PUBLIC CHARGE AND ADVISING PERMANENT RESIDENTS AT THE TIME OF NATURALIZATION

By Erin Quinn and Melissa Rodgers

I. Introduction[1]

On August 14, 2019, the Department of Homeland Security (DHS) published a new public charge rule, governing public charge inadmissibility determinations by U.S. Citizenship & Immigration Services (USCIS).[2] Several lawsuits that were filed to challenge the 2019 public charge rule delayed its implementation until February 24, 2020.[3] Applications postmarked or submitted electronically to USCIS before February 24, 2020 will be adjudicated under prior public charge guidance.

Public charge and this 2019 rule do not apply in the naturalization process, through which lawful permanent residents apply to become U.S. citizens. The rule interprets a provision of the Immigration and Nationality Act (INA) pertaining to inadmissibility. The inadmissibility ground says a person is inadmissible if they are likely to become a public charge, which is a concept having to do with the likelihood that an immigrant will need publicly funded support. (INA § 212(a)(4)). This law only applies to individuals seeking admission into the United States or applying for adjustment of status. This is not a provision of the law that applies to all immigrants.[4]

Indeed, the eligibility requirements for naturalization do not include a public charge test. The legal use of government benefits and programs does not disqualify a permanent resident from naturalization. However, the publicity around the new rule has confused many immigrants and their representatives about the range of its impact, and this practice advisory provides information that can answer many of those questions.

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[1] The material in this practice advisory is covered in depth in the ILRC's *Public Charge and Immigration Law* manual, available at https://www.ilrc.org/publications/public-charge-and-immigration-law.

[2] The 2019 rule is codified at 8 C.F.R. § 212.22. The text of the 2019 rule can be found at 84 Fed. Reg. 41,292, *available at* https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds (last visited Sep. 2020). Corrections issued October 2, 2019 can be found at https://www.federalregister.gov/documents/2019/10/02/2019-21561/inadmissibility-on-public-charge-grounds-correction (last visited Sep. 2020). Public charge guidance can be found in the USCIS Policy Manual, 8 USCIS-PM G, *available at* https://www.uscis.gov/policy-manual/volume-8-part-g (last visited Sep. 2020). The Department of State (DOS) published a companion rule to align consular decisions with the Department of Homeland Security (DHS) rule. As of the date of publication of this practice advisory, however, the DOS rule is currently enjoined. Decisions related to adjusting status and public charge, as well as LPR admissions at the border are controlled by DHS.

[3] For more information about public charge, including status of the litigation, practice advisories and community resources for talking to immigrants about using important government programs and services, please visit the Immigrant Legal Resource Center's website at https://www.ilrc.org/public-charge. While a district court issued a new set of injunctions July 29, 2020 once again blocking implementation of the new rules, the Second Circuit Court of Appeals stayed the injunction, and the DHS public charge rule is now in effect from February 24¸2020 onwards. The 2019 DOS rule remains enjoined at time of writing. Under the new DHS rule, those extending non-immigrant statuses in the U.S. would also be required to disclose public benefit use.

[4] See Immigrant Legal Resource Center's website at https://www.ilrc.org/public-charge for an overview of the public charge ground of inadmissibility.

This practice advisory provides an update on public charge for advocates providing naturalization legal assistance. While there is no public charge test to naturalize, many LPRs will still have questions about how public charge inadmissibility might impact their case or their family. This advisory briefly discusses the legal standard for assessing public charge and then discusses how to advise lawful permanent residents looking to naturalize.

Practice Tip: USCIS will not consider testing, treatment, or preventive care related to COVID-19 as part of the public charge inadmissibility determination and will consider COVID-related explanations, such as job loss, pertaining to the use of other public benefits.[5]

II. What is the Legal Effect of the 2019 DHS Rule on Public Charge?

The rule was published on August 14, 2019. Thanks to litigation, the effective date was pushed to February 24, 2020 (rather than October 15, 2019). On February 24, 2020, USCIS implemented the 2019 public charge rule.[6]

The rule has no retroactive effect. This means that even though the rule adds new negative factors that count against an immigrant for purposes of public charge (discussed below), the United States Citizenship and Immigration Services (USCIS) will only consider these new factors and newly-added benefits if they were used *after* the new rule went into effect on February 24, 2020.[7] Before that date, inadmissibility determinations for lawful permanent residents (LPRs) returning to the United States after an extended absence were also made under prior public charge guidance.[8]

Practice Tip: Public charge does not apply in the naturalization process and the impact of this rule on LPRs applying for naturalization is negligible.

III. What is Public Charge?

Meaning of Public Charge and Rule Change

From 1999 until February 24, 2020, public charge referred to the likelihood that an immigrant who was applying to enter the U.S. on a visa, or applying to become a Lawful Permanent Resident (LPR), would become "primarily dependent on the

[5] *See* Alert posted to the Public Charge page of the USCIS website, which begins with the following statement: "USCIS encourages all those, including aliens, with symptoms that resemble Coronavirus 2019 (COVID-19) (fever, cough, shortness of breath) to seek necessary medical treatment or preventive services. Such treatment or preventive services will not negatively affect any alien as part of a future Public Charge analysis." https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge (last visited Sep. 2020).

[6] The 1999 guidance specified that the United States Citizenship and Immigration Services (USCIS) may not consider an immigrant's past or current use of a government-funded program as a factor when conducting a public charge determination, except if the immigrant used a *cash-based program* such as Temporary Assistance for Needy Families (TANF) or Supplemental Security Income (SSI), or was in *institutional long-term care at government expense*. *See* Pearson U.S. Dep't of Justice, Immigration and Naturalization Service Memorandum*: Public Charge: INA Sections 212(a)(4) and 237(a)(5)* (May 20, 1999), 64 Fed. Reg. 28,689, *available at* https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf (last visited Sep. 2020). Although USCIS has removed from its website the April 29, 2011, *Public Charge Fact Sheet*, that document can be viewed as reference on the website of Community Clinic Association of Los Angeles County (CCALAC) at https://ccalac.org/wordpress/wp-content/uploads/USCIS_Public-Charge-Fact-Sheet_ENG.pdf (last visited Sep. 2020). For immigrants applying for lawful permanent resident status through consular processing, the DOS issued a new rule to align with the new DHS rule. At this time, an injunction is blocking further implementation of the DOS rule, and consulates must follow policies in line with the 1999 Field Guidance. See ILRC's public charge page, https://www.ilrc.org/public-charge, for updates.

[7] The February 24, 2020 effective date only applies to the newly added government benefits that will be considered negative factors, as well as the use of immigration fee waivers. Benefits that have been considered negative factors since 1999 such as cash aid and long-term institutionalization count as negative factors if they were used before February 24, 2020 and continue to be negative factors after that date.

[8] A district court judge enjoined both DHS and DOS from implementing their new rules once again on July 29, 2020. On August 12, the Second Circuit Court of Appeals limited the injunction blocking the DHS rule to New York, Connecticut, and Vermont. On September 11, 2020, the Second Circuit stayed the injunction altogether, allowing USCIS to implement the rule nationwide. On September 22, 2020, USCIS indicated that it considers the rule effective from February 24, 2020, but some advocates will argue that cases filed during the period of injunction should be adjudicated under the 1999 guidance. LPRs who entered the United States during the period that the injunction was in effect and were seeking admission would be subject to the 1999 guidance. The DOS rule remains enjoined as of the date of this writing.

government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."[9] Under both the 1999 guidance and the 2019 rule, the legal standard for determining whether or not an immigrant is likely to become a public charge is a forward looking totality of the circumstances test, that takes into account the immigrant's age; health; family status; assets, resources, and financial status; and education and skills. However, the 2019 rule, 8 C.F.R. § 212.22, includes the following changes:

- It expands the list of government benefits that count against the immigrant to include not only cash-based benefits but also federal Medicaid (with some exceptions for emergency care, children and pregnant women), the federal SNAP program (formerly known as Food Stamps), and housing subsidies including Section 8. *See* 8 C.F.R. § 212.21(b).
- It also considers an application for or use of a fee waiver for immigration benefits by the applicant to be a negative factor in the totality of the circumstances test. *See* 8 C.F.R. § 212.22(b)(4)(ii)(F). However, as discussed below, the impact of this change is negligible for naturalization applicants, including for naturalization applicants who plan to sponsor a relative when they become U.S. citizens.
- It implements harsh standards for personal circumstances, including negative weight for children, seniors, and individuals who have limited English proficiency, limited education, medical conditions, or large families. Income below 125 percent of the federal poverty guidelines is a negative factor. At the same time, the rule strongly favors immigrants with high incomes and includes a single positive factor, namely, a household income equal to or above 250 percent of the federal poverty guidelines. *See* 8 C.F.R. §§ 212.22(b), 212.22(c).
- When looking at public benefit use, the new rule shifts the legal standard from one that considers a likelihood that the immigrant will become "primarily dependent" on the government as demonstrated by the use of cash assistance or long-term care, to one that defines public charge as a person who is likely to need, in aggregate, more than 12 months of certain defined public benefits in any 36-month period in the future. *See* 8 C.F.R. §§ 212.21(a), 212.21(c). Theoretically, a person who used benefits in the past could still overcome the public charge ground of inadmissibility under a totality of the circumstances analysis. But the legal standard in the 2019 rule makes that much more challenging.
- In a drastic shift to USCIS adjudication practice, although the determination also takes into account an affidavit of support, when required from the immigrant's sponsor, the affidavit of support no longer, on its own, suffices to override other negative factors. Rather, the affidavit of support is just one factor considered in the totality of the circumstances analysis. *See* 8 C.F.R. § 212.22(b)(7).

The public charge test continues to be future looking and continues to use a totality of the circumstances analysis. *See* 8 C.F.R. § 212.22(a). Please see the ILRC's practice advisory, *An Overview of Public Charge*, for a comprehensive overview of public charge.[10]

Public Charge is a Ground of Inadmissibility and Does Not Apply in Naturalization

Public charge is a ground of **inadmissibility** under the Immigration and Nationality Act (INA § 212). The 2019 rule interprets this ground of inadmissibility, found at INA § 212(a)(4). A very limited public charge ground of deportability, found at INA § 237(a)(5), also exists. It is discussed below. The 2019 rule does not pertain to the deportability ground.

Grounds of inadmissibility apply only at the time of admission: When an immigrant applies to enter the U.S. (entry) or applies to become a Lawful Permanent Resident (LPR) (adjustment of status); or when an LPR leaves the U.S. for more than 180 consecutive days and re-enters. Grounds of inadmissibility do not apply at the time of naturalization. However, if a naturalization applicant traveled *for more than 180 consecutive days* and was admitted back into the U.S., but was in fact inadmissible at the time they returned due to *any* ground of inadmissibility including public charge, the fact of entering when inadmissible could make the immigrant subject to removal. This could come up during the naturalization

[9] *See* 1999 INS Field Guidance, referenced at footnote 6 of this practice advisory.
[10] The practice advisory is available at https://www.ilrc.org/overview-public-charge.

process. Note that this has been true under existing law, and the new rule does not change this consideration. This practice advisory addresses best practices in screening naturalization applicants for travel-related issues, below.

This practice advisory focuses on the public charge ground of inadmissibility. The public charge ground of deportability, not at issue in the new rule, impacts permanent residents and others who have already been admitted to the United States. The grounds of deportability are the list of reasons an LPR could be charged in immigration court with being deportable. The deportation ground related to public charge is very different from the law discussed in this practice advisory because it is limited at a minimum by several factors. The limiting factors for public charge deportability include: the immigrant must become a public charge within five years of becoming an LPR, based on a condition that pre-dated their admission; there must be a debt for the public benefit; the institution that provided the benefit or service must demand payment; and the immigrant must refuse to pay. See INA § 237(a)(5). The public charge ground of deportability uses this different legal standard and has, to date, been applied narrowly and infrequently. LPRs subject to a ground of deportability go before an immigration judge who determines whether the permanent resident can remain in the U.S. Advocates who need help with a question related to the public charge ground of deportability may contact the ILRC's Attorney of the Day service or consult an ILRC manual.[11]

Only Some Immigrants are Subject to Public Charge

The public charge ground of inadmissibility applies to immigrants seeking to enter the U.S. or to adjust status to lawful permanent residence: it primarily applies to family-based immigration. The 2019 public charge inadmissibility rule also applies to certain nonimmigrants who are not exempt from public charge.[12] The public charge test does not apply to LPRs applying for citizenship (except if they were previously inadmissible, as discussed below). This is clearly stated in the preamble to the 2019 rule, "This rule addresses how DHS determines inadmissibility of aliens on account of public charge; and it does not apply to individuals seeking to be naturalized … because the public charge ground of inadmissibility does not apply in naturalization proceedings."[13] There is no public charge test for many groups of non-citizens, including refugees, asylees, survivors of trafficking or domestic violence, and others.[14]

IV. There Is No Public Charge Test for Naturalization

The Eligibility Criteria for Naturalization Do Not Include Public Charge

General requirements for naturalization include:[15]

- Being at least 18 years old at the time of filing Form N-400, Application for Naturalization.
- Being a permanent resident (having a "Green Card") for at least 5 years, or 3 years if the applicant meets the criteria for marriage to a U.S. citizen.
- Living for at least 3 months in the state or USCIS district where the LPR applies.
- Demonstrating continuous residence in the United States for at least 5 years immediately preceding the date of filing Form N-400, or 3 if the applicant meets the criteria for marriage to a U.S. citizen.
- Showing physical presence in the United States for at least 30 months out of the 5 years (or 18 months out of the 3 years) immediately preceding the date of filing Form N-400.

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[11] Please see https://www.ilrc.org/technical-assistance for more information about the ILRC's Attorney of the Day service. Please also see the ILRC's practice advisory on public charge as a group of deportability, available at https://www.ilrc.org/public-charge-ground-deportability. The ILRC publishes a guide to removal defense law and practice, *Inadmissibility and Deportability*, available at https://www.ilrc.org/publications/inadmissibility-deportability.

[12] 8 C.F.R. § 214.1(a)(3)(iv).

[13] 84 Fed. Reg. 41,292, 41,425 (Aug. 14, 2019). *See DHS Responses to Comments Expressing General Opposition to the NPRM at III(L)(4).*

[14] Please see the ILRC's practice advisory, *An Overview of Public Charge*, for a comprehensive overview of public charge including the groups to whom it does and does not apply. The practice advisory is available at https://www.ilrc.org/overview-public-charge.

[15] For an overview of the requirements for naturalization, see USCIS Policy Manual Vol. 12, *available at* https://www.uscis.gov/policy-manual/volume-12 (last visited Sep. 2020); *see also* information on the USCIS Citizenship Resource Center, *available at* https://www.uscis.gov/citizenship (last visited Sep. 2020). The ILRC publishes a comprehensive guide to naturalization law and practice, *Naturalization and U.S. Citizenship: The Essential Legal Guide*, available at https://www.ilrc.org/naturalization-and-us-citizenship.

- Being able to read, write, and speak basic English.
- Having a basic understanding of U.S. history and government (civics).
- Being a person of good moral character for at least 5 years, or 3 if the applicant meets the criteria for marriage to a U.S. citizen.
- Demonstrating an attachment to the principles and ideals of the U.S. Constitution, including taking the naturalization oath.

Advocates Helping Naturalization Applicants Must Still Screen for Issues Related to Public Benefits

Even though public charge is not part of the eligibility determination for naturalization, attorneys and legal advocates should carefully screen applicants for any red flag issues, especially when helping applicants who receive public benefits and are applying for a fee waiver for their naturalization application. While the fee waiver does not raise any separate concern, it might flag the use of benefits to the adjudicator and thus prompt more questions about receipt of benefits at the interview.

Advocates are screening to ensure the applicant did not trigger a ground of deportability, and to double check that the applicant has not fraudulently used benefits, which might also affect the good moral character determination. Generally, legal use of government-funded programs and the use of a fee waiver will not cause problems for the applicant, provided they have not left the U.S. for a trip a longer than 180 days.

Practice Tip: A red flag is any issue that may impact an LPR's naturalization application, such as an issue that triggers a good moral character bar, or an issue that raises a concern that the naturalization applicant may be deportable. Inadmissibility due to public charge is only an issue for a naturalization applicant if it also raises an underlying concern about deportability. Technically, a person who is deportable may still naturalize, but under current guidance, USCIS is likely to refer such a person to immigration court to face charges of deportability. (In defense, the applicant can apply for relief before the immigration judge.)

V. How Inadmissibility Can Affect an LPR

The public charge test discussed above is a ground of inadmissibility. A permanent resident who lives in the U.S. and never leaves is not subject to the grounds of inadmissibility. Instead, permanent residents within the United States are subject to a different set of rules, the grounds of deportability (INA § 237(a)). Although lawful permanent residents in the U.S. are only subject to the grounds of deportability, the public charge ground of inadmissibility can impact an LPR in one of three ways:

1. They traveled outside the U.S. for more than 180 days;[16]
2. They were actually inadmissible due to public charge at time of adjustment to LPR status (when they got their green card) and lied about it;
3. They are deportable for some other reason, and now want to apply to adjust status again in front of the immigration judge as a relief to removal.

Red Flag: Travel Outside the U.S. for more than 180 Days

An LPR can travel freely outside the U.S. without needing to be re-assessed for admissibility. An LPR is only subject to the grounds of inadmissibility upon return to the U.S. if they travel outside the U.S. and trigger one of the factors in INA §

[16] By statute, an LPR is considered to be seeking a new admission if they trigger any of the conditions listed in INA § 101(a)(13)(C), including committing certain crimes. In practice, if a separate issue such as crime, triggers the admissibility screen upon re-entry, public charge is not the main concern. However, merely being absent for more than 180 days triggers an admissibility screen, regardless of other behavior.

101(a)(13)(C). This list includes committing certain crimes or having abandoned LPR status. In addition, **spending more than 180 consecutive days outside the U.S. triggers a full screen for admissibility when the LPR returns**, regardless of any other negative factors. For this reason, any LPR who stayed outside the U.S. for more than 180 days could have triggered a public charge inadmissibility issue, even if no other legal concern is present.

It is important for attorneys and legal advocates to understand that an LPR who traveled outside the U.S. for more than 180 days, and was inadmissible at the time of entry, could now be deportable for having been inadmissible at entry even if immigration authorities allowed them to enter. *See* INA § 237(a)(1)(A).

> Example 1: LPR Vu takes a trip to Vietnam to visit his family. He stays for two weeks and returns. Even if the officers learn that Vu uses several public benefits of the type that is considered for purposes of public charge (limited to cash-based programs and long-term care for benefits used before February 24, 2020 but applicable to a wider range of benefits used on or after that date), he can freely re-enter the United States. This is because Vu is an LPR and not subject to the public charge ground of inadmissibility.
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> Example 2: LPR Vu takes another trip to Vietnam, and this time stays to take care of his mother after surgery. He stays for 187 days and then returns to the United States. Because Vu was absent more than 180 days, he is now subject to the grounds of inadmissibility. Immigration officers could determine that he is inadmissible for being likely to become a public charge and place him in removal proceedings, charging him as inadmissible under INA § 212(a)(4). Vu will have a chance to argue his case before the immigration judge.
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> Example 3: LPR Vu, who was absent from the U.S. for 187 days and then returns to the United States, is admitted into the U.S. even though he may have been inadmissible due to public charge. When he applies to naturalize, he faces the risk that the adjudicating officer will claim he is now deportable for having been inadmissible at the time of entry. Advocates will argue that the agency should not be able to look back to time of entry to make such a discretionary determination, but Vu should understand the risk of applying.

Practice Tip: In practice, attorneys and advocates are screening to see whether a naturalization applicant had an absence of more than 180 days, and would have been likely to have been barred on public charge grounds at the time they reentered the U.S.

Red Flag: The LPR Was Inadmissible for Public Charge and Lied About It When They Became a Permanent Resident

If an applicant for naturalization was inadmissible at the time they were granted permanent resident status, and that ground of inadmissibility was not waived, USCIS will argue that they are not a lawful permanent resident. A person must have been properly granted lawful permanent resident status to meet the naturalization requirement of being an LPR and maintaining LPR status for 5 or 3 years. Even if the LPR who now wants to naturalize could have been denied a green card on public charge grounds at the time they applied for permanent residence, it is unlikely to be a problem now if all pertinent information was disclosed at the time. A public charge determination at the time of entry requires the admitting officer to considers all circumstances pertaining to public charge and determine admissibility. If an immigrant disclosed all information to USCIS when they applied to become a Lawful Permanent Resident, including any information related to public charge, it would be very difficult for an officer, at time of a naturalization adjudication, to argue that the immigrant was inadmissible at time of adjustment for having been a public charge. The LPR's file would show documentation related to public charge, such as the affidavit of support, documentation of income, family ties, use of benefits, and other factors. If necessary, advocates should be prepared to argue that USCIS had full information and should not be able to look back to the time of entry and revisit the discretionary decision that was made at that time. The decision to grant LPR status is

discretionary and advocates may presume that USCIS considered all factors, unless the immigrant lied. If the immigrant lied about one or more of these critical factors when they became an LPR, the factors related to public charge could come up as problematic at naturalization.

> Example 1: When he was 19 years old and before he became an LPR, Raul was in an inpatient psychiatric hospital, and his institutionalization was paid for by Medicaid. Since then, he has been receiving effective treatment and has a job and a family. When he applied for his green card, he shared most of his medical history but did not disclose the institutionalization, because he was ashamed of it. Since becoming an LPR, he has had one more incident, which required six months of inpatient treatment. Raul now wants to apply to naturalize. Because Raul might have been found to be inadmissible on public charge grounds at the time he got his green card, and lied about an important factor, applying for naturalization now is risky. Raul's advocate should discuss the risks with him, and his options to readjust status if he moves forward with his naturalization application and is placed in removal proceedings. Raul's advocate should raise similar concerns about risk if Raul plans to travel outside the United States for more than 180 days.

> Example 2: LPR Khalida received cash assistance from a government program a year before she applied for and was granted her green card. At the time she applied for permanent residence, she was no longer receiving cash assistance, and she also disclosed her past use of the benefit. USCIS granted Khalida's green card. Khalida faces little risk in applying for naturalization. Even if she uses benefits now, she will be able to show that all factors were disclosed at the time of her green card application: she will argue that the officer made a proper discretionary determination.

Practice Tip: The risks to an LPR of being found deportable for having been inadmissible when they adjusted status or were admitted after a long absence are real. Even if the LPR did not lie, advocates who determine that an LPR seeking to naturalize was in fact likely inadmissible due to public charge (or for any other reason) when they received their green card, or when they returned to the U.S. after a long absence, should communicate the risks to the LPR. Even so, remember that the new rule was not in effect until February 24, 2020. Adjustments before that date would have been conducted under prior guidance, as will many adjustments decisions still to come, for applications filed before February 24, 2020 but not yet adjudicated.

Relief in Immigration Court: Readjusting Status

If an LPR becomes deportable for any reason, one possible defense from deportation is an application to readjust status to become a lawful permanent resident again. This is a possible relief where the issue of deportability is either not a ground of inadmissibility, or when a waiver of the inadmissibility ground is possible, such as with certain crimes. It might also be possible relief where there was a legal error in the initial adjustment. If readjusting status is the relief sought from removal, the applicant will have to show admissibility, including that they are not likely to become a public charge.

> Example: Marc is an LPR who becomes deportable when USCIS realizes at his naturalization interview that he had been inadmissible when he got his green card. It turns out USCIS thought they had jurisdiction over his adjustment of status application whereas in fact jurisdiction was with the court. Marc did not seek legal assistance when he applied to naturalize and was placed in removal proceedings when USCIS realized the error with his green card. Now, Marc is back in front of an immigration judge and needs to adjust status. Luckily, he is married to a United States citizen who can file a new visa petition for him. Any grounds of inadmissibility, including public charge, could bar Marc from readjusting status even though he was previously an LPR.

VI. Effect of the 2019 Rule on the Inadmissibility Analysis for a Naturalization Applicant

The 2019 DHS rule only applies to applications for adjustment of status postmarked on or after February 24, 2020.[17]. Similarly, LPRs who traveled outside the U.S. for more than 180 days and sought a new admission were not subject to the 2019 public charge rule unless they returned to the U.S. on or after February 24, 2020 and while the rule was otherwise in effect.[18] Since that date, the main effect on naturalization applicants is related to the new public charge factors as part of the heightened inadmissibility screening that all LPRs face upon returning to the U.S. after traveling outside the U.S. for more than 180 days. Advocates assisting with naturalization applications will need to screen LPRs who traveled outside the country and returned to the U.S. after the rule went into effect, and who have long absences (more than 180 days), to ensure they were not inadmissible on public charge grounds at the time of entry. If the LPR returned before February 24, 2020, the public charge analysis only pertains to the public benefits considered under the 1999 public charge guidance. If the LPR returned on or after February 24, 2020, the analysis must use the factors of the 2019 public charge rule.

In the event that an LPR left the U.S. before the 2019 rule went into effect, but returned to the U.S. on or after February 24, 2020, the LPR was subject to the 2019 rule at the time of their reentry to the U.S. As a reminder, this is only relevant if the LPR was absent for more than 180 days and was therefore seeking a new admission. Advocates should consider this scenario when screening for long absences. Unfortunately, COVID-19 travel restrictions did cause some LPRs to stay outside the United States longer than intended. While USCIS has indicated that factors related to COVID-19 will be taken into account when assessing public charge, the law stating that a returning LPR is subject to inadmissibility for absences of more than 180 days has no exception.

VII. Good Moral Character and Public Benefits

Good moral character is an eligibility factor for naturalization. It has nothing to do with public charge or the 2019 rule defining public charge. However, naturalization applicants who are applying for a fee waiver based on receipt of a public benefit should receive a legal screening to ensure their use of public benefits does not trigger a good moral character bar, or even a crime bar, specifically related to fraudulent receipt of public benefits. It is a best practice to screen naturalization applicants who are applying for fee waivers for any good moral character issues arising from the improper use of the benefit.

Heightened Scrutiny for LPRs Who Traveled

A naturalization applicant who receives a government benefit and traveled out of the country for more than one calendar month should be screened for potential public benefits problems such as an SSI overpayment, a SNAP (Food Stamps) overpayment, or failure to report the travel to the human services agency when that is required by the particular benefit program. These situations could trigger a good moral character concern for fraudulent or improper use of the benefit. Any conviction for violating laws relating to public benefits, such as "welfare fraud," requires a separate analysis to determine whether the applicant might also be deportable on a crime ground.

Practice Tip: Good moral character issues involving public benefits could arise even for short absences lasting more than one calendar month. These issues concern improper receipt of a benefit. Screening for good moral character is different from screening for inadmissibility after to a long absence. Advocates who identify a potential good moral character issue involving public benefits can partner with a public benefits attorney from a local legal aid office to resolve the issue.

[17] *See* 8 C.F.R. § 212.20, although the October 15, 2019 effective date was delayed by litigation. *See* 8 USCIS-PM G(1)(B)(3).
[18] As discussed in footnote 8, LPRs subject to admissibility upon returning to the U.S. during any period that the July 29, 2020 injunction was in effect are not subject to the 2019 public charge rule. LPRs returning between July 29, 2020 and, at minimum, August 12, 2020, re-entered while the 2019 rule was enjoined and would be assessed for public charge issues under the 1999 guidance.

VIII. Best Practices for Naturalization Workshops

Naturalization workshops continue to be an essential service model for assisting large numbers of LPRs with naturalization applications. During the COVID-19 pandemic, many organizations began holding online workshops. Both in-person and online workshops require stringent screening protocols to ensure LPRs are eligible to naturalize. At a naturalization workshop, it is essential to screen naturalization applicants to see whether their past use of public benefits could be an issue for their naturalization application. Best practices include:

1. Screen all applicants for absences of more than 180 days, which trigger the grounds of inadmissibility including public charge. This is true for all applicants, and especially naturalization applicants who are also applying for a fee waiver on the basis of public benefit receipt,[19] which could open a line of questioning about public benefit use and absences at their naturalization interview. **This is not a new recommendation**. Careful screening for long absences has been a best practice and essential legal screening under the law that predates the new public charge rule. Applicants with long absences should all be getting an in-depth legal consultation to explore not only public charge but also other potential issues.

2. Note that the 2019 public charge rule expanded the categories of benefits that could trigger a finding of public charge (as compared to the 1999 guidance, which focused on cash aid and long-term institutional care). For individuals with absences of more than 180 days, advocates should keep in mind the expanded set of public benefits that could have triggered inadmissibility upon return if those benefits were used on or after February 24, 2020.

3. Screen all applicants who use public benefits, in particular applicants who are applying for a fee waiver on the basis of receipt of a public benefit, for any good moral character issues related to misuse of a benefit. Even short absences could be a red flag for improper receipt of a public benefit while out of the country.

4. Advise naturalization applicants that using a fee waiver could trigger inquiry into their public benefit and travel history, and screen for any travel related issues. Because the fee waiver is such an important and essential tool to allow many LPRs to access all the benefits of U.S. citizenship, advocates should ensure they can continue to help LPRs with fee waivers by implementing rigorous red flag screenings, and paying particular attention to training fee waiver station staff and volunteers. See the discussion on fee waivers, below.

5. To avoid having an absence of more than 180 days trigger a public charge problem, is it also a best practice to advise naturalization applicants to avoid absences of over 180 days between the time they apply and the time they naturalize. This is a good practice not only to avoid public charge problems but also to avoid triggering other potential grounds of inadmissibility.

Practice Tip: There are many issues in a naturalization application—such as crimes, good moral character, how the LPR obtained their green card, absences, and more—that could lead to a negative outcome for the applicant, ranging from a denial of the application to deportation. Public charge is not unique in that respect. Some New Americans Campaign partners require all applicants at workshops to sign a limited scope agreement, examples of which are available from the New Americans Campaign at https://www.newamericanscampaign.org/portal/, For example, CUNY Citizenship Now!'s limited scope agreement states, "We assume no responsibility for the outcome of your case and we cannot guarantee results." Nothing about public charge suggests the need to treat the issue differently from the myriad issues that may arise in a naturalization case.

[19] As of the date of this practice advisory, USCIS is still accepting fee waivers on the basis of receipt of a means-tested public benefit, thanks to preliminary injunctions in *DHS v. Seattle* (which challenged 2019 changes to the fee waiver form) and *ILRC v. Wolf* (challenging the 2020 fee rule).

IX. Fee Waivers for Naturalization as a Negative Public Charge Factor[20]

The 2019 public charge rule considers the application for or use of an immigration fee waiver to be a negative factor in the totality of the circumstances analysis—in other words, one among many factors that would suggest the immigrant is likely to become a public charge.[21] In response to comments that the public submitted opposing the use of a fee waiver as one of the negative factors for public charge because it might discourage naturalization, DHS stated, "This rule addresses how DHS determines inadmissibility of aliens on account of public charge; and it does not apply to individuals seeking to be naturalized who would apply for a fee waiver request because the public charge ground of inadmissibility does not apply to naturalization proceedings."[22]

Most importantly for purposes of this practice advisory, **an LPR who is applying to naturalize is not subject to a public charge bar for using a naturalization fee waiver**. This is because there is no public charge test at naturalization. Additionally, if the fee waiver was for an immigration benefit that is not subject to a public charge inadmissibility decision, such as naturalization or other immigration benefits exempt from public charge, then prior use of a fee waiver may not be counted as a factor.[23] Nor will USCIS consider the request for or receipt of a reduced fee for the naturalization application as a negative factor in a public charge inadmissibility determination. Moreover, the fact that one family member used a fee waiver does not count against another family member who may be applying for a green card in the future, as the new rule only considers an applicant's own prior use of an immigration fee waiver. Therefore, using a fee waiver to apply for naturalization does not raise any concerns about public charge. [24]

Even if the naturalization applicant was denied naturalization on some *other* ground (unrelated to public charge) and put into removal proceedings, their use of a fee waiver for their naturalization application would be irrelevant.[25] If they are eligible to apply to readjust as a defense to removal, their prior use of a naturalization fee waiver would not be a negative factor because only fee waivers for immigration benefits that are subject to a public charge inadmissibility determination may be considered. *See* 8 C.F.R. § 212.22(b)(4)(ii)(F). (See also section above on Relief in Immigration Court: Readjusting Status.) More importantly, a rigorous red flag screening should have identified any risks of deportability and the attorney or legal advocate should have advised the LPR about the risk of getting referred to immigration court.

Practice Tip: Even though using a fee waiver with a naturalization application does not raise public charge concerns, using a fee waiver based on receipt of public benefits could open a line of questioning related to travel and use of benefits. See Best Practices for Naturalization Workshops, above.

[20] As of the date of this practice advisory, the 2020 USCIS fee rule published on August 3, 2020 with an effective date of October 2, 2020, has been enjoined in a case titled *ILRC v. Wolf*. The 2020 fee rule would have eliminated fee waivers for naturalization for all but certain categories of applicants. Consequently, naturalization applicants may continue to apply for fee waivers when filing the N-400.
[21] The 2019 rule considers both application for and receipt of an immigration fee waiver to be negative factors. *See* 8 C.F.R. § 212.22(b)(4)(ii)(F). For immigrants subject to the public charge ground of inadmissibility, only fee waivers submitted on or after February 24, 2020 will be considered negative factors. The Department of Homeland Security's response to comments in the Federal Register specify that "fee waivers applied for or received before the effective date will not be considered." 84 Fed. Reg. 41,292, 41,424 (Aug. 14, 2019).
[22] 84 Fed. Reg. 41,292, 41,425 (Aug. 14, 2019).
[23] The list of categories of immigrants exempt from the public charge ground of inadmissibility, i.e., who may use a fee waiver to apply for their status without it counting in the public charge analysis, can be found at 8 C.F.R. § 212.23. Please also see the ILRC's practice advisory, *An Overview of Public Charge*, for a comprehensive overview of public charge including the groups to whom it does and does not apply. The practice advisory is available at https://www.ilrc.org/overview-public-charge.
[24] Even if a naturalization applicant is denied naturalization and is either put into removal proceedings and seeks to readjust, or remains an LPR, then travels and is subject to admissibility screening after long absence, that individual's prior use of a fee waiver for their naturalization application would not be a negative factor. This is because naturalization is not subject to a public charge inadmissibility test. *See* 8 C.F.R. § 212.22(b)(4)(ii)(F).
[25] The same analysis holds true if a naturalization applicant uses a fee waiver for their naturalization application, is denied naturalization, remains an LPR, then travels and is subject to admissibility screening after long absence. Their prior use of a fee waiver for their naturalization application would not be a negative factor in that screening.

X. Effect of Public Charge on a Naturalization Applicant's Ability to Sponsor a Family Member After Becoming a U.S. Citizen

A naturalization applicant who uses fee waiver in their naturalization application and then as a citizen wants to petition for and sponsor a family member can do so. There is no public charge test for the sponsor of a family-based immigration petition. The public charge test applies to the beneficiary of the petition. Therefore, the fact that the sponsor, who is now a citizen, may have used a fee waiver to apply for naturalization, does not *prevent* them from sponsoring a relative. However, it may weaken them as a sponsor.

The underlying question is whether the sponsor has sufficient resources (income and assets) to file an affidavit of support on behalf of the family member for whom they are petitioning. Quite simply, if the sponsor's income is low enough that they are eligible for public benefits, or low enough that they require a fee waiver to apply for naturalization, then the sponsor's affidavit of support is unlikely to be deemed sufficient and they will probably need a joint sponsor. In this context, a prior use of a fee waiver by a sponsor could give an officer reason to doubt the sponsor's ability to pay if the green card applicant were to later need help. Conversely, if the sponsor's current income and assets are sufficient to support a strong affidavit of support, then the fact that the sponsor may have required a fee waiver to apply for an immigration benefit or naturalization in the past is not unlikely to become a relevant consideration. The most important legal analysis for sponsors pertains to the overall strength of their affidavit of support, which is itself only one factor in the totality of the circumstances that USCIS will consider when evaluating the financial situation of the family member applying to adjust status under the 2019 public charge rule.

While the 2019 DHS public charge rule itself does not mention a sponsor's use of a fee waiver, the policy guidance for USCIS instructs officers to consider prior use of a fee waiver by a sponsor as part of this assessment.[26] Advocates should argue that the sponsor's prior use of a fee waiver should not be a factor used to assess their current ability to support the green card applicant and in addition should argue it goes beyond the language of the public charge rule.

The affidavit of support and the public charge forms do not ask about whether the sponsor ever applied for or received a fee waiver, which further limits the effect of prior fee waiver use by the sponsor because the adjudicating officer is unlikely to know about it. Nonetheless, as noted above, a sponsor who qualifies for a fee waiver or a public benefit may also have trouble meeting the requirements of sponsorship because they may also lack the required income and resources for the affidavit of support. This should not deter a prospective sponsor from using a fee waiver to naturalize: an LPR who uses a fee waiver to naturalize because they cannot afford the naturalization fee will gain greater ability to sponsor a relative as a U.S. citizen. Combining their financial resources with the resources of another sponsor can help the family meet the public charge requirements.

> Example: LPR Priya is applying to naturalize and qualifies for a naturalization fee waiver. She applies for naturalization with the fee waiver and becomes a U.S. citizen. She later petitions for her mother to immigrate to the United States and submits an affidavit of support as her sponsor. The fact that Priya used a fee waiver to apply for naturalization does not count against her mother's green card application or bar her from immigrating. The fact that Priya qualified for a fee waiver, however, may be a factor the immigration officer considers when evaluating the affidavit of support as part of her mother's public charge test, and suggests to her legal advocate that Priya may not have sufficient financial means to meet the requirements for being a sponsor. They may need to add a joint sponsor or other evidence to counter the possibility that Priya's mother will become a public charge, and her legal advocate will need to work with her to include the joint sponsor or secure other evidence. If Priya's income has increased since the time she needed a fee waiver, the legal advocate should show that the financial situation is distinct from the time when Priya needed a fee waiver and that she is now a strong sponsor for her

[26] *See* 8 USCIS-PM G.13(D)(1). By contrast, for sponsors of family members who are consular processing, the sponsor's past use of a fee waiver does not appear as a factor in the Foreign Affairs Manual (FAM) and should not come up at all as part of the consular officer's review of the affidavit of support.

mother. Priya's mother's application could also focus on many other positive public charge factors to help overcome this concern, such as health insurance, assets, other family members able to support, etc.

Notes and Additional Resources

The state of the law on public charge remains in flux due to litigation challenging the new rule. ILRC will be continuing to track new developments related to public charge, as well as specific issues relating to naturalization.

- Please check the ILRC website at https://www.ilrc.org/public-charge for updates to this practice advisory and other materials. This page includes:
  - Up to date litigation information;
  - Legal practice advisories on various aspects of public charge, including the new forms; and
  - Community outreach resources.
- The ILRC's *Public Charge and Immigration Law* manual (new 2nd edition published September 2020) is available at https://www.ilrc.org/publications/public-charge-and-immigration-law.
- Protecting Immigrant Families website, which includes, among other materials and resources:
  - Protecting Immigrant Families resources on how to talk to families about public charge, available at https://protectingimmigrantfamilies.org/know-your-rights/.
  - Protecting Immigrant Families specialized resources for advocates and service providers, available at https://protectingimmigrantfamilies.org/special-resources/.

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About the Immigrant Legal Resource Center

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