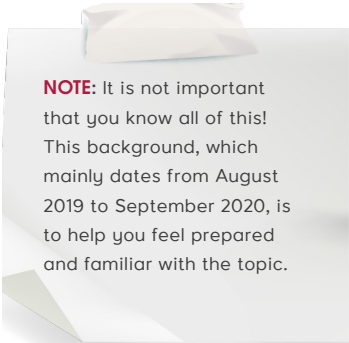


SEPTEMBER 2020

## A QUICK **LEGAL** BACKGROUND

### PUBLIC CHARGE AND IMMIGRATION LAW:



**NOTE:** It is not important that you know all of this! This background, which mainly dates from August 2019 to September 2020, is to help you feel prepared and familiar with the topic.

What public charge is and how it affects noncitizens comes from three main legal sources, listed below in descending order of authority:

- The **law** on public charge, which is contained in the immigration statute, called the Immigration and Nationality Act (INA). The president of the United States cannot change the law, including immigration laws. Only Congress can change laws.
- **Federal regulations** on public charge, which provide details describing how a law will be implemented or carried out in practice. These are often referred to as “rules.” An agency, like the Department of Homeland

Security (DHS) or Department of State (DOS), can make changes to regulations according to a specific process which generally includes notifying the public in advance and soliciting comments on proposed changes before developing and implementing a final rule.

- **Policy guidance** on public charge, which provides further instructions to immigration officers beyond the statute and regulations. For USCIS this guidance is often published in memos or their Policy Manual, whereas for the DOS, these instructions are contained in the Foreign Affairs Manual (FAM). Policy guidance is the easiest to change, can be done by the agency itself, and requires little advance notice, if any.

The current administration has been working to change public charge since 2018 through new federal regulations, with corresponding updated policy guidance. The law on public charge has not changed, but these changes to the *rules* and *guidance* dramatically alter how people will be evaluated for public charge inadmissibility.

### GLOSSARY OF KEY PUBLIC CHARGE & IMMIGRATION LAW TERMS

**DHS/USCIS:** The Department of Homeland Security (DHS) is the U.S. federal executive department responsible for public security. DHS is composed of several agencies, including but not limited to U.S. Citizenship and Immigration Services (USCIS), whose officers adjudicate requests for immigration benefits. For example, USCIS officers make public charge inadmissibility determinations while adjudicating adjustment of status (green card) applications.

**DOS/consulates:** The Department of State (DOS) is the U.S. federal executive department that leads the country’s foreign policy. Consular officers who work out of U.S. consular offices and embassies abroad make public charge inadmissibility determinations while adjudicating immigrant visa applications (for lawful permanent residence, also referred to as “LPR” status or “green cards,” in what are often called “consular processing” cases) and nonimmigrant (temporary) visa petitions.

## GLOSSARY OF KEY PUBLIC CHARGE & IMMIGRATION LAW TERMS (continued)

**Adjustment of status:** Most immigration applications that involve a public charge inadmissibility determination are for family-based adjustment of status, through which a U.S. citizen or LPR petitions for a noncitizen family member to acquire LPR status. There are two ways to become an LPR based on a family-based visa petition: through consular processing at a U.S. consulate or embassy abroad (usually in the person's home country) (see above), or through adjustment of status at a USCIS office in the United States. Any time a person becomes a permanent resident without leaving the United States, they "adjust" immigration status; in other words, becoming a permanent resident in the United States, regardless of the person's prior immigration status, is "adjustment of status." Individuals applying for adjustment of status uniformly file Form I-485, Application to Register Permanent Residence or Adjust Status, with USCIS (usually in conjunction with other forms).

**Ground of inadmissibility:** Our current immigration law divides noncitizens into two groups—(1) those who are seeking admission and must show they are admissible to the United States; and (2) those who have already been admitted, whom the government must show are deportable from the United States. Depending on their current legal status in the United States, an immigrant applying for an immigration benefit or who is in removal proceedings before an immigration judge will either be "charged" under the grounds of inadmissibility or the grounds of deportability, which are listed in our immigration statute, the INA (see above). If a person is present in the United States without ever having been admitted and is applying for an immigration benefit, or if a person is applying for an immigration benefit from abroad, they will be subject to the grounds of inadmissibility. Public charge is one of numerous grounds of inadmissibility in the INA; it is this ground of inadmissibility that has been subject to various agency interpretations and regulatory changes since 2018. There is also a public charge ground of deportability, but to date, it is rarely charged.

## NEW PUBLIC CHARGE RULES AND LEGAL CHALLENGES:

In 2019, DHS and DOS published new rules related to public charge. However, due to lawsuits challenging the changes, neither rule took effect until February 24, 2020. Both agencies implemented their new public charge rules nationwide on that date, after rulings by the U.S. Supreme Court.

Legal challenges to the new public charge rules remain ongoing, and subsequent court decisions have stopped and started their implementation since February 2020. If lawsuits challenging the new rules prevail, the government may be forced to use temporarily or permanently the old, pre-2020 definition of public charge. However, if the government prevails, it will be able to implement the new rules, which expand the definition of public charge. Which definition is used could vary in different locations or apply only to cases filed before certain dates. As of this writing, the new rules appear to be in place and implemented nationally for cases processed in the United States (i.e., the DHS rule), and on hold for cases processed at U.S. embassies and consulates abroad (i.e., the DOS rule). However, this could change based on decisions in lawsuits challenging the new rules. This is a confusing and fluid situation, and it requires education and outreach providers to stay updated on this frequently changing topic. Visit the ILRC's website at [www.ilrc.org/public-charge](http://www.ilrc.org/public-charge) for updates.

## HERE ARE A FEW IMPORTANT POINTS REGARDING PUBLIC CHARGE:

- The pre-2020 definition of public charge and the new DHS and DOS public charge rules interpret a section of U.S. immigration law, which only Congress can change, pertaining to inadmissibility (a list of disqualifications for some immigration benefits). The public charge inadmissibility ground at INA § 212(a)(4) only applies to individuals seeking admission to the United States or applying for permanent residence, if they are likely to become public charges in the future. This provision of the law does not apply to all immigrants.
- Public charge mainly impacts those seeking permanent resident status through U.S. citizen or permanent resident family members. Immigrants should consult with a trusted immigration attorney or DOJ-accredited representative who understands public charge to learn whether the public charge rule even applies to them or their family. Many categories of immigrants are exempt from public charge. For example, public charge does not apply in the naturalization process, through which lawful permanent residents apply to become U.S. citizens.
- If a person is applying for an immigration benefit that requires them to show they are not likely to become a public charge, the government will look at the “totality of the circumstances” in their case. This means that immigration officers must consider various factors, including the applicant’s age, health, household size, financial resources, education, employment skills, and, where it is required, a contract signed by the immigrant’s sponsor indicating that the sponsor will financially support the immigrant (called an “affidavit of support”). No single factor can determine the outcome of the person’s public charge test (other than lack of an affidavit of support where it is required), including prior use of public benefits that count under the public charge policy/rule that applies to their case.
- The public charge assessment is forward-looking, meaning that it is trying to predict the applicant’s *future* likelihood of becoming a public charge based on all of the factors in their case at the time they apply for admission or adjustment of status.
- Use of public benefits by an applicant’s family members does not directly count towards the *applicant’s* public charge assessment if they have one.

## WHAT WAS THE PRE-2020 DEFINITION OF PUBLIC CHARGE?

- Immigration officers decide public charge by evaluating whether an applicant for admission to the United States or an adjustment of status applicant applying for a green card from within the United States is likely to become primarily dependent on the government for support. Primary dependence refers to reliance on public cash assistance for income maintenance or long-term institutionalized care paid for by the government (e.g., in a nursing home or mental health institution).
- To decide whether an individual is a public charge, immigration officers rely on multiple factors specified in the INA, including the applicant’s age, health, household size, financial resources, education, and employment skills. They must also rely on the “affidavit of support” where it is required. The affidavit of support offers strong evidence that the immigrant will not become primarily dependent on the government.
- Immigration officers also consider whether an immigrant applying for a green card or admission to the United States has used cash aid (such as Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), or General Assistance (GA), also known as “welfare”) or long-term institutionalized

care at government expense. Immigrants who have accessed these public benefits will have to show that it is not likely they will need these resources for support in the future.

- Use of publicly-funded health care, nutrition, and housing programs are not considered negative factors for purposes of public charge.
- This is the definition of public charge that is used if the lawsuits challenging the new definition are successful.

## WHAT'S IN THE NEW (2020) PUBLIC CHARGE RULES?

- Immigration officers decide public charge by assessing whether an applicant for admission into the United States (whose application for a visa or permanent residence will be decided at a U.S. consulate or embassy abroad, meaning the DOS rule applies) or an adjustment of status applicant (whose case will be decided at a USCIS office within the United States, meaning the DHS rule applies) is likely to use certain public benefits for more than 12 months in the aggregate over any 36-month period of time. Each benefit used counts toward the 12-month calculation. For instance, if an applicant receives two different benefits in one month, that counts as two months' use of benefits.
- The rules expand the list of publicly-funded programs that immigration officers may consider when deciding whether someone is likely to become a public charge to include federally-funded Medicaid (with some exceptions; see below), the Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps), and Section 8 and federal public housing.
- The rules also consider that *any* use of cash aid for income maintenance, including federal SSI, TANF, or federal, state, or local cash assistance programs, could make an individual inadmissible under the public charge ground of inadmissibility.
- Federally-funded Medicaid received by applicants for emergency medical services, school-based benefits to children, and Medicaid used by immigrant children and youth under 21 years of age is not considered. Medicaid used by immigrants during pregnancy and up to 60 days after a pregnancy is also not considered under the new rules.
- In addition to changing the definition of a "public charge" and expanding the benefits that count in a public charge test, the new rules add detailed criteria for officers to consider when looking at the totality of circumstances factors in an applicant's case. For example, the rules allow immigration officers to consider English proficiency (positive) and medical conditions that require extensive treatment or that interfere with work/study (negative). The rules also require some immigrants to include new Form I-944, Declaration of Self-Sufficiency (for adjustment of status applicants for whom the DHS public charge rule applies) or new Form DS-5540, Public Charge Questionnaire (for admission applicants for whom the DOS public charge rule applies).
- The new rules also add various "heavily weighted negative factors" and "heavily weighted positive factors" to the public charge totality of the circumstances test. For example, it is a heavily weighted negative factor to have received more than 12 months of public benefits that count in the aggregate over the 36-month period of time before submitting the application for admission or adjustment. Heavily weighted positive factors include, for instance, having a household income of at least 250% of the federal poverty level and having private health insurance. It is not clear how an immigration officer should decide a case when reviewing miscellaneous positive factors, negative factors, heavily weighted positive factors, and heavily weighted negative factors.



- Under the new DHS public charge rule (but *not* under the new DOS public charge rule), public charge bonds are possible where an immigration officer finds inadmissibility based on public charge. Bonds are highly discretionary, and the new DHS rule says that heavily weighted negative factors in a case will generally make an applicant ineligible for a bond. The minimum bond amount is \$8,100.

The new DHS and DOS public charge rules are subject to ongoing litigation and fluctuating policy guidance on implementation. Please make sure to check for updates on our website, at [www.ilrc.org/public-charge](http://www.ilrc.org/public-charge). To learn more about the public charge ground of inadmissibility, please see our [overview](#).