



# 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 inadmissibility<sup>1</sup> 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). 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. Generally, people immigrating through a family-based petition face the most scrutiny under the public charge ground. 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 they are admissible.

This advisory<sup>2</sup> 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.

**NOTE:** Earlier versions of this practice advisory were published in December 2019 and December 2020. Please refer only to this updated version of the advisory, as there have been significant changes in public charge policy in the intervening months. Also, on August 23, 2021, the Department of Homeland Security (DHS) published an Advance Notice of Proposed Rulemaking on public charge, indicating the agency's intention to revise public charge policy in the future<sup>3</sup>. To stay apprised of public charge policy developments, visit the ILRC's public charge page at <https://www.ilrc.org/public-charge>.

## Table of Contents

|      |  |    |
|------|--|----|
| I.   | When Does Public Charge Inadmissibility Apply?.....  | 3  |
| II.  | Which Categories of Immigrants are Exempt from Public Charge Inadmissibility?.....   | 3  |
|      | A. “Qualified Alien Victims” .....   | 3  |
|      | B. Lawful Permanent Residents (LPRs) .....   | 4  |
| III. | What Immigration Relief is Not Subject to Public Charge Inadmissibility? .....   | 4  |
|      | A. Relief Exempt from the Public Charge Ground of Inadmissibility .....  | 4  |
|      | B. Relief Not Subject to any Grounds of Inadmissibility.....   | 6  |
|      | C. Moving from a Benefit with No Public Charge Test to Pursuing Lawful<br>Permanent Residency Through a Process where Public Charge Applies..... | 6  |
| IV.  | Special Considerations for T and U Visa Applicants and Recipients<br>Who Plan to Adjust Status .....   | 8  |
|      | A. T Visa Applicants and Recipients.....   | 9  |
|      | B. U Visa Applicants and Recipients .....  | 13 |
| V.   | Additional Resources .....   | 17 |

## I. When Does Public Charge Inadmissibility Apply?

As a ground of inadmissibility, public charge generally applies when a person seeks admission to the United States, such as through an application to immigrate based on a family petition or certain employer petitions.<sup>4</sup> It also impacts individuals who apply for adjustment of status through a relative or certain employers while within the United States. Most commonly, individuals applying to adjust status or consular process through a petition filed by their family member (Form I-130) face scrutiny under the public charge ground, where an officer will consider the affidavit of support<sup>5</sup> filed by a sponsor and other factors.

Additionally, although a lawful permanent resident (LPR) has been admitted and is not generally subject to the public charge ground of inadmissibility,<sup>6</sup> 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.<sup>7</sup> Also, an LPR facing removal might apply to re-adjust status, typically through a family-based petition, as a defense to a removal; this would subject them to the public charge inadmissibility ground.<sup>8</sup>

## 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 form of 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).<sup>9</sup> This group is primarily made up of VAWA self-petitioners, VAWA cancellation applicants, U visa petitioners and U visa grantees, and people with pending or approved applications for a T visa.<sup>10</sup> These groups of immigrants are arguably exempt from public charge inadmissibility by statute regardless of the type of immigration relief they seek.<sup>11</sup>

**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, should 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).<sup>12</sup>

**IMPORTANT:** The 2019 DHS public charge inadmissibility rule promulgated under the Trump administration<sup>13</sup> was vacated in March 2021<sup>14</sup> and is no longer in effect. That rule specifically exempted certain categories of U visa and T visa applicants and holders from public charge inadmissibility if they applied for adjustment of status under INA § 245(a) or 245(I).<sup>15</sup> Now that USCIS is again following the 1999 Guidance on public charge,<sup>16</sup> which predated U and T visa status as remedies altogether, public charge policy is technically silent on whether these populations are exempt from public charge. However, as mentioned above, U and T visa applicants and grantees should be exempt from public charge inadmissibility by statute. See Section IV below for a detailed discussion of public charge exemptions for these individuals.

## 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,<sup>17</sup> with limited exceptions.<sup>18</sup> 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.<sup>19</sup>

## 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 do not require a showing of “admissibility” to qualify.<sup>20</sup> Some forms of relief might require that an applicant not trigger certain grounds of inadmissibility, but not all of them. Immigration officers will not apply a public charge test to decide if a person is eligible to receive an immigration status or benefit in a case where the law does not require overcoming the public charge inadmissibility ground. The following list includes applications or relief that might require overcoming some grounds of admissibility, but public charge does not apply:

- Seeking admission as a refugee<sup>21</sup>
- Applying for adjustment to permanent resident status as a refugee or asylee<sup>22</sup>
- Applying for a T visa<sup>23</sup>
- Applying for a U visa<sup>24</sup>
- T visa holders applying for adjustment to permanent resident status<sup>25</sup>
- U visa holders applying for adjustment to permanent resident status<sup>26</sup>
- Applying for special immigrant juvenile status (SIJS) and adjustment to permanent resident status based on SIJS<sup>27</sup>
- Applying for adjustment to permanent resident status based on an approved VAWA self-petition,<sup>28</sup> and individuals applying for suspension of deportation or cancellation of removal under VAWA<sup>29</sup>
- Applying for Temporary Protected Status (TPS)<sup>30</sup>
- Amerasian immigrants (applying for their initial admission)<sup>31</sup>
- Applying for adjustment to permanent resident status under the Cuban Adjustment Act (CAA)<sup>32</sup>
- Nicaraguans and Cubans applying for adjustment to permanent resident status under the Nicaraguan Adjustment and Central American Relief Act (NACARA)<sup>33</sup>
- Applying for adjustment to permanent resident status under the Haitian Refugee Fairness Act (HRIFA)<sup>34</sup>
- Applying for adjustment to permanent resident status under the Liberian Refugee Immigration Fairness Act (LRIF)<sup>35</sup>

**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 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 asylum<sup>36</sup>
- Applying for Deferred Action for Childhood Arrivals (DACA)<sup>37</sup>
- Applying for cancellation for removal for certain nonpermanent residents<sup>38</sup>
- Applying for cancellation for removal for permanent residents<sup>39</sup>
- Applying for suspension of deportation under former INA § 244
- Applying for suspension of deportation or cancellation of removal under NACARA<sup>40</sup>
- Applying for registry<sup>41</sup>

**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 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.<sup>42</sup>

## 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)<sup>43</sup>
- Certain Cubans may apply for adjustment of status under the CAA<sup>44</sup>
- Certain Nicaraguans and Cubans may apply for adjustment of status under NACARA<sup>45</sup>
- Certain Haitians may apply for adjustment of status under HRIFA<sup>46</sup>
- Certain Liberians may apply for adjustment of status under LRIF<sup>47</sup>

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.<sup>48</sup> 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 exempt from the affidavit of support requirement that is part of the public charge assessment.<sup>49</sup>

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, 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 1999 Guidance, any public benefits used while in a status that is exempt from public charge should not count against a person who later becomes subject to public charge inadmissibility.<sup>50</sup> The now vacated 2019 DHS public charge inadmissibility rule clearly specified that such benefits use would not count against a person in a subsequent public charge test.<sup>51</sup>

#### **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 now vacated 2019 DHS public charge inadmissibility rule clarified that T and U visa applicants and grantees could pursue T- or U-based adjustment or family-based adjustment and remain exempt from public charge,<sup>52</sup> that rule is now vacated and USCIS adjudicators are following the 1999 Guidance in public charge inadmissibility determinations.<sup>53</sup> The 1999 Guidance is silent on the question of public charge exemptions for U and T applicants and recipients because it predated U and T nonimmigrant status as remedies altogether. Nevertheless, there is a statutory public charge exemption for T and U applicants and grantees that should apply in T-based adjustments and family-based adjustments.<sup>54</sup> (A U-based adjustment under INA § 245(m) does not apply the grounds of inadmissibility.)

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.”<sup>55</sup> However, immigration authorities seem to have interpreted this provision somewhat differently in regulation and policy. In this section, we will look at the statutory language, the regulatory provisions, and recent 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.<sup>56</sup> 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.<sup>57</sup> Completely separate from public charge, these grounds could bar an applicant from eligibility for T nonimmigrant status or adjustment of status to lawful permanent residency, 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.<sup>58</sup>

### 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 is not clearly inapplicable when approved T nonimmigrants file for adjustment of status based on their T visa status under INA § 245(l).<sup>59</sup> 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,” which includes INA § 212(a)(4), the public charge ground.<sup>60</sup> Indeed, the adjustment provision for T visa holders specifies that the public charge ground may be waived in the discretion of the Secretary of DHS, implying that this ground applies absent a waiver.

Despite the confusion created by INA § 245(l), advocates argue that, notwithstanding the statutory language at INA § 245(l)(2)(A), T nonimmigrants are actually exempt from public charge inadmissibility when applying for T-based adjustment because of the statutory public charge exemption for T visa grantees at INA § 212(a)(4)(E)(iii).<sup>61</sup> They also maintain 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, which added the public charge exemption for certain “qualified alien victims” to the statute.<sup>62</sup> Advocates further note that INA § 212(a)(4)(E) and INA § 245(l)(2) are inconsistent on this point because Congress has yet to amend INA § 245(l)(2) since adopting the public charge exemption at INA § 212(a)(4)(E).<sup>63</sup> Thus, the later in time amendment must control.

Amid this uncertainty regarding whether there is a public charge exemption for 245(I) adjustments, the option of applying for a discretionary waiver of the public charge ground of inadmissibility remains in the statute.<sup>64</sup> This means that a T visa holder could apply for a waiver and adjust their status to permanent residence under 245(I) despite a USCIS finding that they are likely to become a public charge.

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

- Argue that the public charge ground of inadmissibility 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), public charge inadmissibility does not apply to them.
- 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. Under the 1999 Guidance, mere receipt of benefits is insufficient to find someone is likely to become a public charge. Instead, an officer must find that the person is likely to become *primarily* dependent on cash aid or long-term care at the government's expense to determine they are a public charge.
- 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(I)(2)(A).

Remember that an applicant for adjustment of status under INA § 245(I) must be otherwise admissible (unless they have received a prior waiver of such grounds of inadmissibility), 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.

**NOTE:** The vacated 2019 DHS public charge inadmissibility rule made the matter of a public charge exemption for T-based adjustments of status much more straightforward. The rule explicitly exempted individuals from public charge inadmissibility in 245(I) adjustment of status applications, provided applicants were in valid T nonimmigrant status at the time of application and at the time the benefit request was adjudicated.<sup>65</sup> Moreover, the USCIS Policy Manual guidance on the rule specifically identified the inconsistency on public charge inadmissibility between the 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(I), with the agency stating its position that the inconsistency was due to “Congress’ failure to amend INA 245(I)(2) when it created INA 212(a)(4)(E) in its current form.”<sup>66</sup> DHS explained that “[b]ecause the amendments to INA 212(a)(4)(E) occurred later in time than the creation of INA 245(I), DHS considers the text and exemption in INA 212(a)(4)(E) controlling.”<sup>67</sup> At present, it is unknown whether adjudicators will consider individuals applying for T-based adjustment of status as exempt from public charge inadmissibility, but there is a strong argument under INA § 212(a)(4)(E)(iii) that they are.

### **3. Public Charge Inadmissibility for Those with Pending T Nonimmigrant Applications when Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition**

On the face of the public charge provision in the INA, 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.<sup>68</sup> The statutory language does not limit application of the exemption to a specific application or process. Based on the broad nature of the exemption to the inadmissibility ground, advocates should argue that a person with a pending T visa can pursue adjustment of status based on a family or employer petition without being subject to public charge inadmissibility. Since the waiver appears in the statute as a blanket waiver to the public charge ground of inadmissibility, a person with a prima facie application or status should be able to invoke the waiver any time they are facing this ground of inadmissibility.

Of course, having *granted* T nonimmigrant status is a stronger position than being a mere *applicant*. A person making the argument that the exemption applies as a T nonimmigrant status applicant should be prepared to show that they are prima facie eligible for the T visa.

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.<sup>69</sup> 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).”<sup>70</sup>

**NOTE:** The now vacated 2019 DHS public charge rule and the currently enjoined 2019 Department of State (DOS) public charge rule specifically provided that pending T applicants were exempt from public charge inadmissibility when seeking adjustment of status under 245(a) or any other benefit for which admissibility was required.<sup>71</sup> As mentioned above, the 1999 Guidance does not explicitly mention public charge exemptions for T applicants, but the Guidance predated T nonimmigrant status as a remedy.

#### **4. Public Charge Inadmissibility for those in T Nonimmigrant Status when Applying for Adjustment of Status or Consular Processing Based on a Family or Employer Petition**

Individuals in valid T visa status applying to adjust based on a family or employer 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), applying the same blanket waiver that is described above.<sup>72</sup>

**NOTE:** The vacated 2019 DHS public charge rule and the enjoined 2019 DOS public charge rule specifically exempted individuals who had 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 was in valid T nonimmigrant status at the time of application and adjudication of the benefit request.<sup>73</sup> Although these policies are not in play at DHS and DOS, this recent regulatory language suggests that even absent a new rule, adjudicators at both agencies may consider T nonimmigrants as exempt from public charge in applications for family or employer-based adjustment or consular processing. Again, because the exemption from public charge for T visa holders is found in the statute under the ground of inadmissibility, it should not be limited to a T visa adjustment process. It instead should apply any time such a person faces the ground of inadmissibility.

#### **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. Nonetheless, advocates could still argue that the statutory exemption applies. 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,<sup>74</sup> 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)<sup>75</sup> 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(l). 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).”

It is unclear whether USCIS and the State Department will instead interpret 8 U.S.C. § 1641(c)(4) as only referring to individuals who have been granted *and remain in* T nonimmigrant status.<sup>76</sup> Notwithstanding these possible divergent statutory interpretations, a defensible argument can 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.<sup>77</sup> This is arguable considering that while T nonimmigrant status lasts for up to four years,<sup>78</sup> its duration may be extended in some situations.<sup>79</sup> Nevertheless, given the novelty of this argument, advocates should proceed with caution if their client pursuing adjustment formerly held valid T visa status, or currently has T visa status but it will expire before their adjustment application is adjudicated and no extension is possible, and the client’s case contains significant public charge concerns.

**NOTE:** Under the now vacated 2019 DHS public charge rule and the similar 2019 DOS rule, which is enjoined, approved T nonimmigrants were exempt from public charge inadmissibility when applying for adjustment of status or consular processing under 245(a) or (i), if they were “in *valid* T nonimmigrant status at the time the benefit request [wa]s filed ... and at the time the benefit request [wa]s adjudicated” (emphasis added).<sup>80</sup> Although these regulations are not currently in play, they may signal the agencies’ reluctance to consider T nonimmigrants whose status has lapsed as public charge exempt in their applications for family- or employer-based adjustment or consular processing under the 1999 Guidance.

## 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.<sup>81</sup> 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 received U nonimmigrant status. Alternatively, in the process of waiting for their U visa petitions to be approved, U visa applicants may acquire a family member who can petition for them, such as a U.S.-citizen or LPR spouse or a U.S.-citizen child who turns 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” created in the 2013 reauthorization of the Violence Against Women Act (VAWA) includes a public charge exemption for a person who is “an applicant for, or is granted, nonimmigrant status under section 101(a)(15)(U).”<sup>82</sup> This language suggests that under any 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.<sup>83</sup> The 1999 Guidance on public charge does not mention such an exemption or an exception to the public charge inadmissibility ground for U petitioners, but the Guidance predated the U visa as a remedy. Moreover, regardless of the content of the 1999 Guidance or any future public charge policy, statutory authority is generally stronger than regulatory authority. Consequently, advocates should consider making the argument that their clients with pending U petitions are exempt from public charge in their family- or employer-based adjustment of status or immigrant visa applications. Still, 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. Nonetheless, advocates would be arguing that the statute is clear and should not be subject to agency interpretation that narrows its application.

**NOTE:** The vacated 2019 DHS public charge rule and the enjoined 2019 DOS public charge rule seemed to openly acknowledge that U nonimmigrants were exempt from public charge inadmissibility by citing the statutory “Special Rule for Qualified Alien Victims” when including among public charge exempt groups “[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.”<sup>84</sup> The USCIS Policy Manual guidance on the 2019 DHS rule arguably went 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.”<sup>85</sup> Although the 2019 DHS rule is now vacated and the associated USCIS Policy Manual guidance deleted, DHS may continue to interpret the public charge exemption statute as encompassing those who have applied for U visa status.

Advocates representing clients who have pending U visa petitions and who decide to pursue adjustment of status via INA § 245(a) or (i) 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**

U visa grantees applying for adjustment of status under INA § 245(m) are exempt from public charge inadmissibility based on clear statutory language at INA § 245(m)(1). However, INA § 245(a) and (i) include no such explicit carveout for U visa holders who want to adjust or apply for consular processing via a family member or employer. Nonetheless, like the above 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 INA in the 2013 reauthorization of VAWA.

**NOTE:** The now vacated 2019 DHS public charge rule and the associated USCIS Policy Manual guidance on the rule, as well as the enjoined 2019 DOS public charge rule, specify that 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.<sup>86</sup> Although the 2019 DHS rule is now vacated and the USCIS Policy Manual guidance deleted, USCIS adjudicators may continue to consider U grantees as public charge exempt in family- and employer-based adjustments given that in they based their recent regulatory exemption on the statutory authority of INA § 212(a)(4)(E), which lives on.

Regardless of the policy under which your client’s case will be adjudicated, remember that an applicant for adjustment of status 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**

Like individuals whose valid T nonimmigrant status has lapsed, see Section V.A.5, 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 charge<sup>87</sup> a person who “is an applicant for, or *is granted*, nonimmigrant status under section 101(a)(15)(U)” (emphasis added).<sup>88</sup>

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)<sup>89</sup> 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.

It is unclear whether USCIS and the State Department will instead interpret INA § 212(a)(4)(E)(ii) as only encompassing individuals who have been granted *and remain in* valid U nonimmigrant status. However, advocates can argue that the expansive phrasing of the statute shows



Congress's intention to include all individuals who have ever been granted U nonimmigrant status, regardless of expiration date.<sup>90</sup> This is arguable because while U nonimmigrant status lasts for up to four years,<sup>91</sup> it can be extended.<sup>92</sup> Still, 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 that will expire before their application is adjudicated and an extension is unlikely, particularly if the client's case has significant public charge concerns.

**NOTE:** Under the vacated 2019 DHS public charge rule and the similar DOS 2019 rule, which is enjoined, U grantees were exempt from public charge inadmissibility when applying for adjustment of status or consular processing under 245(a) or (i), provided they were "in *valid* U nonimmigrant status at the time the benefit request [wa]s properly filed ... and at the time the benefit request [wa]s adjudicated" (emphasis added).<sup>93</sup> Although these regulations are not currently in play, they may indicate the agencies' reluctance to consider U grantees whose status has expired as public charge exempt in their applications for family- or employer-based adjustment or consular processing under the 1999 Guidance.

## 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 public charge policy and 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

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<sup>1</sup> INA § 212(a)(4), 8 U.S.C. § 1182(a)(4).

<sup>2</sup> A special thanks to Erin Quinn and former ILRC attorney Em Puhl for their contributions to this advisory.

<sup>3</sup> Public Charge Ground of Inadmissibility, 86 Fed. Reg. 47025 (Aug. 23, 2021).

<sup>4</sup> Nonimmigrant visa applicants, such as visitors, also must 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.

<sup>5</sup> This advisory focuses on exemptions to public charge inadmissibility and other situations where public charge does not apply, not the affidavit of support requirement. Like public charge, the affidavit of support is an important component of most family-based immigration cases, but it is distinct from public charge. For more information about the affidavit of support, see ILRC, *Introductory Guide to the Affidavit of Support* (Apr. 2018), <https://www.ilrc.org/introductory-guide-affidavit-support>.

<sup>6</sup> See Section II for more discussion of LPRs and the public charge ground of inadmissibility.

<sup>7</sup> See INA § 101(a)(13)(C)(ii).

<sup>8</sup> 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 Department of Homeland Security (DHS) public charge inadmissibility rules should not apply to adjustment of applications before the immigration courts because EOIR has its own set of regulations at 8 C.F.R. §§ 1000-1399.

<sup>9</sup> INA § 212(a)(4)(E).

<sup>10</sup> *Id.* See 8 U.S.C. § 1641(c) for a full list of individuals classified as “qualified aliens” who are exempt from public charge inadmissibility.

<sup>11</sup> INA § 212(a)(4)(E). See Section IV for more discussion of public charge exemptions for T and U visa applicants and recipients.

<sup>12</sup> INA § 212(a)(4)(E)(iii). Note that if Jenin applied for adjustment through an employer-based petition that requires an affidavit of support, see INA § 212(a)(4)(D), she would have to submit an affidavit of support.

<sup>13</sup> Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019).

<sup>14</sup> Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14221 (Mar. 15, 2021).

<sup>15</sup> 84 Fed. Reg. 41505.

<sup>16</sup> Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999) [hereinafter “1999 Guidance”].

<sup>17</sup> 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).

<sup>18</sup> 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>.

<sup>19</sup> INA § 101(a)(13)(C)(ii). See Section I for more details about when LPRs are subject to the public charge ground of inadmissibility.

<sup>20</sup> 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>.

<sup>21</sup> INA § 207(c)(3).

<sup>22</sup> INA § 209(c).

<sup>23</sup> INA § 212(d)(13)(A).

<sup>24</sup> INA § 212(a)(4)(E)(ii).

<sup>25</sup> INA § 212(a)(4)(E)(iii); INA § 212(d)(13)(A). See Section IV for more information on public charge inadmissibility for T applicants and recipients.

<sup>26</sup> INA § 245(m). See Section IV for more information on public charge inadmissibility for U petitioners and recipients.

<sup>27</sup> INA § 101(a)(27)(J); INA § 245(h)(2)(A).

<sup>28</sup> INA § 212(a)(4)(E)(i).

<sup>29</sup> INA § 212(a)(4)(E)(iii); 8 U.S.C. §§ 1641(c)(1)(B)(iii), (v). Note that these individuals are also “qualified alien[s]” who are exempt from public charge. See Section II.

<sup>30</sup> 8 C.F.R. § 244.3(a).

<sup>31</sup> INA § 101, note 5.

<sup>32</sup> *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.”).

<sup>33</sup> INA § 245, note 9.

<sup>34</sup> INA § 245, note 10.

<sup>35</sup> National Defense Authorization Act for Fiscal Year 2020, § 7611, Pub. L. 116-92 (Dec. 20, 2019); Consolidated Appropriations Act, 2021, § 901, Pub. L. 116-260 (Jan. 3, 2021).

<sup>36</sup> INA § 208(b).

<sup>37</sup> 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>.

<sup>38</sup> INA § 240A(b).

<sup>39</sup> INA § 240A(a).

<sup>40</sup> INA § 101, note A-9.

<sup>41</sup> INA § 249.

<sup>42</sup> 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>.

<sup>43</sup> 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(l). INA § 212(a)(4)(E)(iii). See Section IV below for a more detailed discussion of issues to consider when T visa holders apply for adjustment of status.

<sup>44</sup> Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161.

<sup>45</sup> INA § 245, note 9.

<sup>46</sup> INA § 245, note 10.

<sup>47</sup> National Defense Authorization Act for Fiscal Year 2020, § 7611, Pub. L. 116-92 (Dec. 20, 2019); Consolidated Appropriations Act, 2021, § 901, Pub. L. 116-260 (Jan. 3, 2021).

- <sup>48</sup> INA § 212(a)(4)(E)(i). 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).
- <sup>49</sup> Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35732–57 (June 21, 2006).
- <sup>50</sup> See 64 Fed. Reg. 28690 (“If *at the time of application for admission or adjustment* an alien is receiving a cash public assistance for income maintenance or is institutionalized for long-term care ... that benefit should be taken into account”) (emphasis added).
- <sup>51</sup> 84 Fed. Reg. 41501 (“In a subsequent adjudication for a benefit for which the public charge ground of inadmissibility applies, public benefits ... do not include any public benefits received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility”).
- <sup>52</sup> 84 Fed. Reg. 41505.
- <sup>53</sup> USCIS, “Public Charge,” <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge>; 64 Fed. Reg. 28689.
- <sup>54</sup> See INA § 212(a)(4)(E)(ii)–(iii).
- <sup>55</sup> INA § 212(a)(4)(E)(ii)–(iii); 8 U.S.C. § 1641(c)(4).
- <sup>56</sup> INA § 212(d)(13)(A).
- <sup>57</sup> 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).
- <sup>58</sup> 8 C.F.R. § 212.16(b).
- <sup>59</sup> See INA § 245(l)(2)(A).
- <sup>60</sup> INA § 245(l)(2).
- <sup>61</sup> 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>.
- <sup>62</sup> *Id.*
- <sup>63</sup> *Id.* Advocates in turn note that the T visa adjustment of status waiver regulation at 8 C.F.R. § 212.18(b)(2) also has not been updated pursuant to the public charge statutory amendment in 2013. *Id.*
- <sup>64</sup> INA § 245(l)(2)(A).
- <sup>65</sup> 84 Fed. Reg. 41505.
- <sup>66</sup> This language was previously included at 8 U.S. Citizenship and Immigration Services Policy Manual (USCIS-PM) G.3(B)(2). However, after the 2019 DHS public charge inadmissibility rule was vacated, it was removed.
- <sup>67</sup> *Id.*
- <sup>68</sup> 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.”
- <sup>69</sup> INA § 212(a)(4)(D); 8 U.S.C. § 1641(c)(4).
- <sup>70</sup> INA § 212(a)(4)(D).
- <sup>71</sup> See 84 Fed. Reg. 41505 [DHS rule]; 84 Fed. Reg. 55014 [DOS rule]. However, note that the DHS rule has been vacated and the DOS rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.
- <sup>72</sup> INA § 212(a)(4)(E)(iii).

<sup>73</sup> 84 Fed. Reg. 41505 [DHS rule]; 84 Fed. Reg. 55014 [DOS rule]. However, note that the DHS rule has been vacated and the DOS rule is currently enjoined. For updates on injunctions and current applications, please visit our website at <http://www.ilrc.org/public-charge>.

<sup>74</sup> 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).

<sup>75</sup> 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).

<sup>76</sup> See 64 Fed. Reg. 28689. Note that the 1999 Guidance only applies to adjudications by DHS (USCIS), not DOS. The State Department follows Foreign Affairs Manual (FAM) guidance on public charge, at 9 FAM 302.8. The current FAM guidance on public charge largely tracks the 1999 Guidance.

<sup>77</sup> 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).

<sup>78</sup> INA § 214(o)(7)(A).

<sup>79</sup> INA § 214(o)(7)(B)–(C). See *T Visas: A Critical Immigration Option for Survivors of Human Trafficking* (ILRC 2019) 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).

<sup>80</sup> 84 Fed. Reg. 41505 [DHS rule]. See also 84 Fed. Reg. 55014 [DOS rule].

<sup>81</sup> INA §§ 212(a)(4)(E)(ii), 245(m).

<sup>82</sup> INA § 212(a)(4)(E)(ii).

<sup>83</sup> 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).

<sup>84</sup> 84 Fed. Reg. 41505 [DHS rule]. See also 84 Fed. Reg. 55014 [DOS rule].

<sup>85</sup> Before the 2019 DHS public charge rule was vacated, this language was included at 8 USCIS-PM G.3(B)(4). The language has since been deleted from the Policy Manual.

<sup>86</sup> 84 Fed. Reg. 41505 [DHS rule]; 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>.

<sup>87</sup> 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).

<sup>88</sup> INA § 212(a)(4)(E)(ii).

<sup>89</sup> See INA § 212(a)(4)(E).

<sup>90</sup> INA 212(a)(4)(E)(ii).

<sup>91</sup> INA § 214(o)(7)(A).

<sup>92</sup> 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.

<sup>93</sup> 84 Fed. Reg. 41505; 8 C.F.R. § 212.23(a)(19)(ii).



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