NISKANEN CENTER

Redefining "Public Charge"

Gauging the Threat to Noncitizens from Trump's Draft EO

By Samuel Hammond and Robert Orr

On February 2nd, 2017, the *Washington Post* published a draft executive order believed to be under consideration by Donald Trump's administration that, if signed, would curtail the admission of new immigrants likely to make use of any means-tested program, as well as permit the deportation of immigrants who already do.

The order makes reference to Section 212 of the Immigration and Nationality Act which defines general classes of alien ineligible for admission to the United States. It includes any alien who a consular officer may, at the time of the visa application or adjustment of status, suspect of becoming a "public charge." This has historically been interpreted to mean individuals likely to become primarily dependent on cash assistance programs such as SSI, TANF or institutionalized for long-term care. Yet the definition of public charge is detailed in regulation, not statute, and as such the guidance about how to identify a public charge is not set in stone.

In this report, we trace the recent policy history around immigrant eligibility for public benefit programs and estimate the population of noncitizens who would potentially fall under an inclusive definition of public charge. We find that this draft executive order, if enacted, would dramatically expand the ability to deny immigrants admission on public charge grounds, and potentially enable the deportation of up to 1.9 million currently lawful aliens.

Background

> *"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."*
>
> Sec. 237(a)(5): Deportable aliens.

The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), commonly known as welfare reform, introduced strict restrictions on recent immigrant use of virtually all public benefits. Qualified aliens, like lawful permanent residents (LPRs) or green

Samuel Hammond is the Poverty and Welfare Policy Analyst for the Niskanen Center and can be reached at shammond@niskanencenter.org. Robert Orr is an intern within the Poverty and Welfare program.

card holders, became banned from means-tested programs for 5-years from their date of legal entry.

The ban and subsequent tweaks to the rule sowed confusion among aliens who worried about the risk of deportation from obtaining such basic services as emergency medical assistance, or immunizations against communicable diseases. Recognizing a potential risk to public health and other federal policy goals, clear definitions and standards for determining a public charge were laid down in a 1999 rulemaking by Immigration and Naturalization Service (INS, now U.S. Citizenship and Immigration Services or USCIS) after extensive inter-agency consultations.

INS ultimately determined public charge to refer to being “primarily dependent on the government for subsistence” — not use of supplementary or non-cash benefits, most of which serve other purposes. Furthermore, the regulation states that deporting or denying admission on public charge grounds must consider the alien’s “totality of circumstances” including age, health, family status, assets, resources, financial status, education, and skills. According to contemporary USCIS guidance, no single factor is sufficient for identifying a public charge.

The draft executive order circulating in the media directs the Secretary of Homeland Security to rescind this and all past guidance “concerning the inadmissibility or deportability of aliens on the grounds that they are likely to be or have become public charges,” and begin taking steps to redefine public charge in a much broader way. Exactly what programs constitute “federal means-tested programs” is to be determined by a new DHS rulemaking. However, it plainly directs the department "to include all Federal programs for which eligibility for benefits, or the amount of such benefits, are determined in any way on the basis of income, resources, or financial need.”

Taken literally, this would potentially jeopardize the admission of virtually all immigrants except those expected to live well above the poverty line, as many federal means-tested programs phase-out at 200% of the poverty line and beyond. Currently, only the Supplemental Nutrition Assistance Program (SNAP), the Children's Health Insurance Program (CHIP), Temporary Assistance for Needy Families (TANF), Medicaid and Supplemental Security Income (SSI) are considered Federal means-tested public benefit programs by the agencies that administer them. However, the language of the order doesn’t appear to preclude adding programs usually considered irrelevant for determining public charge, as well. These could include the National School Lunch Program (NSLP), some veterans benefits, and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).

Though it isn’t current practice, there are no clear statutes protecting children of noncitizens from falling under the executive order’s inclusive definition of means-tested, particularly if the child’s eligibility for programs is means-tested according to the parent’s tax filings. For example, the NSLP offers reduced or free meals to students living in households with income reported below 185% and 130% of the poverty line. Adding child participation in NSLP as among the considerations for determining who is a public charge would be particularly disruptive to the many families whose children are automatically eligible for subsidies simply due to the income profile of the community they live in.

Defining public charge to include programs directed at children would be unprecedented. And yet it is consistent with Section 3(a)(v) of the draft executive order, which declares an intent to combat what it refers to as “birth tourism,” or the unsubstantiated practice of immigrants traveling to the U.S. for the purposes of giving birth and thus qualifying for public assistance.

How Many Noncitizens Could Be Affected?

Inadmissibility

The first way noncitizens would be affected by this executive order is through a higher probability of being denied admission on public charge grounds. A base rate probability can be determined through analysis of the proportion of noncitizens who utilize federal means-tested benefits, but this is not so straightforward. For some programs the Current Population Survey (CPS) asks about persons, while for others it asks about whole households. For this latter group, we can estimate the number of individuals in households receiving benefits, and whether they are home to noncitizens, but not who within the household is the specific recipient. Household numbers are therefore inherently overstated because they count some cohabitants who are either non-recipients, citizens or both. At the same time, household surveys are well known to underreport participation in public programs due to response bias.

With these caveats in mind, according to the 2016 CPS there were approximately 23 million noncitizens living in the United States in 2015. Of these, a total of 6,813,413 — 6.8 million — noncitizens receive at least one of the eight federal means-tested benefits that the CPS surveys with respect to individuals, or about 30% of the noncitizen population. In addition, 7.8 million individuals live in households that take part in at least one of the four federal means-tested programs that the CPS surveys with respect to households. Combining both groups, excluding any overlap, reveals roughly 11 million noncitizens receive federal means-tested programs directly, or live with someone who does — up to 50% of the noncitizen population. This includes 3.2 million households receiving SNAP, 5.1 million households receiving free or reduced school meals, 1.5 million persons accessing Medicare, and 271,000 persons using SSI.

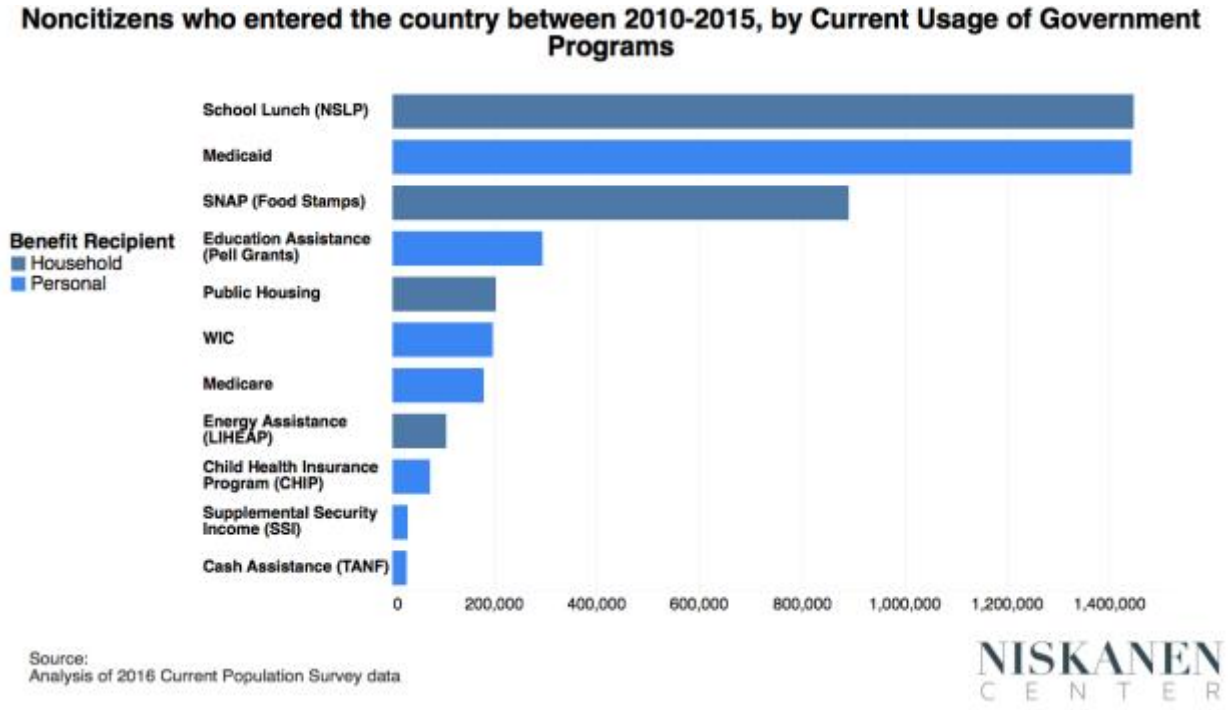
These numbers include noncitizens who entered more than five years ago. Nonetheless, they provide a reasonable approximation of the *likelihood* that a representative immigrant will at some point qualify and accept a federal means-tested benefit. If somewhere between 1 in 3 and 1 in 2 noncitizens receive some form of federal means-tested benefit, then one ought to expect a strictly enforced executive order of similar severity to cause a proportionate increase in denials of admission.

Deportability

The second way noncitizens would be affected by this the executive order is through increased risk of deportation. To reiterate, qualified aliens generally cannot receive means-tested benefits without having lived in the United States for a minimum of five years. Many states and programs layer additional requirements, such as demonstrating 40 quarters of work, or “deeming-requirements” that count the income and resources of the immigrant’s sponsor as if they were their own, thus reducing their chance of eligibility. Major exceptions include noncitizens who qualified for a particular benefit prior to the enactment of the 1996 welfare reform, and the children of qualified aliens, although this once again varies widely by program and state.

In general, the law permits the deportation of aliens if they are determined to have become a public charge “within five years after the date of entry.” Unfortunately, DHS does not collect comprehensive population information on subcategories of noncitizens, like international

students, LPRs, temporary workers, or unauthorized immigrants. However, the CPS allows us to restrict estimates of noncitizens receiving federal means-tested benefits to those who state that their arrival to the U.S. occurred between 2010 and 2015. These estimates will necessarily be inexact, but are reliable for assessing the magnitudes of people likely to be affected, depending on which programs are ultimately added to a more inclusive definition of public charge.



As one might expect, the cohort entering the U.S. in the last five years has very low participation in traditional income support programs like SSI and TANF — the programs historically most relevant for determining who is or isn’t a public charge. The greatest participation levels are in the National School Lunch Program, Medicaid and SNAP (Food Stamps). Each of these programs has its own reason for being high up on the list.

As mentioned previously, the NSLP does not discriminate based on immigration status, and many noncitizen families have children who are automatically eligible for free or reduced lunch, simply due to the income profile of the community they live in. This means the NSLP often reaches citizens and noncitizens independent of income or other means. Using the NSLP to help determine public charge would therefore be highly disruptive, imprecise, and difficult to implement.

The Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009 gave states the option of using Medicaid to cover eligible noncitizen children and pregnant women regardless of their date of entry, which is currently the practice in 29 states and D.C.. Noncitizens may also make use of emergency medical services reimbursed through Medicaid.

Finally, restrictions on SNAP eligibility originally imposed by PRWORA have been slightly relaxed over the years. Under current rules, eligible noncitizens can bypass the 5-year ban if

they have children under the age of 18, are blind or disabled, have a military connection, or have worked for 40 qualifying quarters.

If the definition of public charge were changed right now to include those who benefited from the NSLP, Medicaid, SNAP or other means-tested programs within the last five years of entering the United States, then by our estimate up to 1.9 million noncitizens would become potentially deportable. This disproportionately includes women and noncitizen households with children, as these are the groups most likely to be exempted from the five-year ban on qualified aliens receiving means-tested benefits.

Conclusion

A draft executive order has been circulated that suggests the Trump administration is planning to rescind existing guidance on what constitutes a “public charge” — a term that currently refers to the deportability or inadmissibility of an immigrant likely to be “primarily dependent on the government for subsistence” — and direct the Department of Homeland Security to draft a new definition that includes “all federal programs for which eligibility for benefits, or the amount of such benefits, are determined in any way on the basis of income, resources, or financial need.”

By our estimate, between 30-50% of the 23 million noncitizens currently residing in the United States receive benefits from some form of federal means-tested program. Thus if enacted, this executive order would potentially expand the ability of the U.S. government to deny admission to new immigrants in similar proportions.

Restricting our analysis to noncitizens who arrived to the U.S. within the last five years, we find as many as 1.9 million noncitizens would become potentially deportable on public charge grounds due to participation in programs that noncitizens have historically had partial access to, like Medicaid, SNAP, and school lunches. This would be incredibly disruptive and would likely cause a great deal of fear and confusion among noncitizens, as evidenced by the confusion caused by imposition of eligibility restrictions on noncitizens following the 1996 welfare reform.

The stated purpose of the executive order is to “protect the American taxpayers and promoting immigrant self-sufficiency.” However, its principal effect will be to maximize the executive branch’s discretionary power within existing statute to deport or deny admission to otherwise lawful noncitizens. Whether the administration will enact this executive order and use it to aggressively police the benefit use of lawful noncitizens remains to be seen. But without codifying the existing inter-agency guidance on determining who is public charge into law, there is little holding the administration back.