# AN OVERVIEW OF PUBLIC CHARGE AND BENEFITS

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## I. Introduction

"Public charge" is a ground of inadmissibility that could bar an individual's admission to the United States on a visa or adjustment of status to that of a lawful permanent resident (ability to get a green card).[1] Under Immigration and Nationality Act (INA) § 212(a)(4), an individual seeking admission to the United States or seeking to adjust status is inadmissible (and therefore unable to enter the United States or receive a visa or green card) if the individual, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge." Our immigration statute does not define the term public charge.

Under prior policies, the public charge ground of inadmissibility was triggered if the government determined the individual was likely to become 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.* Under longstanding policies, the use of healthcare, nutrition programs and other benefits were not considered.

On August 14, 2019, the Department of Homeland Security (DHS) published a new, final rule related to public charge in the Federal Register. The new DHS public charge rule creates a new definition of what a "public charge" means; defines a "public benefits" to include more programs than cash assistance programs and long-term care; and directs officers to consider several factors to make a decision about whether someone is likely to become a public charge. While this new rule was slated to go into effect on October 15, 2019, court injunctions delayed implementation. On February 24, 2020 the new DHS rule took effect. In addition, the Department of State (DOS) implemented their own new rule on the same date. Both rules require use of new forms, detailing factors relevant to making a public charge determination.

Noncitizens that intend to file for permanent residency should seek legal consultation to determine whether they are impacted by public charge; whether they can file now, under current policies; and if not, whether it is necessary to discontinue any public benefits before February 24, 2020.

[1] There is also a ground of deportability related to public charge. The ground of deportability impacts permanent residents and others that have been admitted to the United States, although it is very narrow and rarely applies. The deportation ground related to public charge is very different from the law discussed here and was not addressed in the proposed regulation.

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Use of newly-considered benefits is likely not the main obstacle for greencard applicants based on these new rules. Adding consideration of these benefits to the public charge analysis has limited legal impact—most immigrants who are on the path to a greencard don't have access to these benefits, or they are in an immigrant category that is exempt from public charge. Instead, the consideration of many factors that impact low-income families and new arrivals to the United States are likely to pose obstacles for those that are eligible to pursue their greencard.

For most families using benefits, there is no need to disenroll in needed services.

This advisory provides a brief overview on the public charge law generally, who is impacted and what benefits are considered. Adjustment of status applications filed before February 24, 2020 will be adjudicated under policies in effect before the new DHS rule. Consular interviews taking place after February 24, 2020 are subject to the new DOS rule. The new rules will not penalize applicants for having used Medicaid, Section 8 public housing and SNAP before February 24, 2020 when the rule went into effect.

## II. Public Charge Under the New Rule

Under the new rule, public charge refers to someone who uses more than 12 months in aggregate of public benefits over a three-year period of time. With this new definition, an officer making a decision in a case is tasked with deciding whether it is more likely than not that, in the future, the person will face a three-year period of time in which they will need more than 12 months of public benefits. The officer considers each public benefit, such that if a person uses two benefit programs in one month, under this test, that would count as two months use of public benefits.

Public benefits under the new rule are now defined to include:

- Cash assistance for income maintenance
- Supplemental Security Income (SSI)
- Temporary Assistance for Needy Families (TANF) (called CalWORKs in California)
- State and local cash assistance programs (often called "General Assistance" programs)
- Institutionalization for long-term care at government expense in a nursing home or mental health institution, and covered by Medicaid
- Federally-funded Medicaid (excluding Medicaid used for pregnancy, up to 60 days after birth and Medicaid used by those under 21)
- Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps)
- Section 8 housing assistance and federally subsidized housing

Receiving any of these public benefits does not automatically make an individual a public charge. Multiple factors must be considered when making a determination that a person is likely to become a public charge. An officer will consider a totality of circumstances in a person's case, such as household income, employment, whether they are of working age and working, assets, family size, education level, English-speaking ability, the affidavit of support, health and health insurance, among others.

## A. Who is subject to a public charge test?

Individuals applying for admission to the United States or adjustment of status (a green card) are subject to public charge unless they fall under certain statutorily exempted categories (see below). Additionally, many paths to immigration status do not have a public charge test. For instance, cancellation of removal in immigration court, asylum, and other forms of immigration relief do not have a public charge test. Generally, public charge mostly impacts those seeking their greencard through a family-based immigrant petition.

## B. Who is subject to a public charge test?

There are certain groups of people who are either exempt from public charge or may get a waiver for public charge when applying for admission to the United States, a green card, or other benefits with USCIS. Additionally, many paths to immigrant status have no public charge test.

Immigrants exempt from public charge include:

- Refugees and asylum applicants[2]
- Refugees and asylees applying for adjustment to permanent resident status[3]
- Amerasian Immigrants (for their initial admission)[4]
- Individuals granted relief under the Cuban Adjustment Act (CAA)
- Individuals granted relief under the Nicaraguan and Central American Relief Act (NACARA)
- Individuals granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)
- Individuals applying for a T Visa[5]
- Individuals applying for a U Visa[6]
- Individuals who possess a T visa and are applying for adjustment to permanent resident status[7]
- Individuals who possess a U visa and are applying for adjustment to permanent resident status[8]
- Special immigrant juveniles[9]
- VAWA self-petitioners[10]

Additional Immigration relief or applications that have no public charge test:

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[2] INA § 207(c)(3).
[3] INA § 209(c).
[4] 8 USC § 1101 note 5.
[5] INA § 212(d)(13)(A).
[6] INA § 212(a)(4)(E)(ii).
[7] INA § 212(d)(13)(A); Currently, A T-visa adjustment requires a waiver for public charge issues. For advocacy and arguments on whether the waiver should be required, see resources provided by CAST, https://www.castla.org. Under the new rule, T visa recipients will not face a public charge test at time of adjustment.
[8] INA § 245(m).
[9] INA § 245(h)(2)(A).
[10] INA § 212(a)(4)(E)(i).

- Applying for Temporary Protected Status (TPS)[11]
- Applying to renew DACA status
- Applying for cancellation of removal in immigration court
- Applying for naturalization

**Example**: Jenin is an approved VAWA self-petitioner. She is eligible for a number of public benefits as a VAWA self-petitioner but is worried that her receipt of public benefits could impact her ability to get a green card later. However, if she adjusts status as a VAWA self-petitioner she is exempt from the public charge ground of inadmissibility. Additionally, her use of benefits as a VAWA recipient cannot count against her in a public charge determination, if she adjusts in a different way.

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

## C. How does the government decide if someone is likely to be a public charge?

The statute requires the adjudicator to balance several factors, which must be evaluated looking at the person's totality of circumstances. In addition, the affidavit of support is a requirement for certain adjustments. USCIS has relied heavily on the affidavit of support under prior policies. Since January 3, 2018, the consulates have given more weight to the totality of circumstances. Both considerations are discussed below. Under the new rules, the affidavit of support must still be submitted as required, but officers are instructed to weigh all factors regardless of whether the affidavit of support is sufficient.

### 1. Totality of Circumstances Test

The traditional, "totality of circumstances" test considers several factors. Adjudicators shall "at a minimum" consider the person's age, health, family status, assets, resources, financial status, education and skills, and can also consider an affidavit of support.[12]

Receiving public benefits does not automatically make an individual a public charge; the officer must consider all circumstances. It is important to note that, in making this determination, the adjudicator is not supposed to rely on a single factor, such past receipt of public benefits. Rather, the adjudicator needs to consider all of the factors in conjunction and must weigh both the positive and negative factors to determine whether the applicant is likely to become a public charge.[13] This test is forward-looking—the officer is supposed to consider all factors as it relates to *future* likelihood that the person will become dependent on the government.

The new rule emphasizes consideration of negative factors in a person's life circumstances when evaluating whether they are likely to become a public charge in the future. The new rule encourages officers to consider age and ability to work, health conditions, income, ability to speak English, and whether or not the person has

[11] 8 CFR § 244.3(a).

[12]. See "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689 (May 26, 1999).

private health insurance. The new rule includes heavily weighted negative factors and heavily weighted positive factors; nonetheless, there can be no "bright line rule" that one factor on its own is sufficient to find someone is likely to become a public charge. Applicants are required to submit Form I-944, Declaration of Self Sufficiency, which will assist officers in adjudications under the new rule.

### 2. Affidavit of Support

The second test is an affidavit of support. This requirement applies *only* to persons immigrating through a family visa petition and in some cases, employment-based petitions. Under this test, most people immigrating through a family visa petition *must* have an affidavit of support submitted on their behalf on Form I-864, or they will be found inadmissible as a public charge.[13] An immigrant must show that they have a sponsor with sufficient income or assets to support the immigrant (for income, 125% of the Federal Poverty Income Guidelines), and it is legally enforceable contract to provide financial support to the applicant. An applicant may meet this requirement with more than one sponsor by submitting affidavits of support from joint sponsors or by showing other income in the household.

Under the new rule, the affidavit of support is still required, but it will be given less weight than was previously given in adjustment of status cases. Those with problematic factors in the totality of circumstances of their case may consider using a joint sponsor. There are some exemptions, and those who fall into these exemptions should indicate that on the Form I-485, Application to Register Permanent Residence or Adjust Status. Under the new rule, Form I-864W will no longer be used to waive the affidavit of support requirement.

## D. What public benefits does the government consider when making a public charge determination?

Not all publicly-funded benefits are relevant to deciding whether someone is likely to become a public charge. Under the new rule, only programs specifically listed as considered in the public charge determination may count against an applicant. Federally-funded Medicaid, SNAP and Section 8 housing, cash aid from any government source, and long-term institutionalized care at government expense will all be considered. However, any other program or service will not be counted.

Therefore, receipt of many benefits and programs do not harm a person applying for their greencard. Use of benefits by family members is not to be considered—the test focuses on whether the applicant will be likely to use public benefits in the future. Any programs not specifically listed in the new rule, including state-funded and locally-funded programs, do count against an applicant in the public charge test. All school programs, emergency Medicaid, Medicaid for children under 21 and for pregnant women, as well as state-funded programs remain exempt from public charge consideration.

Many programs offered in a community would not trigger a public charge concern, including:

- State-Funded health programs, like California's Medi-Cal for those not covered under federal Medicaid
- Emergency medical services
- Special Supplemental Nutrition Program for Women, Infants and Children (WIC)

[13] See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 286289 (May 26, 1999).

- National School Lunch and School Breakfast Program, and other supplementary and emergency food assistance programs
- Childcare services
- Energy assistance, such as the Low-Income Home Energy Assistance Program (LIHEAP)
- Emergency disaster relief
- Foster care and adoption assistance
- Educational assistance (such as attending public school), including benefits under the Head Start Act and aid for elementary, secondary, or higher education
- Job training programs
- In-kind, community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter)
- Prison, jail, incarceration costs
- Privately-funded treatment programs

State and local programs that are similar to the federal programs listed above are also generally not considered for public charge purposes. Finally, any programs that are entirely funded by private entities are not considered for public charge.

## E. Whose receipt of public benefits are considered?

Only benefits received by the individual applying for admission to the United States or to adjust status are considered. Public benefits received by family members are not counted against the person applying for admission or adjustment for public charge purposes. Nonetheless, the use of benefits by family members might indicate other negative factors, such as low income. In addition, USCIS guidance indicates that they might look at the use of benefits by the sponsor's family. According to USCIS Policy Manual, officers are instructed to consider whether joint sponsors and co-sponsors are really poised to support the applicant. This includes a deeper look at various factors considered, such as family, and the relationship and ability of sponsors to pay.

## F. Could being a public charge make someone deportable?

Permanent residents and others that have been admitted to the United States on a visa are subject to grounds of "deportability." Noncitizens are deportable if they become a public charge anytime within five years after their last entry, unless they can prove that they became a public charge because of something that happened after entry. The public charge deportability ground applies in an even more narrow set of circumstances than the public charge inadmissibility ground. To date the public charge deportability ground has rarely been enforced.

> **Example:** John is a permanent resident whose last entry into the United States was in 2009. In 2011, he was in an accident at work and became disabled. He collects Social Security Income (SSI) and other benefits, and he will never be able to work again. Is John deportable?
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> No. John is not deportable, even though he became a public charge within five years of his last entry, because he can show that the cause of his becoming a public charge (his accident) is something that happened after his last entry.

In practice, very few people have been put into removal proceedings or removed based on this deportability ground. Cases have held that a person does not become deportable under the public charge ground for simply having received a public benefit. Rather, case law establishes three requirements that must be present for a person to be removed as a public charge: 1) the benefit program must provide that the state or other public entity can sue the recipient or other specified persons for repayment, 2) the public entity must demand repayment, and 3) the immigrant must refuse to pay for the cost demanded by the public entity.

The new rule implemented on February 24, 2020 does not alter the public charge ground of deportability. Thus, permanent residents are not likely to have a public charge issue. There is no public charge test to naturalize, and the inadmissibility ground discussed in this advisory can only impact a lawful permanent resident that travels outside the United States for more than 180 days.[14]

For more information on this topic, see the ILRC's practice advisory entitled, "Public Charge as a Ground of Deportability" at https://www.ilrc.org/public-charge-ground-deportability.

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[14] USCIS PM Vol. 8, Part G, Chapt. 13.D.3