

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”¹) 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).²

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"> • Has health insurance • Has the ability to pay for reasonably foreseeable medical expenses 	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"> • 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 • Has disenrolled or requested to be disenrolled from public benefits, as defined in 22 CFR § 40.41(c)³ • Has private health insurance to cover reasonably foreseeable medical costs 	<ul style="list-style-type: none"> • Has “any financial liabilities” • 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 • 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
	++ HEAVILY WEIGHTED POSITIVE FACTOR	-- HEAVILY WEIGHTED NEGATIVE FACTOR
	<ul style="list-style-type: none"> • The applicant’s household income, assets, or resources are equal to at least 250% of the Federal Poverty Guidelines • 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 https://aspe.hhs.gov/poverty-guidelines 	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"> • Has “adequate education and skills” to obtain or maintain lawful employment “with an income sufficient to avoid being likely to become a public charge” • 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” 	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"> • Applicant's sponsor appears "likely to actually provide" the applicant with the statutorily required amount of financial support • Affidavit of Support is "properly filed, non-fraudulent, and sufficient" under the requirements of INA § 213A, in those cases where it is required 	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

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.