Justice in Aging, along with our undersigned partners, appreciate the opportunity to respond to the Department of Homeland Security's (DHS) advance notice of proposed rulemaking (ANPRM).

Justice in Aging is a non-profit organization with the mission of improving the lives of low-income older adults living in the United States. For 49 years, we have used the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Our mission is to secure the opportunity for older adults to live with dignity, regardless of financial circumstances—free from the worry, harm, and injustice caused by lack of health care, food, or a safe place to live.

Using our expertise in Social Security, Supplemental Security Income (SSI), Medicare and Medicaid, and elder rights, we work to strengthen the social safety net and remove the barriers low-income seniors face in trying to access the services they need. We also provide technical expertise to thousands of advocates across the country on how to help low-income older adults access the programs and services they need to meet their basic needs. Our advocacy centers on populations that have traditionally lacked legal protection, including people of color, people with limited English proficiency (LEP), women, people with disabilities, and LGBTQ individuals. In line with our Strategic Initiative to Advance Equity, we seek to pursue systemic changes in policy and partner with agencies and organizations to improve the lives of low-income older adults who experience inequities rooted in structural racism, ageism, sexism, ableism, homophobia, and xenophobia.

We are submitting this comment to share specific impacts the public charge rule has on older adults and how DHS can mitigate discrimination against older immigrants in a new rulemaking. Our comments are organized by category in the ANPRM. As many of our comments are applicable to multiple questions, we have not answered every question separately.

## Purpose and Definition of Public Charge

### [How should DHS define the term “public charge”?](#)

We recognize the public charge policy is rooted in a history of xenophobia and racism and has been used to discriminate against people based on disability, older age, and limited income and wealth. In this context, we urge DHS to adopt a definition of public charge that ensures its narrow application consistent with Congressional intent and legal interpretation. Such a definition would neither deter nor penalize individuals for receiving public benefits they are entitled to. Our current system of public benefits is more robust and drastically different from the “system” in place when Congress first enacted public charge. Instead of segregating older adults and people with disabilities and chronic health conditions who are living in poverty, government programs such as Medicaid, SSI, and the Supplemental Nutrition Assistance Program (SNAP) supplement

### WASHINGTON

1444 Eye Street, NW, Suite 1100  
Washington, DC 20005  
202-289-6976

### LOS ANGELES

3660 Wilshire Boulevard, Suite 718  
Los Angeles, CA 90010  
213-639-0930

### OAKLAND

1330 Broadway, Suite 525  
Oakland, CA 94612  
510-663-1055

programs like Social Security and Medicare to help older adults meet their basic needs and live in and contribute to their communities.

DHS should define public charge for inadmissibility purposes as a person who is “likely to become primarily and permanently reliant on the federal government to avoid destitution.” Under this definition, and consistent with the Ninth Circuit Court of Appeals decision in *City & County of San Francisco v. USCIS*,<sup>1</sup> reliance on government benefits should not be considered unless all of the following conditions are met: the government provides the *primary* source of income, the reliance is *permanent*, and the reliance is to avoid destitution. Many people, including older adults, receive only modest public benefits for a limited period of time that supplement their income by improving their access to nutrition, health care, and other services. Using these supplemental benefits does not make someone a public charge. In addition, if an individual receives a benefit, but also earns income from a job or receives support from family members they are not *primarily* reliant on the government. DHS should consider income and resources broadly to encompass all support and assets available to the individual—not only from their own earnings and savings, but also from their family’s. DHS should also consider the makeup of the individual’s household, for example by considering whether the individual lives in a multigenerational household where rent or mortgage payments are paid by their adult children.

[How might DHS define the term “public charge”, or otherwise draft its rule, so as to minimize confusion and uncertainty that could lead eligible individuals to forgo the receipt of public benefits?](#)

We recommend DHS’s rule minimize the consideration of an applicant’s benefit use altogether by giving primary and presumptive consideration to the affidavit of support, as discussed more fully below.

- ***DHS should draft a rule that does not consider receipt of public benefits.***

We recommend that the public charge NPRM not consider any government benefits, including those that provide cash, health care, long-term care, nutrition, or housing assistance. Receipt of healthcare, nutrition, or housing assistance is not an indication that a person is primarily or permanently reliant on the government. Similarly, receipt of cash assistance in itself does not make a person a public charge. For example, cash assistance under Temporary Assistance for Needy Families (TANF) is by its nature a temporary benefit and so an individual cannot be “permanently reliant” on it. Moreover, TANF benefits nationwide are such that they cannot be the primary sustenance for any individual.<sup>2</sup> SSI is similarly so low—only three fourths of the federal poverty level—that it is impossible for any individual to be considered primarily reliant on SSI alone.<sup>3</sup> Importantly, SSI benefits are *reduced* if an individual receives other sources of assistance (including from family), which further confirms that SSI benefits are merely supplemental.<sup>4</sup> Additionally, SSI is only available for a maximum of seven years for non-citizen

---

<sup>1</sup> *City & County of San Francisco v. USCIS*, D.C. No. 4:19-cv-04717-PJH, <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/02/19-17213.pdf>

<sup>2</sup> “In every state, [TANF] benefits are at or below 60 percent of the poverty line and fail to cover rent for a modest two-bedroom apartment.” Ali Safawi and Ife Floyd, TANF Benefits Still Too Low to Help Families, Especially Black Families, Avoid Increased Hardship (Oct. 8, 2020), <https://www.cbpp.org/research/family-income-support/tanf-benefits-still-too-low-to-help-families-especially-black>.

<sup>3</sup> Kathleen Romig, After Decades of Neglect, It’s Time to Rebuild SSI (June 30, 2021), <https://www.cbpp.org/blog/after-decades-of-neglect-its-time-to-rebuild-ssi>.

<sup>4</sup> *Id.* (“[E]ach dollar of earnings above that level typically reduces SSI benefits by 50 cents. Such reductions dropped the average SSI monthly benefit to \$580 in December 2020.”).

beneficiaries, meaning the program is temporary by nature. Considering receipt of SSI benefits to be a public charge is also ableist and ageist because the program exists to provide a small cash supplement specifically for disabled individuals and individuals ages 65 and over.

- ***If DHS opts to consider public benefits in the public charge determination, it should be limited and narrow.***

In the alternative, DHS should consider only the two specific, *federal* programs that provide *cash* assistance for income maintenance.<sup>5</sup> The only two programs that might possibly create a primary reliance on the federal government to avoid destitution are cash assistance under Temporary Assistance for Needy Families (TANF) and Supplemental Security Income (SSI). However, as explained above, the rule should clarify that simply receiving either or both of these benefits in itself does not make someone a public charge.

Moreover, DHS should provide clear guidance on how to predict the likelihood of becoming a public charge based on *current* benefits use. Such guidance is necessary to prevent speculation and/or arbitrary assessments that would allow immigration officers to discriminate. Adjudicators should only look at an applicant's current use of TANF and SSI, as past benefit use does not automatically indicate future use or make someone a public charge. In addition, if DHS opts to consider limited public benefits use, the I-485 form and its instructions should make clear that applicants only need to provide information about current receipt of TANF and SSI.

- ***DHS should not consider Medicaid—even for institutional long-term care.***

Factoring in long-term care services in the public charge determination is clearly discriminatory against older adults. While age is *an* enumerated factor in the Immigration and Nationality Act, 8 U.S.C. 1182(a)(4)(B), it is not be a *determinative* factor. Given that most older adults need some form of long-term care and that Medicaid funds the vast majority of these services in the U.S., considering government funded long-term care would unjustly give greater weight to the age factor in the public charge determination.

According to the CDC, 40% of adults age 65 and older in the U.S. have a disability.<sup>6</sup> Rates of disability are even higher among Black, American Indian/Alaska Native and Hispanic/Latino older adults. Many of these individuals need or will need assistance with activities of daily living as they age either at home or in an institution. Medicaid continues to be the only option for older adults in the U.S. because Medicare and private health insurance do not cover long-term care, private long-term care insurance is unattainable for most individuals, and the out-of-pocket costs for long-term care are unsustainable.<sup>7</sup> Factoring in government-funded institutional care is even

---

<sup>5</sup> DHS should not consider any exclusively state-funded programs in its public charge test, as doing so would interfere with a state's discretion to set its own policies and undermines policies and services that states want to provide. See *infra* note 17 and accompanying text.

<sup>6</sup> CDC, Disability Impacts All of Us, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html>; Okoro CA, Hollis ND, Cyrus AC, Griffin-Blake S. Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults — United States, 2016. MMWR Morb Mortal Wkly Rep 2018; 67:882–887, <https://www.cdc.gov/mmwr/volumes/67/wr/mm6732a3.htm>.

<sup>7</sup> As of 2015, only 8% of Americans purchased private long-term care insurance and there has been a decline in the market, in part due to the high premium costs and a lack of insurers. The costs for long-term care are so high that individuals pay for long-term care out of pocket “until they qualify for Medicaid”—meaning they have spent down their remaining resources to afford long-term care. U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Long Term Services and Supports for Older Americans: Risks and

more acutely discriminatory against older adults. While our long-term care system and civil rights laws have evolved to enable many people with disabilities to get support at home, the majority of our government funding for long-term care services for older adults, because of a systemic bias, still goes toward institutional care.<sup>8</sup> In fact, according to the Kaiser Family Foundation, one in three people turning 65 will require nursing home care in their lives, and Medicaid covers six in ten nursing home residents.<sup>9</sup>

Furthermore, the long-term care infrastructure in the U.S. inequitably forces older adults of color into nursing facilities, creating racial disparities in how long-term care is delivered.<sup>10</sup> Not only are dementia rates higher among Black and Hispanic older adults (a factor which exponentially increases the likelihood of institutionalization), but inequitable access to affordable and accessible housing creates a disproportionate barrier for low-income older adults of color to receiving in-home care.<sup>11</sup> Considering Medicaid funded institutional long-term care in the public charge determination disproportionately disadvantages immigrants of color and erroneously introduces race as a factor in the determination. We should not penalize immigrants for the problems in the U.S.'s long-term care system that make it difficult to get care at home and force people into institutional care, or for the problems of systemic racism in the U.S. healthcare system that contribute to disproportionate rates of institutionalization in communities of color. In addition, including any type of Medicaid benefit in the public charge test will confuse people and lead them to forego receiving essential health care.

Finally, DHS should not weigh receipt of long-term care against the applicant because programs like Medicaid funded home- and community-based services allow family members who would otherwise act as caregivers to work and earn an income and is often the preference of the older adult or person with disability who is receiving services. Many of the caregiving services in the U.S. are provided by unpaid family members,<sup>12</sup> and programs like Medicaid allow intergenerational households to earn income without placing their loved one at risk without care.

- ***DHS should make clear that any and all programs and benefits not specifically identified on the I-485 from and its instructions are not considered.***

Many low-income older adults have access to a variety of programs that help them meet their basic needs, stay healthy and live safely in the community. It can be challenging to distinguish between programs and understand that they have no bearing on the public charge test. Therefore, we recommend DHS provide guidance on programs *not* included so that applicants and their advocates have a reference. Any such guidance should include Medicare and programs funded under the Older Americans Act, as well as COVID-related assistance, FEMA and other disaster-related benefits, and unemployment insurance benefits.

---

Financing Research Brief, (June 30, 2015), <https://aspe.hhs.gov/reports/long-term-services-supports-older-americans-risks-financing-research-brief-0>.

<sup>8</sup> Justice in Aging, Medicaid Home- and Community-Based Services for Older Adults with Disabilities: A Primer (Apr. 2021), <https://justiceinaging.org/wp-content/uploads/2021/04/HCBS-Primer.pdf>.

<sup>9</sup> Kaiser Family Foundation, Medicaid's Role in Nursing Home Care (June 2017), <https://files.kff.org/attachment/Infographic-Medicoids-Role-in-Nursing-Home-Care>.

<sup>10</sup> See e.g., Feng Z, et al., *Growth of Racial and Ethnic Minorities in US Nursing Homes Driven by Demographics and Possible Disparities in Options*, Health Aff. (2011), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2011.0126>.

<sup>11</sup> Justice in Aging, *supra* note 8.

<sup>12</sup> Deborah Schoch, AARP, 1 in 5 Americans Now Provide Unpaid Family Care (June 18, 2020), <https://www.aarp.org/caregiving/basics/info-2020/unpaid-family-caregivers-report.html>.

This guidance should also address COVID-19 vaccines. Older adults are at an especially high risk from COVID-19, but senior immigrants may face barriers in receiving the COVID-19 vaccine due to limited technology access, language barriers, and hesitancy about the effect of vaccination on their or their families' immigration status.<sup>13</sup> DHS should ensure that all instructions and outreach materials clearly state that COVID-19 vaccines are available regardless of immigration status, that receiving a vaccine will not be considered as part of the public charge test, and that any identification provided at the vaccine site is not shared with DHS.

[What national policies, including the policies referenced throughout this ANPRM, policies related to controlling paperwork burdens on the public, and policies related to promoting the public health and general well-being, should DHS consider when defining the term “public charge” and administering the statute more generally?](#)

- ***Nondiscrimination/ Equity***

As mentioned in discussing the definition of public charge, the public charge policy has a discriminatory history and has become intertwined with many other policies that are part of systemic and institutional racism, ableism, ageism, homophobia and sexism. Therefore, in writing this rule and administering the statute, DHS should be looking at public charge in this context and making every effort to prevent discrimination. Such an approach is necessary to comply with President Biden's Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. Indeed, the public charge policy under the 1999 Guidance does not promote equitable delivery of government benefits, as the EO calls upon federal agencies to do.<sup>14</sup>

In addition to the President's EO, the public charge rule operates within a landscape of federal civil rights laws that are intended to combat discrimination and promote equity, all of which must be coordinated with any new final rule regarding public charge. Title VI of the Civil Rights Act of 1964 requires “recipients of Federal financial assistance to take reasonable steps to make their programs, services, and activities accessible by eligible persons with limited English proficiency.” Accordingly, DHS should, with leadership from the Office for Civil Rights and Civil Liberties (CRCL), make its rules, lists, guides, resources, and outreach materials regarding the public charge final rule available in at least the nine languages it typically translates materials into: Arabic, Chinese, French, Haitian-Creole, Portuguese, Russian, Somali, Spanish, and Vietnamese. Of course, additional languages would ensure more immigrant older adults are better able to meaningfully understand the public charge final rule. Although the Department has taken measures to translate many materials, ensuring that communications, outreach, and education about the final public charge rule are available in multiple languages may pose an opportunity to revisit and improve on its language access strategies. It appears, for example, that the DHCS Language Access Plan has not been updated since February 28, 2012.

---

<sup>13</sup> Gustavo Solis, USC News, Caregivers struggle with barriers to getting COVID-19 vaccines for elderly immigrant parents (Feb. 24, 2021), <https://news.usc.edu/182791/usc-caregivers-elderly-immigrants-covid-19-vaccine-access/>.

<sup>14</sup> Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/> The “Federal government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved and affected by persistent poverty and inequality” Sec. 7 of the EO Also promotes equitable delivery of government benefits and equitable opportunities.

Relatedly, we encourage USCIS to accept forms in other languages and make translation services available and free for any adjudication.

Section 1557 of the Patient Protection and Affordable Care Act prohibits excluding an individual from participating in, receiving benefits of, or being discriminated against in any health program or activity receiving federal funds on the basis of age; race; color; national origin; or sex, including sexual orientation and gender identity.<sup>15</sup> Section 1557 protects the civil rights of historically marginalized groups seeking to access health care services and begins to bridge certain gaps in healthcare inequities. The final public charge rule should not undermine the objectives of Section 1557 by punishing immigrants for using government funded health (e.g., Medicaid) assistance.

Similarly, the public charge rule should not undermine equitable access to nutrition, housing, and cash assistance, all of which contribute to social determinants of health. DHS should take precautions not to chill the use of such services by failing to clarify which public benefits programs are excluded from consideration or not conducting sufficient outreach and education to immigrant communities, including older adults, about the final rule. To that end, we encourage DHS, when administering the statute, to work with the Department of Health and Human Services and other agencies to ensure that the final rule does not further health and economic disparities for older immigrants and others.

- ***Changes in Eligibility for Public Benefits***

As discussed previously, our system of public benefits has evolved dramatically from when the public charge policy was enacted. Most recently, this is made evident by Congress's multiple COVID-19 Relief Bills, which provide access to vaccines and other COVID-related health services for everyone, regardless of immigration status, and provide funds to states and localities to use as they see fit.<sup>16</sup> Moreover, both the federal government and states have enacted legislation in recent years to expand eligibility for SNAP, Medicaid, and CHIP to additional groups of immigrants. For example, California and Illinois both recently expanded their Medicaid programs to provide coverage for low-income older adults regardless of immigration status.<sup>17</sup> These changes favor an approach of limiting consideration of public benefits in the public charge context, both in recognition of the trajectory of policy makers increasing access to public benefits and to mitigate the chilling effect on the use of these critical programs.

---

<sup>15</sup> 42 U.S.C. § 18116; see U.S. Department of Health and Human Services, Office for Civil Rights, Section 1557 of the Patient Protection and Affordable Care Act, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

<sup>16</sup> See National Immigration Law Center, Understanding the Impact of Key COVID-19 Relief Bills on Immigrant Communities (May 27, 2020), <https://www.nilc.org/issues/economic-support/impact-of-covid19-relief-bills-on-immigrant-communities/>.

<sup>17</sup> See Office of Governor Gavin Newsom, Governor Newsom Signs Into Law First-in-the-Nation Expansion of Medical to Undocumented Californians Age 50 and Over, Bold Initiatives to Advance More Equitable and Prevention Focused Health Care (July 27, 2021), <https://www.gov.ca.gov/2021/07/27/governor-newsom-signs-into-law-first-in-the-nation-expansion-of-medi-cal-to-undocumented-californians-age-50-and-over-bold-initiatives-to-advance-more-equitable-and-prevention-focused-health-care/>; Illinois Department of Human Services, New Health Benefit Coverage for Immigrant Seniors (Oct. 30, 2020), <https://www.dhs.state.il.us/page.aspx?item=128154>. See also Sophia Taren, Health Care for Older Immigrants Sees Momentum Among States (July 24, 2021), <https://www.usnews.com/news/best-states/california/articles/2021-07-24/health-care-for-older-immigrants-sees-momentum-among-states> (noting that Oregon and New York are moving towards similar programs).

What potentially disproportionate negative impacts on underserved communities (e.g., people of color, persons with disabilities) could arise from the definition of “public charge” and how could DHS avoid or mitigate them?

DHS should avoid repeating any of the enumerated factors from the 2019 final public charge rule that would target older adults. For example, being 62 or older, having limited English proficiency, or having a serious health condition or disability were all factors that were weighed negatively. Meanwhile, factors such as an annual income above 250% of the federal poverty level, private health insurance, and current employment were all weighed positively. Together, these factors would have made it impossible for older immigrants to pass the public charge test at that time because the majority of non-U.S. citizens over 62 live in low- or moderate-income households, 40% of adults age 65 and over have a disability, and the majority of older adult immigrants have limited English proficiency. DHS should avoid such arbitrary and targeted thresholds and factors that will automatically disadvantage older immigrants.<sup>18</sup>

In addition, the 2019 rule included harmful, outdated and inaccurate prejudices that people with disabilities are not contributors to society—a perspective that Congress has explicitly rejected in multiple statutes, including the Americans with Disabilities Act. Although disability was not to be the “sole factor,” DHS would have considered a wide range of medical conditions and the existence of disability itself in the public charge determination. DHS also failed to offer any accommodation for individuals with disabilities and echoed the biases and “archaic attitudes” about disabilities that the ADA and Rehabilitation Act of 1973 were meant to overcome.

Moreover, if the 2019 public charge rule had not been invalidated by the court, it would have also prevented many immigrants of color and women from immigrating. Many immigrant women are paid direct care workers for older adults in the U.S., and many are themselves older adults. Caregiving positions tend to be low-wage and part time, and 88% of women who are paid care workers rely on public benefits. To avoid a disproportionate and intersectional negative impact on paid care workers, DHS should entirely avoid income thresholds and eliminate or reduce consideration of public benefits utilization in the public charge determination.<sup>19</sup>

## Statutory Factors

Which factors (whether statutory factors or any other relevant factors identified by the commenter) are most predictive of whether a noncitizen is likely (or is not likely) to become a public charge? To the extent that data exist on this question, how can DHS use such data to improve public charge policymaking and adjudication?

We urge DHS to craft a public charge test that is the least complicated possible. Immigration officers should not be predicting who is likely to become a public charge “at any time in the future.” Such a prediction is nothing more than an act of uninformed speculation that would allow immigration officers to discriminate, and it is, quite simply, bad policy. Instead, we recommend a policy which ensures that the affidavit of support creates a presumption that the applicant overcomes the public charge ground of inadmissibility. This is a fair, longstanding approach that is more transparent and easier to administer.

---

<sup>18</sup> See *New York v. U.S. Dep’t of Homeland Security et al.*, Brief on Behalf of Amici Curiae (Jan. 27, 2020), <https://justiceinaging.org/wp-content/uploads/2020/01/Filed-Amicus-Brief-NY-AG-Appeal.pdf>.

<sup>19</sup> *New York v. U.S. Dep’t of Homeland Security et al.*, Brief on Behalf of Amici Curiae (Jan. 27, 2020), <https://justiceinaging.org/wp-content/uploads/2020/01/Filed-Amicus-Brief-NY-AG-Appeal.pdf> (stating that a majority of non-US citizen caregivers who use public benefits are women and Latino).

Affidavits of support are especially crucial when determining whether an older adult is likely to become a public charge. Older immigrants frequently live in intergenerational households,<sup>20</sup> where younger family members may provide some or all of the caregiving and cover the cost of nutrition, housing, and other needs of the senior. In turn, older immigrants often serve as caregivers to younger household members and are an integral part of the family unit.<sup>21</sup> Older adults should not be evaluated in a silo, where their age, inability to work in the formal economy, or health may erroneously indicate that they are likely to become a public charge.<sup>22</sup>

In the absence of an affidavit of support, DHS should use the totality of circumstances test only when an individual is deemed to be primarily and permanently reliant on government assistance to avoid destitution. As discussed above, we propose a three-part test to preliminarily identify whether an individual may be a public charge. When an individual does meet all three parts, the adjudicators should use a totality of the circumstances approach to weigh the statutory factors. Again, it is critical for older adults to be viewed not in a silo, but rather holistically and in consideration with affidavits from their family.

DHS should propose that adjudicators look at all the factors together to see if they would make an applicant likely to become a public charge. If adjudicators identify that a person is “likely to become primarily and permanently reliant on the federal government to avoid destitution,” then they should look to the totality of circumstances to see if there is also evidence to *overcome* the circumstance. The five statutory factors and totality of circumstances test were never intended to be a list of negative and positive factors to be weighed individually in every case.<sup>23</sup> For example, if age and education are a concern because the older adult is not able to work in the formal economy, but that person is a care provider that supports the family, enabling other family members to work and earn for the household, then on balance the applicant is not “likely to become primarily and permanently reliant on the federal government to avoid destitution.”

[How can DHS address the potential for perceived or actual unfairness or discrimination in public charge inadmissibility adjudications, whether due to cognitive, racial, or other biases; arbitrariness; variations in outcomes across cases with similar facts; or other reasons?](#)

DHS should not repeat the mistakes of the 2019 public charge rule by defining the statutory factors in a manner that disproportionately burdens people of color, older adults, women and people with disabilities, or that creates the opportunity for conscious or implicit bias to affect an individual

---

<sup>20</sup> Pew Research Center, A record 64 million Americans live in multigenerational households (Apr. 5, 2018), [pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/](https://pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/) (noting also that people of color are more likely than white people to live in multigenerational households).

<sup>21</sup> *Supra* note 19 (“[F]oreign-born Americans are more likely than those born in the U.S. to live with multiple generations of family.”).

<sup>22</sup> *New York v. U.S. Dep’t of Homeland Security et al.*, Brief on Behalf of Amici Curiae (Jan. 27, 2020), <https://justiceinaging.org/wp-content/uploads/2020/01/Filed-Amicus-Brief-NY-AG-Appeal.pdf> (noting that US immigration law used to value family unification but the 2019 final rule disincentivized intergenerational living).

<sup>23</sup> The Second Circuit found: “[O]ur review of the historical administrative and judicial interpretations of the ground over the years leaves us convinced that there was a settled meaning of ‘public charge’ well before Congress enacted IIRIRA. The absolute bulk of the caselaw, from the Supreme Court, the circuit courts, and the BIA interprets ‘public charge’ to mean a person who is unable to support herself, either through work, savings, or family ties. *See, e.g., Day*, 34 F.2d at 922; *Harutunian*, 14 I. & N. Dec. at 588-89. Indeed, we think this interpretation was established early enough that it was ratified by Congress in the INA of 1952. But the subsequent and consistent administrative interpretations of the term from the 1960s and 1970s remove any doubt that it was adopted by Congress in IIRIRA.” *State of N.Y. v. Dep’t of Homeland Security*, 969 F.3d 42 (2d Cir. 2020).

adjudicator’s determinations. For example, the 2019 public charge rule counted income under 125 percent of the federal poverty level as a “negative factor,” and would have likely resulted in policy that favored immigrants from whiter countries including Europe.<sup>24</sup> Similarly, the 2019 final rule would have a disproportionate effect against older immigrants, not only because older age, chronic health conditions, disability, public benefits use and limited income were considered negative factors, but also because factors such as ability to work, English proficiency and family size heavily weighed against their admission.

[Age: How should an applicant’s age be considered as part of the public charge inadmissibility determination?](#)

We urge DHS not to include any age thresholds for adults under the public charge test and ensure that older age is never a factor that is viewed negatively. As discussed elsewhere, age is not a determinative factor and older adults should not be viewed in a silo. Being an older adult and not working in the formal economy should not be viewed as a negative, particularly when that individual is supporting their household by, for example, providing care for a spouse, a child, or other family member. In addition, if an older person has a sponsor, family or community that will support them, they will be unlikely to become primarily and permanently dependent on the government.

**Health**

[How should DHS define health for the purposes of a public charge inadmissibility determination?](#)

Health should be defined narrowly and carefully so as not to discriminate against older adults or people with disabilities. Being older and/or having a disability does not mean a person is in poor health or is likely to become primarily and permanently dependent on the government to avoid destitution. And, as discussed above, the use of Medicaid long-term care, including institutional care, should not be a negatively weighed factor.

[Should DHS consider disabilities and/or chronic health conditions as part of the health factor? If yes, how should DHS consider these conditions and why?](#)

No. One in four adults in the U.S. and 40% of adults age 65 and older have a disability. Nearly half of all Americans have at least one chronic condition, and the number is growing.<sup>25</sup> This number is highest among older adults. A rule that considers disabilities and chronic conditions as part of the health factor also risks creating a blanket prohibition against admitting older adult immigrants. In addition, considering disabilities or chronic health conditions would open DHS up to potential racial bias. As stated previously, rates of disability and chronic conditions are higher among Black, Hispanic, and American Indian/Alaskan Native older adults.

---

<sup>24</sup> Randy Capps et al., “Gauging the Impact of DHS’ Proposed Public-Charge Rule on U.S. Immigration,” November 2018, available at: <https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration>

<sup>25</sup> Centers for Disease Control and Prevention, Prevalence of Multiple Chronic Conditions Among US Adults, 2018, available at: [https://www.cdc.gov/pcd/issues/2020/20\\_0130.htm](https://www.cdc.gov/pcd/issues/2020/20_0130.htm)

Should DHS account for social determinants of health to avoid unintended disparate impacts on historically disadvantaged groups? If yes, how should DHS consider this limited access and why?

Social determinants of health are widely regarded as having a major impact on the health and well-being of an individual and should be considered as part of the totality of the circumstances. Factors such as access to safe and affordable housing and transportation; education, income, and work opportunities; access to nutrition; polluted air and water; and experiencing violence, discrimination, and racism are all factors that contribute to an individual's overall health and contribute to health inequities.<sup>26</sup> These factors also compound over time, meaning that older adults may be especially disadvantaged due to a lifetime of aggravated negative factors, like an older adult of color who has faced a lifetime of the stress and other harmful effects in encountering racism. Considering an applicant's health without considering the social determinants of health which they experienced paints an incomplete picture of the applicant, and of immigrants as a whole—making it more likely that people of color, people without higher education, and low-income individuals are found inadmissible without any evidence that they will be a public charge. Given the compounding effects over the lifetime, failing to consider social determinants would in effect of doubly count an older adult's age.

Family Status: How should DHS define and consider family status for the purposes of a public charge inadmissibility determination?

DHS should consider the positives of having a large family, such as more people who can work and bring in income, care for children and older adults, and support the family's success and resiliency. As discussed earlier, intergenerational households are common in the U.S. and continue to be prevalent for families with immigrants. The U.S. previously favored family unity—a unity that allows two or three generations of family members to cohabitate and contribute to the household in different ways. Unlike the 2019 final rule that disincentivized immigrants living with family by adding harsh income thresholds, DHS's rule should recognize that living in a multigenerational household is more likely to be self-sustaining than living alone.

Assets, Resources, and Financial Status

How should DHS address the challenges faced by those not served by a bank or similar financial institution in demonstrating their assets, resources, and financial status?

DHS should allow for alternative means to show income, assets and resources and not just those in traditional banks, including records from alternative financial services transactions so as not to unfairly prejudice individuals who are “unbanked” or “underbanked.” In the U.S., 3.5 million households headed by someone age 50 or older are “unbanked,” and Asian and Hispanic/Latino adults ages 65 and over are more likely to be “unbanked” than their younger counterparts.<sup>27</sup> Immigrants, who are more likely to be low income and have less education, are more likely to be unbanked than native born U.S. citizens.<sup>28</sup>

---

<sup>26</sup> U.S. Dep't of Health and Human Services, Social Determinants of Health, <https://health.gov/healthypeople/objectives-and-data/social-determinants-health>.

<sup>27</sup> Joe Valenti, AARP Public Policy Institute, Financial Access Challenges for Older Adults (Sept. 2020), <https://www.aarp.org/content/dam/aarp/ppi/2020/09/financial-access-challenges-for-older-adults.doi.10.26419-2Fppi.00108.001.pdf>.

<sup>28</sup> S. Rhine et. al, The Determinants of Being Unbanked for U.S. Immigrants, The Journal of Consumer Affairs (Summer 2006), <https://www.jstor.org/stable/23860560>

Should DHS address its assessment of the relationship between the applicant’s assets, resources, and financial status in the context of his or her particular circumstances (e.g., costs of living in the applicant’s geographic location) in its rulemaking? If yes, how so?

Any introduction of additional factors into the public charge determination increases the risk of inconsistent outcomes. Such factors should be considered only where they are necessary to redress an inequity (e.g., social determinants of health) or explain a change in circumstances (e.g., a move to a state where home and community-based services were not readily accessible<sup>29</sup>). DHS’s example of the cost of living in the applicant’s geographic location is problematic. It goes against precedent and incorporates an assumption that the applicant will remain in their current location. Relatedly, considering cost of living may unfairly penalize older adults who frequently join their younger family members’ households. Costs of living differ greatly between multigenerational homes and individual homes because, for example, cost of rent and utilities is shared, and projected costs of childcare may be eliminated due to family support.

Should DHS consider the varied economic opportunities afforded to applicants to avoid unintended disparate impacts? If yes, how should DHS consider these limited opportunities and why?

DHS should consider varied economic opportunities both in the U.S. and before coming to the U.S..<sup>30</sup> The U.S. faces a persistent and pervasive wage gap for women and people of color. Latinas are paid just 55 cents for every dollar paid to white, non-Hispanic men, and black women 63 cents for every dollar paid to white, non-Hispanic men.<sup>31</sup> These wage gaps mean that older women are more likely than older men to live in poverty, and older women of color are twice as likely to experience poverty than white older women.<sup>32</sup> LGBTQ older women similarly face high rates of poverty.<sup>33</sup>

Economic opportunities in non-U.S. countries vary greatly by continent, placing applicants from Africa, Central and South America, and many Asian countries at a wealth disadvantage.<sup>34</sup> Applicants may not have been able to work or may have been restricted to certain low-paying jobs based on their race, religion, gender or sexual orientation, or other identity, before they came to the U.S. Lack of economic opportunities in one’s home country has little bearing on whether an individual is likely to become a public charge.

---

<sup>29</sup> Access to Medicaid home and community-based services (HCBS) varies greatly from state to state. While an individual eligible for Medicaid can get nursing facility care coverage right away, they may have to wait years for HCBS. In fact, over 800,000 people are currently on waiting lists for HCBS. Kaiser Family Found., *Waiting List Enrollment for Medicaid Section 1915(c) Home and Community-Based Services Waivers* (2018), <https://www.kff.org/health-reform/state-indicator/waiting-lists-for-hcbs-waivers/>.

<sup>30</sup> World Bank Group, *Moving for Prosperity: Global Migration and Labor Markets* (2018), <https://www.worldbank.org/en/research/publication/moving-for-prosperity> (discussing wealth gaps as driver for migrating between nations).

<sup>31</sup> National Partnership for Women & Families, *Quantifying America’s Gender Wage Gap by Race/ Ethnicity* (March 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf>

<sup>32</sup> Justice in Aging, *Older Women & Poverty* (Dec. 2018), <https://justiceinaging.org/wp-content/uploads/2020/08/Older-Women-and-Poverty.pdf>.

<sup>33</sup> *Id.*; Vanessa Barrington & Denny Chan, Justice in Aging, *How Can Legal Services Better Meet the Needs of Low-Income LGBT Seniors?* (June 2016), <https://justiceinaging.org/wp-content/uploads/2016/06/How-Can-Legal-Services-Better-Meet-the-Needs-of-Low-Income-LGBT-Seniors.pdf>.

<sup>34</sup> United Nations University, UNU-Wider, *The Global Distribution of Household Wealth*, *Blog*, <https://www.wider.unu.edu/publication/global-distribution-household-wealth>.

## Education and Skills: How should DHS consider an applicant's education and skills in making a public charge inadmissibility determination?

As with other financial factors, a person's education and skills should only be used to help overcome other factors. Skills do not need to be related to work in the formal economy or outside the home to count.

Specifically, DHS should not consider proficiency in English as a factor as the 2019 rule did. First, assessing someone's English proficiency in this context is subjective, which allows for bias. The public charge test should not be subjective. Second, it does not correlate with the ability to support oneself. And third, it would unfairly discriminate against older adults. Over 50% of older immigrants in 2010 reported speaking English less than "very well" and this percentage is even higher among Asian American older adults.<sup>35</sup> Lastly, the U.S. does not have a national language. U.S. immigration law not only does not require English proficiency, but also prohibits discrimination based on nationality.<sup>36</sup> To the contrary, language access requirements at the federal, state, local level enable individuals with limited English proficiency, including older immigrants, to participate fully in their communities and contribute to their households and society.

## Other Factors to Consider

### What data and information should DHS consider about the direct and indirect effects of past public charge policies in this regard?

Research has confirmed that the lead up to and rollout of the 2019 public charge policy created a pronounced and persistent "chilling effect," that caused immigrants and their family members to disenroll from or fail to enroll in critical health, nutrition, and economic supports for which they were eligible.<sup>37</sup> For example, after the 2019 rule was finalized, NCOA surveyed agencies nationwide such as senior centers, State Health Insurance Assistance Programs, Benefits Enrollment Centers, and SNAP grantees. Forty-seven percent of responding organizations indicated they had noticed a chilling effect, and 45% had clients ask about dis-enrolling from benefits or refusing services after the rule change was proposed.<sup>38</sup> Moreover, the 2019 rule took effect just weeks before the COVID-19 pandemic hit, amplifying the health and economic harm of the pandemic.

---

<sup>35</sup> See Jeanne Batalova, Senior Immigrants in the United States, Migration Policy Institute (May 30, 2012); The Emerging Needs of Asian American and Pacific Islander Older Adults, National Asian Pacific Center on Aging (Feb. 2017), <https://www.napca.org/wp-content/uploads/2017/10/NAPCA-The-Emerging-Needs-of-AAPI-Older-Adults-Final-Report-Feb2017.pdf>; see also Karthick Ramakrishnan & Farah Ahmad, Language Diversity and English Proficiency, Center for American Progress (May 27, 2014), <https://cdn.americanprogress.org/wpcontent/uploads/2014/04/AAPI-LanguageAccess1.pdf> (explaining that over 75% of the "Asian alone" population speaks a language other than English at home).

<sup>36</sup> 8 U.S.C. § 1152(a)(1)(A). Countless federal, state, and local civil rights laws also prohibit discrimination on the basis of national origin (which can include English proficiency) and specifically provide language access rights. See, e.g., 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance, including the DHS); 42 U.S.C. § 2000e (prohibiting discrimination in employment on the basis of race, color, national origin, sex, or religion); see also *Lau v. Nichols*, 414 U.S. 563 (1974) (holding lack of supplemental language instruction for students with limited English proficiency violated the Civil Rights Act of 1964).

<sup>37</sup> See Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard, Manatt (Oct. 11, 2018), <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-PotentiallyChilled-Population#DataDashboard>.

<sup>38</sup> *New York v. U.S. Dep't of Homeland Security et al.*, Brief on Behalf of Amici Curiae (Jan. 27, 2020), <https://justiceinaging.org/wp-content/uploads/2020/01/Filed-Amicus-Brief-NY-AG-Appeal.pdf>; See also Vicki

## Previous Rulemaking Efforts

[What aspects of the 1999 Interim Field Guidance, if any, should be included in a future public charge inadmissibility rulemaking and why?](#)

DHS should retain the 1999 Field Guidance’s indication that most Legal Permanent Residents (LPRs) who have been outside the United States for 180 days or less are not applicants for admission and therefore are not subject to the grounds of inadmissibility, pursuant to section 101(a)(13)(C) of the INA.<sup>39</sup> In addition, although the public charge inadmissibility ground may apply to returning residents who fall outside the 180-day absence threshold, DHS should exercise its prosecutorial discretion in the investigative questioning process for these individuals. Older immigrants in particular may be in a position to leave the U.S. for longer periods of time, for example to care for siblings or other family in their home country or due to the difficulties of traveling at an advanced age. DHS should administer its public charge policy in a way that promotes family unification.

## Conclusion

We appreciate the opportunity to submit these comments in response to the DHS advanced notice of proposed rulemaking. These questions reflect a thoughtful process behind approaching and rethinking the antiquated notion of public charge and an opportunity to minimize the negative impact on older adults, people with disabilities, people of color, and other members of marginalized groups. By adopting a definition of public charge that focuses on primary and permanent reliance on the government to avoid destitution, individuals can be afforded fair and just immigration decisions without arbitrary speculation into their future likelihood of becoming of a public charge.

If any questions arise concerning this submission, please contact Natalie Kean, Senior Staff Attorney at Justice in Aging ([nkean@justiceinaging.org](mailto:nkean@justiceinaging.org)).

Sincerely,



Denny Chan  
Directing Attorney, Equity Advocacy  
Justice in Aging

*With our partners:*

Caring Across Generations  
Center for Medicare Advocacy  
Jewish Family Service of Los Angeles  
Jewish Federations of North America

MAZON: A Jewish Response to Hunger  
National Council on Aging  
National Hispanic Council on Aging  
PHI

---

Gottlich, U.S. Dep’t of Health and Human Servs., ACL Policy Update: What the changes in the “Public Charge” Immigration Rule Mean for the Aging and Disability Networks (July 30, 2021), <https://acl.gov/news-and-events/acl-blog/acl-policy-update-what-changes-public-charge-immigration-rule-mean-aging> (noting that the chilling effect “created particularly devastating consequences for older adults . . .”).

<sup>39</sup> See Department of Justice, “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 Fed. Reg. 28689, 28691 (May 26, 1999), <https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf>.