

PUBLIC CHARGE FAQ FOR LEGAL PRACTITIONERS

Do I need to worry now about DHS's new rule related to public charge?

No. U.S. District Courts for the [Southern District of New York](#), [Eastern District of Washington](#), and [District of Maryland](#) have issued nationwide preliminary injunctions halting the implementation of DHS's new rule. In turn, U.S. District Courts for the [Northern District of California](#) and the [Northern District of Illinois](#) have issued partial preliminary injunctions of the DHS rule covering the states of California, Illinois, Oregon, Pennsylvania, and Washington, D.C., collectively.

The nationwide injunctions explicitly state that the effective date of DHS's rule, i.e. October 15, 2019, is also stayed pending a final ruling on the merits of the injunctions. Unless all of the nationwide injunctions are lifted, this will remain true. This means that individuals applying for adjustment of status at USCIS after October 15, 2019 who are subject to a public charge test will, for the time being, have their cases adjudicated under the [1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds](#) (USCIS 1999 Guidance),¹ the policy guidance that currently governs public charge inadmissibility determinations by USCIS.

How will I know if the injunctions are lifted?

The Protecting Immigrant Families (PIF) campaign provides up-to-the-minute updates on public charge litigation. Specifically, PIF maintains a [public charge litigation tracker](#), which is accessible via the [Analysis & Research page](#) on PIF's website. Practitioners can also [register to receive PIF's litigation updates by email](#).

In addition, USCIS maintains its own [website](#) on public charge, which clearly states that DHS's new rule has been enjoined nationwide and that the effective date of the final rule has been postponed until final resolution in the cases. If the injunctions are lifted, USCIS will presumably update this website.

Who does public charge apply to?

Because public charge is a ground of inadmissibility, it generally applies when an applicant seeks admission to the United States as a nonimmigrant or as an immigrant based on a family or employer petition (at a DOS consular office or embassy abroad). It also applies when an individual who has been admitted applies for adjustment of status through a relative or employer within the United States (at a USCIS office).²

¹ 64 Fed. Reg. 28689.

² See INA § 212(a)(4)(A)-(D).

What applications or forms of relief are exempt from public charge determinations?

Many categories of applicants are **exempt** from the public charge ground of inadmissibility by statute or regulation, meaning they are not subject to a public charge test (although they may still be subject to other grounds of inadmissibility, not discussed in this toolkit). These include:

- People entering as refugees³
- Refugees and asylees applying for adjustment to permanent resident status on the basis of being a refugee or asylee⁴
- Individuals applying for a T visa⁵
- Individuals who possess a T visa and are applying for adjustment of status based on that T visa⁶
- Individuals applying for a U visa⁷
- Individuals who possess a U visa and are applying for adjustment of status based on that U visa⁸
- Special immigrant juveniles⁹
- VAWA self-petitioners,¹⁰ those who are applying for adjustment of status based on an approved VAWA self-petition,¹¹ and individuals applying for suspension of deportation or cancellation of removal under VAWA¹²
- Applicants for Temporary Protected Status (TPS)¹³
- Amerasian immigrants (for their initial admission)¹⁴
- Individuals granted relief under the Cuban Adjustment Act (CAA)¹⁵
- Nicaraguans and Cubans who are eligible to adjust status under the Nicaraguan Adjustment and Central American Relief Act (NACARA)¹⁶
- Individuals granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)¹⁷

Some applications or forms of relief are NOT exempt from public charge, but individuals in these circumstances may apply for a **waiver** of the public charge ground of inadmissibility if USCIS

3 INA § 207(c)(3).

4 INA § 209(c).

5 INA § 212(d)(13)(A).

6 See Coalition to Abolish Slavery & Trafficking (CAST) et al., “Practice Pointer: T-Visa Adjustment of Status & the Public Charge Ground of Inadmissibility,” available at <https://castla.app.box.com/v/AllCASTPublicChargeTAOS>. There is a potential conflict in the existing regulation and INA section on T visa adjustment at INA 245(I)(2)(A), but the Violence Against Women Act (VAWA) of 2013 amended INA 212(a)(4) to explicitly exempt “qualified aliens,” which includes T visa holders, among others. See INA 212(a)(4)(E)(iii). VAWA 2013 should supersede the conflicting, not-yet-updated statute and regulations on T visa adjustments.

7 INA § 212(a)(4)(E)(ii).

8 INA § 245(m).

9 INA § 245(h)(2)(A).

10 INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(1)(B).

11 INA § 212(a)(4)(E)(i).

12 INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(1)(B)(iii), (v).

13 8 CFR § 244.3(a).

14 INA § 101, note 5.

15 *Matter of Mesa*, 12 I. & N. Dec 432, 437 (BIA 1967) (“We conclude that Congress . . . did not intend requiring application of [public charge] in light of the Congressional history showing the recognized impoverished circumstances of many of the refugees it proposed to benefit and the special legislation enacted to render them Federal assistance.”).

16 INA § 245, note 9.

17 INA § 245, note 10.

determines that they are likely to become a public charge. If USCIS grants their waivers, these individuals may receive this status despite being likely to become a public charge:

- Individuals applying for an S visa¹⁸
- Individuals who have an S visa and are applying for adjustment of status based on that S visa¹⁹

Lastly, some applications and forms of relief are **not subject to the grounds of inadmissibility** at all (i.e. being admissible is not a requirement to apply) and therefore may be granted to someone regardless of whether they are a public charge. In other words, applying for the following does not have a public charge test at all:

- Individuals applying for asylum²⁰
- Recipients of Deferred Action for Childhood Arrivals (DACA) who are applying to renew their DACA²¹
- Individuals applying for cancellation of removal for certain nonpermanent residents²²
- Individuals applying for cancellation of removal for permanent residents²³
- Individuals applying for suspension of deportation under former INA § 244
- Individuals applying for suspension of deportation or cancellation of removal under NACARA²⁴
- Individuals applying for registry²⁵
- Lawful permanent residents applying for naturalization²⁶
- Lawful permanent residents applying to renew their green cards
- Conditional permanent residents applying to lift the conditions on their residency

It is important to remember that a person applying for some of these benefits, like DACA or TPS that do not have their own special adjustment provisions, might later apply for adjustment of status through a petition submitted by an employer or USC or LPR family member, and at that point public charge might apply.

Can public charge inadmissibility ever apply to a lawful permanent resident?

If a permanent resident travels, there are limited circumstances in which inadmissibility grounds might apply. See INA 101(a)(13)(C). The most common way public charge would come up for an LPR is if the LPR left the U.S. for more than 180 days on a single trip. Additionally, if an LPR applies for

18 INA § 212(d)(1).

19 8 CFR § 245.11(c)(1)-(2) (explaining that the ground of inadmissibility can be waived if it was disclosed to the Attorney General prior to admission and specifically waived pursuant to INA § 212(d)(1)).

20 INA § 208(b).

21 USCIS, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

22 INA § 240A(b).

23 INA § 240A(a).

24 INA § 101, note A-9.

25 INA § 249.

26 Lawful permanent residents are not subject to a public charge test at the time of applying for naturalization. For more information on how public charge affects lawful permanent residents who are naturalizing, see Public Charge and Naturalization.

adjustment of status as a defense to deportation (sometimes referred to as “re-adjusting”), they will be required to demonstrate admissibility, including under the public charge ground.

What is the current legal standard for public charge inadmissibility determinations at USCIS?

For adjustment of status cases adjudicated by USCIS officers inside the United States, USCIS currently applies the definition of public charge set out in the USCIS 1999 Guidance²⁷ when interpreting INA § 212(a)(4).

The USCIS 1999 Guidance defines “public charge” as a person “who is likely to become primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”²⁸ When making a public charge determination, USCIS officers may consider only cash aid for income maintenance or institutionalization for long-term care (e.g., in a nursing home or mental health institution) paid for by Medicaid.

INA § 212(a)(4) requires that USCIS officers minimally consider the applicant’s age; health; family status; assets, resources, and financial status; and education and skills. INA § 212(a)(4)(B) also allows officers to consider any affidavits of support²⁹ submitted by the applicant. In practice, USCIS officers primarily consider the sufficiency of an affidavit of support under INA § 213A when making public charge determinations and have not typically engaged in a separate analysis of the totality of the circumstances factors.³⁰

For more information about assessing public charge based on the current USCIS standard, see **PUBLIC CHARGE: TOTALITY OF THE CIRCUMSTANCES WORKSHEET**. See also ILRC *Totality of the Circumstances: Assessing the Public Charge Ground of Inadmissibility* (May 2019), <https://www.ilrc.org/totally-circumstances-assessing-public-charge-ground-inadmissibility>.

What is the current legal standard for public charge inadmissibility determinations at DOS consular offices or embassies?

For visa applications adjudicated by consular officers or embassies abroad, DOS is currently applying its *January 2018 Foreign Affairs Manual (FAM) guidance* (DOS FAM)³¹ when interpreting INA § 212(a)(4).

Just as the USCIS 1999 Guidance does, the DOS FAM defines “public charge” as a person who “is likely, at any time after admission, to become primarily dependent on the U.S. Government (Federal, State, or local) for subsistence,” as demonstrated by either (i) the “[r]eceipt of public cash assistance for income maintenance” or (ii) “[i]nstitutionalization for long-term care at U.S. Government expense.”³² When making a public charge determination, consular officers may

27 64 Fed. Reg. 28689.

28 *Id.*

29 See INA § 213A.

30 See 64 Fed. Reg. 28690.

31 9 FAM 302.8.

32 See 9 FAM 302.8-2(B)(1)(a).

consider only cash aid for income maintenance or institutionalization for long-term care (e.g., in a nursing home or mental health institution) paid for by Medicaid.³³

INA § 212(a)(4) requires that consular officers minimally consider the applicant's age; health; family status; assets, resources, and financial status; and education and skills. INA § 212(a)(4)(B) also allows officers to consider any affidavits of support³⁴ submitted by the applicant. In contrast to USCIS officers' public charge assessment described above, consular officers consider factors under the totality of the circumstances analysis in addition to determining the sufficiency of any affidavits of support under INA § 213A.³⁵ This is because the affidavit of support under the DOS FAM carries less weight than it does under the USCIS 1999 Guidance. Under the DOS FAM, a "properly filed and sufficient, non-fraudulent Form I-864 [Affidavit of Support], may not necessarily satisfy the INA 212(a)(4) requirements."³⁶ Instead, it is merely one "positive factor" as part of the totality of the circumstances test.³⁷

Because of this requirement in the DOS FAM, consular officers have been questioning applicants about their use of various means-tested benefits³⁸ and means-tested benefits used by applicants' family members,³⁹ sponsors,⁴⁰ and members of sponsors' households.⁴¹ Officers are also requiring greater amounts of documentation to show the sponsors' ability to financially support the immigrant visa applicant.⁴²

For more information about assessing public charge based on the current DOS standard, see **PUBLIC CHARGE: TOTALITY OF THE CIRCUMSTANCES WORKSHEET**. See also ILRC, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues* (July 2018), <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.

33 See 9 FAM 302.8-2(B)(1)(b)-(c).

34 See INA § 213A.

35 See 9 FAM 302.8-2(B)(3)(b)(1)(a) ("A properly filed and sufficient, non-fraudulent Form I-864, may not necessarily satisfy the INA 212(a)(4) requirements, but may provide additional evidence in the review of public charge determination.").

36 9 FAM 302.8-2(B)(3)(b)(1)(a).

37 See 9 FAM 302.8-2(B)(2)(a)(3) ("A properly filed, non-fraudulent Form I-864 . . . is a positive factor in the totality of the circumstances. The applicant must still meet the INA 212(a)(4) requirements and satisfy the "totality of the circumstances" analysis").

38 See 9 FAM 302.8-2(B)(2)(f)(1)(b)(i) ("Past or current receipt of public assistance of any type by the visa applicant or a family member in the visa applicant's household is relevant to determining whether the applicant is likely to become a public charge in the future but the determination must be made on the present circumstances.").

39 *Id.*

40 See 9 FAM 302.8-2(B)(2)(f)(1)(c)(i) ("The sponsor's past or current receipt of means-tested benefits is a factor in support of a finding of inadmissibility for the applicant under INA 212(a)(4), insofar as it affects the applicant's resources and financial status, including the sponsor's ability to support the applicant.").

41 See 9 FAM 302.8-2(B)(2)(f)(1)(c)(ii) ("If the sponsor or any member of his or her household has received public means-tested benefits within the past three years, you must review fully the sponsor's current ability to provide the requisite level of support, taking into consideration the kind of assistance provided and the dates received.").

42 See 9 FAM 302.8-2(B)(2)(f)(2) (Evidence of Financial Resources).