



Immigration: DHS Final Rule on Public Charge

January 29, 2020

On January 27, 2020, the Supreme Court of the United States (SCOTUS) [lifted two nationwide preliminary injunctions](#) that blocked the implementation of the [public charge final rule](#). The Department of Homeland Security (DHS) published this rule on August 14, 2019, and it was set to take effect on October 15, 2019. [Multiple lawsuits](#) and preliminary injunctions had halted the rule; the SCOTUS' ruling now permits its implementation while litigation on the merits continues. U.S. Citizenship and Immigration Services [announced](#) that it will begin enforcing the new regulations on February 24, 2020, except in Illinois (where a statewide preliminary injunction is still in effect).

Background

Immigration law in the United States has long contained exclusion and removal provisions designed to limit government spending on indigent non-U.S. nationals (aliens). Under [Section 212\(a\)\(4\)](#) of the Immigration and Nationality Act (INA), an alien may be denied admission into the United States or adjustment to lawful permanent resident (LPR) status if he or she is “likely at any time to become a public charge.” 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.

DHS and the Department of State (DOS) have primary responsibility for implementing the INA’s public charge provisions. DHS’ public charge rule applies to aliens seeking admissions or adjustment of status to LPR. This rule also applies to those seeking to extend or change their nonimmigrant status, but is not applicable to aliens who are applying for citizenship. Moreover, certain categories of aliens, such as refugees and asylees, are exempted from the public charge grounds of inadmissibility. Aliens abroad applying for U.S. visas are adjudicated by DOS officers who make determinations based on guidance in the Foreign Affairs Manual. On October 11, 2019, DOS published an [interim final rule](#) on public charge that largely aligns with DHS’s rule, but it has yet to be implemented.

Public Charge Definition

Although the INA does not explicitly define the term *public charge*, since 1999 [agency guidance](#) has defined it to mean a person who is or is likely to become “primarily dependent on ... public cash

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assistance for income maintenance or ... institutionaliz[ed] for long-term care at government expense.” The definition of public charge was changed when DHS published the public charge final rule on August 14, 2019. The [new rule](#) renders aliens inadmissible to the United States if they are “more likely than not at any time in the future to receive one or more [of the nine designated] public benefits ... for more than 12 months within any 36-month period.”

Designated Benefit Programs

The final rule expands the list of public benefits considered in public charge determinations. The nine programs designated in the final rule include four that were considered 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., U.S. citizen children).

Factors Considered in Public Charge Determinations

Immigration authorities are required by [statute](#) to, at a minimum, consider the following factors when making public charge determinations: age; health; family status; assets, resources, and financial status; and education and skills. Immigration officers may also consider an [affidavit of support](#) submitted by an alien’s petitioner as well as the alien’s prospective immigration status and expected period of admissions. Together, these factors make up what is known as the *totality of the circumstances* test for public charge determinations.

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

Policy Considerations

Some stakeholders are concerned that this rule could have a [chilling effect](#) on aliens’ use of public benefits, which, due to fear or confusion, could also spill over to populations not subject to the rule and impact enrollment in benefit programs not included in the rule. They contend that this could [negatively affect public health](#) as well as hurt the [economy](#). Supporters of the final rule believe it upholds American [values of self-sufficiency](#), ensures that the availability of public benefits will not [incentivize immigration](#) to the United States, and [saves taxpayers money](#).

Some have expressed concerns about the public charge determination process, arguing that individual officers have a large degree of [discretion](#), which could lead to inconsistent outcomes. Some fear it will [increase processing times and backlogs](#). Others believe it [discriminates](#) against low-income individuals and disproportionately affects people of color.

Proposed Legislation in the 116th Congress

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

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