I. Introduction

Amid the COVID-19 pandemic of the past several months, Congress has taken some important steps to provide federal assistance to people who are struggling economically because of job loss or other related financial hardship. Specifically, Congress has passed four bills in response to COVID-19 to date that have supplied critical financial support to businesses, health care providers and, in some cases, individuals. However, the federal COVID-19 relief programs created so far leave out many low-income people, among them immigrants, from key forms of assistance, including but not limited to the stimulus checks provided for in the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Fortunately, some states across the country have stepped up to fill some of these significant gaps. This includes California, which, through the new Disaster Relief Assistance for Immigrants (DRAI) Project, is providing one-time direct cash assistance to undocumented Californians who are experiencing hardship due to the COVID-19 crisis but are excluded from federal relief and ineligible for most state safety-net programs.

At the local level, many counties and cities have established or are in the process of establishing similar emergency funds for low-income individuals with financial need because of COVID-19. Understandably, many immigrant community members—including those with lawful immigration status and those without—are concerned about the public charge implications of accessing these programs. This is undoubtedly connected to the February 24, 2020 implementation of the draconian 2019 Department of Homeland Security (DHS) public charge rule, which has significantly altered the public charge inadmissibility landscape. The fact that this policy shift coincided with the COVID-19 pandemic has augmented many community members’ hesitancy to seek economic support programs available to them, notwithstanding extreme hardship, and even when they are not subject to a public charge determination.

This practice alert analyzes the potential public charge consequences of accessing state and local COVID-19 emergency funds and lays out arguments for why the programs should not cause negative public charge effects.

II. State and Local Covid-19 Emergency Funds and Public Charge

Advocates’ and community members’ main concern with the emerging state and local COVID-19 emergency funds is how U.S. Citizenship and Immigration Services (USCIS) officers will classify the funds in future public charge inadmissibility adjudications. The crux of the issue is whether these emergency funds, which deliver cash aid to recipients, would be considered “cash assistance for income maintenance” or “disaster relief” under the 2019 DHS public charge rule. This
distinction matters, because the receipt of “cash assistance for income maintenance” from a federal, state, or local government source would count in any future public charge test someone may have, whereas the receipt of “disaster relief” would not count.15

Unfortunately, at the time of this writing, USCIS has not provided guidance specifically addressing this issue. The only guidance on COVID-19 and public charge that USCIS has offered is a March 27, 2020 announcement on its public charge webpage that testing, treatment, and preventive care (including a vaccine, if one becomes available) for COVID-19 will not be considered in the public charge test.16 The announcement also specified that these services will have no negative impact as part of a public charge inadmissibility determination (nor as related to the public benefit condition applicable to certain nonimmigrants seeking an extension of stay or change of status), even if such treatment is provided or paid for by one or more public benefits, as defined in the 2019 DHS rule (e.g., federally funded Medicaid).17

USCIS’ announcement also indicated that if a person subject to public charge inadmissibility lives or works in a jurisdiction where disease prevention methods such as social distancing or quarantine are in place, or where the person’s employer, school, or university shuts down operations to prevent the spread of COVID-19, they may submit a statement and supporting documentation with their application for adjustment of status to explain how such methods or policies affected the factors USCIS must consider in a public charge inadmissibility determination.18 This includes, for example, “if the [person] is prevented from working or attending school, and must rely on public benefits for the duration of the COVID-19 outbreak and recovery phase.”19 The agency stated that “[t]o the extent relevant and credible, USCIS will take all such evidence into consideration in the totality of the alien’s circumstances.”20

Advocates take this to mean that, apart from COVID-19 testing, treatment, and preventive care (which will not be considered), the use of public benefits related to COVID-19 will not be exempt from public charge, but adjudicators will accord such use less negative weight than if the use occurred outside of the pandemic and recovery period. This approach would make sense, since the use of benefits during a worldwide pandemic is likely not an accurate reflection of a person’s future likelihood of depending on the government for support, which the public charge inadmissibility test is supposed to determine.21 Nevertheless, it is unclear exactly how adjudicators will treat public benefits receipt during COVID-19 in future public charge adjudications.

III. State and Local Covid-19 Emergency Funds as Public Charge-Exempt Disaster Relief

Despite USCIS’ silence on the public charge implications of state and local COVID-19 emergency funds explicitly, advocates have strong arguments that such funding sources are “disaster relief” under the 2019 DHS public charge rule, the receipt of which would not count against community members if they face a public charge assessment.

In particular, excerpts of the preamble to the 2019 DHS public charge rule include reassuring language suggesting that state and local COVID-19 emergency funds would be considered “disaster relief” that would not count in public charge inadmissibility determinations. The following are examples of passages from the preamble that advocates can draw on to encourage clients to access the funds if they qualify.

- “[A]s indicated in the NPRM, DHS will not consider public benefits beyond those covered under 8 CFR 212.21(b), but even within that category, DHS will not consider all cash assistance as cash assistance for income maintenance under the rule. For instance, DHS would not consider Stafford Act disaster assistance, including financial assistance provided to individuals and households under Individual Assistance under the Federal Emergency Management Agency’s Individuals and Households Program (42 U.S.C. 5174) as cash assistance for income maintenance. The same would hold true for comparable disaster assistance provided by State, local, or tribal governments. Other categories of cash assistance that are not intended to maintain a person at a minimum level of income would similarly not fall within the definition.”22 (emphasis added)
A benefit “not for general income maintenance (e.g., if they are not means-tested or if they are provided for some specific purpose that is not for food and nutrition, housing, or healthcare)” such as “LIHEAP (Low Income Home Energy Assistance Program) and emergency disaster relief would not be considered as a public benefit in the public charge inadmissibility determination even though they may be considered as a cash or cash equivalent benefits.”

The italicized text is helpful in showing that local disaster relief programs, even though they are cash assistance programs in nature, are not considered “cash assistance for income maintenance” under the rule. Rather, the emergency funds are exempt from public charge inadmissibility because they are disaster relief and because they are not for general income maintenance. In turn, the USCIS Policy Manual specifies that in order for federal, state, local, and tribal cash benefits to be considered “cash assistance for income maintenance,” it must be 1) “[c]ash or cash equivalent (such as a debit card or check)”; 2) “[f]or a non-specific purpose in which the cash or cash equivalent may be used for food and nutrition, housing, or healthcare”; 3) “[m]eans-tested (requirement based on income threshold)”; and 4) “[n]ot otherwise excluded under the rule or this chapter.” This language parallels the language in the preamble in underscoring that not all cash assistance programs amount to “cash assistance for income maintenance,” including cash aid provided for emergency disaster relief, such as the current COVID-19 emergency.

Another concern of community members and advocates pertains to whether an emergency fund with an income requirement, i.e., “means-tested” programs, would differentially trigger a public charge concern, given that the types of public programs that count in public charge assessments under the 2019 DHS rule are generally means-tested public benefits. While the latter point is true, USCIS has specifically limited the means-tested public benefits that count under its 2019 public charge rule to those listed in the 2019 rule, i.e., federally-funded Medicaid, federally-funded food stamps, and certain federal housing programs, as well as federal, state, local, or tribal cash assistance programs for income maintenance. Because this list is exhaustive, not all means-tested public benefits are considered under the 2019 DHS public charge rule, including benefits related exclusively to emergency response that are means-tested or that implicate income in some way.

The preamble to the 2019 DHS public charge rule provides additional support for this argument:

- “DHS has defined public benefits by focusing on cash assistance programs for income maintenance, and an exhaustive list of non-cash food, housing, and healthcare, designed to meet basic living needs. This definition does not include benefits related exclusively to emergency response, immunization, education, or social services, nor does it include exclusively state and local non-cash aid programs.”

Despite the strong arguments articulated above for why receipt of state and local COVID-19 emergency funds should not count in public charge inadmissibility determinations, unless USCIS makes a statement indicating that it will consider such funds as public charge-exempt “disaster relief,” practitioners must be prepared to counsel clients and advocate on their behalf accordingly. This means explaining to clients that it is not necessary to include receipt of such funds in their I-944, Declaration of Self-Sufficiency forms, which all adjustment of status applicants subject to public charge inadmissibility and certain applicants and petitioners seeking extension of stay and change in status must submit under the 2019 DHS public charge rule. More broadly, it is incumbent on advocates to be able to distinguish between the various safety-net programs immigrant clients may depend on before, during, and after the COVID-19 pandemic and thoughtfully decide whether or not to list such funds as “public benefits” that count under the 2019 rule in the I-944.

In addition, absent a USCIS statement clarifying that COVID-19 relief funds are “disaster relief,” practitioners must also be ready to advocate on clients’ behalf in future adjustment of status interviews if adjudicators question clients about their use of COVID-19 relief funds. This would mean bolstering arguments in support of that interpretation, relying on key language in the preamble to the 2019 DHS public charge rule and the USCIS Policy Manual. Advocates could also point to any language in state and local emergency funds’ descriptive materials indicating that recipients would not face negative public charge consequences for accessing the aid as persuasive authority for the interpretation.

Remember too, that even if USCIS did, somehow, consider these emergency funds to be “cash assistance for income maintenance” under the 2019 DHS public charge rule, USCIS’ March 27, 2020 announcement said that adjudicators...
would take the COVID-19 crisis into account as a mitigating factor in weighing the totality of a person’s circumstances. Although USCIS’ announcement has not been published in anything more formal than the USCIS Public Charge webpage, such as the USCIS Policy Manual, for instance, advocates must hold the agency to their assurances.

IV. Additional Resources

This is a rapidly changing area of public health, immigration law, and policy. As such, it is critical to stay up to date in order to best assist clients seeking assistance due to COVID-19-related economic hardship and who are applying for immigration relief or may apply for such relief in the near future. The following resources can help advocates track the latest developments in this space, as well as provide practice tips:

- Immigrant Legal Resource Center (ILRC), Public Charge – https://www.ilrc.org/public-charge
- Protecting Immigrant Families (PIF) – http://protectingimmigrantfamilies.org/
End Notes

1 Thank you to Tanya Broder, Senior Staff Attorney at the National Immigration Law Center, Gabrielle Lessard, Senior Policy Attorney at the National Immigration Law Center, and Clarisa Reyes-Becerra, Immigration and Health Law Fellow at the California Rural Legal Assistance Foundation, for their helpful discussion on the topic of this practice alert.


12 Like state and local COVID-19 emergency funds, aid programs from the federal government should, for the most part, similarly not trigger public charge problems for recipients.


14 See 84 Fed. Reg. 41501; 8 C.F.R. § 212.21(b)(1) (including “Any Federal, State, local, or tribal cash assistance for income maintenance” as one of the “public benefits” that counts under the definition of “public charge.”). See also 8 USCIS Policy Manual (USCIS-PM) G.10(A).

15 See 84 Fed. Reg. 41363 (“[I]n its public charge inadmissibility determination DHS will not consider receipt of ... a wide range of other benefits, such as emergency or disaster relief.”); 8 USCIS-PM G.10(A)(2) (citing “cash emergency disaster relief – Stafford Act disaster assistance including financial assistance provided to persons and households under the Federal Emergency Management Agency’s Individuals and Households Program and any comparable disaster assistance provided by State, local, or tribal governments” as an example of “federal, state, local, and tribal provided cash or cash equivalent benefits that are not considered cash assistance for income maintenance”).

Id.

Id.

Id.

Id.

Id.

See 84 Fed. Reg. 41501; 8 C.F.R. §§ 212.21(a), (c) (defining “public charge” as a person “who receives one or more public benefits ... for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months,” and explaining that “[i]t is likely to at any time to become a public charge means more likely than not at any time in the future to become a public charge ... based on the totality of the alien’s circumstances”); 8 C.F.R. § 212.22(a) (explaining that the public charge inadmissibility determination is a “prospective determination” of a person’s “likelihood of becoming a public charge at any time in the future”).


See 8 USCIS-PM G.10(A)(2).


See 84 Fed. Reg. 41501; 8 C.F.R. § 212.21(b)(1)–(6).

Id.

See 8 USCIS-PM G.10.

Id.


See, e.g., Cal. Dep’t of Soc. Servs., “Frequently Asked Questions,” available at https://cdss.ca.gov/inforesources/immigration/covid-19-drai#FAQs (regarding the Disaster Relief Assistance for Immigrants (DRAI) Project, one frequently asked question is, “Will receiving this assistance make someone a public charge?” The response indicated is, “This disaster relief assistance is not means-tested and is one-time assistance. The federal government does not list this assistance as a public benefit for a public charge consideration.”).