



DHS Final Rule on Public Charge: Overview and Considerations for Congress

Updated February 3, 2020

On August 14, 2019, the Department of Homeland Security (DHS) published a [final rule](#) that contains new regulations interpreting the public charge ground of inadmissibility in the Immigration and Nationality Act (INA). The regulations make it more likely that non-U.S. nationals (aliens) will not qualify to become [lawful permanent residents](#) (LPRs) due to their potential future use of public benefits. Specifically, the regulations render aliens inadmissible to the United States (and thus ineligible to obtain LPR status) if they are “more likely than not at any time in the future to receive one or more public benefits . . . for more than 12 months within any 36-month period.” Some non-cash federal benefits—including most forms of Medicaid, federal housing assistance, and benefits received under the Supplemental Nutrition Assistance Program ([SNAP](#))—count as “public benefits” under the regulations. In contrast, under the prior executive branch interpretation of the public charge ground of inadmissibility, which had been in place since 1999, use of such non-cash benefits did not impact public charge determinations.

DHS has [announced](#) that it will begin enforcing the new regulations on February 24, 2020, except in Illinois. The announcement follows a January 27, 2020 Supreme Court [order](#) granting DHS a stay of two nationwide preliminary injunctions that had blocked implementation of the regulations on the ground that they likely violated the INA and the Administrative Procedure Act. Earlier, DHS had obtained stays of other nationwide preliminary injunctions against the regulations from two [federal](#) appellate [courts](#). As of this writing, [one](#) preliminary injunction against the regulations remains in place, and it blocks their implementation in Illinois. As such, under the court orders currently in effect, DHS may enforce the new regulations for the time being, except in Illinois, while litigation over their legality moves forward.

This Legal Sidebar addresses legal aspects of the new public charge rule—specifically, how it changes the criteria for public charge determinations and, to a lesser extent, the ongoing litigation concerning the rule’s legality. The Sidebar does not focus on the policy arguments for and against the rule.

Congressional Research Service

<https://crsreports.congress.gov>

LSB10341

Background on Public Charge and Pre-Existing DHS Guidance

The public charge ground of inadmissibility requires immigration officials to make forward-looking assessments about the likelihood that an alien, if admitted into the United States, will become dependent on public assistance in the future. The INA renders an alien “inadmissible” if he or she is “likely at any time to become a public charge.” (Refugees, asylees, and some other groups of aliens are exempt from the public charge ground of inadmissibility.) As a CRS Report explains, under longstanding executive branch practice, the provision has implications mainly for aliens who seek LPR status either by applying for adjustment of status, if they are already in the United States, or by applying for an immigrant visa at a U.S. consulate, if they are abroad. The U.S. Citizenship and Immigration Services (USCIS) within DHS adjudicates adjustment of status applications; Department of State (DOS) consular officers adjudicate immigrant visa applications. Both types of applications can be denied if the applicant is found inadmissible on public charge grounds.

The INA does not define what it means to be a “public charge.” Under the prior DHS guidance that the new regulations supersede, applicants were inadmissible on public charge grounds only if they were likely to become “primarily dependent” on one of two types of public benefits: (1) public cash assistance for income maintenance (i.e., cash benefits received through state general assistance programs or federal programs such as the Supplemental Security Income (SSI) program), or (2) government-funded institutionalization for long-term care. DHS officials did not consider past, current, or likely future receipt of any other benefits, such as Medicaid or SNAP, when making this determination. Inadmissibility findings under this guidance appear to have been rare. DHS does not publish statistics on the denial of adjustment of status applications based on public charge grounds, but available DOS statistics on immigrant visas issued and refused in fiscal year 2017, during a period when DOS closely followed the DHS guidance, show public charge denials occurred in less than one percent of cases.

DOS, for its part, has promulgated regulations that mirror the new DHS regulations so as to harmonize the two agencies’ application of the public charge ground of inadmissibility. The DOS regulations technically became effective on October 15, 2019, but DOS has yet to implement them because it is still finalizing a new form that it intends to use in conjunction with the regulations (the public comment period for the form closed on December 23, 2019). Nonetheless, even without new regulations in place, DOS consular officers have been considering the use of non-cash benefits when making public charge determinations since January 2018. Before that date, DOS’s Foreign Affairs Manual (FAM), which provides guidance to consular officers abroad, had followed the longstanding DHS guidance in establishing that aliens were inadmissible on public charge grounds only if they were likely to become primarily dependent on public cash assistance or government-funded institutionalization for long-term care. In January 2018, however, DOS revised the FAM to instruct consular officers to consider an alien’s “[p]ast or current receipt of public assistance of any type”—including all types of state and federal non-cash benefits—when determining whether an alien is likely to become dependent in the future on cash assistance for income maintenance or government-funded long-term care. In other words, consular officers (unlike DHS officers) already have a two-year history of taking into account an alien’s past use of non-cash benefits when forecasting the likelihood that the alien will, at some point in the future, come to depend on public cash assistance or government-funded long-term care. Some reporting indicates that this consideration of prior use of non-cash benefits, along with other aspects of the January 2018 FAM changes, has led to a marked increase in the refusal of immigrant visa applications on public charge grounds.

Overview of New Regulations

The new regulations change DHS’s definition of “public charge” to render aliens inadmissible if they are “[more likely than not at any time in the future to receive one or more public benefits . . . for more than 12 months within any 36-month period.](#)” Public benefits, as [defined](#) in the regulations, include not only public cash assistance and government-funded institutionalization for long-term care, but also the following federal non-cash benefits:

- Medicaid (with some exceptions, such as when received for emergency medical conditions or when received by pregnant women or people under age 21)
- SNAP
- Some federal housing or rental assistance programs

No benefits received by certain groups, such as members of the U.S. Armed Forces and their spouses and children, count as “public benefits” under the regulations.

Thus, under the new regulations, instead of determining whether an alien is likely to become “primarily dependent” on public cash assistance or government-funded institutionalization for long-term care, USCIS officers must determine the likelihood of an alien receiving a benefit from this expanded list for more than a year in the aggregate during any future three-year period.

In addition, the new regulations subject applicants for two types of temporary immigration benefits—[extension of nonimmigrant status](#) and [change of nonimmigrant status](#)—to public charge-type determinations. For these nonimmigrants, however, the inquiry under the new regulations is purely retrospective: instead of assessing likely future benefits use, USCIS officers assess [only](#) whether the applicants used public benefits while in nonimmigrant status.

Factor-by-Factor Framework for Assessing the Likelihood of Future Benefits Use

Aside from changing *what* immigration officers must determine about an alien’s likely future benefits use, the new regulations also establish a new framework for *how* officers should make the forward-looking determination. The INA lists [five factors](#) that officials must “at a minimum” consider when making public charge inadmissibility determinations: age; health; family status; education and skills; and assets, resources, and financial status. The statute also allows officials to consider an [affidavit of support](#) submitted on behalf of the alien, which may indicate that the alien can count on financial support from a relative. Together these factors make up what is known as the “totality of the circumstances” test for public charge determinations.

The new DHS regulations set out [considerations](#) to frame the officer’s analysis of each of the statutory factors. For example, under “family status,” the regulations state that “DHS will consider the alien’s household size... and whether the alien’s household size makes the alien more likely than not to become a public charge.” Under the “financial status” factor, the officer must consider, among other issues, whether the alien’s household income “is at least 125 percent of the most recent Federal Poverty Guideline.” The new regulations also instruct officials to consider one additional factor not specified in the INA: the alien’s “prospective immigration status and expected period of admission.” Applicants for adjustment of status must fill out a new form called a “[Declaration of Self-Sufficiency](#)” to supply information relevant to each factor. (Aliens applying to extend or change a nonimmigrant status must answer [new questions](#) about public benefits use on their application forms but need not submit the Declaration of Self-Sufficiency.)

For most factors, the new regulations go on to identify some types of evidence that officers consider. Under “financial status,” for example, USCIS considers the alien’s “credit history and credit score.” Under “health,” the USCIS assessment takes into account the report of a medical examination “by a civil surgeon or panel physician where such examination is required.”

The officer’s assessment of each factor [leads to a determination](#) that the factor is “positive” or “negative” for the applicant. Some positive or negative determinations, however, are “[heavily weighted](#)”:

Heavily weighted negative factors

- Unemployment: the applicant neither studies nor works despite authorization to do so, and lacks a “reasonable prospect of future employment”
- Public Benefits: the applicant has received or has been approved to receive a “public benefit” for more than 12 of the previous 36 months
- Inability to cover medical costs: the applicant “is likely to require extensive medical treatment” that she likely cannot afford and cannot cover with private insurance
- A prior immigration court determination that the alien is a public charge

Heavily weighted positive factors

- Household income or assets of “at least 250 percent of the Federal Poverty Guidelines”
- Individual annual income of “at least 250 percent of the Federal Poverty Guidelines” for the alien’s household size
- Private health insurance (not including subsidized insurance under the Patient Protection and Affordable Care Act)

Officers incorporate their positive and negative determinations into an overall, balancing-style assessment of the alien’s likelihood to use a public benefit in the future. If the [negatives outweigh the positives](#), the alien is deemed inadmissible.

Consideration of the Applicant’s Past Receipt of Some Federal Non-Cash Benefits

The aspect of the new regulations that subject some non-cash benefits to public charge consideration only apply [prospectively](#). Thus, an alien’s receipt of relevant non-cash benefits (SNAP, federal housing assistance, and Medicaid, with exceptions) before the regulations became effective does not factor into a public charge determination under them. Going forward, however, receipt of or approval for any relevant non-cash benefit for more than 12 of the prior 36 months constitutes a “heavily weighed negative factor.” USCIS is to count months separately for each benefit received, “[such that, for instance, receipt of two benefits in one month counts as two months](#).” If the alien has received the non-cash benefits for a period under the 12-month threshold, USCIS still considers the benefits use but does not count it as a “heavily weighted negative factor.” (The same rules apply to the types of benefits subject to consideration under the pre-existing guidance—public cash assistance and government-funded institutionalization for long-term care—except that receipt of or approval for these types of benefits before the effective date of the regulations counts as a negative but not heavily-weighted factor.)

Eligibility rules for the relevant non-cash federal benefits also suggest that an alien’s *past* use of these benefits may be less likely to impact public charge determinations under the new regulations than immigration officers’ projections of the likelihood that the alien will use the benefits in the *future*. Under the INA, aliens who are subject to public charge determinations (essentially, aliens who do not yet have LPR status and who do not fall into any of the exemptions to the public charge inadmissibility ground, such as the exemptions for asylees and refugees) [generally do not qualify](#) for the relevant non-cash federal

benefits. Yet, even when an alien applying for adjustment of status has not received Medicaid, SNAP, or federal housing assistance in the past, the USCIS officer must still determine, under the new regulations, whether it is more likely than not that the alien will receive these benefits for more than one year in any future three-year period. It is this projection of aliens' future use of these non-cash benefits—not past use—that is likely to impact public charge determinations under the new regulations.

The scope of this prospective determination could result in more inadmissibility findings than under the pre-existing guidance. As DHS [asserted](#) when it initially proposed the new regulations in October 2018, aliens and citizens alike are far more likely to use the relevant non-cash benefits than the public cash assistance that is the focus of public charge determinations under the pre-existing guidance. According to statistics cited in the proposal, 3.7% of all foreign-born persons (including both aliens and naturalized U.S. citizens) and 1.8% of noncitizens in the United States receive public cash assistance. In contrast, just over 20% of people in those groups receive the forms of non-cash benefits that the new regulations subject to consideration (for native-born U.S. citizens, the figures are similar—3.4% receive public cash assistance and 20.4% receive non-cash benefits). Accordingly, the new regulations transform the public charge inadmissibility assessment from a prediction about whether an applicant for adjustment of status will become primarily dependent on a relatively rare benefit into a prediction about whether the applicant will receive an appreciable amount of benefits that are much more common.

In a different vein, some [commentary](#) has suggested that the new regulations may deter use of benefits for which certain groups of non-LPR aliens do qualify and which would not be relevant to public charge determinations (such as benefits use by refugees, for example, or use of non-cash benefits like the [Special Supplemental Nutrition Program for Women, Infants, and Children](#) (WIC) that is not subject to consideration under the new regulations).

Litigation

After an initial stage of litigation over the legality of the DHS regulations, DHS currently may enforce the new public charge regulations throughout the United States, except in Illinois. DHS has [announced](#) that it will begin doing so on February 24, 2020. A complicated web of court orders has produced this status quo.

Before the DHS regulations could go into effect as scheduled on October 15, 2019, a number of federal district courts held that the regulations likely violated the INA and the Administrative Procedure Act. District courts in three federal judicial circuits—the Second, Fourth, and Ninth Circuits—[issued](#) nationwide preliminary injunctions barring DHS from implementing the regulations anywhere in the United States during further proceedings. An [injunction](#) issued by a district court in another federal circuit—the Seventh Circuit—barred implementation in the state of Illinois. DHS obtained stays of the district court injunctions in the [Ninth](#) and [Fourth](#) Circuits from the Courts of Appeals for those circuits. DHS obtained stays of the remaining nationwide injunctions—those issued by a district court in the Second Circuit—from the [Supreme Court](#), after the Court of Appeals for the Second Circuit [declined](#) to grant the stays. Thus, none of the nationwide preliminary injunctions remain in effect. However, the injunction that applies in Illinois remains in place; the Court of Appeals for the Seventh Circuit declined to stay that injunction (without a published opinion).

The upshot of this series of orders is that DHS may enforce the new regulations outside of Illinois at least until the litigation returns to the Supreme Court, which probably would not hear an appeal until its next term given the status of proceedings in the various cases. Even then, only a Supreme Court outcome adverse to DHS could result in another nationwide block of the regulations. As for Illinois, the Trump Administration has [indicated](#) that it will ask the Seventh Circuit to revisit its stay application in light of the Supreme Court order. In any event, the Seventh Circuit is to hear oral arguments in the next phase of the case—the government's appeal of the state-wide preliminary injunction—on February 26, 2020,

according to the case docket. Thus, DHS potentially could obtain permission to implement the regulations in Illinois in the coming months.

Considerations for Congress

Immigration adjudications often turn on broad, forward-looking assessments. Applications for [temporary visitor visas](#), for example—of which DOS adjudicated about [ten million](#) in FY2018—typically come down to a judgment about the applicant’s plans. If the applicant intends to visit the United States for a brief period of business or pleasure, he may qualify for a tourist visa. If he intends to abandon his residence in a foreign country to remain in the United States indefinitely, then he does not qualify.

But in the context of immigrant visa and adjustment of status adjudications, where LPR status is at stake, such prospective determinations have traditionally played a smaller role. The primary issues that such adjudications pose are whether the applicant has a [legal basis to immigrate](#) (such as a [qualifying family or employment relationship](#)) and whether he falls within any [grounds of inadmissibility](#) (such as the provisions rendering aliens inadmissible if they have been convicted of certain crimes). And while some grounds of inadmissibility require forward-looking assessments—such as those barring aliens who “seek to enter the United States to engage” in activity that violates espionage laws or to engage in other unlawful activity—their narrow focus constrains the scope of the immigration official’s inquiry. The new DHS regulations alter this general framework. They bring a prospective assessment to bear on adjustment of status applications that is much broader than exists under current policy, because the regulations change the public charge inquiry to focus upon a lower threshold of likely future benefits use.

If Congress disapproves of the new regulations, it has several legislative options. Congress could codify the pre-existing DHS guidance, enact some other definition of “public charge” narrower than that contained in the regulations, or change the statute to require an assessment of an applicant’s current self-sufficiency instead a predictive inquiry. Congress could also establish in more detail the factors that officials can and cannot consider when making the prospective assessment (e.g., specify that officials should not consider use of certain types of benefits, such as Medicaid or other non-cash benefits). Or, as bills [introduced](#) in the [House and Senate have](#) proposed, Congress could preserve the status quo under the current guidance by prohibiting DHS from using funds to implement the new regulations.

On the other hand, if Congress agrees with the new regulations, it could codify them to obviate legal arguments that the regulations lack adequate justification or unreasonably interpret the inadmissibility statute. If Congress finds the DHS regulations too permissive, it could codify a stricter definition of “public charge” or specify that officials making public charge determinations must consider an even broader list of public benefits received by aliens, such as non-cash benefits received from state and local governments.

Author Information

Ben Harrington
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.