SEPTEMBER 2021

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 2021, 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 since it can be done by the agency itself and requires little advance notice, if any.

The Trump administration changed public charge through new federal regulations by DHS and DOS, with corresponding updated policy guidance. The law on public charge did not change during the Trump administration. After President Biden took office, the Biden administration stopped defending the Trump DHS public charge rule in court, which ultimately brought an end to the DHS rule (see below). **DHS/USCIS is currently following public charge policy issued by the former Immigration and Naturalization Service (INS) in 1999 ("1999 Guidance").** This is the guidance the agency was following before the Trump changes to public charge. The Trump DOS public charge rule has been blocked worldwide by a federal court since July 29, 2020. **DOS is following public charge policy that aligns with the 1999 Guidance**.

NOTE: DHS policymaking on the horizon. On August 23, 2021, DHS published an Advance Notice of Proposed Rulemaking on public charge, indicating the agency's intention to revise public charge policy in the future. To stay apprised of public charge policy developments, visit the ILRC's public charge page at **www.ilrc.org/public-charge**.

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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 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.

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.

HERE ARE A FEW IMPORTANT POINTS REGARDING PUBLIC CHARGE:

- Both the current definition of public charge and the 2019 Trump 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.

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- 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 current or 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 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 IS THE CURRENT DEFINITION OF PUBLIC CHARGE, I.E., THE 1999 GUIDANCE?

- 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 ongoing 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 healthcare, nutrition, and housing programs are not considered negative factors for purposes of public charge.
- This is the definition of public charge that was in place for INS adjudicators, and then DHS/USCIS adjudicators after the restructuring of immigration agencies in 2003, from 1999 until February 24, 2020,

that DHS/USCIS has been applying again since March 9, 2021. DOS consular officers follow the Foreign Affairs Manual section on public charge, which currently aligns with the 1999 Guidance on public charge that DHS/USCIS officers are following.

WHAT IS THE CURRENT DEFINITION OF PUBLIC CHARGE, I.E., THE 1999 GUIDANCE?

- In 2019, under the Trump administration, 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.
- The legal challenges in opposition to the Trump rules continued in 2020, and court decisions stopped and started their implementation for cases processed in the United States (i.e., the DHS rule), and cases processed at U.S. embassies and consulates abroad (i.e., the DOS rule).
- Currently:
    - **DOS is blocked from implementing its 2019 public charge rule at embassies and consulates.**
    - **DHS stopped applying its 2019 public charge rule to case processing in the United States on March 9, 2021.** On March 15, 2021, USCIS published a final rule removing its 2019 public charge regulations from the Federal Register. See the USCIS website on public charge and the ILRC's Public Charge Timeline, for more information on the events leading up to this shift.
- The content of the 2019 DHS and DOS public charge rules was substantially similar.
    - Immigration officers decided public charge by assessing whether an applicant for admission to the United States (whose application for a visa or permanent residence would be decided at a U.S. consulate or embassy abroad, meaning the DOS rule applied) or an adjustment of status applicant (whose case would be decided at a USCIS office within the United States, meaning the DHS rule applied) was likely to use certain public benefits for more than 12 months in the aggregate over any 36-month period of time.
    - The rules expanded the list of publicly-funded programs that immigration officers could consider when deciding whether someone was likely to become a public charge to include federally-funded Medicaid (with some exceptions), the Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps), and Section 8 and federal public housing.
    - The rules also considered 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.
    - In addition, the 2019 rules added detailed criteria for officers to consider when looking at the totality of circumstances factors in an applicant's case, including various "heavily weighted negative factors" and "heavily weighted positive factors." The rules also required some immigrants to include a new Form I-944, Declaration of Self-Sufficiency (for adjustment of status applicants) or new Form DS-5540, Public Charge Questionnaire (for admission applicants).
- At time of writing, the Texas Attorney General and the Attorneys General of several other states are trying to "intervene" in the lawsuit that culminated in the end of the 2019 DHS Trump public charge rule. They are asking federal courts to permit them to argue that the process through which the Trump public

charge rule was revoked was flawed, to reinstate the rule. Likewise, the litigation blocking the 2019 DOS public charge rule is ongoing. Therefore, it is possible, though unlikely, that the 2019 DHS and/or DOS public charge rules could return. Please visit the ILRC's public charge page often to monitor the state of play.

Public charge policy is 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**.