



PUBLIC CHARGE EXEMPTIONS AND CONSIDERATIONS

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Individuals applying for admission to the United States or adjustment of status are subject to the public charge ground of inadmissibility¹ unless they fall into categories that are exempt from public charge or are otherwise not subject to this ground of inadmissibility within the Immigration and Nationality Act (INA). Primarily, people subject to a public charge test are applicants for an immigrant visa or permanent resident status through a family- or employer-based petition, and people applying for most nonimmigrant visas. It is important to remember that the INA exempts some categories of immigrants from public charge inadmissibility. Others may avoid public charge concerns when they apply for a type of immigration status that does not have a public charge test or does not require proving your client is admissible.

This advisory provides an overview of the statutory and regulatory exemptions to public charge inadmissibility and the forms of relief a client may seek without being subject to a public charge test. It also discusses public charge issues to keep in mind when advising immigrants who may be considering adjustment of status or consular processing through a family or employer petition after having a status that is not subject to public charge inadmissibility. Understanding these considerations will help advocates best counsel their clients and prepare applications.

ALERT: An earlier version of practice advisory was published in December 2019. Please refer only to this updated version of the advisory, as there have been significant changes in public charge policy in the intervening months.

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I. When Does Public Charge Inadmissibility Apply?

As a ground of inadmissibility, public charge generally applies when an applicant seeks admission to the United States, such as through an application to immigrate based on a family or employer petition.² It also impacts individuals who apply for adjustment of status through a relative or employer while within the United States. Thus, public charge inadmissibility applies when an individual seeks to:

- adjust status or consular process based on an approved family-based petition (Form I-130)
- adjust status or consular process based on select approved employer petitions (Form I-140)

Additionally, although a lawful permanent resident (LPR) has been admitted and is not generally subject to the public charge ground of inadmissibility,³ an LPR who has been outside of the country for more than 180 consecutive days is subject to all grounds of inadmissibility, including public charge.⁴ An LPR facing removal, might apply to re-adjust status, typically through a family-based petition, as a defense to a removal—which would subject them to the public charge inadmissibility ground.⁵

II. Which Categories of Immigrants are Exempt from Public Charge Inadmissibility?

Several groups of immigrants are not affected by the public charge ground of inadmissibility because the INA exempts them or because they have already been admitted to the United States. Other groups of immigrants might not face a public charge determination because they are applying for a benefit or relief that does not require overcoming public charge inadmissibility to qualify. See Section III below for an explanation of forms of immigration relief that are not subject to public charge inadmissibility.

A. “Qualified Alien Victims”

The public charge statute sets out a specific exemption for certain “qualified alien victims,” including VAWA self-petitioners, U visa applicants and U visa grantees, and “qualified alien[s]” as described in 8 U.S.C. § 1641(c).⁶ As a whole, this group is made up primarily of VAWA self-petitioners, VAWA cancellation applicants, U visa applicants and U visa grantees, and people with a pending or approved application for a T visa.⁷ These groups of immigrants are arguably exempt from public charge inadmissibility by statute regardless of the type of immigration relief that they seek.⁸

Example: Jenin is an approved VAWA self-petitioner. She is eligible for several 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, as a VAWA self-petitioner she is statutorily exempt from the public charge ground of inadmissibility when she adjusts status or consular processes. This means that, while she has an approved VAWA self-petition, she is not subject to public charge inadmissibility when she adjusts status or consular processes based on this approved VAWA self-petition. It also means that Jenin, as a VAWA self-petitioner, would not be subject to public charge inadmissibility if she adjusts status or consular processes based on an approved family-based petition (Form I-130) or certain employer-based petitions (Form I-140).⁹

IMPORTANT: The new DHS public charge inadmissibility rule also specifically exempts certain categories of U visa and T visa applicants and holders from public charge inadmissibility if they apply for adjustment of status under INA § 245(a) or 245(l).¹⁰ See Section IV below for a detailed discussion of public charge exemptions for these populations.

B. Lawful Permanent Residents (LPRs)

An LPR has been admitted to the United States and so is not subject to the public charge ground of inadmissibility,¹¹ with limited exceptions.¹² This means that an LPR need not worry about the public charge inadmissibility ground when petitioning to remove conditions on their residence (Form I-751), when applying to renew their green card (Form I-90), applying to naturalize (Form N-400), or when making short trips outside of the United States. However, note that an LPR may be subject to public charge inadmissibility if they spend more than 180 consecutive days outside of the United States and then seek to reenter the country.¹³

III. What Immigration Relief is Not Subject to Public Charge Inadmissibility

A. Relief Exempt from the Public Charge Ground of Inadmissibility

Many forms of immigration relief are statutorily exempt from the public charge ground of inadmissibility.¹⁴ This means that immigration officers will not apply a public charge test to decide if a person is eligible to receive that immigration status or benefit. The following list includes applications or relief that might require overcoming some grounds of inadmissibility, but public charge does not apply:

- Seeking admission as a refugee¹⁵
- Applying for adjustment to permanent resident status as a refugee or asylee¹⁶
- Applying for a T visa¹⁷
- Applying for a U visa¹⁸
- T visa holders applying for adjustment to permanent resident status¹⁹
- U visa holders applying for adjustment to permanent resident status²⁰
- Applying for Special Immigrant Juvenile Status (SIJS) and SIJS holders applying for adjustment of status based on SIJS²¹
- Applying for adjustment of status based on an approved VAWA self-petition,²² and individuals applying for suspension of deportation or cancellation of removal under VAWA²³
- Applying for Temporary Protected Status (TPS)²⁴
- Amerasian immigrants (applying for their initial admission)²⁵
- Applying for adjustment to permanent resident status under the Cuban Adjustment Act (CAA)²⁶
- Nicaraguans and Cubans applying for adjustment to permanent resident status under the Nicaraguan Adjustment and Central American Relief Act (NACARA)²⁷
- Applying for adjustment to permanent resident status under the Haitian Refugee Immigration Fairness Act (HRIFA)²⁸
- Applying for adjustment under the Liberian Refugee Immigration Fairness Act (LRIF).²⁹

Example: Saul is fourteen years old and came to the United States because his father was abusive toward him. He can apply for SIJS and adjustment of status based on SIJS without being subject to a public charge test because the public charge ground of inadmissibility does not apply to SIJS applicants under INA § 245(h).

B. Relief Not Subject to Any Grounds of Inadmissibility

The INA provides that certain forms of relief are do not require a showing of admissibility and thus may be granted to someone regardless of any likelihood of becoming a public charge. People applying for the following forms of relief do not undergo a public charge test because proving admissibility is not required to qualify:

- Applying for asylum³⁰
- Applying for Deferred Action for Childhood Arrivals (DACA)³¹
- Applying for cancellation of removal for certain nonpermanent residents³²
- Applying for cancellation of removal for permanent residents³³
- Applying for suspension of deportation under former INA § 244
- Applying for suspension of deportation or cancellation of removal under NACARA³⁴
- Applying for registry.³⁵

Example: Douglas is HIV-positive and receives a variety of cash and non-cash benefits from the State of California. He is eligible to apply for cancellation of removal for nonpermanent residents. Douglas does not have to worry about using any public benefits because cancellation of removal is not subject to any grounds of inadmissibility, including public charge.

Finally, it is important to remember that LPRs are not subject to a public charge test at the time of applying for naturalization.³⁶

C. Moving from a Benefit with No Public Charge Test to Pursuing Lawful Permanent Residency Through a Process Where Public Charge Applies

As explained above, many types of immigration relief are exempt from public charge inadmissibility, including some forms of adjustment of status based on certain types of humanitarian relief. People who are on these tracks can travel the entire path to U.S. citizenship without being subject to public charge inadmissibility. For example:

- Refugees and asylees may apply for adjustment of status under INA § 209
- Certain youth under twenty-one years of age may apply for adjustment of status under INA § 245(h) based on a grant of SIJS
- People who have been granted U nonimmigrant status may apply for U-based adjustment of status under INA § 245(m)
- People who have been granted T nonimmigrant status may apply for T-based adjustment of status under INA § 245(l)³⁷
- Certain Cubans may apply for adjustment of status under the CAA³⁸

- Certain Nicaraguans and Cubans may apply for adjustment of status under NACARA³⁹
- Certain Haitians may apply for adjustment of status under HRIFA⁴⁰
- Certain Liberians may apply for adjustment of status under LRIF.⁴¹

Additionally, certain people who are applying to adjust status under INA § 245(a) are statutorily exempt from public charge inadmissibility. For example, an applicant designated as a “VAWA self-petitioner” under INA § 101(a)(51) is exempt from public charge inadmissibility when they adjust under INA § 245(a), although they are subject to most other grounds of inadmissibility.⁴² By contrast, widows and widowers (and their children) of deceased U.S.-citizen spouses are subject to public charge inadmissibility when they apply for adjustment of status or are consular processing through a family petition filed by this relative, although they are statutorily exempt from the affidavit of support requirement that is part of the public charge assessment.⁴³

Some people may find it beneficial to apply for adjustment of status under INA § 245(a) or for an immigrant visa through consular processing after having status or protection that was not subject to public charge. For example, DACA and TPS recipients may decide to forgo the temporary protection offered by those programs because they have become eligible for adjustment of status or an immigrant visa through their relationship to a U.S.-citizen or LPR family member or employer.

Many DACA and TPS recipients have become eligible for adjustment of status or immigrant visas based on a relationship to a family member or employer because of their long-standing ties to the United States. When these individuals apply for adjustment of status or an immigrant visa based on a family or employer petition, they will be subject to public charge inadmissibility.

NOTE: While DACA and TPS applicants are not subject to a public charge test when they apply for DACA or TPS,¹ they are not subsequently *exempt* from public charge inadmissibility in other applications. This means that they could face public charge inadmissibility in a future immigration application, like adjustment of status under INA § 245(a).

In addition, while an asylee or refugee could continue on the path to permanent residency as an asylee or refugee, in some cases individuals apply to adjust status through a family-based petition instead of as an asylee under INA § 209. If a person chooses to “switch” to a family-based process rather than pursue adjustment as an asylee, they will face public charge inadmissibility.

Lastly, note that under the new 2019 DHS public charge inadmissibility rule, any public benefits used while in a status that is exempt from public charge will not count against a person who later becomes subject to public charge inadmissibility.⁴⁴

IV. Special Considerations for T and U Visa Applicants and Recipients Who Plan to Adjust Status

T nonimmigrant status and U nonimmigrant status allow noncitizen survivors of human trafficking and serious crimes to remain in the United States temporarily, obtain employment authorization, apply for LPR status, and help certain family members obtain derivative T and U visa status. The act of applying for, as well as obtaining, these statuses also provides access to public benefits. Thus, many T and U visa applicants and holders might have at various points used benefits that could trigger public charge considerations. While the 2019 DHS regulation clarifies that individuals in these statuses may pursue adjustment and remain exempt from public charge,⁴⁵ the exemption might in fact apply more broadly.

T and U visa recipients may wish to pursue adjustment of status through a U.S.-citizen or LPR family member instead of waiting the requisite three years in their nonimmigrant status to adjust via INA § 245(l) [for T visa adjustment] or INA § 245(m) [for U visa adjustment]. Individuals who have applied for T or U visa status but whose applications remain pending may also qualify for family-based adjustment through INA § 245(a) or (i) and wish to pursue that opportunity.

T and U visa applicants and holders are arguably exempt from public charge regardless of what path they take to lawful permanent residency, although there is a fair amount of confusion around this point. The statutory provision on public charge inadmissibility identifies U visa applicants and holders, and T visa applicants and holders as exempt from public charge as “qualified alien victims.”⁴⁶ However, immigration authorities seem to have interpreted this provision somewhat differently in regulation and policy. Indeed, after publication of the 2019 DHS and Department of State (DOS) public charge rules and guidance, it is unclear how agencies will now interpret this statutory provision.⁴⁷ In this section, we will look at the statutory language, the regulatory provisions, and current policy guidance on this issue in detail. Advocates may use the information provided here to argue for their clients and the possibility that public charge should not apply in a particular case.

A. T Visa Applicants and Recipients

1. Public Charge Inadmissibility When Applying for T Nonimmigrant Status

Individuals applying for T nonimmigrant status are statutorily exempt from the public charge ground of inadmissibility.⁴⁸ However, applicants for T nonimmigrant status are subject to the *other* grounds of inadmissibility in INA § 212(a), albeit with the opportunity to apply for a waiver of such grounds.⁴⁹ Completely separate from public charge, these grounds could bar an applicant from eligibility for T nonimmigrant status or adjustment of status to lawful permanent residence, as discussed below. But because the *public charge* ground of inadmissibility does not apply to an applicant for T nonimmigrant status, no waiver of this ground is necessary when applying for a T visa.⁵⁰

2. Public Charge Inadmissibility When Applying for T-Based Adjustment of Status

Although T visa *applicants* are statutorily exempt from public charge inadmissibility, the public charge ground of inadmissibility appears to apply when approved T nonimmigrants file for adjustment of status based on their T visa status under INA § 245(l).⁵¹ This is because the statute states that T nonimmigrants may not adjust to LPR status based on their T visa status if they are “inadmissible to the United States by reason of a ground that has not been waived under section 212,” including INA § 212(a)(4).⁵²

The language at INA § 245(l)(2)(A) suggests that T visa holders who have received public benefits and apply to adjust under INA § 245(l) could find themselves inadmissible to the United States by reason of the public charge ground. However, the new DHS rule and associated revisions to the USCIS Policy Manual make the matter of a public charge exemption for T-based adjustments of status much more straightforward. The rule explicitly exempts individuals from public charge inadmissibility in 245(l) adjustment of status applications, provided applicants are in valid T nonimmigrant status at the time of application and at the time the benefit request is adjudicated.⁵³ Moreover, the USCIS Policy Manual specifically calls out the inconsistency on public charge inadmissibility between the public charge exemption contained in INA § 212(a)(4)(E) and the adjustment of status provision for those seeking adjustment based on approved T nonimmigrant status at INA § 245(l), stating its position that the inconsistency is due to “Congress’ failure to amend INA 245(l)(2) when it created INA 212(a)(4)(E) in its current form.”⁵⁴ DHS explains that “[b]ecause the amendments to INA 212(a)(4)(E) occurred later in time than the creation of INA 245(l), DHS considers the text and exemption in INA 212(a)(4)(E) controlling.”⁵⁵

Thus, under the new DHS public charge rule and current USCIS Policy Manual, individuals applying for T-based adjustment of status are exempt from public charge and do not need to apply for a waiver of the public charge ground of inadmissibility. Because the USCIS Policy Manual applies to all adjudications, advocates whose T visa clients submitted their 245(l) applications before February 24, 2020 (and whose requests will therefore be decided under the 1999 Guidance,⁵⁶ under which there is uncertainty regarding the existence of a public charge exemption for T-based adjustment applications; see below) should argue that their clients are exempt from public charge inadmissibility in any responses to Requests for Evidence (RFEs) or Notices of Intent to Deny (NOIDs) if USCIS raises a public charge issue.

However, remember that an applicant for adjustment of status under INA § 245(l) must be otherwise admissible (unless they have received a prior waiver of such grounds of inadmissibility),⁵⁷ and, as is the case with U visa adjustment discussed below, public charge may not be the main inadmissibility ground that applies to the client.

Before the new DHS public charge rule went into effect and the USCIS Policy Manual was updated, advocates argued that, notwithstanding the statutory language at INA § 245(l)(2)(A) (see above), T nonimmigrants were actually exempt from public charge inadmissibility when applying for T-based adjustment, arguing that Congress intended for public charge inadmissibility not to apply at the T visa adjustment stage when it passed the Violence Against Women Act of 2013,⁵⁸

Amid this uncertainty regarding whether there was a public charge exemption for 245(l) adjustments under the 1999 Field Guidance, fortunately individuals who were found likely to become a public charge could apply for a discretionary waiver of the public charge ground of inadmissibility.⁵⁹ This meant that a T visa holder could apply for a waiver and adjust their status to permanent residence under 245(l) despite a USCIS finding that they were likely to become a public charge.

Therefore, for cases that were filed prior to February 24, 2020 and will be decided under the 1999 Guidance, advocates should argue that public charge inadmissibility does not apply to individuals who are in valid T nonimmigrant status at the time of adjustment under INA § 245(l). As explained above, this is because INA § 212(a)(4)(E) explicitly exempts “qualified alien victims” from INA § 212(a)(4)(A),⁶⁰ a group that includes T visa holders.⁶¹

In sum, a practitioner whose T-adjustment client is facing a possible public charge finding under the 1999 Guidance has the following avenues of advocacy:

1. Argue that INA § 212(a)(4)(A) is inapplicable to their T nonimmigrant client seeking to adjust based on their T visa status because, according to INA § 212(a)(4)(E)(iii) and the current USCIS Policy Manual, public charge inadmissibility does not apply to them.
2. If the argument above is unsuccessful, the advocate could submit evidence showing that the client is not likely to become a public charge in the totality of the circumstances despite receiving cash aid or long-term institutionalization at government expense.
3. If the client is found inadmissible on public charge grounds, the advocate could pursue a waiver of the public charge ground of inadmissibility under INA § 245(l)(2)(A).

3. Public Charge Inadmissibility for Pending T Nonimmigrants When Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition

Individuals with pending applications that set forth a prima facie case of eligibility for T nonimmigrant status are statutorily exempt from the public charge ground of inadmissibility for any benefit that requires the person to establish admissibility, including 245(a) or (i) adjustment or an immigrant visa through consular processing.⁶² Note, however, because INA § 212(a)(4)(E) does not state that qualified immigrants are exempt from the requirement under INA § 212(a)(4)(D), an individual in valid T nonimmigrant status who elects to adjust status via certain employer petitions would still be subject to the requirement to file an affidavit of support.⁶³ This situation applies only to applicants for admission or adjustment of status “by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest).”⁶⁴

The new DHS and DOS rules also specifically provide that pending T applicants are exempt from public charge inadmissibility when seeking adjustment of status under 245(a) or any other benefit for which admissibility is required.⁶⁵ Therefore, under both the new DHS rule and the prior 1999 Guidance,⁶⁶ pending T visa applicants can pursue adjustment of status based on a family or employer petition without being subject to public charge inadmissibility.

4. Public Charge Inadmissibility for T Nonimmigrants When Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition

The new DHS and DOS rules specifically exempt individuals who have been granted T nonimmigrant status from public charge inadmissibility at the time of application for family- or employer-based adjustment via INA § 245(a) or (i), provided the person is in valid T nonimmigrant status at the time of application and adjudication of the benefit request.⁶⁷

Under the 1999 Guidance that pre-dates the new DHS rule, individuals in valid T visa status applying to adjust based on a family petition under INA § 245(a) or (i) should also be exempt from public charge because of the statutory language at INA § 212(a)(4)(E), as described above.⁶⁸ Advocates whose clients are pursuing 245(a)

or (i) adjustment can also cite the USCIS Policy Manual as support for the existence of a public charge inadmissibility exemption, since the current Policy Manual applies to all USCIS adjudications.⁶⁹

5. Public Charge Inadmissibility for Individuals Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition After Their T Nonimmigrant Status Has Lapsed

Individuals whose valid T nonimmigrant status has expired may be subject to public charge inadmissibility if they later apply for adjustment of status or consular processing based on a family or employer petition. As explained above, 8 U.S.C. § 1641(c)(4) classifies T visa holders and T visa applicants with prima facie eligibility for T nonimmigrant status as “qualified alien[s]” who are exempt from public charge inadmissibility under INA § 212(a)(4)(E)(iii). In exempting this group of individuals,⁷⁰ the statute describes the group as “alien[s] who *ha[ve] been granted* nonimmigrant status under section 101(a)(15)(T) of this title” (emphasis added).

The language of 8 U.S.C. § 1641(c)(4) suggests that the “Special Rule for Qualified Alien Victims” exempting “qualified alien[s]” from INA § 212(a)(4)(A)–(C)⁷¹ may apply to individuals whose approved T nonimmigrant status is no longer valid when they apply for admission or to adjust status via a method other than INA § 245(I). A plain reading of the statute suggests that an individual whose T visa status has lapsed remains someone who, in the past, “has been granted nonimmigrant status under section 1101(a)(15)(T).”

Before the new DHS and DOS rules were published and the USCIS Policy Manual was updated,⁷² it was unclear whether USCIS and the State Department would instead interpret 8 U.S.C. § 1641(c)(4) as only referring to individuals who have been granted *and remain in* T nonimmigrant status. Notwithstanding these possible divergent statutory interpretations, a defensible argument could be made that the broad phrasing of the statute indicates Congress’s intention to include in the “qualified alien” category all individuals who have been granted T nonimmigrant status, regardless of expiration date.⁷³ This was arguable considering that while T nonimmigrant status lasts for up to four years,⁷⁴ its duration may be extended in some situations.⁷⁵

However, now that the new DHS rule has been implemented, there is much less ambiguity about individuals whose valid T visa status has lapsed. The new DHS rule explicitly states that for approved T nonimmigrants to be exempt from public charge inadmissibility at the time of application for an immigration benefit for which admissibility is required, including but not limited to adjustment of status under 245(a), they must be “in *valid* T nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated” (emphasis added).⁷⁶ The USCIS Policy Manual elaborates further, explaining that:

“It may be possible that, at the time of filing for an immigration benefit, the applicant’s T nonimmigrant status has expired, was revoked, or has otherwise been terminated. The officer should consult the systems available to USCIS to determine whether the applicant is in valid T nonimmigrant status, taking into consideration any extensions. If the applicant did not have valid T nonimmigrant status at the time of filing the benefit request or is no longer in valid T nonimmigrant status at the time USCIS makes a decision on the benefit request subject to public charge grounds, he or she is not exempt from the public charge ground of inadmissibility. The officer, in this case, should proceed with the public charge assessment.”⁷⁷

Given that the USCIS Policy Manual applies to all USCIS adjudications, advocates should proceed with caution if their client pursuing adjustment formerly held valid T visa status or currently has T visa status but their status will expire before their adjustment application is adjudicated and no extension is possible, particularly if the client's case contains significant public charge concerns.

B. U Visa Applicants and Recipients

Applicants for U nonimmigrant status and U-based adjustment of status are statutorily exempt from public charge inadmissibility and so have a legalization path free from a public charge test.⁷⁸ However, U-based adjustment of status requires an applicant to accrue three years in U nonimmigrant status before applying for adjustment of status under INA § 245(m). Also, current applicants for U nonimmigrant status must undergo long waits to receive this status and to start the three-year clock. Therefore, many U visa applicants and recipients may be eager to consider faster paths to permanent residence that are available to them after applying for or receiving a U visa. For example, many U visa holders who were previously ineligible for family-based adjustment of status under INA § 245(a) may become eligible when they obtain U nonimmigrant status because:

- They were otherwise admissible but did not have a prior admission until they were officially admitted upon receiving U nonimmigrant status; or
- In the process of waiting for their U visa application to be approved, they acquired a family member who could petition for them, such as a U.S.-citizen or LPR spouse or a U.S.-citizen child who turned twenty-one years old.

Below we highlight public charge issues to consider if you have clients who have already petitioned for U visa status but are awaiting adjudication, or who are approved U visa holders, and are interested in exploring adjustment of status options besides INA § 245(m).

1. Public Charge Inadmissibility for Pending U Nonimmigrants When Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition

The statutory “Special Rule for Qualified Alien Victims” includes a public charge exemption⁷⁹ for a person who is “an applicant for, or is granted, nonimmigrant status under section 101(a)(15)(U).”⁸⁰ This statutory language suggests that under any DHS and DOS public charge policy, individuals with pending U visa petitions (as “applicant[s] for. . . nonimmigrant status under section 101(a)(15)(U)”) would be exempt from public charge inadmissibility if they applied for adjustment of status or consular processing through a family or employer petition.⁸¹

Indeed, the new DHS and DOS⁸² rules seem to acknowledge that U nonimmigrant “petitioner[s]” as a group are exempt from public charge inadmissibility by explicitly citing the statutory “Special Rule for Qualified Alien Victims” when including as exempt from public charge “[a] petitioner for nonimmigrant status under section 101(a)(15)(U) of the Act, in accordance with section 212(a)(4)(E)(ii) of the Act.”⁸³ The USCIS Policy Manual arguably goes further than the rule in directly stating that “[i]n general, for purposes of public charge inadmissibility, the following provisions do not apply to qualified alien victims: public charge inadmissibility” and that “[a] qualified alien victim includes: . . . [a]n alien who is an applicant for, or is granted, U nonimmigrant status.”⁸⁴ However, the Policy Manual does not reconcile this point with the more subtle reference to qualified alien victims in the new DHS rule itself. There also appear to be discrepancies between the instructions for Form I-485, Application to Register Permanent

Residence or Adjust Status, and several questions on the form itself as to public charge inadmissibility considerations for pending U visa applicants. We highlight some of these points of ambiguity in the below table:

Issue	New DHS Rule	USCIS Policy Manual	I-485 Form & Instructions	New DOS Rule ⁸⁵
Public charge exemption for pending U applicants	8 CFR § 212.23(a)(19): no mention of “pending” U but U “petitioner” exempt in accordance with INA § 212(a)(4)(E)(ii)	8 USCIS-PM G.3(B)(3): no mention of “pending” U but those “seeking”/ “petitioning” U visa status and footnoting INA § 212(a)(4)(E)(ii) 8 USCIS-PM G.3(B)(4): exempting “qualified alien victims,” including “[a]n alien who is an applicant for . . . U nonimmigrant status” and footnoting INA § 212(a)(4)(E)(ii)	Instrs. p. 14: “valid” U exempt if apply to adjust under 245(m) or any other category; no mention of “pending” U Q. 61: asks if exempt and refers to I-944 Dec. of Self-Sufficiency instrs. (which mirror I-485 instrs.) Q. 62i: exempt from I-864 Aff. of Support if “have a pending petition” for U	22 CFR § 40.41(c) refers to 8 CFR § 212.23(a)

Because statutory authority is generally stronger than regulatory authority, and because the statutory “Special Rule for Qualified Alien Victims” predates the new public charge framework by a number of years,⁸⁶ advocates could consider making the argument that their clients with pending U petitions are exempt from public charge inadmissibility in their family- or employer-based adjustment of status or immigrant visa applications. Nevertheless, it is uncertain how adjudicators will handle these types of applications. It is important to stay apprised of any agency clarifications that may materialize or litigation that may happen on this question in the coming months or years.

Advocates representing clients who have pending U visa petitions and who decide to pursue adjustment of status could proceed knowing that the statutory argument for a public charge exemption is available, but also prepare, in the alternative, to argue that their clients are not likely to become public charges in the future. Whether it is advantageous for such clients to pursue adjustment of status or consular processing based on a family petition will likely depend on the strength of each client’s particular case should the agency determine that public charge inadmissibility applies, and each client’s wishes given the implicit risk involved.

2. Public Charge Inadmissibility for U Nonimmigrants When Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition

Unlike adjustment of status under INA § 245(m), under the 1999 Guidance and prior DHS and DOS regulations, U visa recipients seemed to be subject to public charge inadmissibility if they applied for adjustment of status with USCIS under INA § 245(a) or (i) or consular processing with the State Department.⁸⁷ Under the new DHS and DOS public charge rules, however, individuals in valid U nonimmigrant status are exempt from public charge inadmissibility if they apply to adjust status or consular process through a family- or employer-based petition.⁸⁸

Regardless of the policy under which your client’s case will be adjudicated, remember that an applicant for adjustment of status under INA § 245(a) or (i) or consular processing must be otherwise admissible and public charge may not be the primary inadmissibility ground that applies to the client. For example, applicants who received a waiver for other grounds of inadmissibility—such as for criminal convictions or bars based on prior removal orders or unlawful entries—may be found inadmissible if they apply under INA § 245(a). Because of the broad exemption from the grounds of inadmissibility under INA § 245(m), advocates may decide that U-based adjustment of status under INA § 245(m) remains the best option for a client who has been granted U nonimmigrant status.

3. Public Charge Inadmissibility for Individuals Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition After Their U Nonimmigrant Status Has Lapsed

Similar to individuals whose valid T nonimmigrant status has lapsed, as discussed above, people whose valid U nonimmigrant status has expired may be subject to public charge inadmissibility if they later apply for adjustment of status or consular processing based on a family or employer petition. As explained above, the “Special Rule for Qualified Alien Victims” at INA § 212(a)(4)(E) exempts from public charge⁸⁹ a person who “is an applicant for, or *is granted*, nonimmigrant status under section 101(a)(15)(U)” (emphasis added).⁹⁰

The broad language of INA § 212(a)(4)(E)(ii) suggests that the “Special Rule for Qualified Alien Victims” exempting select populations from INA § 212(a)(4)(A)–(C)⁹¹ may apply to individuals whose approved U nonimmigrant status is no longer valid when they apply for admission or to adjust status via a method other than INA § 245(m). A plain reading of the statute suggests that an individual whose U visa status has lapsed is still someone who “is granted” U status, albeit in the past.

Before the new DHS and DOS rules were published and the USCIS Policy Manual was updated, it was unclear whether USCIS and the State Department would instead interpret INA § 212(a)(4)(E)(ii) as only encompassing individuals who have been granted *and remain in* valid U nonimmigrant status. Notwithstanding these possible divergent statutory interpretations, a tenable argument could be made that the expansive phrasing of the statute indicated Congress’s intention to include in the “Special Rule for Qualified Alien Victims” all individuals who have ever been granted U nonimmigrant status, regardless of expiration date.⁹² This was arguable considering that while U nonimmigrant status lasts for up to four years,⁹³ its duration may be extended in some situations.⁹⁴

However, now that the new DHS rule has been implemented, there is much less ambiguity about individuals whose valid U visa status has lapsed. The new DHS public charge rule explicitly states that for approved U nonimmigrants to be exempt from public charge inadmissibility at the time of application for an immigration benefit for which admissibility is required, including but not limited to adjustment of status under 245(a), they must be “in *valid* U nonimmigrant status at the time the benefit request is properly filed with USCIS and at the time the benefit request is adjudicated” (emphasis added).⁹⁵ The USCIS Policy Manual elaborates further, explaining that:

“An alien is in valid U nonimmigrant status if the petition for U nonimmigrant status, or derivative U nonimmigrant status, shows as approved in systems available to USCIS or in the alien’s file. It may be possible that, at the time of filing for an immigration benefit, the alien’s

U nonimmigrant status has expired, was revoked, or has otherwise been terminated. The officer should check the records available to USCIS to ascertain whether the alien is in valid U nonimmigrant status, taking into consideration any extensions. If the applicant has a pending application for adjustment of status under INA 245(m) based on U nonimmigrant status, the underlying U nonimmigrant status is extended until USCIS makes a decision on the adjustment application. If the alien did not have valid U nonimmigrant status at the time of filing the benefit request or is no longer in valid U nonimmigrant status at the time USCIS makes a decision on the immigration benefit request subject to the public charge ground, he or she is not exempt from the public charge ground of inadmissibility. The officer, in this case, should proceed with the public charge assessment.”⁹⁶

Given that the USCIS Policy Manual applies to all USCIS adjudications (i.e., adjudications under the new DHS rule *and* under the previous 1999 Guidance), advocates should proceed with caution if their client pursuing family- or employer-based adjustment or consular processing formerly held valid U visa status, or currently has valid U visa status but that status will expire before their application is adjudicated and no extension if possible, particularly if the client’s case contains significant public charge concerns.

V. Additional Resources

This is a rapidly changing area of the law, so it is important to stay up to date to best assist clients in applying for immigration relief. The following resources can help advocates track the new public charge rules and pending lawsuits against them, as well as provide practice updates:

- Immigrant Legal Resource Center (ILRC), Public Charge – <https://www.ilrc.org/public-charge>
- Protecting Immigrant Families (PIF) – <https://protectingimmigrantfamilies.org/>
- National Immigration Law Center (NILC), Economic Support – <https://www.nilc.org/issues/economic-support/>

End Notes

¹ INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

² Nonimmigrant visa applicants, such as visitors, must also show they are admissible. Public charge applies in this context as well, but because a visitor does not intend to stay permanently, it is generally less of a concern.

³ See Section II below for more discussion of LPRs and the public charge ground of inadmissibility.

⁴ See INA § 101(a)(13)(C)(ii).

⁵ Note that the Executive Office for Immigration Review (EOIR), the agency that adjudicates adjustment of status applications for individuals in removal proceedings, is a component of the Department of Justice (DOJ). Therefore, there is a strong argument that DHS public charge inadmissibility rules should not apply to adjustment applications before the immigration courts because EOIR has its own set of regulations at 8 C.F.R. §§ 1000–1399.

⁶ INA § 212(a)(4)(E)(i)–(iii).

⁷ INA § 212(a)(4)(E). See 8 U.S.C. § 1641(c) for a full list of individuals classified as “qualified aliens” who are exempt from public charge inadmissibility.

⁸ INA § 212(a)(4)(E); 8 C.F.R. § 212.23(a)(21). See Section IV below for more discussion of public charge exemptions for T and U visa applicants and recipients.

⁹ INA § 212(a)(4)(E)(iii); 8 C.F.R. § 212.23(a)(21). Note that if Jenin applied for adjustment through an employer-based petition that requires an affidavit of support, see INA § 212(a)(D), she would have to submit an affidavit of support. 8 C.F.R. § 212.23(b).

¹⁰ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41505 (Aug. 14, 2019); 8 C.F.R. § 212.23(a)(18)–(19).

¹¹ Generally, individuals that have already been admitted to the United States are subject to the grounds of deportability, not inadmissibility, while in the United States. The grounds of deportability are described at INA § 237(a), while the grounds of inadmissibility are listed at INA § 212(a).

¹² See INA § 101(a)(13)(C). While LPRs are subject to the public charge ground of deportability at INA § 237(a)(5), this standard is very narrow. Thus, few LPRs have been charged as deportable for having become a public charge. For more information, see ILRC, *Public Charge as a Ground of Deportability* (June 2019), available at <https://www.ilrc.org/public-charge-ground-deportability>.

¹³ INA § 101(a)(13)(C)(ii). See Section I above for more details about when LPRs are subject to the public charge ground of inadmissibility.

¹⁴ For a complete list of groups not subject to public charge, see ILRC, *An Overview of Public Charge* (Mar. 2020), available at <https://www.ilrc.org/overview-public-charge-and-benefits-march-2020>.

¹⁵ INA § 207(c)(3); see also 8 C.F.R. § 212.23(a)(1).

¹⁶ INA § 209(c); see also 8 C.F.R. §§ 212.23(a)(1)–(2).

¹⁷ INA § 212(d)(13)(A); see also 8 C.F.R. § 212.23(a)(17).

¹⁸ INA § 212(a)(4)(E)(ii); see also 8 C.F.R. § 212.23(a)(19)(i).

¹⁹ INA § 212(d)(13)(A); 8 C.F.R. § 212.23(a)(18)(ii) (explaining that T visa recipients seeking 245(a) or 245(l) adjustment are not subject to public charge); 8 USCIS-PM G.3(B)(2). See also Section IV for more information on public charge inadmissibility for T applicants and recipients.

²⁰ INA § 245(m); 8 C.F.R. § 212.23(a)(19)(ii) (explaining that U visa recipients seeking 245(a) adjustment are not subject to public charge). See also Section IV for more information on public charge inadmissibility for U applicants and recipients.

²¹ INA § 101(a)(27)(J); INA § 245(h)(2)(A). See also 8 C.F.R. § 212.23(a)(10).

²² INA § 212(a)(4)(E)(i); see also 8 C.F.R. § 212.23(a)(20).

²³ INA § 212(a)(4)(E)(iii); 8 U.S.C. §§ 1641(c)(1)(B)(iii), (v). See also 8 C.F.R. § 212.23(a)(21). Note that these individuals are also “qualified aliens” who are exempt from public charge. See Section II.

²⁴ 8 C.F.R. § 244.3(a); see also 8 C.F.R. § 212.23(a)(12).

²⁵ INA § 101, note 5; see also 8 C.F.R. § 212.23(a)(3).

²⁶ *Matter of Mesa*, 12 I. & N. Dec. 432, 437 (BIA 1967) (“We conclude that Congress ... did not intend requiring application of [public charge] in light of the Congressional history showing the recognized impoverished circumstances of many of the refugees it proposed to benefit and the special legislation enacted to render them Federal assistance.”). See also 8 C.F.R. § 212.23(a)(6).

- ²⁷ INA § 245, note 9; see also 8 C.F.R. § 212.23(a)(7).
- ²⁸ INA § 245, note 10; see also 8 C.F.R. § 212.23(a)(8).
- ²⁹ National Defense Authorization Act for FY 2020, §7611, Pub. L. 116-92 (Dec. 2019).
- ³⁰ INA § 208(b); see also 8 C.F.R. § 212.23(a)(2).
- ³¹ See USCIS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.
- ³² INA § 240A(b).
- ³³ INA § 240A(a).
- ³⁴ INA § 101, note A-9.
- ³⁵ INA § 249; see also 8 C.F.R. § 212.23(a)(11).
- ³⁶ For additional information about how public charge impacts lawful permanent residents who are naturalizing, see ILRC, *Public Charge and Advising Permanent Residents at the Time of Naturalization* (Sept. 2020), available at <https://www.ilrc.org/public-charge-and-naturalization>.
- ³⁷ People in T nonimmigrant status are “qualified alien[s]” who are exempt from public charge inadmissibility when they apply for adjustment of status under INA § 245(I). INA § 212(a)(4)(E)(iii); 8 CFR 212.23(a)(18)(ii), (a)(21). See Section IV below for a more detailed discussion of issues to consider when T visa holders apply for adjustment of status.
- ³⁸ Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161.
- ³⁹ INA § 245, note 9; see also 8 C.F.R. § 212.23(a)(7).
- ⁴⁰ INA § 245, note 10; see also 8 C.F.R. § 212.23(a)(8).
- ⁴¹ National Defense Authorization Act for FY 2020, §7611, Pub. L. 116-92 (Dec. 2019).
- ⁴² INA § 212(a)(4)(E)(i); see also 8 C.F.R. § 212.23(a)(20). Note that VAWA self-petitioners applying to adjust to permanent residency through certain employer-based petitions must submit an affidavit of support. INA § 212(a)(4)(D); 8 C.F.R. §§ 212.23(a)(20), (b).
- ⁴³ 84 Fed. Reg. 41342.
- ⁴⁴ 8 C.F.R. § 212.21(b)(8).
- ⁴⁵ 8 C.F.R. § 212.21(b)(8).
- ⁴⁶ INA § 212(a)(4)(E)(ii)–(iii); 8 U.S.C. § 1641(c)(4).
- ⁴⁷ See generally *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019); *Visas: Ineligibility Based on Public Charge Grounds*, 84 Fed. Reg. 54996 (Oct. 11, 2019). Note that the new DOS public charge rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.
- ⁴⁸ INA § 212(d)(13)(A).
- ⁴⁹ A waiver is available for most grounds of inadmissibility “if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization” leading to eligibility for the T visa. INA § 212(d)(13)(B).
- ⁵⁰ 8 C.F.R. § 212.16(b).
- ⁵¹ See INA § 245(I)(2)(A).
- ⁵² INA § 245(I)(2).
- ⁵³ 84 Fed. Reg. 41505; 8 C.F.R. § 212.23(a)(18)(ii).
- ⁵⁴ 8 USCIS-PM G.3(B)(2).
- ⁵⁵ *Id.*
- ⁵⁶ Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999) [hereinafter “1999 Guidance”]. This is the public charge policy applicable to adjustment cases filed before February 24, 2020.
- ⁵⁷ INA § 245(I).
- ⁵⁸ See, e.g., AILA VAWA, U, & T Committee and the Coalition to Abolish Slavery & Trafficking (CAST), *Practice Pointer: Q&A: T-Visa Adjustment of Status & the Public Charge Ground of Inadmissibility*, (May 2019), available at <https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/t-visa-adjustment-of-status-public-charge-ground>.
- ⁵⁹ INA § 245(I)(2)(A).
- ⁶⁰ INA § 212(a)(4)(E)(iii).
- ⁶¹ 8 U.S.C. § 1641(c)(4).
- ⁶² INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(4).
- ⁶³ INA § 212(a)(4)(D); 8 U.S.C. § 1641(c)(4); 8 C.F.R. § 212.23(b).
- ⁶⁴ INA § 212(a)(4)(D).

⁶⁵ 8 C.F.R. § 212.23(a)(18)(i) [DHS regulation]. However, note that if the person’s T nonimmigrant application is no longer pending at the time of adjudication of their adjustment of status application, and the T nonimmigrant application was denied, the individual would be subject to public charge inadmissibility. 8 USCIS-PM G.3(B)(2). See *also* 84 Fed. Reg. 55014 [DOS rule]. However, note that the DOS rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.

⁶⁶ This argument is based on statutory interpretation of INA § 212(a)(4)(E)(iii) and 8 U.S.C. § 1641(c)(4), which exempts from public charge inadmissibility those who have “pending [T visa] application[s] that set[] forth a prima facie case for eligibility for such nonimmigrant status.”

⁶⁷ 8 C.F.R. § 212.23(a)(18)(ii) [DHS regulation]; 8 USCIS-PM G.3(B)(2). See *also* 84 Fed. Reg. 55014 [DOS rule]. However, note that the DOS rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.

⁶⁸ INA § 212(a)(4)(E)(iii) (explicitly exempting “qualified alien victims” from INA § 212(a)(4), subparagraphs (A) (describing “public charge” in general), (B) (describing the factors to be considered in the totality of the circumstances test), and (C) (regarding family-sponsored immigrants)).

⁶⁹ 8 USCIS-PM G.3(B)(2).

⁷⁰ This public charge exemption does not include INA § 212(a)(4)(D), meaning that individuals who are applying for lawful permanent residency through certain employment-based petitions must nevertheless submit an affidavit of support. See INA § 212(a)(4)(E).

⁷¹ See INA § 212(a)(4)(E)(iii).

⁷² Note that the DOS rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.

⁷³ Note that the “[s]pecial [r]ule” at INA § 212(a)(4)(E) does not apply to employment-based immigrants seeking admission or adjustment “by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest).” See INA § 212(a)(4)(D).

⁷⁴ INA § 214(o)(7)(A).

⁷⁵ INA § 214(o)(7)(B)–(C). See *T Visas: A Critical Immigration Option for Survivors of Human Trafficking* (ILRC) for more information about extending T nonimmigrant status past the initial four-year period. More generally, the Coalition to Abolish Slavery and Trafficking (CAST) also produces helpful written resources on T visa status and provides free individualized technical assistance to attorneys assisting trafficking survivors with immigration legal needs. See *Training & Resources*, <https://www.castla.org/training-resources/> (last visited Dec. 2019).

⁷⁶ 84 Fed. Reg. 41505; 8 C.F.R. § 212.23(a)(18)(ii).

⁷⁷ 8 USCIS-PM G.3(B)(2).

⁷⁸ INA §§ 212(a)(4)(E)(ii), INA § 245(m); see *also* 8 C.F.R. § 212.23(a)(19)(i)–(ii).

⁷⁹ This exemption does not include individuals who are applying for lawful permanent residency through certain employment-based petitions. INA § 212(a)(4)(D).

⁸⁰ INA § 212(a)(4)(E)(ii).

⁸¹ This public charge exemption does not include INA § 212(a)(4)(D), meaning that individuals who are applying for lawful permanent residency through certain employment-based petitions must nevertheless submit an affidavit of support. See INA § 212(a)(4)(E).

⁸² Regarding public charge exemptions, the DOS rule refers to the DHS rule for a list of exemptions as set forth in 8 C.F.R. § 212.23(a). Note, however, that the DOS rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.

⁸³ 84 Fed. Reg. 41505; 8 C.F.R. § 212.23(a)(19)(i).

⁸⁴ 8 USCIS-PM G.3(B)(4).

⁸⁵ The DOS is currently enjoined from implementing this rule.

⁸⁶ INA § 212(a)(4)(E) was added to the INA as part of the 2013 reauthorization of the Violence Against Women Act.

⁸⁷ Note, however, that like the argument that pending U visa applicants are exempt from public charge inadmissibility when applying for adjustment of status or consular processing based on a family or employer petition, see Section V.B.1, arguably those granted U nonimmigrant status are also exempt from public charge inadmissibility when applying to adjust status or consular process based on a family or employer petition under INA § 212(a)(4)(E)(ii) after such provision was added to the INA in the 2013 reauthorization of the Violence Against Women Act.

⁸⁸ 84 Fed. Reg. 41505, 8 C.F.R. § 212.23(a)(19)(ii) [DHS rule]. 84 Fed. Reg. 55014 [DOS rule]. Note, however, that the DOS rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.

⁸⁹ Note that the “Special Rule for Qualified Alien Victims” at INA § 212(a)(4)(E) does not include INA § 212(a)(4)(D), meaning that individuals who are applying for lawful permanent residency through certain employment-based petitions must nevertheless submit an affidavit of support. See INA § 212(a)(4)(E).

⁹⁰ INA § 212(a)(4)(E)(ii)

⁹¹ See INA § 212(a)(4)(E).

⁹² INA 212(a)(4)(E)(ii).

⁹³ INA § 214(o)(7)(A).

⁹⁴ INA § 214(p)(6). See *The U Visa: Obtaining Status for Immigrant Victims of Crime* (ILRC 2019) for more information about extending U nonimmigrant status past the initial four-year period.

⁹⁵ 84 Fed. Reg. 41505; 8 C.F.R. § 212.23(a)(19)(ii).

⁹⁶ 8 USCIS-PM G.3(B)(3).

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.