

December 9, 2018

Comments submitted via email

Re: DHS Docket No. USCIS-2010-0012

Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
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Dear Ms. Deshommes:

The National Foundation for American Policy is a policy research organization and appreciates the opportunity to comment on DHS Docket No. USCIS-2010-0012.

A close reading of the proposed regulation on “public charge” (DHS Docket No. USCIS-2010-0012) leads to the conclusion that the rule is an unlawful attempt to reduce legal immigration to the United States. The regulation attempts to negate the laws on immigration Congress has established by imposing administrative measures well beyond the Department of Homeland Security’s legal authority. In addition, it avoids readily available material that would demonstrate the flaws in its methodology for denying individuals permanent residence, leading to the conclusion the methodology was designed to achieve a particular result, specifically to lower the level of legal immigration to the United States. The regulation also leaves enormous discretion in the hands of government officials who could establish procedures to prevent almost anyone, in theory, from obtaining permanent residence. The regulation also avoids readily available material that would demonstrate the likely significant costs of the rule.

Concern About Public Benefits Use is Contrived to Reduce Legal Immigration

Concern about benefits use in the regulation is used as a contrived means – or nexus – by which adjudicators can project future benefits use upon immigrants as a way to invoke the “public charge” section of the Immigration and Nationality Act and thereby prevent foreign nationals from immigrating to the United States.

Many restrictions already exist under current law that prevent immigrants from using “welfare” benefits. If the administration wanted to prevent immigrants from using federal benefits in the future it could work with Congress to enact new, more expansive restrictions on benefit use that go beyond current law. The fact that neither the president nor the administration more generally has put forward or advocated for a legislative proposal to prohibit immigrants from using federal benefits beyond the restrictions in current law demonstrates the concern about benefit use stated in the regulation is only a pretext employed to reduce legal immigration – a reduction Congress has shown in votes it would not favor.

The proposed scheme in the regulation to determine if a foreign national might become a “public charge” under section 212(a)(4) of the Immigration Nationality Act is contrived to achieve lower levels of immigration. Stating that income levels below 250% of the poverty line will count against immigrants who apply for admission – even though such a figure does not appear in the Immigration and Nationality Act – is one of the most obvious examples of how the regulation is crafted to achieve the result of preventing immigration through administrative means.

Related to this, the regulation makes an egregious analytical error by projecting *future* benefits use based on *current* income. This ignores a substantial body of research that shows immigrants increase their income over time. In short, even if the contrived formulation proposed in the regulation of using projected benefit use were lawful – it should be found to be unlawful for being beyond the statute and authority of DHS – the method devised for adjudicators to determine who may someday use benefits is fatally flawed.

A look at income relative to poverty level on the most recent Census Bureau data demonstrates how rapidly an immigrant’s income can grow with time spent in the United States. Immigrants in 2016/2017, aged 26 to 40 who had just entered the United States, were, on average, at 239% of the poverty level, while only 4 years after entry to the United States, immigrants with the same entry ages were, on average, at 300% of the federal poverty level, only slightly less than natives of the same age. (See table below.)

Status in 2016/2017 of Recent U.S. Immigrants who were age 26-40 at entry

Average Percentage of Poverty Level

Years after US entry	Immigrant age 26-40 at Entry	US-Born of same Age Range
0	238.5	312.6
1	262.9	315.4
2	286.7	318.0
3	293.1	320.5
4	299.5	323.1

Source: NFAP tabulation of U.S. Census American Community Survey (2016, 2017).

Note: Percentage of federal poverty level is calculated for the family containing immigrant, regardless of nativity or citizenship status of other family members.

It makes no sense to prevent the immigration of person X because he has an income of 200% of the poverty level today and, therefore, the regulation supposes, may someday use benefits, if 10 years from now person X is likely to have a much higher income. Indeed, it is

precisely those immigrants with the lowest earnings who are found to have the most rapid earnings growth. This has been shown in numerous academic studies, several of which are listed below. The Department of Homeland Security and USCIS should read all of the studies listed below (and read all of the studies or reports listed in this comment letter, some of which have links included in the letter).

Here are studies that illustrate rapid earning growth for immigrants:

Akresh, I.R. 2007. "U.S. Immigrants' Labor Market Adjustment: Additional Human Capital Investment and Earnings Growth." *Demography*, 44(4): 865-881.
<https://link.springer.com/article/10.1353%2Fdem.2007.0034>

Demombynes, Gabriel M (2002) "Three Ways of Looking at Immigrant Wage Growth: Analysis With the 1993-1998 Current Population Survey" Prepared for the Institute for Labor and Employment Conference, January 18-19, 2002

DeSilva, Arnold (1996) "Earnings of Immigrant Classes in the Early 1980's in Canada: A Re-examination," Working Paper, Human Resource Development Canada, 1996.
<https://ideas.repec.org/a/cpp/issued/v23y1997i2p179-202.html>

Duleep, Harriet and Dan Dowhan, 2002. "Insights from Longitudinal Data on the Earnings Growth of U.S. Foreign-born Men," *Demography*, 39(3):485-506.

Duleep, Harriet, Xingfei Liu, and Mark Regets, 2018. "Country of Origin, Earnings Convergence, and Human Capital Investment: A New Method for the Analysis of U.S. Immigrant Economic Assimilation" Global Labor Organization Discussion Paper.

Duleep, Harriet and Mark Regets. 1994. "The Elusive Concept of Immigrant Quality: Evidence from 1960-1980," (1992 American Economic Association version), PRIP-UI-28, Washington, DC: Urban Institute.

—, 1996a. "Admission Criteria and Immigrant Earnings Profiles," *International Migration Review*, 30(2):571-90.

—, 1996b. "Family Unification, Siblings, and Skills" in H. Duleep and P. V. Wunnava (eds.), *Immigrants and Immigration Policy: Individual Skills, Family Ties, and Group Identities*, Greenwich, CT: JAI Press, 219-244.

—, 1997. "Measuring Immigrant Wage Growth Using Matched CPS Files," *Demography*, 34(2):239-249.

—, 1999. "Immigrants and Human Capital Investment," *American Economic Review*, 89(2):186-191

—, 2002. "The Elusive Concept of Immigrant Quality: Evidence from 1970-1990," IZA Discussion Paper #631, <https://www.iza.org/publications/dp/631/the-elusive-concept-of-immigrant-quality-evidence-from-1970-1990>

Green, David A., and Christopher Worswick. 2012. "Immigrant Earnings Profiles in the Presence of Human Capital Investment: Measuring Cohort and Macro Effects," *Labour Economics*, Vol. 19, No. 2, April pp. 241-259.

Hall, Matthew and George Farkas. 2008. Does human capital raise earnings for immigrants in the low-skill labor market? *Demography*, Volume 45-Number 3, August: 619–639.

Jasso G. and Rosenzweig, M. R. (1995) Do Immigrants Screened for Skills Do Better than Family-Reunification Immigrants? *International Migration Review* 29: 85-111.

LaLonde, R J. and Topel, RH. (1991) “Immigrants in the American Labor Market: Quality, Assimilation, and Distributional Effects,” *The American Economic Review*, May.

LaLonde, R J. and Topel, RH., (1997) “Economic Impact of International Migration and the Economic Performance of Migrants,” in *Handbook of Population and Family Economics*, ed. Mark R. Rosenzweig and Oded Stark, Amsterdam: Elsevier, pp. 800-850.

Lin, Carl (2013) “Earnings Gap, Cohort Effect and Economic Assimilation of Immigrants from Mainland China, Hong Kong, and Taiwan in the United States,” *Review of International Economics*, 2013, 21(2), 249-265.

Schoeni, R. (1997) “New Evidence on the Economic Progress of Foreign-Born Men in the 1970s and 1980s,” *Journal of Human Resources*, vol. 32, Fall, pp. 683-740.

While it is likely others will comment on this as well, to the extent a figure related to the poverty level is addressed in the INA, the figure is 125% of the federal poverty level and it is connected to the *sponsor* of an immigrant, not the immigrant. (This figure was vigorously debated by Congress in 1996.) Here is part of the relevant passage from Section 213A of the INA:

Sec. 213A. (a) Enforceability.-

(1) Terms of affidavit.-No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge under section [212\(a\)\(4\)](#) unless such affidavit is executed by a sponsor of the alien as a contract-

(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable;

(B) that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State) or by any other entity that provides any means-tested public benefit (as defined in subsection (e)), consistent with the provisions of this section; and

(C) in which the sponsor agrees to submit to the jurisdiction of any Federal or State court for the purpose of actions brought under subsection (b)(2).

A final point on this topic: In footnote 583 in the proposed regulation, the agency indicates that the concept of evaluating gradations in immigrants’ income level relative to the federal poverty level as a way to predict future benefit use is unreliable, calling into question the

foundation of the regulation and the scheme it lays out for adjudicators to use in approving or disapproving applications for lawful permanent residence.

The footnote states, in reference to noncitizen participation rates in non-cash benefit programs: “The difference in rates between noncitizens living below 125 percent of the FPG [Federal Poverty Guidelines] and those living either between 125 and 250 percent of the FPG, or 250 and 400 percent of the FPG, was not statistically significant.” If there is no “statistically significant” difference, then it raises the question: Why does DHS propose to weigh heavily these gradations in income as crucial to determining if someone should be allowed to become a lawful permanent resident to the United States?

It is also worth noting DHS did not find significant differences in benefits use between natives and noncitizens (page 51160): “Using the 2014 Panel of the Survey of Income and Program Participation (SIPP), DHS analyzed data detailing the participation rates for various cash and non-cash federal public benefits programs. The results suggest that receipt of non-cash public benefits is more prevalent than receipt of cash benefits. When analyzed by nativity and citizenship status, the results also suggest comparable levels of program participation by native-born individuals, foreign-born individuals, and noncitizens.”

On page 51161, it states, in reference to both native-born and foreign-born, “The rate of receipt of cash benefits was only 2 to 4 percent for these populations.”

Lower Levels of Immigration

The proposed regulation, if enacted, would lead to lower levels of immigration. “[N]early half of the U.S. noncitizen population could be at risk of a public-charge determination – up from the current 3 percent,” according to an analysis by the nonpartisan Migration Policy Institute (MPI). This demonstrates how the proposed regulation is essentially a piece of legislation put into the form of a regulation, as there is no evidence Congress ever intended such a result.

The MPI analysis concludes:

Demonstrating income or financial assets over 250 percent of the federal poverty line (about \$62,000 for a family of four) would be a heavily weighted positive factor—though not a guarantee. The administration would have enormous discretion to deny admission or green cards to those with incomes or financial assets below 250 percent of the poverty line.

While there are no available data about the income levels of individuals seeking admission or green cards, data exist on the incomes of immigrants admitted legally in the past five years. Our analysis of U.S. Census Bureau data makes clear that a large share of this proxy population would fall short of the 250 percent threshold. We estimate that 2.3 million of the 4 million legally present noncitizens who arrived during the past five years (56 percent) do not have incomes sufficient to meet the 250 percent standard. In fact, 40 percent of U.S.-born persons would be unable to meet that threshold.

The introduction of this 250 percent standard would have pronounced regional, national-origin and—by extension—racial effects on flows.

The full MPI analysis can be found here: <https://www.migrationpolicy.org/news/through-back-door-remaking-immigration-system-expected-public-charge-rule>

The technology company Boundless, which assists immigrant clients in navigating the legal immigration system, conducted its own analysis that found, “If this new requirement were strictly enforced by DHS and the State Department, the government could begin denying more than half of all [marriage green card](#) applicants, each year forcing nearly 200,000 couples to either leave the United States together or live apart indefinitely.”

According to Boundless:

We estimated the likely impact of the public charge rule by analyzing the visa status, current employment, and household income of foreign national spouses in our secure customer database and concluded:

- 31% of foreign-born spouses are unemployed when they apply for a marriage-based green card. Because student visas, visitor visas, and other common visas generally do not authorize employment in the United States, these spouses would be in an impossible situation—prevented from legally working yet required to earn an income.
- 22% of foreign-born spouses are employed in the United States when they apply for a marriage-based green card, but are in jobs that likely would not meet the new annual household income threshold proposed by DHS. This includes everything from cooks and factory workers to tutors and teaching assistants.
- Therefore, more than half (53%) of foreign-born spouses who are currently eligible for green cards could suddenly find themselves ineligible if the DHS public charge rule is enacted.
- Even if DHS ultimately decides to allow both spouses to pool their income to meet the new threshold, 36% of couples could still find themselves unable to qualify for a marriage green card.

The full Boundless analysis can be found here:

<https://www.boundless.com/blog/looming-immigration-directive-separate-nearly-200000-married-couples/>

The conclusions are similar to the MPI analysis. Both indicate the regulation, if enacted, would result in many fewer people being eligible to immigrate to the United States. Family preference categories currently have very long backlogs (F1, F2B, F3 and F4), according to the State Department. That means at least in the short term some of those unable to immigrate because of the new rule might be replaced by others who can immigrate.

However, if one looks at Table 7 in the 2017 Yearbook of Immigration Statistics published by DHS, then one can see that approximately half of legal immigration to the United States comes from the uncapped Immediate Relatives of U.S. Citizens category (516,508 of 1,127,167 in 2017). Under the proposed rule, those numbers could see significant reductions. A 33% reduction in Immediate Relatives, for example, would mean about 170,000 fewer immigrants a year.

Here is a link to Table 7 of the 2017 Yearbook of Immigration Statistics:

<https://www.dhs.gov/immigration-statistics/yearbook/2017/table7>

The F2A category, the spouses and children of lawful permanent residents, no longer has a large backlog, with current processing within about two years of filing for applicants, according to the December 2018 State Department Visa Bulletin. Since younger married people and people with children are likely to be significantly affected by the new rule and prevented from immigrating, it is reasonable to assume the category could in a short time become “current” and then undersubscribed if the public charge rule prevents large numbers of people from immigrating. In FY 2017, approximately 97,500 people immigrated as a spouse or child of a lawful permanent resident.

Here is a link to a recent Visa Bulletin:

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-december-2018.html>

In sum, it is reasonable to assume the public charge rule could result in much less immigration to the United States, potentially in excess of 200,000 fewer immigrants to the U.S. on an annual basis. That would have a major impact on U.S. labor force growth, economic growth assumptions, which affect projections for the future federal budget deficit, and the fiscal health of the Social Security system. The proposed regulation makes no attempt to analyze in detail such impacts.

A March 2005 study by the National Foundation for American Policy, based on data and memos received from the Social Security Administration (SSA) Office of the Chief Actuary found: “A 33 percent reduction in legal immigration would increase the actuarial deficit by 10 percent over 50 years and result in lost revenues of \$132 billion in present value over 50 years and \$111 billion over 75 years, which would need to be made up for through higher taxes or other means. Such a tax increase would cost an American earning \$60,000 in 2004 more than \$600 over the next 10 years. The reduction of 264,000 (or 33%) in legal immigration annually is from a base of 800,000.”

The paragraph above is meant to be illustrative, since time has passed and an analysis today would produce somewhat different numbers. Yet the direction of the analysis would not change: Fewer immigrants would have a negative impact on the Social Security system. To gauge the impact of the rule, it is incumbent upon USCIS and the Department of Homeland Security to produce an analysis of how much lower the level of immigration would be under the new regulation and the impact that would have on the Social Security system, as well as economic growth and other government cost estimates affected by lower labor force growth in the United States.

Here are links to the National Foundation for American Policy study, the memos from the Office of the Chief Actuary and the latest SSA-produced trustee’s report:

<http://www.nfap.com/researchactivities/studies/SocialSecurityStudy2005Revised.pdf>

<http://www.nfap.com/researchactivities/studies/Appendix1toSocialSecurityStudy.pdf>

<http://www.nfap.com/researchactivities/studies/Appendix2toSocialSecurityStudy.pdf>

<https://www.ssa.gov/OACT/TR/2018/tr2018.pdf>

The regulation seeks to decrease legal immigration and avoid measuring or accounting for the negative impact of the regulation caused by reducing legal immigration. It is worth noting that lower levels of immigration are referred to in the 2018 OASDI Trustees Report as part of “high-cost assumptions,” meaning that the cost of Social Security system for taxpayers will rise if immigration levels are reduced.

The 2018 OASDI Trustees Report also explains that increases in immigration (the opposite of the expected impact of the “public charge” rule) would *improve* the actuarial balance of the Social Security system: “The cost rate decreases with an increase in total net immigration because immigration occurs at relatively young ages, thereby increasing the numbers of covered workers earlier than the numbers of beneficiaries. Increasing average annual total net immigration by 100,000 persons improves the long-range actuarial balance by about 0.08 percent of taxable payroll.”

The level of legal immigration has been the subject of considerable Congressional debate. Bills that would have either raised or lowered the level of legal immigration into the United States were voted on in at least one house of Congress in 1996, 2006, 2007 (amendments on the floor), 2013 and 2018. Measures to decrease legal immigration were defeated by wide margins in 1996 and 2018. Bills to increase legal immigration passed the U.S. Senate in 2006 and 2013 by wide margins.

The evidence is clear that Congress is capable of debating and voting on measures to increase or decrease the level of legal immigration. The votes held over the past two decades have indicated little support for reducing legal immigration. It would be improper for the executive branch, in the form of the proposed “public charge” regulation, to taken it upon itself to usurp the role of Congress and reduce the level of legal immigration to the United States by administrative means.

Respectfully submitted,

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