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Immigration: Public Charge

Immigration law in the United States has long contained exclusion and removal provisions designed to limit government spending on indigent non-U.S. nationals. (Non-U.S. nationals are referred to as *aliens* in immigration law.) Under the Immigration and Nationality Act (INA), an alien may be denied admission into the United States or lawful permanent resident (LPR) status if he or she is “likely at any time to become a public charge” (8 U.S.C. §1182(a)(4)). An admitted alien may also be subject to removal from the United States based on a separate public charge ground of deportability, but this is rarely employed.

The Department of Homeland Security (DHS) and the Department of State (DOS) have primary responsibility for implementing the public charge ground of inadmissibility. DHS makes public charge inadmissibility determinations for aliens seeking admission or *adjustment* from a temporary status to LPR status. DOS consular officers make public charge inadmissibility determinations for aliens abroad applying for U.S. visas, based on guidance in the Foreign Affairs Manual (FAM). While this applies to both immigrant and nonimmigrant (i.e., temporary) visas, in practice it is rarely employed for nonimmigrant visas. Certain categories of aliens, such as refugees and asylees, are exempted from the public charge ground of inadmissibility. Moreover, it is not applicable to aliens who are applying for citizenship (i.e., naturalization).

Defining Public Charge

Because the INA does not define the term *public charge*, the determination of whether an alien seeking a visa or adjustment of status is inadmissible on public charge grounds turns largely on standards set forth in agency guidance materials. Because both DHS and DOS are primarily responsible for implementing the INA’s public charge provisions, both agencies’ evolving definitions of public charge must be considered.

Since 1999, agency guidance (formerly the Department of Justice’s Immigration and Naturalization Service, now DHS) has defined public charge to mean a person who is or is likely to become primarily dependent on public cash assistance or government-funded institutionalization for long-term care. From 1999-2018, DOS’s FAM followed DHS’ guidance.

In January 2018, DOS revised the FAM to instruct consular officers to consider an alien’s “past or current receipt of public assistance of any type”—including all types of state and federal noncash benefits—when determining whether an alien is likely to become a public charge. While this did not change the definition of public charge (i.e., it was still defined as someone dependent on cash assistance for income maintenance or government-funded long-term

care), it did change the scope of public benefits that consular officers must consider when applying that definition (i.e., noncash benefits as well as cash benefits).

On August 15, 2019, DHS published a final rule that redefines public charge as someone “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.” This rule also changed how factors are considered in public charge determinations (see below). It was set to take effect on October 15, 2019, but multiple lawsuits and preliminary injunctions halted the rule. However, federal appellate courts and the U.S. Supreme Court eventually lifted all of these injunctions, allowing DHS to implement the rule while litigation over its legality continues (for more information on this litigation, see CRS Legal Sidebar LSB10341, *DHS Final Rule on Public Charge: Overview and Considerations for Congress*, by Ben Harrington). On February 24, 2020, DHS began implementing the final rule nationwide.

On October 11, 2019, DOS published an interim final rule on the public charge ground of inadmissibility that largely aligns with DHS’ rule. The DOS rule was set to take effect on October 15, 2019, but was delayed until the Office of Management and Budget (OMB) approved the Public Charge Questionnaire (DS-5540). On February 12, 2020, DOS “published a notice of intent in the Federal Register seeking emergency OMB processing and approval for the DS-5540 in order to implement the Department’s interim final rule by February 24, 2020.” On February 20, 2020, DOS announced that OMB had approved the DS-5540. On February 21, 2020, the FAM was updated to reflect this new rule. Thus, DOS implemented the interim final rule on February 24, 2020, the same day as DHS. However, the rule was enjoined on July 29, 2020 (see “COVID-19 Pandemic” below).

Designated Benefit Programs

The DHS final rule, and the subsequent DOS interim final rule, expanded the list of public benefits considered in public charge determinations. The nine programs designated in the new rules include four that were included under the 1999 guidelines: Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), state general assistance, and benefits provided for institutionalized long-term care; as well as five additional programs: the Supplemental Nutrition Assistance Program (SNAP), Medicaid (with exceptions), Project-Based Rental Assistance, the Housing Choice Voucher Program, and Public Housing.

Benefits received by certain groups, such as members of the U.S. Armed Forces and their spouses and children, do not

count as public benefits under the regulations. Additionally, DHS will only consider benefits directly received by the alien for the alien's own benefit; it will not consider benefits received by a legal guardian on behalf of another (e.g., a U.S. citizen child).

Factors Considered in Public Charge Determinations

The INA requires immigration authorities to consider, at a minimum, the following factors when making public charge determinations: age; health; family status; assets, resources and financial status; and education and skills (8 U.S.C. §1182(a)(4)(B)). Immigration officers may also consider an affidavit of support submitted by an alien's petitioner as well as the alien's prospective immigration status (e.g., immigrant or nonimmigrant) and expected period of admissions as factors. Together, these factors make up what is known as the totality of the circumstances test for public charge determinations.

The new rules explicate how officers should evaluate each of the statutory factors, setting new standards and required evidence for each factor. In addition, officers are to consider a set of heavily weighted factors. There are four *heavily weighted negative factors*: (1) unemployment, (2) past receipt of (or approval to receive) public benefits for more than 12 of the previous 36 months, (3) inability to cover medical costs, and (4) prior public charge determination. In addition, there are three *heavily weighted positive factors*: (1) household income or assets of at least 250% of federal poverty guidelines (FPG), (2) individual annual income of at least 250% of the FPG, and (3) having private health insurance.

Impact

The number of aliens denied visas or adjustment of status due to a determination of inadmissibility on public charge grounds is difficult to quantify precisely. DHS does not compile statistics and share publicly the number of adjustment of status applications denied by particular grounds of inadmissibility. Nevertheless, to understand the scope of those who could be subject to the new DHS rule, in FY2019 DHS approved 576,872 applications for adjustment of status and denied 76,215.

In contrast, DOS reports on the total number of immigrant and nonimmigrant visa refusals, and also breaks out the refusals by specific grounds of inadmissibility. However, given that DOS' interim final rule took effect on February 24, 2020, data are not yet available to assess its impact. Nevertheless, since the January 2018 FAM changes, which, like DOS' new rule, included consideration of prior use of noncash benefits for public charge determinations, there has been a marked increase in the refusal of immigrant visa applications on public charge grounds (see **Table 1**). To put these numbers in context, in FY2019 DOS issued 462,422 immigrant visas and denied 298,017 immigrant visa applications.

Table 1. DOS Refusals of Immigrant Visas (IV) on Public Charge (PC) Grounds of Inadmissibility

Fiscal Year	IV Refusal on PC Grounds	Percentage of All IV Refusals
2015	897	0.3%
2016	1,076	0.3%
2017	3,237	1%
2018	13,450	3%
2019	20,941	5%

Source: DOS, Report of the Visa Office 2015-2019, Table XX: Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Years 2015, 2016, 2017, 2018, and 2019.

Policy Considerations

Many observers are concerned that these new rules could have a chilling effect on the use of public benefits by individuals not subject to the rules (e.g., LPRs, U.S. citizen children). They could deter enrollment of eligible people in benefit programs and negatively affect public health. Others are concerned about the impact of the new rules on the public charge determination process; they fear that individual officers now have a larger degree of discretion, which could lead to inconsistent outcomes. Some also fear the rules will increase processing times and backlogs.

Supporters of the new rules believe they uphold American values of self-sufficiency, ensure that the availability of public benefits will not incentivize immigration to the United States, and save taxpayers money.

COVID-19 Pandemic

In light of the pandemic, some observers fear that these rules will discourage immigrants from utilizing public health care systems, which could increase the spread of COVID-19. USCIS announced that it will not consider any testing or treatment for COVID-19 as part of the public charge inadmissibility determination. However, a New York federal judge found this announcement "plainly insufficient." On July 29, 2020, the court issued a nationwide injunction blocking the DOS public charge rule until further court order. With respect to the DHS public charge rule, although litigation is ongoing, currently there are no court orders in place that restrict its application during the pandemic.

Proposed Legislation in the 116th Congress

Legislative proposals aimed at limiting the implementation of the public charge rules have been introduced in the 116th Congress. The No Federal Funds for Public Charge Act of 2019 (H.R. 3222) would prohibit the use of federal funds (including fees) "to implement, administer, enforce, or carry out" these rules. Companion legislation—the Protect American Values Act (S. 2482)—has been introduced in the Senate.

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