

Public Charge and Disabilities: Toward a More Inclusive Immigration Policy

A Report by Living Hope Wheelchair Association & Houston United
January 2013

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About the Organizations:

Living Hope Wheelchair Association

Living Hope is an independent, non-profit organization serving people with spinal cord injuries as well as with other disabilities so that they may lead full and productive lives. Our group was founded by people with spinal cord injuries, the majority of our members are not entitled to benefits, lack medical insurance, and do not have a stable source of income. We provide services to our members and engage in community advocacy to achieve our goals.

Suffering a catastrophic spinal cord injury has a brutal impact on a person's life. If this person is an immigrant or a low-wage worker in the United States then he or she is in an extremely vulnerable situation. During our existence as an organization we have been able to help each other first to survive the depression that comes after the accident, then to survive the problems that come with not having resources to buy medical supplies and equipment. We have learned to improve our quality of life through hope and solidarity, sharing what we have and organizing to get what we need.

Houston United/Houston Unido

Houston United/Unido is community-based coalition of civic, immigrant, labor, religious, peace and social justice organizations in the Greater Metropolitan Houston Area. Our mission is to create a society on the principal that all human beings are created equal in dignity and rights. Our primary goal is to protect, promote, and defend the exercise of the constitutional and human rights of all persons in our communities, particularly immigrants and refugees. In the last seven years, we have addressed the impact of numerous violations of the human and civil rights of immigrant and refugees in our midst that emanate from the shortcomings of our legal immigration system.

Introduction

The purpose of this report is to explore the Public Charge provision of U.S. immigration policy and address the exclusions created under this provision affecting many undocumented and mixed-status immigrant families currently residing in the U.S. Many of these families are composed of individuals with mental and physical disabilities or chronic illnesses that pose many challenges and hardships in their everyday lives. Despite their active roles and contributions to their communities, they are susceptible to outdated public charge exclusions in immigration policy that result in family separation and decrease in quality of life. As policy-makers prepare to once again focus on immigration policy through federal legislation, it is essential that these unnecessary exclusions be addressed in ways that respect the dignity and contributions of disabled undocumented immigrants and their families.

This report provides a preliminary overview of existing public charge policies and their limitations and also outlines an initial list of policy recommendations for fair and inclusive federal immigration legislation. Due to the ongoing enforcement of existing federal immigration laws, it also seeks to address some of the limitations of detention and removal proceedings regarding immigrants with disabilities. **The authors would like to emphasize the need for further research on public charge policies and inclusive alternatives and the importance of further consultation of immigrants with disabilities and other groups directly affected by these policies.**

Immigrants with Disabilities: Who is Affected?

It is important to start off at the often invisible intersection of immigration and disabilities, two designations that are accompanied with an institutional and societal history of discrimination and exclusion. This combined identity exacerbates the challenges faced by many of these individuals. However, both of these groups also share a longstanding history of resilience and solidarity in the struggle to assert their rights.

It is estimated that nearly 54 million Americans have an activity limitation or disability associated with a long-term physical, sensory, or cognitive condition. Some of these conditions can be congenital, yet the majority – especially in adults and people with old age – result from workplace or crime-related injuries or other major accidents.¹ While there are no recorded figures on the number of undocumented immigrants with disabilities, estimates range anywhere from 1 to 2 million individuals residing in the U.S.² These individuals face many of the same challenges as American citizens with disabilities, including public visibility, integration into their communities, and access to health care, but must navigate these challenges within the stigma and limitations of being undocumented. Unfortunately, this is particularly challenging when it comes to immigration policies that could not only prevent them from adjusting their status, but that also pose immediate risk of detention and removal.³

¹ Office on Disability, U.S. Department of Health & Human Services, "Prevalence and Impact Factsheet".

http://www.hhs.gov/od/about/fact_sheets/prevalenceandimpact.html

² PewResearch Hispanic Center, "Unauthorized Immigrant Population: National and State Trends, 2010", February 1, 2011.

<http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010/> estimates that approximately 11.2 undocumented immigrants reside in the U.S. Using this figure and applying the incidence of disability among the American population, estimates range from 1-2 million individuals. (Author's analysis)

³ For the purposes of this report, a person with a disability is generally defined as someone who (1) has a physical or mental impairment that substantially limits one or more "major life activities," (2) has a record of such an impairment, or (3) is regarded as having such an impairment. (Under the Americans with Disabilities Act, Section 503 of the Rehabilitation Act of 1973, and Section 188 of the Workforce Investment Act)

Background on the Public Charge

The United States is well known for being diverse and accessible; however, in many cases having a physical or mental disorder or disability has been a reason to be formally excluded by the U.S. government. U.S. Immigration laws from 1882 and 1891 established the stated policy of excluding potential immigrants with certain disabilities by barring entry of anyone who would be a public ward.⁴ These laws target people with any type of disability that would affect them from earning a living.⁵

Public charge provisions have been part of U.S. immigration law for more than 100 years as grounds of inadmissibility and deportation.⁶ “Public charge,” refers to an individual who is likely to become “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense.”⁷ The term describes persons who cannot support themselves and who depend on benefits that provide cash—such as Supplemental Security Income (SSI) or Temporary Assistance for Needy Families (TANF)—for their income.

Under section 212 of the 1986 IRCA, the first mass legalization immigration policy, individuals who may be considered a “public charge” are excluded from the application process for adjustment of status. Various subsequent laws, including 1996 IIRIRA and 2000 LIFE Act amendments, continue to enumerate exclusions for legalization for individuals who may be perceived as future burdens on their local, state, or federal governments by way of medical or other living assistance.⁸ While these policies continue to expand on the “public charge” provision, very little clarification is given regarding how a “public charge” determination is made or which individuals qualify for admissibility waivers. Perhaps the most expansive explanation of this provision came during the Clinton administration, with their published rule in the Federal Register that clarifies the circumstances under which a non-citizen can receive public benefits without becoming a “public charge” for purposes of admission into the United States, adjustment of status to legal permanent resident, and deportation.⁹

⁴ Baynton, D. C. (2005). Defectives in the land: disability and American immigration policy, 1882-1924. *Journal of American Ethnic History*, 24(3), 31-44. Retrieved from <http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=39070fa2-7ae3-40a1-befc-83fbbc5527a5@sessionmgr112&vid=2&hid=128>

⁵ For the purpose of this report the definition for “mental disorder” was derived from the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). The DSM-IV defines Mental Disorders as a clinically significant behavioral and psychological syndrome or pattern that occurs in an individual and that is associated with present distress or disability, impairment in one or more important areas of functioning or with significantly increased risk of suffering death, pain, disability, or an important loss of freedom American Psychiatric Association. (1994). *Diagnostic and statistical manual of mental disorders* (DSM-IV). (4th ed.). Washington, DC: Author.

⁶ National Immigration Law Center, “Public Charge: An Overview”, August 2012. <http://www.nilc.org/pubcharge.html> (Accessed on 1/20/13)

⁷ USCIS, “Public Charge Fact Sheet”, April 29, 2011.

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=775d23cbea6bf210vgnVCM1000082ca60aRCRD&vgnnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD> (Accessed on 1/19/13)

⁸ Pub. Law 99-603 Immigration Reform and Control Act of 1986; Pub. Law 104-208 Illegal Immigration Reform and Immigrant Responsibility Act of 1996; Pub. L. 106-553 and -554 The Legal Immigration Family Equity Act and Amendments

⁹ U.S. Department of Housing and Urban Development, “INS Public Charge Fact Sheet”.

<http://archives.hud.gov/offices/cpd/library/pubcharge/summary.cfm> (Explanation of Clinton Administration’s clarification of public charge on the Federal Register)

The Public Charge Relevance in Immigration Policy

As previously stated, public charge provisions have a longstanding history of being attached to immigration policies in order to safeguard public resources and exclude certain types of immigrants from a path to legalization. However, these types of provisions have not kept up with the developments in U.S. social policy, which has evolved to address these issues through Welfare Reform, Health Care Reform, among others. Arguably, public charge provisions in immigration policy have become irrelevant, especially concerning individuals with physical or mental disabilities.

Within the immigration debate one of the most common misconceptions is the idea that immigrants are or will become a public burden taking advantage of public assistance programs. However, it is important to note that in 1996 with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), provisions are already established to reduce and limit the availability of welfare programs to undocumented individuals.

According to the National Association of Social Workers' summary on the PRWORA, this law cuts approximately \$55 billion that comes from reductions in the Food Stamp program, the Supplemental Security Income (SSI) program that undocumented immigrants would not qualify for.¹⁰ Similarly, the estimated 11.2 million undocumented immigrants residing in the U.S. are also ineligible for Medicaid and other means-tested federal benefits due to PRWORA.¹¹

Although these are just a few examples of the social policies already in place to prevent individuals, especially undocumented immigrants, from becoming a "public charge" on the state, these outdated provisions also have impacts on the community at large. In its 1999 proposed rule and field guidance on the public charge, INS noted that "immigrants' fears of obtaining these necessary medical and other benefits are not only causing them considerable harm, but are also jeopardizing the general public."¹²

Furthermore, immigration and welfare policies also heavily restrict access to federal and state assistance programs even after an immigrant has gained legal permanent residency. The passage of PRWORA and IIRIRA in 1996 ushered in a new era of unprecedented restrictionism, especially for immigrant communities. Even where eligibility for immigrants was preserved by the 1996 laws or restored by subsequent legislation, many immigrant families hesitate to enroll in critical health care, job-training, nutrition, and cash assistance programs due to fear and confusion caused by the laws' chilling effects. As a result, the participation of immigrants in public benefit programs has decreased sharply after passage of the 1996 law.¹³

¹⁰ National Association of Social Workers, "Personal responsibility and work opportunity reconciliation act of 1996". <http://www.naswdc.org/advocacy/welfare/legislation/summary.pdf>

¹¹ Trends, 2010, Pew Hispanic Center, Washington, D.C., February 1, 2011, p. 25.

¹² 64 Fed. Reg. 28676 (May 26, 1999), <http://www.gpo.gov/fdsys/pkg/FR-1999-05-26/html/99-13188.htm> (accessed on Jan. 10, 2013).

¹³ Michael Fix and Jeffrey Passel, "[The Scope and Impact of Welfare Reform's Immigrant Provisions](#)" (Discussion Paper No. 02-03), Assessing the New Federalism, Washington, DC: The Urban Institute, Jan. 2002.

Impacts on Immigrants with Disabilities

In the year 2008 there was at least an estimated 15 percent of individuals in immigration proceedings with existing mental disorders/disabilities.¹⁴ This significant percentage would account for approximately 57,000 individuals. We can infer that with the increased rates of deportation under the Obama administration the percentage of individuals with disabilities in immigration proceedings has also increased.

In the recent years there has been more attention towards the inhumane treatment of individuals within ICE detention facilities and the lack of representation in the immigration court process for individuals with disabilities. Initial screening is inadequate, the quality of care suffers, and the lack of an electronic records system further exacerbates these problems.¹⁵

The report by Travis Packer indicates that when individuals are in custody of immigration there is a screening process and standards to identify mental disorders, however it is not administered to every single individual.¹⁶ Unfortunately, the undiagnosed or lack of treatment of certain disorder within the immigration detention center cannot only affect negatively the individual's physical and psychological health, but also the outcome of the immigration case.

One of the victories out of exposing the maltreatment of individuals with disabilities is the initiative ICE has undergone to develop a "risk assessment tool" that will help identify mental disorders and who should be detained and the conditions under which that individual should be detained.¹⁷ While little is known about the assessment tool, it sets a positive precedent and is a step in the right direction to uphold human rights of people with disabilities within the immigration context.

Discrimination Under the Law

Since the passage of the Americans with Disabilities Act more than 20 years ago – a landmark civil rights victory thanks to the struggle of disability rights groups – there have been many improvements against discrimination and towards a more inclusive environment for people with disabilities in the U.S. The U.S. government is justifiably proud of the progress it has made in protecting the rights of people with disabilities in the workplace, healthcare, education and public accommodations. In the immigration sphere, however, the U.S. has yet to provide similar substantive protections through U.S. constitutional law and international human rights standards.

Public charge provisions are inherently discriminatory and fundamentally against the principles of the Americans with disabilities Act and the struggle of the organizations and individuals who fought for this civil rights victory. Although this legislation was approved four years after the Immigration Reform and Control Act, little effort has been made from the U.S. government to update immigration law within this context – further demonstrating the public charge's irrelevance.

¹⁴Human Rights Watch, Deportation by default: mental disability, unfair hearings, and indefinite detention in the US immigration system, July 2010 http://www.aclu.org/files/assets/usdeportation0710_0.pdf

¹⁵ Packer, T. Esq. (2010). Non-citizens with mental disabilities the need for better care in detention and in court. Immigration Policy Center, American Immigrant council. <http://www.immigrationpolicy.org/sites/default/files/docs/Non-Citizens with Mental Disabilities 112310.pdf>

¹⁶ Packer, T. Esq. (2010). Non-citizens with mental disabilities the need for better care in detention and in court. Immigration Policy Center, American Immigrant council. <http://www.immigrationpolicy.org/sites/default/files/docs/Non-Citizens with Mental Disabilities 112310.pdf>

¹⁷ Human Rights Watch, Deportation by default: mental disability, unfair hearings, and indefinite detention in the US immigration system, July 2010 http://www.aclu.org/files/assets/usdeportation0710_0.pdf

Assessing “Public Charge” and Other Discretionary Procedures

The current restrictions on public charges have changed little since the beginning of the twentieth century. Section 212(a)(4) of the Immigration and Nationality Act declares that: "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible."¹⁸ The legislation specifies that the factors to be taken into account in determining whether an alien is excludable include age, health, family status, assets, financial status, and education and skills. However, it is important to note that there has to be a clear definition of public charge as well as specific criteria that would make someone inadmissible. It is also troubling that the assessment and determination of inadmissibility under public charge is placed on the opinion of one individual that might have special consideration on one case over the other. In addition, Section 237(5) states that: "Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."¹⁹

While the Immigration and Nationality Act excludes individuals with physical and mental disabilities, all applicants under immigration proceeding may also qualify for a special rule cancellation of removal under section 309 (f)(10)(A) of IIRIRA if they can establish that their deportation would result in “extreme hardship”. [*For a list of “extreme hardship” contributing factors, see Appendix A*]

While there is a list of what would qualify for “extreme hardship”, every case must be reviewed on an individual basis in review of all the circumstances that the individual and family might face. The individual must present evidence that the deportation would cause extreme hardship beyond that associated with the deportation.

Limitations of Waivers and Other Discretionary Procedures

Each of the above mentioned policies includes “waivers” of inadmissibility which could potentially address some of the exclusions due to “public charge” determination or other grounds for inadmissibility. At the same time, the determination of “public charge” and other exclusions often rests on the discretion of either the Secretary of Homeland Security, Attorney General, or other consular level official handling the individual application. However, these types of waivers and discretionary provisions tend to be reactive and come into play only after individual cases have been identified. The issue with these types of reactive policies is that they create an inconsistent, and arguably less effective, process for reviewing cases (variance depends on individual consular staff or administrator in power) and also create an increased burden on already vulnerable individuals - having already expended their resources in time and monetary fees throughout the application process.

¹⁸ “INA: act 212 – General Classes of aliens ineligible to receive visas and ineligible for admission; waivers of inadmissibility” (USCIS webpage).

<http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM100000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=act> (last visited January 21, 2013).

¹⁹ “INA: act 237 – general classes of deportable aliens” (USCIS webpage).

<http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM100000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=act>

Policy Recommendations

The following is a list of initial policy recommendation that federal legislators should consider in any discussion of a truly comprehensive immigration policy rooted in the dignity of immigrants communities. As previously mentioned, this is a preliminary document which includes recommendations based only on existing immigration policies. However, it is of utmost importance that immigrants with disabilities and other communities directly affected continue to be part of this discussion and are able to provide their assessment and input into upcoming immigration legislation.

Our initial recommendations include:

Eliminating the “Public Charge” Provision

Given the expanded explanation of “public charge” under the Clinton administration coupled with the approval of the 1996 Welfare Reform Act, any future comprehensive immigration policy which includes a path to legalization and status adjustment should exclude any “public charge” provision, and instead, enumerate ways in which individuals with mental or physical disabilities may apply for status adjustment, given the same considerations as other “able-bodied” individuals.

Replacing “Waivers” and “Discretionary” Provisions with Proactive, Efficient Policies

The process for an extreme hardship waiver is very ambiguous; USCIS should establish clear guidelines for making extreme hardship decisions to ensure consistency and inclusivity for individual who suffer from mental, physical or chronic disorders.

A proactive policy on persons with disabilities and other exclusions is necessary to reduce the burden on already vulnerable individuals and increase the efficiency and efficacy of government agencies charged with the application process. This would in turn ensure that individuals with disabilities can focus their efforts on their contributions to their families and communities sooner than later and reduce agency time and resources spent on processing waivers and discretionary procedures.

Improving Treatment of Persons with Disabilities Currently in Detention/Deportation Proceedings

Amend Section 236(c) of the Immigration and Nationality Act (INA) to exempt from mandatory detention vulnerable groups that have mental, physical and medical disabilities. This would address the documented abuses and inadequate treatment in detention facilities and potentially alleviate the hardship resulting from family separation of individuals with disabilities due to immigration detention and deportation.

Consideration for Relief in AOS for Persons with Disabilities

Given the existing hardships and already vulnerable conditions of undocumented immigrants with disabilities, efforts should be made to relieve the financial burden caused by the application of adjustment of status after any new comprehensive immigration package is approved. This can be achieved through humanitarian application fee waivers and considerations of financial burden in regards to fines and other financial constraints.

Appendix A

According to USCIS there are various forms to determine “extreme hardship” the following is a list provided by them:

(1) the age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation; (2) the age, number, and immigration status of the alien's children and their ability to speak the native language and adjust to life in another country; (3) the health condition of the alien or the alien's child, spouse, or parent and the availability of any required medical treatment in the country to which the alien would be returned; (4) the alien's ability to obtain employment in the country to which the alien would be returned; (5) the length of residence in the United States; (6) the existence of other family members who will be legally residing in the United States; (7) the financial impact of the alien's departure; (8) the impact of a disruption of educational opportunities; (9) the psychological impact of the alien's deportation or removal; (10) the current political and economic conditions in the country to which the alien would be returned; (11) family and other ties to the country to which the alien would be returned; (12) contributions to and ties to a community in the United States, including the degree of integration into society; (13) immigration history, including authorized residence in the United States; and (14) the availability of other means of adjusting to permanent resident status.²⁰

²⁰ “What factors are considered in evaluating extreme hardship?” (USCIS webpage). <http://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-42380/0-0-0-44857/0-0-0-47481/0-0-0-47683.html> (last visited January 22, 2013).