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PRACTICE ADVISORY - COUNSELING CLIENTS ON PUBLIC CHARGE AND PUBLIC BENEFITS

I. Introduction

Throughout 2018, rumors and leaked documents regarding proposed changes to the public charge ground of inadmissibility have distressed immigrant communities[1] and put immigration lawyers in the unenviable position of advising clients during a period of change, or potential change, in the law. With the formal publication of the proposed rule on October 10, 2018,[2] there is additional clarity on the administration's plans but still no clear timeline for implementation, nor a final text to refer to.

Despite this uncertainty, there are some clear principles that should guide immigration attorneys as they counsel clients. The goal of this practice advisory is not to review the draft of the proposed rule in detail, which has been done elsewhere,[3] but to provide clear guidance on best practices for advising clients in the shadow of this potential new regulatory structure, and to strongly encourage attorneys not to push blanket withdrawal from benefits programs.

It is important to keep in mind that for many individuals, benefits are central to their health and safety, and their ability to take care of themselves, their families, and lead self-sufficient lives. Any advice to disenroll from benefits should only be given in the context of this specific, potential rule change, and the client's own life and situation. Advising all clients who may one day be eligible to adjust status to disenroll from any benefits program they are currently using is not an appropriate response at this juncture, not an accurate reflection of the current proposed rule, and may be counter-productive. Attorneys are advised to take advantage of the existing

[1] https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292

[2] https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds

[3] https://static1.squarespace.com/static/59578aade110eba6434f4b72/t/5bfeb9f76d2a737720f245ad/1543420408161/Screening+Tool+(ver+11-28-2018).pdf

practice advisories and trainings available on the rule, and to consult with colleagues where there are questions about the impact of the draft rule.

II. Advising Clients Appropriately

Through the end of 2018 and for an undetermined period of time after that, attorneys will continue to operate in a world governed by the current public charge guidance, but with the expectation that those rules will change. During this period of uncertainty, there are some key principles to keep in mind when advising clients:

1. **Access to benefits is crucial for the health, safety, and self-sufficiency of clients**

The programs targeted by the proposed rule include those that support access to food, shelter, and life-saving medications and health care. Many individuals and families who make use of these programs do so because they need them to survive. These supports promote self-sufficiency by making it possible for recipients to remain healthy and safe and focus on school, work, and caring for their families. The likely consequences of loss of benefits can be seen in the proposed rule itself, where the government predicted that impacts of the rule would include increased poverty, particularly child poverty, worsened health outcomes, including increased obesity and malnutrition, an increased prevalence of communicable diseases in the US, increased poverty and housing instability, and decreased educational attainment.

Due to the importance of these programs to people who rely on them, immigration attorneys are encouraged to consider benefits use by their clients in a holistic manner, and not just as a negative factor in future or potential future applications.

2. **The proposed rule as drafted would not apply retroactively to benefits usage before the effective date**

The proposed rule is clear that applicants for admission will not be penalized for using benefits targeted by the new rule prior to its eventual effective date. In other words, an individual who is receiving Section 8 assistance in October 2018 would not have that use counted against them in a public charge determination made once the new rule is finalized, unless they continued to receive those benefits and had been approved for a period of time that exceeded the relevant threshold. Therefore, there is currently no clear benefit to withdrawing from those programs or refusing to enroll on the basis of the proposed rule itself - clients should understand that the new rule does not apply yet, and that there will be a 60-day grace period within which decisions to remain in a program or withdraw from it can be reevaluated.

3. **Many commonly-used benefits programs are not targeted in the rule**

As news of public charge changes has spread through media and social networks, some nuances of the ground of inadmissibility and the proposed rule have gotten lost. Attorneys can and should reassure clients that certain programs are safe from changes, and certain individuals are exempted by statute from the public charge test itself. Benefits such as WIC, CHIP, EITC, or entirely state-funded programs that are not for income maintenance are *not* included in the current proposed rule. Clients should not be advised to avoid or withdraw from these programs, or from others that are not referenced in the proposed rule. In addition, clients who are exempt from public charge determinations should be counseled as such.

4. **Given the changes to the totality of circumstances test, it is not clear that disenrolling from benefits will be a net positive for applicants**

One of the most concerning proposed changes to the rule is the re-configured totality of circumstances test, which, by diminishing the weight accorded a facially-valid affidavit of support, would increase the weight given to other factors in the test like family status, health, age, and financial status. The impact of this change will certainly be to make it more difficult overall for lower-income individuals, the elderly, and the infirm to quality for admission. At the same time, this also means that after a new rule is finalized, withdrawing from benefits programs will not be a silver bullet to resolve public charge inadmissibility concerns, as families already eligible for those benefits will face challenges due to their income alone. Particularly where benefits use (like access to medical care or housing) is *promoting* self-sufficiency, withdrawing from those supportive programs may result in an overall decline in the applicant's ability to support themselves, and thus to qualify for admission. Attorneys should keep all of these factors in mind when advising clients.

5. **Each determination should be case- and fact-specific, no blanket instructions to disenroll**

Given the complexities of the totality of the circumstances test and the important role that benefits play in the lives of clients, immigration attorneys should approach each case independently, and *refrain from giving blanket advice that any current or future green card applicants should disenroll from benefits*. Each case should be assessed individually, and clients advised accordingly - and reassured that the new rule is not yet in effect, and will not be retroactive. It is clearly appropriate for attorneys to advise their clients on the impacts that benefits usage may have on a future green card application, however, that advice should be

grounded in what we know about the proposed rule, including its scope and the lack of retroactivity, as well as the client's own situation.

III. Preparing for a Post-Final Rule World

Assuming that a final rule is eventually published, whether in January 2019 or later, attorneys will have more clarity on the content of the rule and timing of implementation. At that point, it may become prudent for certain clients with pending or upcoming adjustment/visa applications to consider withdrawing from benefits programs. However, even at that point it would still not be appropriate to advise blanket withdrawals from all benefits programs for all clients - attorneys should continue to offer case-by-case assessments that take into account the specific benefits program a client is using, the impact of that program on their health, safety and current or future self-sufficiency, and how those issues will weigh against other factors at play for that individual in any public charge test. Anything short of this risks compounding the chilling effects of the rule, and doing some of the current administration's work for them.

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