



# **PUBLIC CHARGE LEGAL SERVICES TOOLKIT**

# INTRODUCTION

Your role as an attorney, DOJ-accredited representative, or other legal services provider is critical to ensure immigrants and their families understand changes to public charge policy. Many immigrants are not subject to public charge inadmissibility yet may be fearful to access public benefits or pursue immigration options because of public charge. Others may be subject to public charge and need to understand when and how it applies. As their legal representative, you will be the one they look to for the answers.

In addition to staying on top of all the changes to public charge so that you can properly advise your clients, legal practitioners may need to re-acquaint themselves with public charge law, as for the last twenty years proving public charge admissibility centered on having a strong affidavit of support and consequently many practitioners did not spend much time thinking about the totality of the circumstances test or any of the other factors in the statute.

This toolkit will bring legal practitioners up-to-speed on the current state of public charge and immigration law and includes tools for screening and analyzing public charge issues in your cases. Note that this toolkit only addresses the public charge ground of *inadmissibility*. Consequently, all references to “public charge” and “public charge test” have to do with public charge inadmissibility, unless otherwise specified.

**Please note:** This toolkit was published in December 2019. As of this toolkit’s writing, changes to the Department of Homeland Security (DHS) and Department of State (DOS) public charge rules and Foreign Affairs Manual public charge policy are in flux due to ongoing litigation and other issues. This toolkit reflects the most updated information as of the date of publication. Please visit the ILRC’s public charge page at <https://www.ilrc.org/public-charge> for updates.

## OBJECTIVES OF THIS TOOLKIT

- To update legal practitioners on the current state of play of public charge law and policy
- To enhance legal practitioners’ ability to identify whether public charge applies to a client’s case and if so, how public charge affects an impacted client’s case
- To provide legal practitioners with tools and other resources for analyzing and addressing public charge in clients’ green card applications

## INCLUDED IN THIS TOOLKIT, YOU WILL FIND

### 04 PUBLIC CHARGE TIMELINE

This timeline provides a quick, visual summary of the recent proposed changes to DHS and DOS public charge policies and the current status of these changes.

### 05 SUMMARY OF LEGAL STATE OF AFFAIRS

This summary provides a brief overview of the statute on public charge inadmissibility, as well as the current legal status of public charge policy changes.

### 06 PUBLIC CHARGE FAQs FOR LEGAL PRACTITIONERS

This collection of Frequently Asked Questions (FAQs) provides answers to some of the most commonly asked questions concerning public charge inadmissibility, including who is exempt from a public charge determination, when can LPRs be subject to public charge inadmissibility, and what are the current legal standards for public charge inadmissibility determinations at USCIS offices and DOS consular offices or embassies.

### 11 WHO / WHAT / WHERE / HOW PUBLIC CHARGE ANALYSIS FOR ADVOCATES

This tool is designed to guide legal practitioners through a public charge analysis to determine whether a client will be subject to a public charge test, which public charge rules or policies apply, and which factors will impact a client's case.

### 20 PUBLIC CHARGE SCREENING FLOWCHART

This flowchart is a screening tool to determine whether the public charge inadmissibility ground applies to a client, based on their current immigration status and immigration goals.

### 21 PUBLIC CHARGE RELIEF CHART

This chart outlines whether public charge is applicable when a person is applying for various forms of immigration relief.

### 23 PUBLIC CHARGE CONSIDERATIONS: ADJUSTMENT OF STATUS VS. CONSULAR PROCESSING

This practice advisory helps legal practitioners determine which public charge rule applies to clients who are seeking a green card depending where their interview will be.

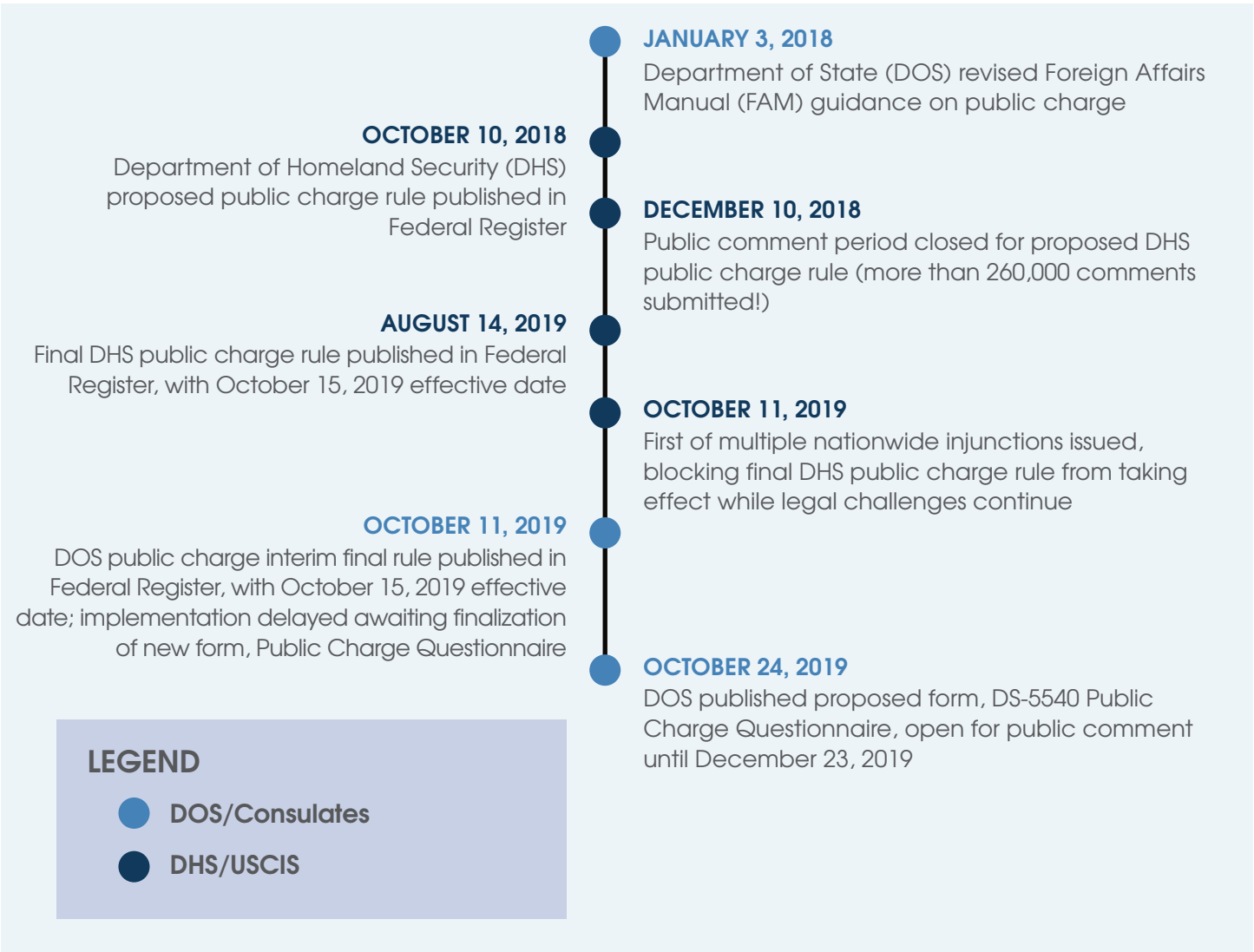
### 29 PUBLIC CHARGE INADMISSIBILITY RULES COMPARISON CHART

This chart outlines the main differences between the 1999 DHS public charge rule, which currently applies to cases with USCIS; 2019 DHS public charge rule, which is currently enjoined; 2018 DOS public charge rule, based on guidance in the Foreign Affairs Manual (FAM); and 2019 DOS public charge rule, which has an October 15, 2019 effective date but is not yet being implemented.

### 37 PUBLIC CHARGE: TOTALITY OF CIRCUMSTANCES WORKSHEET

This worksheet is intended to guide legal practitioners in assessing each of the public charge factors in an application for admission at the consulate or adjustment of status with USCIS.

# PUBLIC CHARGE TIMELINE



## SO WHERE ARE WE NOW?

Old DHS/USCIS public charge policy, based on guidance from 1999, continues to apply to adjustment of status cases, as it has for the last twenty years.

At the consulates, the 2018 FAM revisions continue to guide consular officers because DOS is delaying implementation of their interim final rule until the new form DS-5540, Public Charge Questionnaire, is finalized. This new form will not be finalized until sometime after December 23, 2019 and thus most assume the interim final rule will not be implemented until next year. However, no litigation has been filed to date challenging the new DOS rule. Note that litigation challenging the 2018 FAM revisions to DOS public charge adjudications is ongoing.

For more details, see “[SUMMARY OF LEGAL STATE OF AFFAIRS.](#)”

# SUMMARY OF LEGAL STATE OF AFFAIRS

(LAW CURRENT AS OF DECEMBER 4, 2019)

## SUMMARY OF LEGAL STATE OF AFFAIRS

- “Public charge” is a statutory ground of inadmissibility at Immigration and Nationality Act (INA) § 212(a)(4) that could bar an individual’s admission to the United States on a visa or lead to a denial of their application for lawful permanent residence (ability to get a green card).
  - INA 212(a)(4) states that a person is inadmissible if, at the time of application for admission or adjustment of status, that person is “likely at any time to become a public charge.”
  - The statute lays out factors that immigration officers must consider when assessing public charge inadmissibility, but does not provide a definition of what it means to be a “public charge.” Thus, regulatory rules and other guidance define “public charge.”
- The Department of Homeland Security (DHS), through its subsidiary U.S. Citizenship and Immigration Services (USCIS), is the agency that controls adjustment of status applications adjudicated within the United States.
  - On August 14, 2019, the Department of Homeland Security (DHS) published a new rule related to public charge in the Federal Register, which was scheduled to take effect on October 15, 2019.
  - **However, as of October 11, 2019 this rule has been enjoined nationwide by multiple federal courts. The injunctions stop the rule from taking effect while legal challenges continue. Thus, USCIS cannot implement the new rule until a court rules otherwise, and cases filed with USCIS will follow longstanding policies around public charge.**
- The Department of State (DOS) is the agency that controls visa decisions at U.S. consulates and embassies abroad.
  - On October 11, 2019, DOS published a [new interim final rule](#) related to public charge in the Federal Register, which was set to take effect at the consulates on October 15, 2019.
  - **However,** as of November 4, 2019, the [DOS website indicates](#) that “[a]lthough the effective date of the interim final rule is October 15, 2019, **the DOS will not implement the rule until the use of a new form for information collection is approved by the Office of Management and Budget.**” On October 24, 2019, the DOS published a 60-Day Notice of Proposed Information Collection for [proposed form DS-5540 Public Charge Questionnaire](#), which is open for public comment until December 23, 2019. The DOS website also states that “[v]isa applicants are not requested to take any additional steps at this time and should attend their visa interviews as scheduled. We will inform applicants of any changes to current visa application procedures.” This suggests that cases filed with DOS will follow current policies around public charge at the consulates—not the interim final rule.

# 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),<sup>1</sup> 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).<sup>2</sup>

<sup>1</sup> 64 Fed. Reg. 28689.  
<sup>2</sup> 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 refugees<sup>3</sup>
- Refugees and asylees applying for adjustment to permanent resident status on the basis of being a refugee or asylee<sup>4</sup>
- Individuals applying for a T visa<sup>5</sup>
- Individuals who possess a T visa and are applying for adjustment of status based on that T visa<sup>6</sup>
- Individuals applying for a U visa<sup>7</sup>
- Individuals who possess a U visa and are applying for adjustment of status based on that U visa<sup>8</sup>
- Special immigrant juveniles<sup>9</sup>
- VAWA self-petitioners,<sup>10</sup> those who are applying for adjustment of status based on an approved VAWA self-petition,<sup>11</sup> and individuals applying for suspension of deportation or cancellation of removal under VAWA<sup>12</sup>
- Applicants for Temporary Protected Status (TPS)<sup>13</sup>
- Amerasian immigrants (for their initial admission)<sup>14</sup>
- Individuals granted relief under the Cuban Adjustment Act (CAA)<sup>15</sup>
- Nicaraguans and Cubans who are eligible to adjust status under the Nicaraguan Adjustment and Central American Relief Act (NACARA)<sup>16</sup>
- Individuals granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)<sup>17</sup>

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/AllLACASTPublicChargeTAOS>. 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 visa<sup>18</sup>
- Individuals who have an S visa and are applying for adjustment of status based on that S visa<sup>19</sup>

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 asylum<sup>20</sup>
- Recipients of Deferred Action for Childhood Arrivals (DACA) who are applying to renew their DACA<sup>21</sup>
- Individuals applying for cancellation of removal for certain nonpermanent residents<sup>22</sup>
- Individuals applying for cancellation of removal for permanent residents<sup>23</sup>
- Individuals applying for suspension of deportation under former INA § 244
- Individuals applying for suspension of deportation or cancellation of removal under NACARA<sup>24</sup>
- Individuals applying for registry<sup>25</sup>
- Lawful permanent residents applying for naturalization<sup>26</sup>
- 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 Guidance<sup>27</sup> 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.”<sup>28</sup> 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 support<sup>29</sup> 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.<sup>30</sup>

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)<sup>31</sup> 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.”<sup>32</sup> 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.<sup>33</sup>

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 support<sup>34</sup> 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.<sup>35</sup> 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."<sup>36</sup> Instead, it is merely one "positive factor" as part of the totality of the circumstances test.<sup>37</sup>

Because of this requirement in the DOS FAM, consular officers have been questioning applicants about their use of various means-tested benefits<sup>38</sup> and means-tested benefits used by applicants' family members,<sup>39</sup> sponsors,<sup>40</sup> and members of sponsors' households.<sup>41</sup> Officers are also requiring greater amounts of documentation to show the sponsors' ability to financially support the immigrant visa applicant.<sup>42</sup>

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).

# WHO/WHAT/WHERE/HOW: PUBLIC CHARGE ANALYSIS FOR ADVOCATES

Public charge, found at section 212(a)(4) of the Immigration and Nationality Act (INA), has existed as a ground of inadmissibility in immigration law for over a century. The current definition applied by U.S. Citizenship and Immigration Services (USCIS) has been in place since 1999, and defines a public charge as a person “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.”<sup>1</sup> While the Department of State (DOS), through embassies and consulates, applies the same law as USCIS, DOS officers are guided by different sets of rules and policy guidance. The Trump Administration has sought to upend this long-standing policy, causing confusion among advocates and community members. Below is a brief summary of the chronology of public charge regulatory changes.

In January 2018, the Department of State (DOS) changed its public charge guidance in the Foreign Affairs Manual (FAM), keeping the 1999 definition of public charge, but instructing officers to go beyond the affidavit of support to consider the totality of the circumstances factors, resulting in stricter scrutiny of individual cases.

In August 2019, USCIS published a new regulation that defined public charge as a person “who receives one or more public benefits, . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”<sup>2</sup> This USCIS regulation did not directly change the FAM guidance applied by DOS, nor did it change the public charge rules applied by immigration judges, which are part of the Department of Justice (DOJ). Although the regulation was intended to go into effect on October 15, 2019, several federal courts issued decisions temporarily blocking the regulation’s implementation in October 2019. As a result, USCIS cannot apply this new definition while litigation is pending. Additionally, any newly added public benefits used while this injunction is in place would not count against applicants if the DHS rule were allowed to be implemented in the future.

<sup>1</sup> Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).

<sup>2</sup> *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41501 (Aug. 14, 2019); 8 CFR § 212.21(a).

In October 2019, DOS announced in an interim final rule (IFR) that it would apply the same standard as that in the August 2019 USCIS regulation for visa interviews at the consulates and embassies abroad.<sup>3</sup> This IFR is effective as of October 15, 2019, and instructs consular officials to look at a variety of factors in an applicant's case to decide if they are likely to receive one or more public benefits for more than 12 months within any 36-month period in the future. DOS has announced that it will not apply this new rule while new forms are being approved, and will continue to implement the FAM guidance until then.<sup>4</sup>

Advocates must be able to accurately determine whether public charge applies to a particular client's case and if so, which rules apply and how. While many classes of immigrants are not subject to public charge at all, those who are will need to present strong and convincing evidence to avoid a public charge finding. This advisory guides advocates through a three-step public charge analysis for determining whether a client will be subject to a public charge test, which public charge rules or policies will apply to them, and finally, which factors will impact the client's immigration case. The following is a basic guide to be used in conjunction with the other materials in this toolkit in order to best advise clients about public charge.

## STEP 1: DETERMINE IF PUBLIC CHARGE APPLIES

First, it is important to remember that the public charge ground of inadmissibility does not apply to all applications for immigration relief. Additionally, some categories of immigrants are exempt from public charge when applying for most immigration statuses. Therefore, advocates must first determine whether public charge is applied to the type of application that the client will submit or if the client in particular is exempt from public charge. In order to make this determination, advocates should ask:

- A. **WHO:** Who is the client? Are they exempt from public charge because of their current immigration status?
- B. **WHAT:** What type of application do they plan to submit? Are they applying for a visa or for permanent resident status (adjustment of status or consular processing) through a family-based or employer petition?

### Step 1A: WHO is the Client?

Some immigrants are not affected by the public charge ground of inadmissibility because they are either exempt or have already been admitted to the United States. "Qualified aliens" as defined in 8 U.S.C. § 1641(c) are exempt from public charge.<sup>5</sup> This group is made up primarily of VAWA self-petitioners, VAWA cancellation applicants, and T-visa holders.<sup>6</sup> While other humanitarian immigrants generally need not worry about public charge inadmissibility, this depends on the specific form of relief that the client will seek to obtain. Section 1B below explains the forms of relief that are exempt from a public charge test.

3 See Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54996 (Oct. 11, 2019).

4 See <https://travel.state.gov/content/travel/en/traveladvisories/ea/Information-on-Public-Charge.html>.

5 INA § 212(a)(4)(E)(iii).

6 See 8 USC § 1641(c) for a full list of individuals classified as "qualified aliens."

A lawful permanent resident (LPR) has been admitted to the United States and so is not subject to the public charge ground of inadmissibility, with limited exceptions.<sup>7</sup> For example, an LPR need not worry about a public charge test when petitioning to remove conditions from their residence, when applying to renew their green card, or when making short trips outside the United States. However, note that an LPR may be subject to the public charge inadmissibility test if they spend more than 180 days outside of the United States at one time and then seek to reenter the country.<sup>8</sup>

**IMPORTANT:** The enjoined USCIS regulation specifically exempted certain categories of U-visa or T-visa holders from public charge inadmissibility if they applied for adjustment under INA § 245(a) or 245(l). However, this regulation has been blocked in full by federal courts. Advocates should remember that U-visa holders remain exempt from public charge inadmissibility if they adjust under INA § 245(m) (U visa adjustment provision), but will be subject to public charge inadmissibility if they instead adjust through a relative under 245(a).

Advocates should remember that an individual with no valid immigration status who is not submitting any application for immigration status is not affected by public charge because they are not seeking to be admitted to the United States. Such an individual need not worry about public charge, but should be screened for eligibility for possible forms of immigration relief available to them so they can fully understand whether they may have an option for relief in the future.

## Step 1B: WHAT Application is the Client Filing?

If a client does not have a current status that exempts them from public charge, the advocate should determine whether the specific application filed by the client is subject to a public charge test. Generally, public charge applies to people seeking admission to the United States. However, many forms of immigration relief are statutorily or regulatorily exempt from the public charge ground of inadmissibility. Other forms of relief are not subject to any grounds of inadmissibility at all. Finally, some forms of relief provide for a waiver if the applicant is found to be a public charge. Therefore, the type of relief that a person seeks will determine whether the public charge ground of inadmissibility applies to the client.

### 1. Immigration Relief Subject to Public Charge

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. It also applies when an individual who has been admitted applies for adjustment of status through a relative or employer within the United States.

#### a) Relief subject to public charge without a waiver

An applicant is subject to the public charge ground of inadmissibility when they apply for most nonimmigrant visas to enter the United States.<sup>9</sup> Additionally, the public charge ground applies when an individual seeks to:

<sup>7</sup> See INA § 101(a)(13)(C). While LPRs are subject to the public charge ground of deportability at INA § 237(a)(5), this standard is very narrow. Thus, few LPRs have been charged as deportable for having become a public charge. For more information, see <https://www.ilrc.org/public-charge-ground-deportability>.

<sup>8</sup> INA § 101(a)(13)(C)(ii).

<sup>9</sup> Note that U and T nonimmigration status are exempt from many grounds of inadmissibility, including public charge. See Section 2 below.

- adjust status or consular process based on an approved family-based petition (Form I-130)
- adjust status or consular process based on an approved employer petition (Form I-140).

Note that public charge applies even if the applicant currently has or previously held a status that was exempt from public charge. See subsection 2 below for an explanation of immigration relief exempt from public charge.

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

Additionally, although a permanent resident has been admitted and is not generally subject to the public charge ground of inadmissibility, a permanent resident who has been outside of the country for more than 180 days is subject to the grounds of inadmissibility, including public charge. Further, if a lawful permanent resident loses that status and applies to re-adjust status through a family-based petition—typically as a defense to a deportability charge—they will be subject to the public charge inadmissibility ground when the new application for adjustment of status is adjudicated.<sup>10</sup>

### **b) Relief subject to public charge with a waiver**

Finally, a select few forms of relief are subject to the public charge ground of inadmissibility but allow for a waiver if the applicant is determined to be likely to become a public charge.<sup>11</sup> These applications are primarily:

- Applications for S nonimmigrant status
- Applications for adjustment of status based on S nonimmigrant status

Applicants for these forms of relief are subject to public charge inadmissibility and may be found likely to become a public charge by USCIS. See Step 2B below for more information about the public charge test applied by USCIS. However, the INA allows USCIS to grant a waiver to these applicants in the agency's discretion.

## **2. Immigration Relief NOT Subject to Public Charge**

### **a) Relief specifically exempt from the public charge ground of inadmissibility**

Many forms of immigration relief are statutorily exempt from the public charge ground of

<sup>10</sup> See Step 2A below for an explanation of public charge rules applied by immigration judges in removal proceedings. Note that the Executive Office for Immigration Review (EOIR) is a component inside the Department of Justice (DOJ) and will not apply the new public charge regulation published by the Department of Homeland Security (DHS) in the event that an injunction is lifted. As a result, immigration judges who adjudicate adjustment of status applications in removal proceedings will follow relevant Board of Immigration Appeals (BIA) and circuit court precedent on public charge unless and until the DOJ officially adopts its own public charge regulation.

<sup>11</sup> INA § 245(i)(2).

inadmissibility.<sup>12</sup> For example, refugees,<sup>13</sup> people applying for Temporary Protected Status (TPS),<sup>14</sup> and applicants for humanitarian forms of relief, such as U visas,<sup>15</sup> T visas,<sup>16</sup> or certain relief under the Violence Against Women Act (VAWA)<sup>17</sup> are exempt from public charge. The INA and other provisions of the regulations exempt applicants for these forms of relief from the public charge ground of inadmissibility.

Note that the enjoined USCIS regulation specifically listed the immigration categories that are exempt from public charge at 8 CFR § 212.23(a). Because this regulation is enjoined, advocates should not use this regulation as legal authority when arguing that a client is exempt from public charge. Advocates will make a stronger legal argument by using the legal authority in the INA or other regulatory provisions cited here.

### b) Relief not subject to any grounds of inadmissibility

The INA provides certain forms of relief that are not subject to the grounds of inadmissibility. These include asylum<sup>18</sup> and cancellation of removal for certain permanent and nonpermanent residents.<sup>19</sup> Additionally, Deferred Action for Childhood Arrivals (DACA)<sup>20</sup> does not have a public charge test, as the exercise of prosecutorial discretion does not require an applicant to be admissible. People applying for these forms of relief do not have to undergo a public charge test.

**Example:** Douglas is HIV-positive and receives a variety of cash and non-cash benefits from the State of California. He is eligible to apply for cancellation of removal for nonpermanent residents because, among other criteria, his citizen spouse also has HIV and will suffer exceptional and extremely unusual hardship if the couple has to relocate to Douglas' home country. Douglas does not have to worry about using any public benefits because cancellation of removal is not subject to any grounds of inadmissibility.

Finally, it is important to remember that lawful permanent residents are not subject to a public charge test at the time of applying for naturalization. For additional information about how public charge impacts lawful permanent residents who are naturalizing, see ILRC, *Public Charge and Naturalization*, (Sept. 2019).<sup>21</sup>

Refer to the **PUBLIC CHARGE RELIEF CHART** and **PUBLIC CHARGE SCREENING FLOWCHART** for more details regarding when public charge applies to specific forms of immigration relief.

<sup>12</sup> For a complete list of groups who are not subject to public charge, see ILRC, *An Overview of Public Charge* (December 2018), [https://www.ilrc.org/sites/default/files/resources/overview\\_of\\_public\\_charge-20181214.pdf](https://www.ilrc.org/sites/default/files/resources/overview_of_public_charge-20181214.pdf).

<sup>13</sup> INA § 207(c)(3). Refugees applying for adjustment of status based on refugee status are also exempt from public charge. INA § 209(c).

<sup>14</sup> 8 CFR § 244.3(a).

<sup>15</sup> INA § 212(a)(4)(E)(ii).

<sup>16</sup> INA § 212(d)(13)(A).

<sup>17</sup> INA § 212(a)(4)(E)(i) (exempting VAWA self-petitioners), (iii) (exempting "qualified aliens"); 8 U.S.C. § 1641(c)(1)(B) (classifying as a "qualified alien" an individual with an approved or pending petition that sets forth a prima facie case for classification as a VAWA self-petitioner). See also 8 U.S.C. § 1641(c)(1)(B)(iii), (v) (suspension of deportation or cancellation of removal under VAWA).

<sup>18</sup> See INA § 208(b). Asylees applying for adjustment of status based on asylee status are also exempt from public charge. INA § 209(c).

<sup>19</sup> INA § 240A(a) (permanent residents), (b) (nonpermanent residents).

<sup>20</sup> 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>.

<sup>21</sup> Available at <https://www.ilrc.org/public-charge-and-naturalization>.

If at the end of Step 1 you determine that public charge does not apply to your client, based on their current status or the form of relief they will be seeking, the analysis ends here--no need to move on to Step 2. If instead you determine public charge does apply, move on to Step 2.

## STEP 2: DETERMINE WHICH PUBLIC CHARGE RULE APPLIES

**REMEMBER:** A client who is applying for a form of immigration status that is not subject to public charge will not need to continue to Steps 2 and 3!

If a client is subject to the public charge ground of inadmissibility, the advocate must next determine which public charge rule applies. Agencies within three distinct departments adjudicate applications subject to the public charge ground of inadmissibility, and apply distinct definitions of public charge. Therefore, in Step 2, advocates must ask:

- **WHERE:** Where will the client's application for admission or adjustment of status be adjudicated? Will the client apply for adjustment of status within the United States or go through consular processing abroad? If client is applying for adjustment of status, will they file affirmatively with USCIS or defensively with the immigration judge?

Advocates must know which agency will adjudicate an application for admission or permanent residence to determine which public charge rule will apply. There are three possible agencies that will decide a client's application: (1) the Department of Homeland Security (DHS) through a local U.S. Citizenship and Immigration Services (USCIS) office; (2) the Department of Justice (DOJ), through an immigration judge in removal proceedings; or (3) the Department of State (DOS) at a U.S. embassy or consulate abroad. The geographical location of the client, the procedural history of any immigration case in the United States, and the requirements within the INA will determine which agency will take jurisdiction over adjudicating the client's application. For more details, see **PUBLIC CHARGE CONSIDERATIONS: ADJUSTMENT OF STATUS VS CONSULAR PROCESSING**.

### 1. USCIS: Adjustment of Status at Local USCIS Office

An individual may file an application for adjustment of status with USCIS when they meet the requirements under INA § 245 and are not currently in removal proceedings before an immigration judge. Additionally, people who are categorized as "arriving aliens" must apply with USCIS for adjustment of status even if they are in removal proceedings.<sup>22</sup>

Although USCIS sought to change the definition of public charge in the new regulation published on August 14, 2019, this new definition and other provisions of the new regulation have been enjoined nationwide by several federal courts.<sup>23</sup> Therefore, USCIS cannot apply this new standard while litigation is pending unless all the nationwide injunctions are stayed (lifted). Additionally, USCIS cannot retroactively apply the enjoined regulation to applications that were filed or newly added benefits that were received while the injunction is in place. USCIS must apply the definition of public charge set out in the 1999 Field Guidance until further notice. For more information about assessing public charge based on the current USCIS standard, see ILRC, *Totality of the Circumstances: Assessing the Public Charge Ground of Inadmissibility* (May 2019).<sup>24</sup>

<sup>22</sup> See 8 C.F.R. § 1245.2(a)(1)(ii).

<sup>23</sup> For updates on litigation against the DHS public charge regulation, see <https://protectingimmigrantfamilies.org/>.

<sup>24</sup> Available at <https://www.ilrc.org/totality-circumstances-assessing-public-charge-ground-inadmissibility>.



## 2. Department of Justice: Adjustment of Status Before an Immigration Judge

An individual who is in removal proceedings must file their application for adjustment of status with the immigration judge who presides over the case. When deciding adjustment of status applications, immigration judges follow precedent established by Board of Immigration Appeals (BIA) and federal courts of appeals. The BIA and federal circuit case law largely tracks the 1999 USCIS public charge guidance. Because the Department of Justice has not yet formally changed its interpretation of public charge, immigration judges will continue to apply this case law until further notice. While the Department of Justice is considering proposing a new regulation on public charge to align its interpretation with the now-enjoined DHS rule, no proposed regulation has been published as of the date of this advisory.<sup>25</sup> Therefore, any application for adjustment of status filed by an applicant in removal proceedings will be subject to the public charge ground of inadmissibility as applied by the BIA and court of appeals case law. For an overview of the 1999 USCIS policy and BIA case law regarding public charge, see <https://www.ilrc.org/totality-circumstances-assessing-public-charge-ground-inadmissibility>.

**NOTE:** Individuals classified as “arriving aliens” must file an application for adjustment of status with USCIS, even if they are currently in removal proceedings. See subsection 1 above for more information about filing with USCIS.

## 3. Department of State: Consular Processing at a U.S. Embassy or Consulate Abroad

An applicant for a nonimmigrant or immigrant visa who is physically abroad and seeks to enter the United States must submit their application with the Department of State, through a U.S. consulate or embassy in the appropriate country. Additionally, an applicant for permanent resident status through a family-based or employment-based petition who is not eligible for adjustment of status must also apply for an immigrant visa through consular processing.<sup>26</sup> Consular officers adjudicate applications for immigrant visas following instructions in the Foreign Affairs Manual (FAM).

Currently, the FAM public charge policy—located in 9 FAM 302.8—retains the definition of public charge laid out in the 1999 USCIS guidance but requires consular officials to take into account many additional negative factors when deciding if the applicant is likely to become a public charge. For example, the FAM allows officials to inquire into use of public benefits by non-applicant family members and by the sponsor who submits an affidavit of support. Denials based on public charge have increased in the last two years due to this change.

On October 11, 2019, DOS announced that it would apply the same standards as those in the August 2019 (currently enjoined) USCIS regulation for visa interviews at consulates and embassies abroad.<sup>27</sup> This interim final rule defines public charge as a person “who receives one or more public benefits, . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”<sup>28</sup> It also instructs officers to look at a variety of negative factors in an applicant’s case to decide if they are likely to become a public charge in the future. DOS has announced that it will not apply this new rule while new forms are being approved, and will continue to implement the FAM guidance until then.<sup>29</sup>

<sup>25</sup> For updated information regarding a public charge regulation proposed by the DOJ, visit [www.protectingimmigrantfamilies.org](http://www.protectingimmigrantfamilies.org).

<sup>26</sup> For more information on eligibility for adjustment of status, see *Family-Based Adjustment of Status Options* (Dec. 2018), <https://www.ilrc.org/family-based-adjustment-status-options>.

<sup>27</sup> See *Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54996 (Oct. 11, 2019).

<sup>28</sup> See 84 Fed. Reg. 55014, 22 CFR § 40.41(b).

<sup>29</sup> See <https://travel.state.gov/content/travel/en/traveladvisories/ea/Information-on-Public-Charge.html>.

Advocates should carefully screen and prepare cases to avoid a finding of public charge under this stricter standard being applied at U.S. embassies and consulates and look for adjustment eligibility even where it may appear that the client was not inspected and admitted or paroled in the traditional sense, for example if they have 245(i) eligibility, were granted TPS and live in the Sixth or Ninth circuits, or were “waved through.” For more information on public charge at embassies and consulates, please see Step 3B below.<sup>30</sup>

### STEP 3: DETERMINE HOW THE RELEVANT PUBLIC CHARGE STANDARD WILL APPLY TO THE CLIENT

- **HOW:** How can the client show enough positive factors and minimize negative factors to avoid a public charge finding?

**NOTE:** For a comparison of the 1999 guidance, the 2018 FAM changes, the 2019 USCIS regulation, and the 2019 DOS IFR see **PUBLIC CHARGE INADMISSIBILITY RULES COMPARISON CHART**.

Once an advocate determines which public charge rule applies to the client application, they must analyze how the client can present their strongest case to avoid a public charge finding. Although public charge law has always required officers to look at all the positive and negative factors in the client’s case, the 1999 USCIS guidance limits the evidence that officers could consider.

Under the USCIS 1999 Guidance, USCIS officers can only consider whether the client has used two specific types of public benefits: cash assistance for income maintenance and long-term care at the government’s expense. Apart from looking at receipt of just these two types of benefits programs, USCIS officers have generally accepted a strong Form I-864, Affidavit of Support, with evidence of sufficient income by a sponsor or joint sponsor, as meeting the public charge test.<sup>31</sup>

**NOTE:** Multiple federal courts have blocked implementation of the August 2019 USCIS regulation on public charge. Advocates should remember that the 1999 USCIS guidance remains in effect for applications for admission or adjustment of status adjudicated by USCIS while this litigation is underway.<sup>32</sup> Additionally, USCIS cannot retroactively apply the enjoined regulation to applications that were filed or newly added benefits that were received while the injunction is in place.

Officials at consulates and embassies, however, will apply a different standard with a stricter test that emphasizes more scrutiny of the totality of the circumstances factors.<sup>33</sup> If a client has any negative factors, it is important for the advocate to strategize about how to minimize these

<sup>30</sup> For more information about public charge considerations during consular processing under the January 2018 FAM changes, see *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues* (July 2019), <https://www.ilrc.org/totally-circumstances-assessing-public-charge-ground-inadmissibility>.

<sup>31</sup> For more information about assessing public charge when an applicant has received the two specified public benefits, see *Totally of the Circumstances: Assessing the Public Charge Ground of Inadmissibility* (May 2019) [https://www.ilrc.org/sites/default/files/resources/total\\_circum\\_assess\\_pub\\_charge\\_inadmis-20190503.pdf](https://www.ilrc.org/sites/default/files/resources/total_circum_assess_pub_charge_inadmis-20190503.pdf).

<sup>32</sup> For updated information regarding litigation against the new USCIS public charge regulation, visit <https://protectingimmigrantfamilies.org/>.

factors, provide evidence of positive factors, and convince a consular official that they are not likely to receive specified public benefits after being admitted to the United States. Advocates should refer to the **PUBLIC CHARGE INADMISSIBILITY RULES COMPARISON CHART** and **TOTALITY OF THE CIRCUMSTANCES WORKSHEET** for guidance in advising and preparing clients for visa interviews at U.S. consulates and embassies abroad.

# IS YOUR CLIENT SUBJECT TO PUBLIC CHARGE INADMISSIBILITY?

See also **WHO/WHAT/WHERE/HOW Public Charge Analysis and Public Charge Relief Chart** for more details.



\*Others include: Amerasians, Afghan and Iraqi military translators, certain Cuban and Haitian adjustment applicants, certain Nicaraguans and Central Americans under NACARA, Registry applicants, Soviet and Southeast Asian Lautenberg parolees



# PUBLIC CHARGE APPLICABILITY TO APPLICATIONS AND FORMS OF RELIEF

APPLICATION OR FORM OF RELIEF	PUBLIC CHARGE APPLIES?	AUTHORITY	NOTES
Family-sponsored I-485 Adjustment in the U.S.	Yes	INA §212 (a)(4)(A)	Any beneficiary or derivative of an I-130 is subject to public charge, must file an Affidavit of Support or exemption
Family-sponsored Immigrant Visa	Yes	INA § 212(a)(4)(A)	See 9 FAM 302.8 <sup>1</sup> or 22 C.F.R. § 40.41
Employment-based I-485	Yes	INA §212 (a)(4)(A)	Affidavit of support is required only if petitioner is a relative with significant ownership interest in the employing entity. INA § 212(a)(4)(D)
VAWA I-360 Self-Petition	No	INA §212 (a)(4)(E)(i)	
VAWA Adjustment	No	INA §212(a)(4)(E)(i) Sec. 804 VAWA 2013	Submit I-864W exemption
VAWA Suspension/Cancellation	No	INA §212(a)(4)(E)(iii), 8 USC § 1641(c)(1)(B)(v)	
U Visa Applicant	No	INA §212(a)(4)(E)(ii)	
U Adjustment	No	INA §245(m)	
T Visa	No	INA §212(d)(13)(A)	
T Adjustment	No	INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(4)	The T adjustment statute at INA 245(l)(2)(A) and regulation have not been updated to reflect this <sup>2</sup>
Refugee	No	INA §207(c)(3)	
Asylee and Refugee Adjustment	No	INA §209(c)	
Special Immigrant Juveniles	No	INA §245(h)(2)(A)	
Temporary Protected Status	No	8 CFR §244.3(a)	
Widow/Widowers of U.S. Citizen	No	INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(1)(B)(i)	Submit I-864W exemption 8 CFR §213A.2(a)(2)(ii)(A)
Relief under Cuban Adjustment Act	No	<i>Matter of Mesa</i> , 12 I&N Dec. 432, 437 (BIA 1967)	

APPLICATION OR FORM OF RELIEF	PUBLIC CHARGE	AUTHORITY	NOTES
<b>Nicaraguans and Cubans adjusting through NACARA</b>	No	INA §245, note 9 NACARA Pub. L. 105-100 Sec. 202(a)(1)(B)	
<b>Haitian Refugee Immigration Fairness Act (HRIFA)</b>	No	INA §245, note 10 8 CFR §245.15(e)	
<b>Applicants for asylum</b>	No	INA §208(b)	
<b>DACA</b>	No		
<b>Registry</b>	No	INA §249	
<b>Cancellation or Suspension relief</b>	No	INA §240A(a) and (b)	
<b>Naturalization</b>	No	inapplicable	Unless travel as LPR abroad for more than 180 days INA §101(a)(13)(C)(ii). See ILRC's manual, Public Charge and Immigration Law, ch. 9 for a full discussion of risks that LPRs face in certain circumstances due to long absence from the U.S. or prior history of fraudulent receipt of public benefits

<sup>1</sup> The Foreign Affairs Manual requires immigrant visa applicants to have a qualifying I-864 in addition to other financial documents evidencing "positive factors." See ILRC, Consular Processing 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>.

<sup>2</sup> The Trafficking Victims Protection Act of 2000 and Violence Against Women Act of 2013 exempt T adjustment applicants from the public charge ground of inadmissibility.

# 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 States with a visa or parole document or they qualify to adjust under INA § 245(i).<sup>1</sup>

### 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.

<sup>1</sup> 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?*

- 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**.
- 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<sup>2</sup>

### **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,*

<sup>2</sup> 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<sup>3</sup>)**

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*

<sup>3</sup> 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

# 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>



	1999 DHS Rule	2019 DHS Rule	2018 DOS Rule	2019 DOS Rule
<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>

# PUBLIC CHARGE: TOTALITY OF THE CIRCUMSTANCES WORKSHEET

*This worksheet is intended to guide advocates in assessing each of the public charge factors in an application for admission at the consulate or adjustment of status with USCIS under current policy. The policy guidance governing USCIS processing of adjustment of status cases (“1999 Field Guidance”<sup>1</sup>) is different in many ways from the DOS rules that governs consular officers’ adjudication of applications for admission processed abroad. Advocates should apply the three-step analysis laid out in the [WHO/WHAT/WHERE/WHEN/HOW: PUBLIC CHARGE ANALYSIS FOR ADVOCATES](#) to determine which rules apply to the specific client. This worksheet explains how DHS or DOS, as applicable, interprets each factor and suggests a list of documents that advocates may submit to bolster evidence of positive factors in the client’s application; essentially the “How” from the Who/What/Where/How analysis. For the most part, the evidence this worksheet suggests to counteract less favorable facts in a client’s case is geared towards consular processing cases, because current USCIS policy focuses primarily on the affidavit of support, rather than the totality of the circumstances factors. After completing the worksheet for a given client, a list of supporting documents will be generated that the client and advocate can begin to gather. For additional guidance on how to prepare clients for consular processing interviews, see Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues (July 2018).<sup>2</sup>*

**PRACTICE NOTE:** *Given that implementation of the Interim Final Rule (IFR) issued by the Department of State (DOS) on October 11, 2019 is delayed until the new DS-5540 form is finalized, consular officers continue to be guided by the Foreign Affairs Manual (FAM), revised in January 2018. For more information on the state of play of the different rules and legal challenges, see [SUMMARY OF LEGAL AFFAIRS](#), and the [PUBLIC CHARGE TIMELINE](#). However, we encourage advocates to argue for consular officials to use the standards in the IFR where these are beneficial for a client’s application, for example to argue that use of benefits by family members should not be considered, as under the IFR. For this reason, we have included both the DOS FAM and DOS IFR in this worksheet.*

**REMEMBER:** *Not all applicants for immigration status are subject to public charge! Please refer to [WHO/WHAT/WHERE/HOW: PUBLIC CHARGE ANALYSIS FOR ADVOCATES](#) and Public Charge Screening Flowchart to determine whether a specific client will file an application that is subject to the public charge ground of inadmissibility.*

**FACTORS: Several factors fall under the totality of the circumstances analysis. While not an exhaustive list, the primary factors will each be outlined below, in no particular order.**

These factors include ones listed in the statute at INA 212(a)(4)(B), as well as others that may also be considered. No one factor is determinative; immigration officers are required by the statute to consider, at a minimum, all the factors listed at INA 212(a)(4)(B). Further, although the DOS IFR introduces “heavily weighted” positive and negative factors, it is unclear exactly how much weight a “heavily weighted” factor carries, or how an officer will resolve a case that has two or three positive factors, but also one or two heavily weighed negative factors. In all cases, practitioners should advocate for a full and comprehensive totality of the circumstances assessment. This worksheet is designed to help practitioners build the strongest public charge admissibility case for their clients by suggesting documentation to show that in the totality of the circumstances, your client is not in danger of becoming a public charge.

## I. AGE

» **USCIS 1999 Guidance:**

*USCIS officers primarily focus on the sufficiency of the **affidavit of support** and supporting evidence, and do not separately assess this factor. However, in general, being “in the prime of life” is a positive factor.*

» **DOS FAM and IFR:**

AGE	+ POSITIVE FACTOR	- NEGATIVE FACTOR
	<i>applicant is of working age: 18 to 62 years old (early retirement age)</i>	<i>applicant is younger than 18 or older than 62 years old</i>

### Ideas For Positive Evidence to Include in Consular Processing Cases with Regards to Age:

If applicant is younger than 18 or older than 62, consider providing:

- Evidence that applicant is currently working or will be able to work in the future
- Statements from family, friends, or other members of the household explaining they will support the applicant, with proof of income, or with proof that applicant will live in the home
- Evidence of private health insurance available to the applicant to cover any anticipated medical costs (*see [Health](#) below for more evidence to submit showing applicant’s ability to pay for medical costs*)
- If applicable, proof of any long-term care insurance or other plans (*see [Health](#) below for more evidence to submit show applicant’s ability to pay for medical costs*)
- If applicable, statement from applicant explaining that they will be the primary caretaker for another member of the household (*see [Education and Skills](#) below for more evidence to submit to showing applicant’s current or future ability to work*)

## II. HEALTH

» **USCIS 1999 Guidance:**

USCIS officers primarily focus on the sufficiency of the **affidavit of support** and supporting evidence and do not separately assess this factor. However, in general, it is a positive factor if applicant is [a] “healthy person.”

» **DOS FAM:**

If the panel physician’s report shows diagnosis of a medical condition, officers consider whether the prognosis might prevent or hinder the maintenance of employment, affect the applicant’s ability to adequately provide for self or dependents, or require institutionalization at government expense

» **DOS IFR:**

HEALTH	+ POSITIVE FACTOR	- NEGATIVE FACTOR
	<ul style="list-style-type: none"> <li>• Has health insurance</li> <li>• Has the ability to pay for reasonably foreseeable medical expenses</li> </ul>	If diagnosed with a medical condition that is likely to require extensive medical care, institutionalization, or will interfere with the applicant’s ability to care for self, attend school, or work upon admission
	++ HEAVILY WEIGHTED POSITIVE FACTOR	-- HEAVILY WEIGHTED NEGATIVE FACTOR
	If applicant has private health insurance covering the expected period of admission for which the applicant does not receive subsidies in the form of premium tax credits under the ACA	<p>If applicant:</p> <p>(A) has medical condition described in negative factor above</p> <p>(B) <u>AND</u> has no health insurance for use in the United States has “neither the prospect of obtaining private health insurance for use in the United States, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition”</p>

### Ideas for Positive Evidence to Include in Consular Processing Cases with Regards to Health:

To show proof of health insurance, consider providing:

- Proof of health insurance from employer (a “heavily weighted” positive factor according to the IFR)
- Proof of health insurance purchased for applicant without ACA subsidies (a “heavily weighted” positive factor according to the IFR)
- Proof of health insurance purchased for applicant with ACA subsidies
- Letter from prospective employer explaining that applicant will be able to enroll in employer-sponsored health insurance (a “heavily weighted” positive factor according to the IFR)
- Letter from prospective educational institution explaining that applicant will be able to enroll

in school-sponsored health insurance (a “heavily weighted” positive factor according to the IFR)

- Letter from spouse or parent (if applicant is under 26 years old) stating willingness to pay for applicant’s medical expenses or explaining that applicant will be able to join current insurance plan, with proof of current insurance
- Proof of pending insurance application for applicant, with explanation that application will be approved when applicant is admitted or adjusts status

To overcome evidence of a medical condition, consider providing:

- Statement from applicant explaining their current or anticipated employment, study, and/or care routine and how they will ensure they will be able to continue this despite the health condition
- Medical records or statement from doctor explaining that applicant is otherwise in good health, including doctor’s recommended treatment for medical condition, prognosis, and ability of applicant to care for themselves, work, or study
- Evidence showing applicant’s current or previous ability to work or study with medical condition, such as school records, paystubs, and/or tax returns
- Letter from potential employer explaining intent to hire applicant upon admission or receipt of work authorization
- Letter from potential employer stating that applicant will be eligible for insurance through employer
- Letter from potential educational institution explaining applicant’s admission to program
- Letter from potential educational institution stating that applicant will be eligible for insurance through school program
- Proof of current or potential health insurance that applicant can use to cover medical treatment
- Proof of assets that can be used to pay for medical treatment, or statement of financial support from family, friends, or other members of the household to pay for such expenses

### III. FAMILY STATUS

» **USCIS 1999 Guidance:**

*USCIS officers primarily focus on the sufficiency of the **affidavit of support** and supporting evidence and do not separately assess this factor. The affidavit of support also shows that the applicant “has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency,” which is a positive factor.*

» **DOS FAM and IFR:**

*Family status is not considered a positive or negative factor on its own, but is analyzed in conjunction with Assets, Resources, and Financial Status. Household size determines household income necessary to meet 125% income requirement (see Assets, Resources, and Financial Status factor below), which bears on officers’ consideration of applicant’s family status.*

**NOTE:** *The FAM defines “family status” as “the number of dependents for whom the applicant would have financial responsibility.” However, the DOS IFR has a much broader definition of “household size,” defined in 22 CFR § 40.41(d).*

**Practice tip:** To limit household size, consider amending prior tax returns if applicant has a non-household member listed as a dependent on the applicant's return or if a non-household member has listed the applicant as a dependent. Also, submit proof of address for any family members who are not living with the applicant or for whom the applicant is not obligated to provide support (such as a spouse or child).

#### Ideas for Positive Evidence to Include in Consular Processing Cases with Regards to Family Status:

See *Assets, Resources, and Financial Status* factor for additional evidence to submit for household members.

If applicant is married:

- If applicable, proof that spouse does not live with applicant
- If applicable, divorce decree or other documents showing whether applicant must provide support to ex-spouse

If applicant has children:

- Birth certificates for applicant's children and proof of current address
- If applicable, custody order for all children not living with or intending to live with the applicant
- If applicable, child support order for all children not living with or intending to live with the applicant
- If applicable, other order or agreement specifying financial support for all children not living with or intending to live with the applicant

If applicant has listed other dependents on their tax returns:

- Tax transcripts or evidence of income for any individuals listed as dependents on the applicant's tax returns

If applicant is under 21 years old and unmarried (**NOTE:** below items only needed when IFR is implemented):

- Tax transcripts or evidence of income for the applicant's parents, legal guardians, or any other individuals providing or required to provide at least 50% financial support to the applicant, and any order or agreement specifying that financial support
- Tax transcripts or evidence of income for any individuals listed as dependents on tax transcripts of applicant's parent(s), legal guardian(s), or any other individuals who live with the applicant
- Tax transcripts or evidence of income for other children (who are unmarried and under 21) or dependents of applicant's parent(s) or legal guardian(s), who do not live with the applicant's parent(s) or legal guardian(s), for whom the parent or legal guardian provides or is required to provide at least 50% financial support to the child/children, and any order or agreement specifying that financial support

## IV. ASSETS, RESOURCES, AND FINANCIAL STATUS

### » USCIS 1999 Guidance:

USCIS officers primarily focus on the sufficiency of the **affidavit of support** and supporting evidence and do not separately assess this factor. The affidavit of support also shows that the

applicant “has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency,” which is a positive factor.

» **DOS FAM:**

Officers can consider past or current receipt of “public assistance of any type” by the applicant or a family member in the applicant’s household.

If the applicant no longer receives public assistance:

FINANCIAL STATUS (FAM)	+ POSITIVE FACTOR	- NEGATIVE FACTOR
Relevance of receipt of public assistance	If the applicant’s financial circumstances are significantly different from when they received public assistance, this mitigates against a public charge finding	If the applicant’s financial circumstances are similar to those when the applicant received public assistance, this is a “strong factor in favor” of a public charge finding

Receipt of means-tested benefits by the sponsor or any member of the sponsor’s household within the past three years requires a full review of the sponsor’s ability to provide financial support, including:

- The date and type of public assistance received
- Form I-864 or Form I-134, and any attachments to the Form I-864 or Form I-134
- Any other evidence of the sponsor’s current financial circumstances

» **DOS IFR:**

FINANCIAL STATUS (IFR)	+ POSITIVE FACTOR	- NEGATIVE FACTOR
	<ul style="list-style-type: none"> <li>• Has an annual gross household income of at least 125% of the Federal Poverty Guidelines, or if applicant has sufficient household assets and resources to pay for reasonably foreseeable medical costs. See 22 CFR 40.41(d) for definition of household</li> <li>• Has disenrolled or requested to be disenrolled from public benefits, as defined in 22 CFR § 40.41(c)<sup>3</sup></li> <li>• Has private health insurance to cover reasonably foreseeable medical costs</li> </ul>	<ul style="list-style-type: none"> <li>• Has “any financial liabilities”</li> <li>• Has applied for, been certified to receive, or received one or more public benefits, as defined in 22 CFR § 40.41(c), on or after October 15, 2019</li> <li>• Has received an immigration benefit fee waiver from DHS on or after October 15, 2019, unless the fee waiver was applied for or granted as part of an application for which a public charge inadmissibility determination under INA § 212(a)(4) was not required</li> </ul>
	++ HEAVILY WEIGHTED POSITIVE FACTOR	-- HEAVILY WEIGHTED NEGATIVE FACTOR
	<ul style="list-style-type: none"> <li>• The applicant’s household income, assets, or resources are equal to at least 250% of the Federal Poverty Guidelines</li> <li>• The applicant has work authorization and current employment with income of at least 250% of the Federal Poverty Guidelines for the applicant’s household. See income guidelines at <a href="https://aspe.hhs.gov/poverty-guidelines">https://aspe.hhs.gov/poverty-guidelines</a></li> </ul>	If the applicant has received, been certified to receive, or been approved to receive one or more public benefits, defined in 22 CFR § 40.41(c), for more than 12 months in the aggregate in any 36-month period (with receipt of two benefits in one month counting as two months’ worth of benefits), beginning October 15, 2019, or for more than 12 months in the aggregate within the 36-month period prior to the adjudication of the applicant’s visa application, whichever is later



**Ideas for Positive Evidence to Include in Consular Processing Cases with Regards to Finances:**

For the applicant:

- Tax returns or other evidence of income
- Letters from employer or pay stubs showing current employment and current salary
- For independent contractors: recent 1099s, invoices for payment to applicant, or other evidence of income earned by applicant
- Proof of employment or job offer for applicant or other evidence of change in financial circumstances
- Bank statements showing date account opened, present balance, and record of deposits and withdrawals in last 12 months
- Statements showing value of real estate, retirement accounts or other assets.
- Proof of any current non-Medicaid health insurance
- Statement explaining that applicant will be added to a household member's insurance or insurance provided by an employer
- Credit report or report showing no credit record or score (if applicant has positive credit score)
- If applicable, letter from federal, state, local, or tribal agency showing applicant does not qualify for a public benefit
- If applicable, documentation from county/state benefits office(s) showing end date of public benefits received by applicant or their household members
- If applicable, statement from applicant and/or household members explaining how financial circumstances have improved since receiving public benefits in the past

If applicant has received public benefits:

- Provide proof that applicant was in an excluded status at the time of receiving such benefits OR at the time of filing the application for admission or adjustment. See 8 CFR § 212.23(a) for a list of immigrant categories who do not accrue public benefits months when in such status.

For each household member:

- Tax returns or other evidence of income
- Letters from employer or pay stubs showing current employment
- For independent contractors: recent 1099s, invoices for payment to applicant, or other evidence of income earned by applicant
- Bank statements showing date account opened, present balance, and record of deposits and withdrawals in last 12 months
- Statements showing value of real estate, retirement accounts or other assets.

For all sponsors (**NOTE:** only while DOS IFR is not being implemented and so 2018 FAM guidance controls):

- If applicable, documentation from county/state benefits office(s) showing end date of means-tested benefits received by sponsor or sponsor's household member
- Proof of employment or job offer for sponsor or other evidence of change in financial circumstances

## V. EDUCATION AND SKILLS

- » **USCIS 1999 Guidance:**  
USCIS officers primarily focus on the sufficiency of the **affidavit of support** and supporting evidence and do not separately assess this factor.
  
- » **DOS FAM:**  
Officers consider work experience, length of employment, and frequency of job changes to assess likelihood of the applicant’s ability to become or remain self-sufficient in the United States. Work experience is viewed as evidence of skills, a positive factor.
  
- » **DOS IFR:**

EDUCATION AND SKILLS	+ POSITIVE FACTOR	- NEGATIVE FACTOR
	<ul style="list-style-type: none"> <li>• Has “adequate education and skills” to obtain or maintain lawful employment “with an income sufficient to avoid being likely to become a public charge”</li> <li>• Is over 18 years of age and is the “primary caregiver” for a member of the household, with “primary caregiver” defined as having “significant responsibility for actively caring for and managing the well-being of a minor, elderly, ill, or disabled person” in the applicant’s household, such that the applicant “lacks an employment history or current employment, or is not employed full time”</li> </ul>	None specified
	++ HEAVILY WEIGHTED POSITIVE FACTOR	-- HEAVILY WEIGHTED NEGATIVE FACTOR
	if applicant is authorized to work and is currently employed with an annual income of at least 250% of the Federal Poverty Guidelines for the applicant’s household size	if applicant is not a full-time student and is authorized to work but is unable to demonstrate current employment, recent employment history, or a “reasonable prospect of future employment”

**Ideas for Positive Evidence to Include in Consular Processing Cases with Regards to Education & Skills:**

To show that applicant is likely to maintain lawful employment, consider providing:

- History of employment with related pay stubs/W-2s or letters from employer indicating length of employment and salary
- Tax returns from prior year, showing income (or last three years, if shows higher income)
- Any prior approved Form I-140s
- High school diploma or other degrees, or proof of enrollment in school or training program
- Proof of occupational skills, certifications, or licenses
- Certificates from English courses taken
- Certification, attestation, or other proof of fluency in a third language, besides English and applicant's first language

If the applicant is the primary caregiver for an individual living within the household, submit:

- Letter from the individual for whom the applicant provides care
- Proof that the individual resides in the applicant's household
- Evidence of the individual's age
- Evidence of the individual's medical condition, including disability, if any.

**VI. AFFIDAVIT OF SUPPORT**

For more information about preparing an affidavit of support, see *Introductory Guide to the Affidavit of Support*: <https://www.ilrc.org/introductory-guide-affidavit-support>.

*All applicants for adjustment of status or an immigrant visa based on an approved Form I-130 family-based petition (or based on an employer petition filed by an entity in which an applicant's relative has a significant ownership interest) must submit a Form I-864, Affidavit of Support, showing their sponsor's ability to maintain the sponsored applicant at an annual income of at least 125% of the Federal Poverty Guidelines.*

*Applicants who must file an affidavit of support may also submit an additional affidavit of support from a joint sponsor, if this person is willing to accept joint and several liability with the petitioner-sponsor. In most cases, the applicant can only have one joint sponsor. See ILRC, *Introductory Guide to the Affidavit of Support*, for more information. A sponsor may be subject to additional requirements at the consulate (explained below).*

- » **USCIS 1999 Guidance:**  
*USCIS officers determine the sufficiency of the **affidavit of support** based on the evidence of income and/or assets submitted by the sponsor and joint sponsor (if applicable).*
- » **DOS FAM:**  
*If the applicant submits an Affidavit of Support from a joint sponsor, consular officers will evaluate the "likelihood" that the sponsor will "voluntarily" follow through with financial support by considering:*
  - The joint sponsor's financial resources
  - The joint sponsor's relationship with the applicant
  - The number of other immigrants for whom the joint sponsor has filed an affidavit of support

## » DOS IFR:

AFFIDAVIT OF SUPPORT	+ POSITIVE FACTOR	- NEGATIVE FACTOR
	<ul style="list-style-type: none"> <li>• Applicant's sponsor appears "likely to actually provide" the applicant with the statutorily required amount of financial support</li> <li>• Affidavit of Support is "properly filed, non-fraudulent, and sufficient" under the requirements of INA § 213A, in those cases where it is required</li> </ul>	None specified

**NOTE:** For any Affidavit of Support showing income of at least 125% of the Federal Poverty Guidelines, consular officers will evaluate the "likelihood" that the sponsor (or joint sponsor, if applicable) "actually would provide the required financial support, based on the [sic] any available relevant information about the sponsor." The IFR does not state the factors that officers will consider when determining the likelihood that a sponsor will provide financial support. However, after DOS modified the Foreign Affairs Manual (FAM) in January 2018, officers were instructed to consider:

- Sponsor's (or joint sponsor's) annual income, assets, and resources
- Sponsor's (or joint sponsor's) relationship with the applicant, including whether they live together
- Whether the sponsor (or joint sponsor) has submitted other affidavits of support

It is unclear what legal authority the consular officers can use to give less weight to a facially sufficient Affidavit of Support, as the affidavit of support is a legal contract signed under penalty of perjury. Further, the FAM does not require that the joint sponsor have a family relationship with the applicant. See 9 FAM 302.8-2(C)(7)(b) ("The joint sponsor can be a friend or third party who is not necessarily financially connected with the sponsor's household.").. For additional guidance on how to prepare clients for consular processing, see Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues: <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.

### Ideas for Positive Evidence to Include in Consular Processing Cases with Regards to the Affidavit of Support:

To show sponsor is "likely" to support applicant, consider providing for the sponsor:

- Tax returns for sponsor and joint sponsor (if applicable) from prior year (or three years, if shows higher income);
- Bank statements;
- Statements showing value of real estate, retirement accounts or other assets;
- Evidence of familial relationship between sponsor(s) and applicant, if applicable, e.g. birth and marriage certificates showing the familial relationship;
- Short signed statement by sponsor, if not related by family, describing relationship between sponsor and re-affirming ability and intention to follow through with affidavit of support obligations if necessary;

- Proof of residence shared by applicant and sponsor, if any
- Evidence that individuals previously sponsored by sponsor have naturalized, passed away, can be credited with 40 qualifying quarters of work in the U.S., or are no longer LPRs such that the sponsor's obligations to these other immigrants under the affidavit of support have terminated

## VII. PRIOR PUBLIC CHARGE FINDING

- » **USCIS 1999 Guidance**  
*USCIS officers primarily focus on the sufficiency of the affidavit of support and do not assess this factor.*
- » **DOS FAM:**  
*DOS officers do not consider this factor under the FAM.*
- » **DOS IFR:**

PREVIOUSLY FOUND TO BE A PUBLIC CHARGE	+ POSITIVE FACTOR	- NEGATIVE FACTOR
	<i>None specified</i>	<i>if an immigration judge or the Board of Immigration Appeals has previously found the applicant inadmissible or deportable on public charge grounds</i>

### Ideas for Positive Evidence to Include in Consular Processing Cases with Regards to Prior Public Charge Finding (**NOTE: only when IFR is implemented**):

If applicant has previously been found to be a public charge, consider providing:

- Statement from applicant explaining improved circumstances in applicant's employment and/or household finances that no longer make them likely to become a public charge
- Statements from household members explaining how they will provide for applicant so that the applicant will not become a public charge in the future
- If applicant was previously a public charge due to a medical condition, letter from doctor or medical records showing that applicant no longer has medical condition and/or can provide for themselves in spite of medical condition
- Include positive evidence from each of the factors listed above to show such improved circumstances

## VIII. PROSPECTIVE VISA CLASSIFICATION

- » **USCIS 1999 Guidance**  
*USCIS officers primarily focus on the sufficiency of the affidavit of support and do not assess this factor.*
- » **DOS FAM:**  
*DOS officers do not consider this factor under the FAM.*

» **DOS IFR:**

*Consular officers will consider what visa classification applicants are seeking as it relates to applicants' ability to financially support themselves and the members of their households while in the United States. The "purpose and duration of travel" are relevant to officers' assessments of the likelihood that an applicant would use public benefits, which will figure into their public charge determinations.*

**Ideas for Positive Evidence to Include in Consular Processing Cases with Regards to Prospective Visa Classification (NOTE: only when IFR is implemented):**

If applicant is pursuing an immigrant visa for a short stay for a discrete purpose, consider providing::

- Documents describing the purpose and length of the stay
- Proof of health insurance coverage while in the United States for stay
- Other documentation showing that applicant has the means and intent to pay for all expenses while in the United States

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**ENDNOTES**

- 1 See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999) ("1999 Field Guidance").
- 2 <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>
- 3 22 CFR § 40.41(c): Definition of "public benefit" ("DOS Interim Final Rule").
- 4 Although this regulation has been enjoined, most categories of immigrants are exempt via other regulations or provisions under the INA. See <https://www.ilrc.org/overview-public-charge> for a full list of immigrants exempt from public charge. Note that DACA recipients are not explicitly "exempt" from public charge but, nonetheless, are not subject to a public charge test.



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