



# PUBLIC CHARGE FAQs

By Ariel Brown

This FAQ addresses questions related to current public charge policy. As of December 23, 2022, the new 2022 final regulation (“rule”) on public charge is in effect. Applications submitted on or after that date will be decided under the new rule. Applications submitted prior to that date will be adjudicated under prior policy, the 1999 Field Guidance. The new rule and the 1999 Field Guidance are similar. This FAQ will note where the answer might vary based on which policy applies.

**NOTE: Pending Litigation.** On January 5, 2023, the state of Texas filed a lawsuit challenging the new 2022 final rule on public charge. Texas is seeking a permanent injunction blocking the rule and for the court to find that the new rule is unlawful. **At this time, nothing has changed, and the new rule remains in effect for all I-485 applications involving a public charge test that were filed on or after December 23, 2022.** Check for updates on the pending litigation at <https://www.ilrc.org/public-charge>. A separate request that the U.S. Supreme Court hear a case brought by the Attorney General of Texas and thirteen other states attempting to intervene in litigation over the Trump-era 2019 public charge rule, an attempt to revive the Trump-era rule, was denied by the Supreme Court on January 9, 2023.

This advisory addresses questions we have received in the following categories:

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## I. Definitions and Applicability of the New Rule

### What is the definition of public charge and where does it come from?

The statute on the public charge ground of inadmissibility, at INA § 212(a)(4), does not provide a definition of public charge, it merely says that someone deemed *likely to become a public charge* will be inadmissible, and identifies various factors an immigration officer should minimally consider when making this prediction about the future.

We get our definition of public charge from agency guidance and the regulations that went into effect on December 23, 2022.

For both pending applications and new filings, public charge is defined as being *primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or long-term institutionalization at government expense*. Thus, when an immigration officer is evaluating public charge (the “public charge test”) they are determining whether they believe the person is likely to rely, in the future, on public cash assistance for income maintenance or long-term institutionalization paid for by the government.

### **Does the new rule apply to applications submitted before December 23, 2022, if the case is still pending?**

No. The new rule only applies to applications postmarked on December 23, 2022 or later. All applications submitted before that date will be adjudicated under the 1999 Field Guidance, even if the interview or decision is made after that date. For most cases, assessing the public charge ground under the 1999 Field Guidance will match analysis under the new rule.

### **Does the new rule apply in consular decisions?**

No, the Department of State (which handles consular cases) has not yet published a rule to align with the new USCIS rule. Nonetheless, consular policies were updated in March 2021 (to return to longstanding policy prior to Trump-era changes) and these policies generally track the 1999 Field Guidance.

### **When does public charge come into play?**

Public charge only applies in limited scenarios. Public charge inadmissibility applies when a person applies for a visa to enter the United States or otherwise seeks admission, including when they apply for lawful permanent residence (a “green card”) through adjustment of status (Form I-485) or immigrant visa consular processing (DS-260). It does not apply to all green card applicants, however—see below for more information on who is exempt from public charge.

Other applications, like Deferred Action for Childhood Arrivals (DACA), Temporary Protected Status (TPS), U nonimmigrant status (the “U visa”), etc., do NOT involve a public charge test.

If an individual is not submitting ANY immigration application whatsoever, then they do not need to think about public charge since they’re not subject to a public charge test unless also submitting an immigration application involving a public charge test; they should access the public benefits they qualify for and need without fear.

### **Do lawful permanent residents (LPRs) ever face a public charge determination?**

Most of the time, no. There is NO public charge test to renew a green card (I-90), lift conditions on residency (I-751), or apply to naturalize (N-400). Once a person has a green card and is a lawful permanent resident, they are only subject to public charge and other grounds of inadmissibility if they travel outside the United States and fall under INA § 101(a)(13)(C), most

commonly if they had a criminal conviction and then departed or remained outside the United States for more than 180 days during their trip.

There is also a separate public charge *deportability* ground that applies in a different context from the inadmissibility ground and has different requirements. The public charge deportability ground is unaffected by these policy changes and rarely comes up.<sup>1</sup>

## II. Benefits and Government Programs

### A. Cash assistance questions

#### **What is considered cash assistance for income maintenance that could trigger public charge?**

Under both prior guidance and the new rule, *cash assistance for income maintenance* includes: Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF) (in California, this program is called CalWORKs), and state, tribal, territorial, or local cash benefit programs (General Assistance, or GA).

#### **Do CalWORKs and CAPI (Cash Assistance Program for Immigrants) in California count as public charge?**

Yes, receipt of CalWORKs and CAPI in California would be considered cash assistance for income maintenance as part of the public charge test, along with looking at other factors an officer must consider like the applicant's age, health, work history, skills, etc., *but only if the applicant who is subject to the public charge test is the person receiving the benefit*. In other words, if a child or other household member is the one who actually qualifies for the benefit, *not* the applicant (even if the applicant helped them apply or benefits communications are addressed to the applicant as head of household), this would not count towards public charge since the public charge assessment only looks at public benefits that count that the *applicant* received in the past or is presently receiving.

If the applicant is, in fact, the one receiving CalWORKs, CAPI, or another public benefit that counts, the immigration officer would consider how long the person received CalWORKs or CAPI (or another public benefit that counts), whether they are still receiving it, and (if applicable) how long ago they stopped receiving the benefit—if the person received the benefit for a short time and/or a long time ago, this would lessen the negative impact of having received the benefit as part of the overall public charge assessment. As part of the overall public charge assessment the officer also looks at other factors besides just receipt of benefits that count. Receipt of benefits that count, by itself, cannot lead to a negative public charge determination since the officer must also consider all the other factors (applicant's age, health, etc.). If a person received CalWORKs or CAPI a long time ago or only for a brief time or can show that their circumstances are changing such that they will not need CalWORKs or CAPI in the future, then this should not lead to a negative public charge determination.

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<sup>1</sup> For more information, see ILRC, *Public Charge As a Ground of Deportability*, (June 11, 2019), <https://www.ilrc.org/public-charge-ground-deportability>.

## Does receiving financial aid count?

No, financial aid does not count as public charge under either the prior guidance or the new rule. Prior guidance specified that financial aid for education did not count as cash aid for income maintenance. The new rule also says that publicly funded scholarships and educational grants do not count.

## B. Institutionalized care questions

### What constitutes long-term institutionalized care?

Longstanding guidance does not define long-term institutionalized care, apart from mentioning care in a nursing home or mental health institution as examples and stating that institutionalization as imprisonment for a crime does not count.

Updated guidance in the USCIS Policy Manual defines “long-term institutionalized care” by elaborating on the meaning of “long term” and “institutionalized care”:

“Long-term” means of extended duration, even if not permanent. It does NOT include short, intermittent, or sporadic institutionalization, even if recurring.<sup>2</sup>

“Institutionalized care” could include in a nursing home or mental health institution but does NOT include imprisonment for conviction of a crime or short/intermittent institutionalization for caregiver respite care, rehabilitation, behavioral health, or substance abuse treatment.

### Does substance abuse in-patient care count as institutionalized care?

The updated Policy Manual says that sporadic or intermittent institutionalization related to substance abuse treatment would not be considered “long term institutionalization” for public charge purposes.<sup>3</sup>

### What if the person received long-term treatment but it wasn't institutionalized care?

If not institutionalized care, then it would not count. Updated guidance in the USCIS Policy Manual distinguishes institutionalized care from home and community-based services (HCBS), which do NOT count towards public charge even if at government expense.<sup>4</sup>

### Do at-home nursing services paid through the state of California count as long-term institutionalized care?

No, see answer above.

### Does long-term include chronic or persistent mental illness, that may require occasional hospitalizations?

No. Guidance on the new rule clarifies that short, intermittent, or sporadic institutionalization, even if recurring, does not count towards public charge.

<sup>2</sup> 8 USCIS-PM G.2(C) & G.7(C).

<sup>3</sup> 8 USCIS-PM G.7(C).

<sup>4</sup> 8 USCIS-PM G.7(C)(1).

## C. Other public benefits questions

### **Does Medi-Cal in CA count as public charge?**

No. Medi-Cal programs would only count if the issue was provision of long-term institutionalization. No other Medi-Cal or Medicaid benefits count for public charge purposes.

### **I have a potential client who was receiving Medi-Cal that went beyond emergency Medi-Cal in the past. Would that type of Medi-Cal negatively impact her regarding public charge?**

No. Only long-term institutionalization paid for by Medicaid/Medi-Cal counts; no other healthcare, Medi-Cal, or Medicaid benefits count for public charge purposes.

### **Do food stamps count for public charge?**

No. Although food stamps were part of the Trump-era public charge rule, they do not count under the current public charge rule that applies to pending cases submitted on or after December 23, 2022, or under prior longstanding policy, which applies to pending cases submitted before December 23, 2022.

### **Does section 8 trigger public charge?**

No. Although section 8 and other housing benefits were part of the Trump-era public charge rule, they do not count under the current public charge rule that applies to pending cases submitted on or after December 23, 2022, or under prior longstanding policy, which applies to pending cases submitted before December 23, 2022.

### **What benefits are safe to use without triggering public charge?**

Lots! Health care programs, including Medicaid and COVID care, housing, food programs, and many other vital services are safe to use without implicating public charge—see the ILRC’s Safe to Use List for an extensive (although not exhaustive) list. Any program that is not cash assistance or institutionalization is safe to use.

Also, remember only those subject to a public charge test need to worry about using programs that might be considered for public charge purposes and if a family member is the one who is receiving the benefits, that won’t be considered as part of the applicant’s public charge assessment. Further, even for those applicants who have used or are using benefits that can be considered in a public charge test, receipt of public benefits is just one piece of the “totality of the circumstances” assessment which also looks at the affidavit of support and an applicant’s age, health, work history, etc.

**Some clients who are PRUCOL (“permanently residing under color of law,” a public benefits-granting agency designation) received rental and cash assistance (for income maintenance) and are now seeking to adjust status. They want to disenroll from income maintenance before filing their adjustment application. Does the past receipt of cash assistance impact them adversely?**

If an applicant who is subject to a public charge test was receiving benefits that count (cash assistance for income maintenance like SSI, TANF, or GA or long-term institutionalized care paid for by the government), the immigration officer will consider the benefits use as part of the totality of the circumstances. This means they will look at receipt of benefits that count, in addition to looking at the affidavit of support, applicant’s age, health, etc. When the officer considers receipt of benefits that count, they will look at the duration, recency, and amount of benefits received. Receipt of benefits that count, by itself, cannot lead to a negative public charge determination.

#### **D. Family members’ use of benefits**

**Do sponsors’ or family members’ use of benefits trigger public charge for the immigrating family member?**

No, sponsors’ or family members’ use does NOT count. Only the applicant’s receipt of public benefits can be considered as part of the public charge assessment (and even then, only two types of benefits programs can be considered: cash assistance for income maintenance or long-term institutionalized care at government expense).

In consular cases, however, current guidance mentions if a sponsor used public benefits in the last three years, it may require more review.

**Is cash assistance received based on having minor USC children considered to be benefits received by the adult parent?**

No. If the family receives cash assistance for U.S. citizen children, that is not considered “receipt” by the adult parent.

**What if the family member who uses/used benefits that count is the sponsor?**

Sponsors’ or family members’ use does NOT count (even if the sponsor is also a family member). Only the applicant’s receipt of public benefits that count can be considered as part of the public charge assessment.

In consular cases, however, current guidance mentions if a sponsor used public benefits in the last three years, it may require more review.

## What if the petitioner receives cash aid for income maintenance such as TANF?

The petitioner is not subject to a public charge test. However, the petitioner is the sponsor and may also be a member of the household, thus the petitioner/sponsor/household member's *income* (but NOT use of benefits) may be considered as part of the applicant's totality of the circumstances.

### III. Exemptions

#### Are both refugees and asylees exempt from public charge?

Yes, asylees and refugees are exempt from public charge.

#### If someone is applying for an immigration benefit like a humanitarian benefit, are they exempt from public charge while their application is pending?

Public charge is a ground of inadmissibility that may or may not apply, depending on the type of immigration application a person is submitting. In other words, not being inadmissible for public charge is a requirement to apply for some forms of immigration relief—most commonly, a green card through a U.S. citizen or LPR family member. If someone is applying for a form of relief that involves a public charge test, like a green card through family, then public charge will be a consideration for them while their application is pending and in order for it to be approved.

If a person is applying for a humanitarian benefit, for example a U visa or VAWA (Violence Against Women Act), then they are exempt from public charge because being admissible for public charge is *not* a requirement to be granted U status or VAWA.

#### Are U applicants exempt from public charge even if they haven't received deferred action/BFD yet?

*U applicants* are exempt from public charge,<sup>5</sup> regardless of whether they have received deferred action or BFD (bona fide determination).

*Approved U nonimmigrants* are also exempt from public charge. Under the current regulation, they remain exempt when they apply to adjust status even if they adjust through the general adjustment provision at INA § 245(a) as opposed to through the U-specific adjustment provision at § 245(m). For example, if a U nonimmigrant later applies to adjust through family, they will not face a public charge test as long as they remain in valid U nonimmigrant status at time of filing the adjustment application and at time of adjudication.<sup>6</sup>

Applicants who will be evaluated under the 1999 Field Guidance (if their adjustment application was filed and still pending before December 23, 2022) should rely on statutory language at INA

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<sup>5</sup> INA § 212(a)(4)(E)(ii).

<sup>6</sup> By statute, such individuals have arguments that they should remain exempt even when no longer in valid U status, because the statute does not distinguish that the exemption no longer applies if later the person is no longer in valid U nonimmigrant status. See INA § 212(a)(4)(E)(ii).

§ 212(a)(4)(E)(ii) that they are exempt from public charge, now codified by the new rule at 8 CFR § 212.23(a)(19).

In addition, any benefits received while a U applicant or while in U nonimmigrant status would not be considered in a public charge test. Thus, if the above exceptions do not cover the person's circumstances and the person were subject to a public charge test later one (which as described above would only be if they are applying to adjust under § 245(a), are no longer in valid U nonimmigrant status, and USCIS does not agree that the statutory exemption at § 212(a)(4)(E) continues to apply), the adjudicator would not be able to consider in the public charge analysis any benefits used while a U applicant or U nonimmigrant.

### **Are parolees subject to public charge?**

No, there is no public charge test as part of the decision to grant parole. There are many different types of parole, and for some humanitarian parole requests, a sponsor is required. So while there is no formal adjudication of public charge inadmissibility, the process might require showing some level of support. Further, certain parolees are eligible for public benefits, such as refugee resettlement benefits that have been extended to Ukrainians and Afghans—they can access these benefits for which they qualify without worrying about public charge.

### **For a client who was in an exempt status when they received benefits and is now adjusting through a family-based petition, should proof of client's exempt status be submitted along with the I-485?**

If an applicant who is subject to a public charge test received public benefits that count in the past *while in an exempt status*, then submitting proof of their exempt status with the initial filing could be helpful since such receipt of benefits would not count towards public charge. The updated Form I-485 instructions do not mention an exception for disclosure of benefits received while exempt, so it would appear the onus is on the applicant/preparer to bring this to the adjudicator's attention (and they would still have to list receipt of these benefits on the I-485).

## **IV. Affidavit of Support and Sponsor Questions**

### **Is an I-864 affidavit of support required for someone who adjusts through a family member if they also have a pending U visa application?**

If a person with a pending U visa application is also submitting an adjustment application based on a family petition filed by a U.S. citizen or LPR family member, then they will have to submit an I-864 in association with their family-based adjustment application; the fact that they also have a pending U visa application doesn't change this.

### **How are adjustment applicants impacted if they have a strong affidavit of support?**

While immigration officers must still consider the full totality of the circumstances, having a strong affidavit of support makes it less likely the applicant will become a public charge in the future.

## When does a family member need to have an affidavit of support?

Most family-based adjustment applicants are required to submit an affidavit of support with their adjustment application unless they qualify to submit Form I-864W, Affidavit of Support Exemption instead. The following family-based adjustment applicants may submit I-864W instead of an I-864 affidavit of support: children of U.S. citizens who will automatically become U.S. citizens under the Child Citizenship Act of 2000 upon their admission to the United States, self-petitioning widow(er)s of U.S. citizens, VAWA self-petitioners, and applicants who have earned or can be credited with 40 qualifying quarters of work.<sup>7</sup>

## What if the petitioner/sponsor receives cash aid for income maintenance, such as TANF?

This does not factor into USCIS's public charge assessment. However, current guidance at the consulates does mention that if a sponsor used public benefits in the last three years, it may require more review.

## V. Bond

### What is the benefit of paying a bond? If a bond is paid, will they automatically approve it?

A public charge bond will allow someone who has been found inadmissible for public charge to overcome that disqualification. Otherwise, their application will be denied based on public charge.

An applicant cannot affirmatively request to pay a public charge bond, but even if USCIS decides to favorably exercise its discretion to "invite" the applicant to post a public charge bond, USCIS will still decide whether to accept it; paying the bond is not enough to guarantee acceptance and approval.<sup>8</sup>

### How long does USCIS keep a bond before the person gets their money back?

USCIS keeps the bond indefinitely. The bond may be cancelled if USCIS decides to cancel it on its own, or if either the bond obligor or noncitizen applies to cancel the bond using Form I-356. USCIS will cancel a bond if the noncitizen has died, permanently departed the United States, become a U.S. citizen, or has been an LPR for at least five years and has not breached the public charge bond, by using public benefits that count, during that time.

If USCIS cancels the bond and it was a cash bond (USCIS will also accept surety bonds), USCIS must return the full bond amount plus all interest accrued.

<sup>7</sup> For more information see ILRC, *Introductory Guide to the Affidavit of Support*, (Sept. 16, 2022), <https://www.ilrc.org/introductory-guide-affidavit-support>.

<sup>8</sup> 8 USCIS-PM G.11(D)(1).

## VI. Miscellaneous

**For household size, does it include a stepchild (i.e., child of immigrant but not the petitioner) who doesn't live in the household. Also, what about elderly parents who live with the petitioner/sponsor that are not listed as dependents on the taxes?**

Prior guidance from 1999, that applies to pending applications filed before December 23, 2022, does not specify who is part of the applicant's household for public charge purposes.

The new rule, however, which applies to pending applications involving a public charge test filed on or after December 23, 2022, defines the applicant's household for public charge purposes as the following people: (1) the applicant; (2) their spouse, parents, unmarried siblings under age 21, and children if physically residing with the applicant; and (3) any other individuals who either *list the applicant* as a dependent or are *listed by the applicant* as a dependent on their tax returns.

The Policy Manual on the new public charge rule uses the definition of "child" under the immigration laws at INA § 101(b)(1), which means unmarried, under age 21, and includes stepchildren, adopted children, and children born out of wedlock if certain other conditions are met. But if the child—including a stepchild—does not *physically reside* with the applicant, then they are not counted as part of the household for public charge purposes (unless the applicant lists them as a dependent on their tax returns).

Elderly parents who live with the petitioner/sponsor would be included in the household for public charge purposes *if they physically reside with the applicant*, regardless if they are listed as dependents on the applicant's taxes. If they do not physically reside with the applicant, are not listed on the applicant's tax returns as dependents, and do not list the *applicant* as a dependent on *their* tax returns, then they are not counted as part of the applicant's household for public charge purposes.

**Now that public charge is codified as a rule in the Federal Register and not just guidance, does that mean that a new administration cannot change this without going through rulemaking process again?**

Yes, if a future administration wants to change the public charge rule now that it has been codified, they will have to go through the rulemaking process outlined by the Administrative Procedures Act (APA) which takes time and may lead to legal challenges if not properly followed.

**Are public charge concerns the only consideration when advising a client whether to use public benefits?**

As an immigration law advocate, the first step is determining if the person will be applying for a type of relief that requires overcoming the public charge ground of inadmissibility. Even so, immigration advocates should be careful not to overstate the reach of public charge—most benefits for which clients qualify will not raise public charge concerns. These benefits can be very important to stabilizing the situation of their family and might ultimately lead to better facts

for the immigration case. Qualifying for means-tested benefits might also indicate that the applicant is eligible for a fee waiver for their immigration application.

### **What about someone who is undocumented and leery about becoming known to the government (i.e., worried about getting on the government's radar and thus increasing the possibility of a removal action)?**

Being worried about becoming known to the government by signing up for public benefits is a valid concern. However, in general providing information to benefits agencies should be safe and should not be shared for federal immigration enforcement purposes. For more information and resources on confidentiality protections and other information-sharing safeguards when a person applies for public benefits, see the Protecting Immigrant Families campaign (PIF) at <https://pifcoalition.org/>.

### **At time of naturalization, can USCIS re-evaluate if LPR status was approved properly based on public charge?**

As part of naturalization adjudication, USCIS looks at whether LPR status was properly granted.<sup>9</sup> With regards to public charge, this would mean USCIS would have to consider the *public charge policy that applied at the time of LPR grant* and consider whether the individual was inadmissible for public charge at that time. Since this is an extremely fact-based determination and any one factor on its own cannot form the basis for a public charge denial (except failure to include an affidavit of support, where required), it is hard to imagine a situation where the officer reviewing the naturalization application could definitively say that back when the person was granted LPR status they should have been denied for public charge. This type of issue is more likely to occur where there was a misrepresentation at the adjustment stage. There is NO public charge test at time of naturalization.

### **Can an embassy or consulate find someone to be a public charge?**

Yes. Individuals who do not qualify to adjust status from within the United States must apply for lawful permanent residence via consular processing, which involves an interview at a U.S. consulate or embassy abroad (instead of at a USCIS office, as with adjustment of status). In either scenario—adjustment of status or consular processing—the applicant must not be inadmissible under any grounds of inadmissibility, including the public charge ground of inadmissibility. However, U.S. consulates and embassies fall under the Department of State (DOS), which has its own public charge guidance. The new final rule that went into effect on December 23, 2022 only applies to the Department of Homeland Security (DHS, which includes USCIS), *not* DOS. We expect that DOS may issue its own rule on public charge inadmissibility and update its guidance on public charge for consular officers, but do not know when this will happen. For now, DOS is following 1999 guidance and its own instruction manual for adjudicating officers, the Foreign Affairs Manual (FAM).<sup>10</sup> Traditionally, DOS's public charge policy has mirrored DHS policy, so that LPR applicants are not subject to differing standards depending on whether they adjust versus consular process. The only significant difference right now between public charge guidance at USCIS and DOS is that for

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<sup>9</sup> See 12 USCIS-PM D.2(A)(1).

<sup>10</sup> 9 FAM § 302.8.

consular cases, the FAM says that the affidavit of support “should normally be considered sufficient to satisfy” public charge.<sup>11</sup>

### **If someone applies for a fee waiver, will they be considered a public charge?**

Having applied for a fee waiver, by itself, will not make a person a public charge. To be found inadmissible for public charge, the person must be submitting an immigration application that requires public charge admissibility/involves a public charge test, *and* the immigration officer reviewing their application must look at the full “totality of the circumstances”—no one factor, besides failure to submit an affidavit of support where required, can lead to a public charge denial.

As part of the totality of the circumstances evaluation the immigration officer must, at a minimum, consider the applicant’s age, health, household size, financial situation, employment and education history, and skills. They will also consider the affidavit of support and the applicant’s receipt of any public benefits that count. In addition, new guidance in the USCIS Policy Manual states that for cases evaluated under the new rule—applications submitted on or after December 23, 2022—immigration officers may additionally consider fee waivers the applicant submitted in the past that are in the applicant’s immigration record.<sup>12</sup> Nonetheless, having sought a fee waiver in the past, by itself, will not make a person a public charge.

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<sup>11</sup> 9 FAM § 302.8-2(B)(2)(b).

<sup>12</sup> 8 USCIS-PM G.9(A)(2). Family-based adjustment applicants are not eligible to request fee waivers with the adjustment application, so this only pertains to fee waivers submitted in relation to other applications, prior to the adjustment application.



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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 the fundamental rights of immigrant families and communities.