

# PUBLIC CHARGE

## INADMISSIBILITY RULES COMPARISON CHART

The specific rule on public charge inadmissibility that applies to a particular case depends on which *agency* will be adjudicating the application, as well as the current state of legal challenges. In practice, legal representatives must be thinking about *multiple* public charge inadmissibility rules because DHS guidance on public charge applies to adjustment of status cases, while DOS guidance applies in consular processing cases. Legal challenges have also affected which DHS rule applies for adjustment of status cases. The chart below outlines the main differences between each of these public charge inadmissibility rules.

For an explanation of which clients will consular process with DOS or apply for adjustment of status with DHS, see [WHO/WHAT/WHERE/HOW PUBLIC CHARGE ANALYSIS](#) and [PUBLIC CHARGE CONSIDERATIONS: ADJUSTMENT OF STATUS VS CONSULAR PROCESSING](#).

Briefly, the various rules are as follows:

- **1999 DHS Rule** – Used by USCIS for the last twenty years in making public charge determinations. This guidance 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)

The four rules below interpret the statutory language on public charge inadmissibility, at INA § 212(a)(4):

*A. In general.* – Any [noncitizen] who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.

*B. Factors to be taken into account.*—

(i) In determining whether [a noncitizen] is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the [noncitizen]’s (I) age; (II) health; (III) family status; (IV) assets, resources, and financial status; and (V) education and skills.

(ii) In addition to the factors under clause (i), the consular officer or the Attorney General may also consider any affidavit of support under section 213A for purposes of exclusion under this paragraph.

The chart below compares and contrasts how these four rules interpret the statutory language on public charge inadmissibility at INA 212(a)(4). Note variations in the definition of “public charge” and the standard used by officers to determine when a person is “likely at any time” to become a public charge. The chart also lays out which public benefits are considered under the relevant rule, as well as the role (if any) of public benefits received by family members. For more details about when these different rules apply to green card applications based on family or employer petitions, see **PUBLIC CHARGE CONSIDERATIONS: ADJUSTMENT OF STATUS VS CONSULAR PROCESSING**, and for a more in-depth discussion on how to prepare cases under these rules, see **PUBLIC CHARGE: TOTALITY OF THE CIRCUMSTANCES WORKSHEET**.

	1999 DHS Rule	2019 DHS Rule	2018 DOS Rule	2019 DOS Rule
Where to find it	64 FR 28689 (May 26, 1999)	84 FR 41295 (Aug. 14, 2019), amending 8 CFR §§ 212.21, 212.22, and related provisions	9 FAM § 302.8 (Jan. 3, 2018)	84 FR 54996 (Oct. 11, 2019), amending 22 CFR § 40.41
Applicability (for those subject to public charge inadmissibility)	All cases decided by USCIS, regardless when filed. Currently applied while 2019 DHS rule is enjoined	Currently enjoined – if implemented, it would apply to cases decided by USCIS. Does not apply to newly added benefits while enjoined	All consular processing cases, until 2019 DOS Rule is implemented and/or the FAM is updated	All consular processing cases, when implemented. DOS has stated that it will not implement this rule until a new Form DS-5540 is approved

	1999 DHS Rule	2019 DHS Rule	2018 DOS Rule	2019 DOS Rule
Definition of “public charge”	<p>Primarily dependent on the government for subsistence, as demonstrated by receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense</p>	<p>Receives 1 or more specified public benefits for more than 12 months in the aggregate within any 36-month period, such that receipt of 2 benefits in 1 month counts as 2 months.</p> <p>8 CFR § 212.21(a)</p>	<p>Primarily dependent on the U.S. government for subsistence, meaning receipt of public cash assistance for income maintenance or institutionalization for long-term care at U.S. government expense.</p> <p>9 FAM § 302.8-2(B)(1)(a)(1)</p>	<p>Receives 1 or more specified public benefits for more than 12 months in the aggregate within any 36-month period, such that receipt of 2 benefits in 1 month counts as 2 months’ worth of benefits.</p> <p>22 CFR § 40.41(b)</p>
Standard for “likely at any time to become a public charge” (looking at the totality of the circumstances)	<p>“A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in the case of an emergency.”</p> <p>64 FR 28689, citing Matter of Martinez-Lopez, 10 I&amp;N Dec. 409, 421-422 (AG, Jan. 6, 1964)</p>	<p>More likely than not.</p> <p>8 CFR § 212.21(c)</p>	<p>Officer must be able to point to circumstances which make it not merely possible, but likely.</p>	<p>More likely than not; “no one enumerated factor alone, apart from the lack of a sufficient Affidavit of Support under section 213A of the Act where required, will make [noncitizen] more likely than not to become a public charge.”</p>

	1999 DHS Rule	2019 DHS Rule	2018 DOS Rule	2019 DOS Rule
Public benefits that count	<ul style="list-style-type: none"> <li>• Cash aid (TANF, SSI, General Assistance)</li> <li>• Long-term institutionalization at government expense</li> </ul>	<ul style="list-style-type: none"> <li>• Cash aid (TANF, SSI, General Assistance)</li> <li>• Long-term institutionalization at government expense                             <ul style="list-style-type: none"> <li>• *Federal Medicaid (exceptions for: emergency care; Medicaid used by persons under 21; or used by a pregnant person, including up to 60 days after pregnancy)</li> <li>• *Federal food stamps (SNAP)</li> <li>• *Federal Section 8 housing vouchers and rental assistance</li> <li>• *Federal public housing</li> </ul> </li> <li>* Receipt of these benefits only counts on or after effective date of enjoined rule Receipt of the benefits above does not count for members of U.S. Armed Forces, those serving in active duty or Ready Reserve, and their spouses and children; people present in a status “exempt” from public charge; or children of USC’s who will automatically acquire citizenship under INA 320 or are entering the U.S. to attend an interview under INA 322)</li> </ul> <p>8 CFR § 212.21(b)</p>	<ul style="list-style-type: none"> <li>• Cash aid (TANF, SSI, General Assistance)</li> <li>• Long-term institutionalization at government expense</li> </ul> <p>9 FAM § 302.8-2(B)(1)(b)-(c)</p>	<ul style="list-style-type: none"> <li>• Cash aid (TANF, SSI, General Assistance)</li> <li>• Long-term institutionalization at government expense                             <ul style="list-style-type: none"> <li>• **Federal Medicaid (exceptions for: emergency care; received by persons under 21; or received by a pregnant person, including up to 60 days after pregnancy)</li> <li>• **Federal food stamps (SNAP)</li> <li>• **Federal Section 8 housing vouchers and rental assistance</li> <li>• **Federal public housing</li> </ul> </li> <li>** Receipt of these benefits only counts on or after October 15, 2019 Receipt of the benefits above does not count for members of U.S. Armed Forces, those serving in active duty or Ready Reserve, and their spouses and children; people present in a status “exempt” from public charge; or children of USC’s who will automatically acquire citizenship under INA 320 or are entering the U.S. to attend an interview under INA 322)</li> </ul> <p>22 CFR § 40.41(c)</p>

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<b>Consider use of other public benefits, that don't count under public charge definition?</b>	No	No	Yes, can consider as part of totality of the circumstances 9 FAM § 302.8-2(B)(d) ("There are many forms of public assistance that ... are of a non-cash and/or supplemental nature and should not be considered to be benefits when examining the applicant under INA 212(a)(4), and may only be considered as part of the totality of the circumstances...")	No
<b>Consider family member use of public benefits?</b>	No, unless evidence that family is reliant on family member's benefits as its sole means of support 64 FR 28692	No 8 CFR § 212.21(e)	Yes, "receipt of public assistance of any type" 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...")	No 22 CFR § 40.41(e)
<b>Evaluating public charge</b>	Qualifying I-864 is usually strong indicator that the applicant is not likely to become public charge	In addition to qualifying I-864, DOS officers should focus on scrutiny of statutory factors, including detailed criteria for looking at factors; adds another minimum factor to consider (prospective immigration status and expected period of admission); adds heavily weighted positive and negative factors	Qualifying I-864 carries less weight than in the past. DHS officers should focus on statutory factors and totality of the circumstances	In addition to qualifying I-864, DOS officers should focus on scrutiny of statutory factors, including detailed criteria for looking at factors; adds another minimum factor to consider (prospective immigration status and expected period of admission); adds heavily weighted positive and negative factors

	1999 DHS Rule	2019 DHS Rule	2018 DOS Rule	2019 DOS Rule
Scrutiny of affidavit of support sponsor	<p>Minimal as long as affidavit of support shows sufficient income and/or assets; sponsor’s receipt of benefits cannot be counted towards showing that they have income and assets sufficient to meet 125% FPL</p>	<p>If affidavit of support shows sufficient income and/or assets, officers should consider “likelihood” sponsor “would actually provide the statutorily-required amount of financial support” according to the affidavit of support; look at whether sponsor lives with applicant and sponsor’s relationship to applicant, among other things 8 CFR § 212.22(b)(7)</p>	<p>If affidavit of support shows sufficient income and/or assets, officers should consider “likelihood” sponsor would fulfill affidavit of support obligations (non-family member joint sponsors viewed as less likely to fulfill affidavit of support obligations); consider “receipt of means-tested benefits” by sponsor and members of sponsor’s household 9 FAM § 302.8-2(B)(3)(b)(1)(b) (likelihood) 9 FAM § 302.8-2(B)(2)(f)(1)(c) (receipt of benefits)</p>	<p>If affidavit of support shows sufficient income and/or assets, officers should consider “likelihood” sponsor “actually would provide the required financial support, based on the any [sic] available relevant information about the sponsor.” 84 FR 55004</p>
Other notes		<p>If implemented, requires submission of new form, I-944 Declaration of Self-Sufficiency, for adjustment of status applications. Also establishes a public charge bond process.</p>	<p>If applicant had a previously approved provisional waiver (Form I-601A), will be revoked upon finding of public charge inadmissibility.</p>	<p>Adds new form, DS-5540 Public Charge Questionnaire; if applicant had a previously approved provisional waiver (Form I-601A), will be revoked upon finding of public charge inadmissibility. The rule also removes reference to public charge bond as “obsolete.”</p>