



PUBLIC CHARGE AS A GROUND OF DEPORTABILITY

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I. Introduction to the Public Charge Deportability Ground

Under the Immigration and Nationality Act (INA), any noncitizen who “within five years from the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.”¹ In current practice, this ground of deportability rarely comes up in pending removal proceedings or as a reason for the initiation of removal proceedings.

In May 2019, [Reuters reported](#) that the Trump administration is considering publishing a U.S. Department of Justice draft regulation interpreting this provision to make it easier to deport legal permanent residents who have used public benefits.² Any potential change to the public charge ground of deportability will likely take a long time to take effect because it would have to go through a public comment period and potential litigation. In the meantime, this practice advisory provides an overview of current law.

PRACTICE TIP: The 2018 proposed public charge regulation does not address the public charge deportability ground. On October 10, 2018 the U.S. Department of Homeland Security (DHS) published a proposed rule related to public charge in the Federal Register.³ The proposed rule interprets the public charge inadmissibility ground under INA § 212(a)(4). It does address not the public charge deportability ground under INA § 237(a)(5). Existing regulations and Board of Immigration Appeals (BIA) precedent decisions continue to govern the standards regarding public charge deportability determinations.

II. When Does a Ground of Deportability Apply?

Our current immigration law divides noncitizens into two groups: those who are seeking admission, and those who have already been admitted. Generally speaking, the terms “admission” and “admitted” are defined in INA § 101(a)(13). Section 101(a)(13)(A) defines admission as “the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer.”

¹ INA § 237(a)(5).

² Grounds of deportability apply to those that have already been admitted. Refugees, Lawful permanent residents and those that have been admitted with a visa are subject to the grounds of deportability. See next section.

³ The proposed rule can be found at <https://www.federalregister.gov/documents/2018/10/10/2018-21106/inadmissibility-on-public-charge-grounds> (last visited Feb. 2019). The proposed rule received more than 250,000 public comments

Noncitizens who entered the United States with inspection, pursuant to a visa of some kind, have been admitted.⁴ If DHS places such a person in removal proceedings, DHS has the burden of proving that the individual comes within a ground of deportability.⁵

On the other hand, noncitizens considered not to have been admitted to the United States are seeking admission. If these individuals are placed in removal proceedings, they have the burden of proving that they do not come within one of the grounds of inadmissibility.⁶ One of the grounds of inadmissibility is being present in the United States without permission.

The grounds of inadmissibility are found at INA § 212(a), and the grounds of deportability are found at INA § 237(a). They are similar, but not identical. For instance, the ground of deportability for being a public charge is very different from the ground of inadmissibility. If the government believes that someone who has already been admitted, like a permanent resident, is deportable, they issue a notice to appear and place the person in removal proceedings. The person charged with being deportable can argue the government is wrong and also apply for relief from deportation if they qualify.

The following people are subject to the grounds of deportability:

- Lawful permanent residents, including conditional residents, except those who fall within INA § 101(a)(13)(C).
- Refugees;
- Nonimmigrant visa holders within the United States following a lawful admission;
- People admitted as visa waiver entrants; and
- Visa holder and visa waiver overstays in the United States.

III. Definition of Public Charge

USCIS has defined “public charge” for both inadmissibility and deportability purposes as an individual who is like to become (for inadmissibility purposes) or has become (for deportability purposes) “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.”⁷

The types of benefits that have triggered a finding of inadmissibility due to public charge are: Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), state and local cash assistance programs (often called “General Assistance” programs), and institutionalization for long-term care using Medicaid in a nursing home or mental health institution. While receipt of these services and benefits programs may meet the definition of public charge, which in turn can affect inadmissibility, as we discuss below, they would not trigger deportability under INA § 237(a)(5), since none of these benefits require a repayment by the beneficiary.

Under USCIS policy, a request for a fee waiver “does not necessarily subject [an] applicant or petitioner to public charge liability under other provisions of the INA, such as deportability under INA § 237(a)(5).”⁸

⁴ INA § 101(a)(13)(A).

⁵ See INA § 240(c)(3).

⁶ See INA § 240(c)(2).

⁷ “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999) attached as Appendix A.

⁸ Pearson Memorandum to Service Center Regional Directors, “Interim Field Guidance on granting fee waivers pursuant to 8 CFR 103.7(c)” (Oct. 9, 1998).

The deportability ground of public charge is quite different from the more familiar inadmissibility ground of public charge. Although both focus on similar benefits such as the receipt of cash assistance in determining public charge, in most other ways the determinations for public charge inadmissibility and deportability are very different from each other.

IV. Requirements to Prove Public Charge Deportability

A. The Statute

The statute at INA § 237(a)(5) requires a two-step determination for USCIS to charge someone as deportable as a public charge. For a non-citizen to be deportable, USCIS must determine that

1. the person has become a public charge within five years of date of entry, and
2. the circumstances causing the person to become a public charge arose before their entry into the United States.⁹

In the context of deportability, it is the government's burden to prove by clear and convincing evidence that the deportability ground applies through reasonable, substantial, and probative evidence.¹⁰ A non-citizen who can disprove either of those issues is not removable.

In determining whether a person has become a public charge, DHS must prove that the person within five years of their date of entry has 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.”¹¹

It is unclear which entry would be relevant for lawful permanent residents who travel. This is because our immigration laws have changed since this law was written. Now, lawful permanent residents are only considered to be making a new “admission” in certain circumstances.¹² Here, we do not know if current courts will consider the use of the word “entry” as referring to the date of admission or the date of any physical entry into the United States. In determining the time period of five years since date of entry, advocates should conservatively consider the five years since *last* entry. While other grounds of deportability are dependent on the date of “admission,” INA § 237(a)(5) specifically uses the term “entry.” Albeit in a case that pre-dated our new framework for admission and entry, this has been interpreted by the BIA as meaning the date of last entry, even in the context of lawful permanent residents (LPRs).¹³

Example: Beatriz had been an LPR for over ten years before she decided to take a trip to Canada. In 2017 she traveled to Toronto for two weeks. She returned to the United States in August 2017. In March 2018 she developed a mental illness that required her to be institutionalized. For purposes of determining whether she is deportable as a public charge, the government will consider whether she has become primarily dependent on the government for subsistence since her *entry* in August 2017. Since her institutionalization is being covered by Medicaid, she will need to show her mental illness requiring institutionalization arose *after* her entry in August 2017 in order to show she is not subject to the deportability ground of public charge.

⁹ INA § 237(a)(5).

¹⁰ INA § 240(c)(3)(A).

¹¹ “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999).

¹² With the passage of IIRIRA in 1997, lawful permanent residents are considered to be making a new “admission” in certain circumstances, see INA § 101(a)(13)(C).

¹³ *Matter of B*, 3 I&N Dec. 323, 326 (AG 1948).

The courts have been reluctant to find that a person in status has become a public charge for a condition that arose before entry. Locating the medical issue to after entry is a way to defend against this ground:

Example: Bopha came to the United States as a refugee after escaping the civil war in Cambodia that killed most of her family. Two years after receiving her green card, Bopha had to be institutionalized due to a mental breakdown from the trauma she suffered during the war. Because Bopha's mental breakdown occurred after her entry into the United States, she is not deportable as a public charge even though some of her issues began before her entry.¹⁴

B. Agency's Interpretation of the Public Charge Ground

The mere receipt of public benefits – even cash assistance received within five years of the non-citizen's date of entry – does not make a non-citizen removable as a public charge. To find that someone has become a public charge, the Board of Immigration Appeals (BIA) has outlined a strict three-part test that must be met to find someone has become a public charge.¹⁵ All three of the following conditions must apply for the public charge deportability ground to apply.

1. Legally Imposed Charge or Fee

First, the state or other government entity must by law impose a charge or fee for the services rendered to the non-citizen. This means that the non-citizen or their designated family members or friends must be legally obligated to repay the state or government entity for the benefits or services they received. If there is no reimbursement requirement under the law, the non-citizen cannot be determined to be a public charge.

2. Demand for Payment

Second, the responsible government agency granting the benefit must have made a demand for payment from the non-citizen, their sponsor or other person legally responsible for the debt under federal or state law. The demand for payment must be made within five years of the non-citizen's last entry into the United States,¹⁶ and the benefit-granting agency must file an action in the appropriate court and take all legally available steps to enforce a final judgment against the sponsor or other financially obligated party.¹⁷

3. Failure to Pay

Third, the non-citizen, their sponsor or other person legally responsible for the debt must fail to repay the charge or fee after a demand has been made.

These very specific requirements in the deportability context help explain why DHS rarely raises public charge as an issue in the deportability context. It is important to keep these limitations in mind since they significantly narrow the circumstances in which the ground would be applied.

¹⁴ See *Matter of S-*, 5 I&N Dec. 682 (BIA 1954) (a person who had to be institutionalized two years after her entry as a permanent resident was not deportable because her mental breakdown occurred after her entry due to her and her family's flight from Nazi Germany); INS Office of Administrative Appeals Decision, Identity of Respondent Redacted, 1998 WL 2000793 (INS) (although permanent resident was on kidney dialysis before entry into the United States, subsequent diagnosis of chronic kidney failure was a circumstance that arose after his entry, therefore making public charge inapplicable as a ground of deportability).

¹⁵ *Matter of B*, 3 I&N Dec. 323, 326 (AG 1948).

¹⁶ *Matter of L*, 6 I&N 349 (BIA 1954).

¹⁷ "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 FR 28689, 28691 (May 26, 1999).

Example: John became a permanent resident in 2000, but his last entry into the United States was in 2016. In 2018, he was diagnosed with a serious illness that has caused him to leave his job. He now relies on social security disability income (SSDI). Is John deportable? No, John is not deportable. First, even though John started relying on SSDI within five years of his entry, he is not deportable because he can show that the cause of him becoming a public charge (his illness) is something that happened after his last entry. Second, SSDI does not require the beneficiary to repay the money.¹⁸ In fact, SSDI is paid out with payroll taxes and is only given to those who have earned SSDI benefits through work.

Example: Lucia entered the United States without inspection in 2000. She has an old petition that was filed on her behalf by her brother, which now qualifies her to adjust status under § 245(i), based on her recent marriage to a U.S. citizen. As she is preparing to file her adjustment application, Lucia and her husband lose their jobs and both she and her husband begin receiving SSI benefits as their primary income in 2015. The SSI payments, along with their low income and other factors may trigger the public charge ground of *inadmissibility* and affect Lucia's ability to adjust status.

Conversely, once Lucia is admitted, if she and her husband were to lose their jobs *after* Lucia becomes a permanent resident, she would not be subject to the public charge ground of *deportability* since she did not become a public charge within five years of her entry in 2000.

V. Practical Application of Public Charge and Deportability

As a practical matter the public charge ground of deportability is rarely, if ever, charged by DHS.

First, to trigger public charge, a person must have received certain benefits within five years of an entry. Many non-citizens are barred from receiving federal means-tested public benefits in their first five years after admission or adjustment and therefore cannot trigger public charge during the critical period for purposes of determining public charge deportability.

For those who receive benefits after a subsequent (and therefore more recent) entry into the United States, they are likely to be receiving benefits due to circumstances arising after entry.

Second, currently, we were unable to locate any federal or state public benefits that require the beneficiary to pay a fee or repay the government for benefits received. For example, neither SSI nor TANF require any type of payment to the federal government. In California, for example, no state program that provides cash assistance or institutionalization for long-term care imposes a charge for those services, i.e., CalWORKS, Medi-Cal.¹⁹ Therefore the first part of the three-part test wherein a government entity must impose a charge or fee for benefits received can rarely be met.

Third, even if a demand for repayment can be made, the non-citizen can also repay the amount and avoid a public charge deportability determination.

At the same time, a change in case law, regulations or relevant legislation could increase the use of the public charge ground of deportability as a charge of deportability to those lawfully in the United States. Therefore, it is a good idea to be aware of this ground of deportability and how it currently functions in light of a potential new proposed regulation and the possibility this administration might attempt to reshape the BIA's prior interpretation of this ground.

¹⁸ While the Social Security Administration requires reimbursement for overpayment, it does not require compensation or charge a fee.

¹⁹ Other examples include New York (Temporary Assistance and Medicaid), Oregon (TANF and Medicaid), and Colorado (Colorado Works and Aid to the Needy Disabled).

PRACTICE TIP: For naturalization applicants, the public charge issue can come up in two ways: (1) the deportability issues discussed in this advisory can potentially impact any LPR or other admitted non-citizen; and (2) an inquiry into whether the applicant was in fact inadmissible at the time they became a permanent resident because they were a public charge and in addition purposefully committed fraud or omitted information to avoid a finding of inadmissibility. See INA §§ 212(a)(6)(C), 237(a)(1). So while it is prudent to assess whether a naturalization applicant's history raises red flags in the context of the public charge deportability ground, it is more important (because it is more likely to realistically come up) to ensure that if an applicant has used public benefits before being lawfully admitted, the information was disclosed in their application, and they were actually admissible at that time. The ILRC has an [entire practice advisory on public charge and naturalization](https://www.ilrc.org/public-charge) available online at www.ilrc.org/public-charge.



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