PUBLIC CHARGE CONSIDERATIONS:
ADJUSTMENT OF STATUS VS CONSULAR PROCESSING

DETERMINING WHICH PUBLIC CHARGE RULES APPLY WHEN SEEKING A GREEN CARD

Some—but not all—people applying for a green card are subject to a public charge test, meaning they must be concerned with the public charge ground of inadmissibility at INA § 212(a)(4) when they seek permanent residency.

NOTE: For more information about which categories of immigrants are not subject to public charge, see WHO/WHAT/WHERE/HOW: Public Charge Analysis for Advocates.

People who are applying for a green card through a family petition *are* subject to public charge inadmissibility, but the rules vary depending where their application will be adjudicated—specifically, *where* their green card interview will be.

ADJUSTMENT OF STATUS WITH DHS/USCIS

Generally, a person is eligible for adjustment of status because they last entered the United Sates with a visa or parole document or they qualify to adjust under INA § 245(i).[1]

CONSULAR PROCESSING WITH DOS

Those who are ineligible for adjustment of status may have the option to consular process, which means their green card interview will be at a U.S. consulate or embassy abroad. Some individuals who are consular processing may be presently in the United States but will be traveling abroad to attend their green card interview, so it is important to focus on *where the green card interview will be*, not necessarily where the applicant is right now. Others who will be consular processing may already be outside the United States; some may have never been to the United States before, whereas others may have visited the United States before but nonetheless reside abroad.

1 For more information on ways to qualify for adjustment of status, see ILRC, *Family-Based Adjustment of Status Options,* (Dec. 21, 2018), available at https://www.ilrc.org/family-based-adjustment-status-options.

There are four variations of public charge rules that are potentially relevant to public charge determinations:

- **1999 DHS Rule** – Used by USCIS for the last twenty years in making public charge determinations. This rule will continue to apply to all cases decided by USCIS while the 2019 DHS Rule is enjoined.
- **2019 DHS Rule** – The "new rule" that was intended to go into effect for cases adjudicated by USCIS, but is currently blocked by multiple injunctions.

- **2018 DOS Rule** – Revised in 2018 in the Foreign Affairs Manual (FAM), guides all public charge determinations by Department of State (DOS) consular officers in consular processing cases.
- **2019 DOS Rule** – Intended to be effective October 15, 2019 to align with the 2019 DHS Rule. However, DOS has announced that implementation is delayed awaiting a new Public Charge Questionnaire form (DS-5540).

Even though much focus has been on the new DHS public charge rule that was set to take effect in October 2019 until blocked by multiple nationwide injunctions, as the flowchart below illustrates different public charge rules apply in consular processing cases, which are controlled by DOS, not DHS. In the last 23 months DOS has also sought to change its public charge guidance, making revisions to the FAM in 2018 and then, in October 2019, issuing an interim final rule meant to match the new (enjoined) DHS rule. Thus, it is critical to figure out which public charge rules apply for green card applicants, depending if they will be adjusting status or consular processing. For a more detailed comparison of the different public charge inadmissibility rules, see **PUBLIC CHARGE INADMISSIBILITY RULES COMPARISON CHART**. For more details about how to prepare applications in light of these rules, see **PUBLIC CHARGE: TOTALITY OF THE CIRCUMSTANCES WORKSHEET**.

Will the green card interview be inside the United States (with USCIS) or outside the United States at a U.S. consulate or embassy abroad?

a. If inside the United States (adjustment of status), then the **1999 DHS public charge rule** applies while there is an injunction on the **2019 DHS public charge rule**.

b. If outside the United States, at a U.S. consulate or embassy abroad (consular processing), then the **2018 DOS public charge rule** applies until DOS implements the **2019 DOS public charge rule**.

1999 DHS PUBLIC CHARGE RULE

Found in 1999 field guidance published in Federal Register on May 26, 1999, at 64 Fed. Reg. 28689

- Immigration officers look at whether the applicant is likely to become *primarily dependent* on governmental programs for support
- Just two types of benefits programs "count" towards the public charge assessment: *cash aid like TANF, SSI, and general assistance, or long term institutionalization at government expense*
- Does not count receipt of benefits by family members
- *Focus is on qualifying I-864 affidavit of support*, rather than the statutory list of 5 factors

(age, health, family status, financial resources, education & skills) that must be considered as part of a holistic "totality of the circumstances" evaluation, in addition to affidavit of support

- If applicant is found inadmissible as likely to become a public charge, they may attempt to overcome this finding by submitting a new affidavit of support and other supporting documents
- If the applicant is unable to overcome a public charge inadmissibility finding, USCIS will deny their adjustment application
- If the applicant has no other lawful status at time of the denial of the adjustment application, USCIS may issue a Notice to Appear (NTA), placing applicant in removal proceedings, unless USCIS decides to exercise prosecutorial discretion not to issue the NTA or refer the applicant's information to Immigration and Customs Enforcement (ICE) to initiate removal proceedings[2]

2019 DHS PUBLIC CHARGE RULE
(NOT IN EFFECT - ENJOINED ON OCTOBER 11, 2019 DURING PENDING LITIGATION)

Published as a final rule in the Federal Register on August 14, 2019, at 84 Fed. Reg. 41295

- Immigration officers look at whether applicant is "more likely than not" to use certain public benefits for more than 12 months in the aggregate over a 36-month period, and use of two benefits in one month counts as two months
- Continues to "count" receipt of *cash aid like TANF, SSI, and general assistance, or long term institutionalization at government expense*
- Also adds to the list of public benefits that "count" against applicant in public charge determination:
  - *Federally-funded food stamps (SNAP)*
  - *Medicaid (exceptions for emergency care, receipt by children under 21, and receipt by pregnant people up to 60 days after pregnancy)*
  - *Section 8 rental assistance & housing vouchers and federal public housing*
- *Only counts receipt of benefits by the applicant* and excludes from consideration all public benefits by active duty military and their spouses and children; by people who are present in the U.S. in a status that is "exempt" from public charge inadmissibility; and for children of U.S. citizens who will automatically derive citizenship
- *Does not count receipt of benefits by family members*
- Directs officers to consider the "likelihood" an affidavit of support sponsor "would actually provide the statutorily-required amount of financial support" in fulfilling their promises under the affidavit of support
- Qualifying I-864 affidavit of support is just one factor considered in the totality of the circumstances analysis (unless exempt from affidavit of support requirement, which will be indicated on I-485 rather than with separate Form I-864W)
- *Provides detailed criteria for scrutinizing the 5 statutory factors in the totality of the circumstances*, including English language proficiency, credit history and credit score,

2 *See* https://www.uscis.gov/legal-resources/notice-appear-policy-memorandum.

lack of employment or recent employment history if authorized to work and not a full-time student, whether acting as full time caregiver, etc.

- *Creates new "heavily weighted" positive and negative factors*
- *Adds another minimum factor* that must be considered, in addition to 5 statutory factors and affidavit of support: prospective immigration status and expected period of admission, such that an individual seeking LPR status presumably will need to show ability to support self for longer period of time than a short-term, nonimmigrant visitor
- Applicants must submit *a new form, I-944 Declaration of Self-Sufficiency*, along with Form I-485 and other forms required for adjustment of status applications
- If the applicant is found inadmissible as likely to become a public charge, they may attempt to overcome this finding by submitting new affidavit of support and other supporting documents or, if allowed by DHS in their discretion, by posting a *public charge bond*
- If the applicant is unable to overcome public charge inadmissibility finding and is ineligible to post a public charge bond, USCIS will deny their adjustment of status application
- If the applicant has no other lawful status at time of adjustment denial, USCIS may issue an NTA placing applicant in removal proceedings unless USCIS decides to exercise prosecutorial discretion not issue an NTA or to refer their information to ICE to initiate removal proceedings

2018 DOS PUBLIC CHARGE RULE

Found in the Foreign Affairs Manual (FAM), at 9 FAM 302.8, revised on January 3, 2018

- Immigration officers look at whether applicant is likely to become *primarily dependent* on governmental programs for support
- Just two types of benefits programs "count" towards the public charge assessment: *cash aid like TANF, SSI, and general assistance, or long term institutionalization at government expense*
- Directs officers to consider the "likelihood" that a sponsor who files an affidavit of support will fulfill their obligations to support the applicant. Joint sponsors who do not have a clear family relationship to the applicant have been viewed as less likely to follow through on the affidavit of support, without additional explanations of ties between the applicant and joint sponsor
- Qualifying I-864 affidavit of support is just one, positive factor in the totality of the circumstances analysis; (unless exempt from affidavit of support requirement), shifts focus to *the 5 statutory factors and the full totality of the circumstances*
- Applicant's use of non-cash and supplemental benefits deemed "relevant" in the totality of the circumstances analysis
- Looks at past or current use *of public assistance of any type by the applicant's family members and means-tested benefits by sponsor and sponsor's household members*
- If an applicant is found inadmissible as likely to become a public charge, they may attempt to overcome this finding by submitting new affidavit of support and other supporting documents. This finding also leads to revocation of any previously approved I-601A provisional waiver. If this occurs, the applicant will also need to submit a new waiver for unlawful presence, using Form I-601, in addition to new evidence to overcome public charge inadmissibility

- If an applicant is unable to overcome public charge inadmissibility finding, they will be unable to immigrate to the United States through the family or employer petition. Applicants who had been living in the United States prior to the consular interview will be unable to return to the United States based on that family or employer petition

2019 DOS PUBLIC CHARGE RULE

(NOT IN EFFECT – Stated effective date is October 15, 2019, but DOS has delayed implementation until new form, DS-5540 Public Charge Questionnaire, is approved[3])

Published as an interim final rule in the Federal Register on October 11, 2019, at 84 Fed. Reg. 54966

- Immigration officers look at whether applicant is "more likely than not" to use certain public benefits for more than 12 months in the aggregate over a 36-month period, and use of two benefits in one month counts as two months
- Continues to "count" receipt of *cash aid like TANF, SSI, and general assistance, or long term institutionalization at government expense*
- Also adds to the list of public benefits that "count" against applicant in public charge determination:
  - *Federally-funded food stamps (SNAP)*
  - *Medicaid (exceptions for emergency care, receipt by children under 21, and receipt by pregnant people up to 60 days after pregnancy)*
  - *Section 8 rental assistance & housing vouchers and federal public housing*
- *Only counts receipt of benefits by the applicant* and excludes from consideration all public benefits by active duty military and their spouses and children; by people who are present in the U.S. in a status that is "exempt" from public charge inadmissibility; and for children of U.S. citizens who will automatically derive citizenship
- *Does not count receipt of benefits by family members or look at receipt of benefits by sponsor or sponsor's household members*
- Directs officers to consider the "likelihood" an affidavit of support sponsor "would actually provide the statutorily-required amount of financial support" in fulfilling their promises under the affidavit of support
- Qualifying I-864 affidavit of support is just one factor considered in the totality of the circumstances analysis (unless exempt from affidavit of support requirement)
- *Provides detailed criteria for scrutinizing the 5 statutory factors in the totality of the circumstances*, including English language proficiency, lack of employment or recent employment history if authorized to work and not a full-time student, whether acting as full time caregiver, etc.
- *Creates new "heavily weighted" positive and negative factors*
- *Adds another minimum factor* that must be considered, in addition to 5 statutory factors and affidavit of support: prospective immigration status and expected period of admission, such that an individual seeking LPR status presumably will need to show ability to support self for longer period of time than a short-term, nonimmigrant visitor
- Applicants must complete a *new form, DS-5540 Public Charge Questionnaire*

3 Comment period for new DS-5540 closes on December 23, 2019.

- If an applicant is found inadmissible as likely to become a public charge, they may attempt to overcome this finding by submitting a new affidavit of support and other supporting documents. This finding also leads to revocation of any previously approved I-601A provisional waiver. If this occurs, the applicant will also need to submit a new waiver for unlawful presence, using Form I-601, in addition to new evidence to overcome public charge inadmissibility
- If an applicant is unable to overcome public charge inadmissibility finding, they will be unable to immigrate to the United States through the family or employer petition. Applicants who had been living in the United States prior to the consular interview will be unable to return to the United States based on that same family or employer petition