

# 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.

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

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

<sup>5</sup> INA § 212(a)(4)(E)(iii).

<sup>6</sup> 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 *Totality 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.