AN OVERVIEW OF PUBLIC CHARGE

By ILRC Attorneys

I. Introduction

"Public charge" is a ground of inadmissibility. Grounds of inadmissibility are reasons that a person could be denied a green card, visa, or admission into the United States. In deciding whether to grant some applicants a green card or a visa, an immigration officer must decide whether that person is likely to become dependent on certain government benefits in the future, which would make them a "public charge." It is not a test that applies to everyone, not even to all those applying for green cards.

During the Trump administration, the public charge ground of inadmissibility received much attention. The Trump administration implemented new rules on public charge that increased scrutiny of applicants for green cards. **The Trump-era rules are no longer in effect.**

The Biden administration has returned to longstanding prior public charge policy, the 1999 "field guidance," making it safe for immigrants and their families to use health, nutrition, and housing programs for which they qualify. Health care programs, including Medicaid and COVID care, housing, food programs, and many other vital services are once again safe to use.

On February 24, 2022, USCIS issued a notice of proposed rulemaking on public charge. The public comment period closed on April 25, 2022. The government must review all the comments before issuing a final rule. Until then, there are no changes to public charge.

This advisory seeks to provide practitioners with current information about the public charge ground of inadmissibility. For more information, see USCIS's Public Charge Resources page: https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/public-charge-resources.

II. What Is Public Charge?

"Public charge" is a ground of inadmissibility that could bar an individual's admission to the United States on a visa or application for lawful permanent residence (application for a green card).[1] Under Immigration and Nationality Act (INA) § 212(a)(4), an individual seeking admission to the United States or seeking to adjust status is inadmissible (and therefore unable to enter the United States or receive a visa or green card) if the individual, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge." This ground of inadmissibility is triggered if the government determines the individual 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.[2]

Receiving public benefits does not automatically make an individual a public charge. A number of factors must be considered when making a determination that a person is likely to become a public charge. See **Section IV**.

Currently, for immigrants adjusting status or seeking admission, only benefits received by the individual applying for admission or to adjust status are considered. Public benefits received by family members are not counted against the person applying for admission or adjustment for public charge purposes unless the cash benefits amount to the sole support of the family.

Public charge does *not* apply in naturalization proceedings.

Public charge is not a new policy; it has been a concept in immigration law since the Immigration Act of 1882. For about the last twenty years, the definition of a public charge has been someone "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."[3]

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[1] There is also a ground of deportability related to public charge. The ground of deportability impacts permanent residents and others who have been admitted to the United States, although it is very narrow and rarely applies. The deportation ground related to public charge is very different from the law discussed here. Neither the Trump-era rule nor the Biden administration's proposed rule addresses the public charge deportation ground. *See* Section V.

[2] *See* "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 Fed. Reg. 28689 (May 26, 1999).

[3] *See id.*

III. Who Does Public Charge Apply to?

A. Who Is Subject to a Public Charge Test?

Individuals applying for admission to the United States or adjustment of status (a green card) are subject to public charge unless they fall under certain statutorily exempted categories (see below).

B. Who Is NOT Subject to a Public Charge Test?

There are certain groups of people who are either exempt from public charge or may get a waiver for public charge when applying for admission to the United States, a green card, or other benefits with USCIS. These include:

- Refugees and asylum applicants[4]
- Refugees and asylees applying for adjustment to permanent resident status[5]
- Amerasian immigrants (for their initial admission)[6]
- Individuals granted relief under the Cuban Adjustment Act (CAA)
- Individuals granted relief under the Nicaraguan and Central American Relief Act (NACARA)
- Individuals granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)
- Individuals applying for a T Visa[7]
- Individuals applying for a U Visa[8]
- Individuals who possess a T visa and are applying for adjustment to permanent resident status[9]
- Individuals who possess a U visa and are applying for adjustment to permanent resident status[10]

[4] INA § 207(c)(3).

[5] INA § 209(c).

[6] 8 USC § 1101 note 5.

[7] INA § 212(d)(13)(A).

[8] INA § 212(a)(4)(E)(ii).

[9] INA § 212(d)(13)(A). For advocacy and arguments on whether the waiver should be required, see resources provided by CAST, https://www.castla.org.

[10] INA § 245(m).

- Special immigrant juveniles[11]
- VAWA self-petitioners[12]
- Applicants for Temporary Protected Status (TPS)[13]
- Individuals applying to renew DACA status[14]

Example: Jenin is an approved VAWA self-petitioner. She is eligible for a number of public benefits as a VAWA self-petitioner but is worried that her receipt of public benefits could impact her ability to get a green card later. However, if she adjusts as a VAWA self-petitioner she is exempt from the public charge ground of inadmissibility.

Example: Ahupathi was approved for Temporary Protected Status (TPS). When he applied for TPS, he did not have to address public charge concerns as the ground of public charge does not apply to TPS applicants. Now he is married to a U.S. citizen and ready to adjust status. Even though he has TPS status, he *will* be subject to a public charge determination when he applies to adjust status as there is no special exemption for TPS holders at the time of adjustment through a family member.

IV. How Is Public Charge Evaluated?

A. How Does the Government Decide if Someone Is Likely to Be a Public Charge?

There are two tests relating to public charge, discussed further below, that the government uses to assess whether a person is likely to be a public charge: 1) the totality of the circumstances test and 2) the affidavit of support.

1. Totality of Circumstances Test

The INA requires an adjudicator to consider several factors when assessing public charge. Adjudicators shall "at a minimum" consider the person's age, health, family status, assets, resources, financial status, education, and skills, and can also consider an affidavit of support.[15]

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[11] INA § 245(h)(2)(A).

[12] INA § 212(a)(4)(E)(i).

[13] 8 CFR § 244.3(a).

[14] Applicants for DACA also are not subject to public charge; however, currently USCIS is enjoined from approving initial DACA applications.

[15] INA § 212(a)(4)(B).

This is considered a "totality of circumstances" standard—under this standard, the officer is required to consider *all* factors, both good and bad, and the officer must not rely on one single factor in making a decision.

Receiving public benefits does not automatically make an individual a public charge since the officer must consider all circumstances and must not rely on a single factor, not even current or past receipt of public benefits. Rather, the adjudicator needs to consider all of the factors together and must weigh both the positive and negative factors to determine whether the applicant is likely to become a public charge.

The totality of the circumstances test is forward-looking—the officer is supposed to consider all factors as it relates to *future* likelihood that the person will become dependent on the government.

2. Affidavit of Support

The second test is an affidavit of support. This requirement applies *only* to persons immigrating through a family visa petition and in some cases, employment-based petitions.[16] Under this test, most people immigrating through a family visa petition *must* have an affidavit of support on Form I-864 submitted on their behalf, or they will be found inadmissible as a public charge.[17] There are some exemptions, and those who fall into these exemptions have to file Form I-864W instead.

The I-864 affidavit of support requires the sponsor to have a certain level of income or assets (for income, 125% of the Federal Poverty Income Guidelines), and it is a legally enforceable contract to provide financial support to the applicant. Historically, a qualifying affidavit of support has been strong evidence the applicant is unlikely to be a public charge.

B. What Public Benefits Does the Government Consider When Making a Public Charge Determination?

Not all publicly-funded benefits are relevant to deciding whether someone is likely to become a public charge. For example, forms of assistance other than cash assistance, such as food stamps, health insurance, and rental assistance, are not considered negative factors in the public charge determination. In assessing the totality of the circumstances, an adjudicator may consider receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense to determine whether that person is likely to become

[16] *See* INA § 212(a)(4)(C) & (D).

[17] INA § 212(a)(4)(C).

primarily dependent on the government for subsistence. Short-term institutionalization for rehabilitation is *not* subject to public charge consideration under existing guidance.

Therefore, the only programs currently considered to determine if someone is likely to be a public charge are:

- Cash assistance for income maintenance
  - Supplemental Security Income (SSI)
  - Temporary Assistance for Needy Families (TANF) (called CalWORKs in California)
  - State and local cash assistance programs (often called "General Assistance" programs)
- Institutionalization for long-term care at government expense (covered by Medicaid) in a nursing home or mental health institution

If an individual received one of these public benefits programs, how long ago and the length of time that the individual received this assistance may be significant in determining public charge. The government has stated that the more time that has passed since an individual received cash benefits or was institutionalized, the less weight these factors will have as a predictor of future receipt of benefits.[18]

> **Example:** Kar Wai will be eligible soon to adjust status (apply for a green card) through a petition filed by his permanent resident spouse. At the time of his green card interview, he should be prepared to show that he is not likely to be primarily dependent on government aid to survive. Although Kar Wai's family received cash assistance from the government years ago, he has now is in a job training program. His prior receipt of cash assistance will not be the only factor considered in determining whether he is likely to be a public charge in the future. The government will consider the fact that Kar Wai has not received cash assistance for many years, along with his new job skills and the financial support that his spouse can provide.

[18] *See* "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 Fed. Reg. 28689 (May 26, 1999).

C. What Public Benefits Programs Are NOT Considered When Making a Public Charge Determination?

Past, current, or future receipt of non-cash benefits and special-purpose cash benefits that are not intended for income maintenance are not subject to public charge consideration. These include:

- Non-cash benefits (other than institutionalization for long-term care)
- Non-cash TANF benefits such as subsidized childcare, transit subsidies
- Medicaid (called Medi-Cal in California) and other health insurance and health services (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases; use of health clinics, short-term rehabilitation services, and emergency medical services) other than support for long-term institutional care
- Children's Health Insurance Program (CHIP) (called Healthy Families in California)
- Nutrition programs, including Food Stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the National School Lunch and School Breakfast Program, and other supplementary and emergency food assistance programs, like Pandemic-EBT (P-EBT)
- Housing benefits
- Childcare services
- Energy assistance, such as the Low-Income Home Energy Assistance Program (LIHEAP)
- Emergency disaster relief
- Foster care and adoption assistance
- Educational assistance (such as attending public school), including benefits under the Head Start Act and aid for elementary, secondary, or higher education
- Job training programs
- In-kind, community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter)
- Prison, jail, incarceration costs
- Privately-funded treatment programs

All COVID-19 related vaccinations and health care are safe to use, including food assistance and housing programs!

State and local programs that are similar to the federal programs listed above are also generally not considered for public charge purposes. Finally, any programs that are entirely funded by private entities are not considered for public charge.

D. Whose Receipt of Public Benefits Are Considered?

Currently, for immigrants adjusting status or seeking admission, only benefits received by the individual applying for admission or to adjust status are considered. Public benefits received by family members are not counted against the person applying for admission or adjustment for public charge purposes unless the cash benefits amount to the sole support of the family.

When considering applications for those who intend to consular process, it is important to look to the policies followed by the Department of State (DOS). Consular officers rely on the guidance contained in the DOS's Foreign Affairs Manual (FAM). The FAM instructs that "a properly filed, non-fraudulent Form I-864 should normally be considered sufficient to satisfy the [public charge] requirements." Nonetheless, officers can consider a sponsor's past or current receipt of means-tested benefits. While use of a means-tested benefit by the sponsor, in itself, should not result in a public charge finding, if a sponsor or any member of their household has received public means-tested benefits within the past three years, the consular official must review fully the sponsor's current ability to provide the requisite level of support, taking into consideration the kind of assistance the sponsor received and the dates received. Nonetheless, the main public charge "test" is still whether the applicant is likely to become primarily dependent on cash aid or long-term institutionalization.

V. Could Being a Public Charge Make Someone Deportable?

Permanent residents and others who already have been admitted to the United States on a visa are subject to grounds of deportability, rather than grounds of inadmissibility. The public charge deportability ground applies in an even more narrow set of circumstances than the public charge inadmissibility ground, and to date it has been only rarely enforced. Noncitizens are deportable if they become a public charge anytime within five years after their last entry, unless they can prove that they became a public charge because of something that happened after entry.[19]

[19] Under 1990 amendments to the INA, a noncitizen 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." In other words, people who become a public charge within five years of their last entry are not deportable if they can prove that this was caused by something that happened after that entry. INA § 237(a)(5).

Example: John is a permanent resident whose last entry into the United States was in 2009. In 2011, he was in an accident at work and became disabled. He collects Social Security Income (SSI) and other benefits, and he will never be able to work again. Is John deportable as a public charge?

No. John is not deportable, even though he became a public charge within five years of his last entry, because he can show that the cause of his becoming a public charge (his accident) is something that happened after his last entry.

In practice, very few people have been put into removal proceedings or removed based on this deportability ground. Cases have held that a person does not become deportable under the public charge ground for simply having received a public benefit.[20] Rather, caselaw establishes three requirements that must be present for a person to be removed as a public charge: 1) the benefit program must provide that the state or other public entity can sue the recipient or other specified persons for repayment, 2) the public entity must demand repayment, and 3) the immigrant must refuse to pay for the cost demanded by the public entity.[21]

[20] *See, e.g., Matter of B*, 3 I&N Dec. 323 (BIA and AG 1948).

[21] *See Matter of V.*, 2 I&N Dec. 78 (BIA 1944); *Matter of Kowalski*, 10 I&N Dec. 159 (BIA 1963); *Matter of C.*, 2 I&N Dec. 538 (BIA 1946).

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend