

The Public Charge Final Rule: FAQs for Immigration Practitioners

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Topics

[Public Charge](#)

On August 14, 2019, the Department of Homeland Security (DHS) issued final regulations that dramatically change the assessment of public charge inadmissibility. Although the rule was enjoined by five district courts, the Supreme Court on January 27, 2020 stayed the only nationwide injunction that had been in effect. That means that the agency is now able to implement the final rule throughout the United States except for Illinois, where a statewide injunction of the rule is still in effect. USCIS has announced that the new rules affect adjustment application postmarked on or after February 24, 2020..

Overall, the new regulations will make it much more difficult for an applicant for adjustment of status or for an immigrant visa to show that he or she is not likely to become a public charge. The FAQs below address many of the concerns raised by practitioners about how the new regulations will affect their clients.

1. Summary of the New Test for Public Charge Inadmissibility

The term “likely at any time to become a public charge,” which is a ground of inadmissibility found in INA § 212(a)(4), has been redefined in four important ways:

- In determining public charge inadmissibility, the regulation shifts attention away from the petitioner/sponsor’s income as reported on the affidavit of support and re-directs it to the applicant’s age, health, family status, assets/resources/financial status, and education/skills. It defines these terms in ways that may make it very difficult for low-income, low-skilled, under-educated, elderly, or disabled applicants to overcome a public charge finding.
- Instead of being applied to those who might become “primarily dependent” on a designated list of state and federal programs, it is to be applied to those who are more likely than not to receive any of nine benefits for more than 12 months in the aggregate within any 36-month period.
- DHS has expanded the list of designated programs that can be considered when applying the public charge “totality of the circumstances” test. Prior to the regulation becoming final, the agency could only consider receipt of three cash assistance programs— Supplemental Security Income (SSI), Temporary

Assistance to Needy Families (TANF), and state general relief or general assistance—as well as a Medicaid program that covers institutionalization for long-term care. The final regulation adds five new programs: non-emergency Medicaid; Supplemental Nutrition and Assistance Program (SNAP, formerly food stamps); Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and Public Housing. Only benefits received by the applicant are considered.

- The regulation allows for the posting of a public charge bond for applicants who, in the opinion of the USCIS or State Department, might otherwise fail the public charge test.

2. Overview of Who is Affected by the DHS Final Rule on Public Charge

1. Which non-citizens are subject to the public charge ground of inadmissibility and the new rule?

All applicants for admission to the United States are subject to the public charge inadmissibility under INA § 212(a)(4) unless specifically exempted, as discussed below. The groups of non-citizens who are affected by the grounds of inadmissibility include:

- Applicants for adjustment of status in the United States
- Applicants for an immigrant visa abroad
- Applicants for a nonimmigrant visa abroad
- Applicants for admission at the U.S. border who have been granted an immigrant or nonimmigrant visa, and
- Nonimmigrants applying for an extension or change of status within the United States (new policy under the final rule).

2. Who is *most* affected by the public charge ground of inadmissibility and the new rule?

The non-citizens most affected by the public charge ground of inadmissibility are those seeking lawful permanent resident (LPR) status based on a family relationship. These include the spouses, children, and unmarried adult sons and daughters of a U.S. citizen or LPR and the parents, siblings, and married sons and daughters of a U.S. citizen. Approximately two-thirds of the one million non-citizens who obtain LPR status every year base it on a family relationship.

While nonimmigrants (e.g., students, tourists, and temporary workers) are also subject to the public charge ground of inadmissibility, this does not usually present a significant barrier. Most of these applicants must also establish that they do not intend to immigrate to the United States (reside permanently) and have the resources to support

themselves while they are here temporarily. This new rule will require them to prove they have not accessed certain benefit programs at the time they apply for an extension or a change of their nonimmigrant status.

LPRs who have been absent from the United States for a continuous period in excess of 180 days are also subject to the grounds of inadmissibility and thus could be questioned as to their likelihood of becoming a public charge when they seek reentry at a port of entry.

3. Who is *not* subject to the public charge ground of inadmissibility?

Some of the most common groups of non-citizens who are **not** subject to the public charge ground of inadmissibility and thus not affected by this new rule include the following:

- Refugee applicants and refugees who are applying for adjustment of status
- Asylum applicants and asylees who are applying for adjustment of status
- Applicants for withholding of removal or relief under the Convention Against Torture
- Applicants for initial or re-registration of Temporary Protected Status (TPS)
- Applicants for initial or renewal of Deferred Action for Childhood Arrivals (DACA) status
- Cubans who are applying for adjustment of status under the Cuban Adjustment Act
- Amerasians who are applying for adjustment of status
- Afghan and Iraqi interpreters and translators who are applying for special immigrant visas (SIV)
- Applicants for Special Immigrant Juveniles Status (SIJS)
- Victims of certain crimes who are applying for a U nonimmigrant visa or U visa holders applying for adjustment of status
- Victims of trafficking who are applying for a T nonimmigrant visa; T visa recipients who are applying for adjustment of status no longer have to seek a waiver of public charge inadmissibility
- Victims of domestic violence who are applying for relief under the Violence Against Women Act (VAWA), including approved self-petitioners who are applying for adjustment of status
- Applicants for “registry” based on their having resided in the United States since before January 1, 1972
- Applicants for benefits under the Nicaraguan Adjustment and Central American Relief Act (NACARA)
- Applicants for benefits under the Haitian Relief and Immigrant Fairness Act (HRIFA)
- Lautenberg parolees who are applying for adjustment of status.

4. Are non-citizens who were once exempt from public charge inadmissibility always exempt?

No. The public charge ground of inadmissibility is dependent on the immigration program the non-citizen is applying for. If a person was in a category that was not subject to public charge, such as TPS, he or she would nevertheless be subject to public charge if applying for adjustment of status in a family-based category. Note, however, that benefits received by an individual who was not subject to the public charge ground of inadmissibility when the benefits were received are not considered.

5. Even when the public charge ground does not apply, are there situations where receipt of public benefits can be a negative factor?

Many forms of immigration benefits are discretionary, meaning that the adjudicator weighs various factors to decide if the applicant deserves to be granted the benefit she or he is seeking. Discretionary benefits include applications for waivers of inadmissibility, adjustment of status, and certain forms of relief from removal, including non-LPR cancellation. If the non-citizen is applying for a discretionary benefit where public charge inadmissibility is inapplicable, the significance of receipt of public benefits depends on the specific circumstances and form of relief sought. For example, in non-LPR cancellation, receipt of public benefits may be a negative consideration, but may also provide support for a factor related to the exceptional and extremely unusual hardship standard required for relief. In a case where a non-citizen is applying for discretionary relief not subject to public charge inadmissibility and is also eligible for and receiving public benefits, it is highly unlikely that receipt of public benefits will be an adverse discretionary factor. For this reason, asylees or refugee applicants for adjustment of status who require a waiver for a ground of inadmissibility are unlikely to experience negative consequences if they are receiving public benefits.

Finally, many applicants for adjustment of status or an immigrant visa who have been found inadmissible on a variety of grounds—such as misrepresentation, health, criminal conduct, unlawful presence, prior order of removal, or smuggling—may be eligible to file a waiver (Form I-601 or Form I-212). Although the public charge ground of inadmissibility does not apply at the waiver adjudication stage, the intending immigrant will ultimately need to satisfy the public charge admissibility test, unless exempt. For this reason, it's important to note that the same facts that may support a finding of hardship in a waiver application may also sound alarm bells for public charge concerns.

Advocates representing clients seeking provisional waivers (I-601A) should take particular care on this issue, because the provisional waiver will be adjudicated without regard to the client's potential inadmissibility on public charge grounds. But if the consulate subsequently finds the applicant inadmissible based on public charge, or any other ground, it will revoke the provisional waiver.

6. How does the final rule affect LPRs, including conditional LPRs?

LPRs are only subject to the grounds of inadmissibility when they are seeking admission to the United States. While INA § 101(a)(13)(C) lists several circumstances that subject an LPR returning from a trip abroad to the grounds of inadmissibility, the most common one is when an LPR returns after a continuous absence that is longer than 180 days. In that situation, the LPR may be questioned at the port of entry about current or likely use of public benefits and be subject to the harsher standard under the new public charge rule. LPR clients who are currently receiving one of the nine designated benefit programs should be cautioned about the risks if they intend to remain outside the United States for more than 180 days.

- **Naturalization (Form N-400)**

LPRs who apply to naturalize are not be subject to the public charge ground of inadmissibility. However, if the naturalization applicant traveled abroad while an LPR for more than 180 days and is also viewed by the DHS officer as someone who was likely to become a public charge at the time of readmission, the LPR could be subject to a charge of being deportable for being inadmissible at the time of admission.

- **Removal of conditional residency (Form I-751)**

Conditional residents are similarly not subject to the public charge ground of inadmissibility when they apply at the two-year stage to remove the conditions (Form I-751). Since they have the same status as other LPRs, however, they would be subject to all grounds of inadmissibility if they depart the United States and then seek readmission after 180 days.

- **Green card renewals (Form I-90)**

LPRs applying to renew their resident alien card (Form I-551) will not be affected by the new public charge rule. Questions concerning income and benefit receipt are not asked on the Form I-90; potential public charge is not a factor that adjudicators can consider.

3. Assessment of Public Charge: Six-Factor Analysis

1. What factors are considered in the assessment of public charge inadmissibility?

Under this final rule, inadmissibility based on the public charge ground is determined by looking at the factors set forth in the statute and deciding on the applicant's likelihood of becoming a public charge at any time in the future based on the "totality of the circumstances." An applicant does not need to have received public benefits in the past to be subject to public charge inadmissibility. While receipt of designated benefit programs is part of the statutory factors' analysis, most findings of inadmissibility under this new rule will likely not be based on the applicant's current receipt. In making this determination, the adjudicator must consider the following factors, each described in more detail below.

- Age
- Health
- Family Status
- Assets, Resources and Financial Status
- Education and Skills
- Affidavit of Support

The applicant will be required to submit much of the information required for this assessment in the new Form I-944, Declaration of Self-Sufficiency. As of the date of publication of these FAQs, this I-944 has been released only in draft form; analysis and information in these FAQs is based on this draft version.

2. How will the applicant's age be evaluated?

The final rule states simply that the USCIS will consider whether the applicant's age will impact his or her ability to work. It does not provide any further explanation, except it will matter if the applicant's age is between the age of 18 and 62. The preamble to the regulation acknowledges that applicants under 18 and over 61 may nevertheless be working or have other adequate means of support, such as from family members. For applicants for admission under age 18, USCIS will give weight to the availability of

outside support from a parent “and any other evidence addressing the resources and assets available to the child in the totality of the circumstances.”

It will be considered a heavily weighted negative factor if the applicant is authorized to work, not a full-time student, and is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment. This is more likely to affect applicants between the ages of 18 and 61.

3. How will the applicant’s health and health insurance coverage be evaluated?

The USCIS will be looking to see if the applicant has been diagnosed with a “medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien’s ability to provide and care for himself or herself, to attend school, or to work.” In making this determination, USCIS will generally defer to the civil surgeon’s medical report (Form I-693) that is a required part of the application process. But it could also consider other evidence of the medical condition. The agency has not proposed amending the I-693 to include additional questions based on the new rule. Bear in mind that the Administration issued a separate proclamation mandating that most applicants for an immigrant visa show enrollment in an approvable health insurance plan or the willingness to enroll within 30 days of admission. This proclamation has been enjoined at the present time.

- **Health Insurance as a Heavily Weighted Factor**

Applicants who have such a medical condition must evidence that they have or are likely to have private health insurance or the financial resources to pay for reasonably foreseeable medical costs. Private health insurance would not include state-funded coverage, but it would include subsidized Affordable Care Act (ACA) coverage. If the applicant is uninsured and does not have the financial resources or ability to secure private health insurance, this will constitute a heavily weighted negative factor and likely result in a finding of public charge.

In contrast, if the applicant has private unsubsidized health insurance, this will be considered a heavily weighted positive factor. This would *not* include subsidized ACA coverage. It does not appear that the applicant needs to have a medical condition for this factor to apply.

4. What does the rule mean when it refers to family status?

The final rule addresses how to calculate the applicant's family size for purposes of determining household income. The larger the family size, the more income the applicant will need to establish. As detailed below, which family members the applicant must count as part of the household depends on whether the applicant is unmarried and under 21 or is over 21.

- **Applicants who are under 21 and unmarried**

Applicants who are under 21 and unmarried must count the following family members as part of the household size, in addition to themselves:

- their children (unmarried and under 21) physically residing with them
- their children not physically residing with them but for whom they provide or are required to provide at least 50 percent of their financial support
- their parents, legal guardians, or any other individual providing or required to provide at least 50 percent of their financial support
- their parents' or legal guardians' other children who are physically residing with them
- their parents' or legal guardians' other children who are not physically residing with them but for whom the parent or legal guardian provides or is required to provide at least 50 percent of their financial support
- any individuals to whom the parents or legal guardians provide, or are required to provide, at least 50 percent of their financial support, and
- any individuals who are listed as a dependent on the parent's or legal guardian's federal income tax return.

- **Applicants who are 21 years or older or married**

Applicants who are 21 years or older or married must count the following family members as part of the household size, in addition to themselves:

- their spouse if physically residing with them
- their children physically residing with them
- their other children not physically residing with them but for whom they provide or are required to provide at least 50 percent of their financial support
- any individuals (including a spouse not physically residing with them) to whom they provide, or are required to provide, at least 50 percent of the individual's financial support
- any individuals who are listed as dependents on the applicant's federal income tax return
- any individuals who provide at least 50 percent of the applicant's financial support, and

- any individual who lists the applicant as a dependent on his or her federal income tax return.

5. What is the applicant's required income, assets, and resources?

- **Income**

Under the final rule and a draft of the Form I-944, the applicant should evidence an annual gross income at least 125 percent of the federal poverty guidelines (FPG), which are updated every year by the Health and Human Services. Applicants who are on active duty, other than training, in the U.S. Armed Forces need only to evidence 100 percent of the FPG. The 2019 FPG and 125 percent of the FPG can be found by going to uscis.gov/i-864p.

- **Evidence of income**

The applicant's financial status will be measured by annual gross income reported on the most recent tax-year transcript from the Internal Revenue Service (IRS Form 1040). Information on obtaining an IRS tax transcript can be obtained by going to irs.gov/individuals/get-transcript. Tax transcripts can be requested by submitting IRS Form 4506-T. The applicant can include the income reported by any family members who must be included in the household size. While the regulations require only the submission of last year's tax return as evidence of assets, resources, and financial status, they require three years of tax returns as evidence of the applicant's education and skills.

If the applicant did not file a tax return last year, he or she should explain why such transcript is not available, such as the applicant did not earn enough to incur a tax liability or was not subject to taxation in the United States. In that case the applicant can submit other credible and probative evidence of income, such as a W-2 or a Social Security Statement that provides a history of total annual income. Although not specified, the applicant should also be able to include wage statements and an employer's letter. Income earned while the applicant was working in the United States without employment authorization will be counted. Applicants who incurred a tax liability and failed to file a return should file one late, which may require payment of past taxes and any penalties.

Additional non-taxable income of a continuing nature, such as from child support or Social Security, can also be included. Income from illegal activity, such as illegal gambling or illegal drug sales, cannot be counted. Nor can income from one of the nine designated benefit programs discussed below.

- **Assets and resources**

If the applicant cannot evidence this amount of income, assets may be considered to make up for the shortfall. These can be the assets and resources belonging to the applicant or belonging to any family member who is included in the household size. For example, an applicant in a household of four should evidence income of at least \$32,187 for 2019. If the applicant can only evidence income of \$25,000, this would be a shortfall of \$7,187. If the applicant is the spouse or child over age 18 of a U.S. citizen, assets must equal three times the income shortfall, or \$21,561. For all other applicants except orphans, the value of assets must equal five times the difference, or \$35,935. Orphans must show only that the value of their assets equals the shortfall in income.

- **Evidence of assets and resources**

If the applicant is including assets to make up the shortfall in income, they must be “significant” and convertible to cash within one year. These assets could be held within or outside the United States and include savings accounts, stocks, bonds, certificates of deposit, retirement and educational accounts, and real estate. If counting the value of real estate, it must include a recent appraisal by a licensed appraiser and indicate the equity value (appraised value minus any loans, mortgage, trust deed, or other liens). The value of an automobile can be included, but only if the applicant or household member has more than one automobile and it is not being included as an asset. If counting funds in a checking or savings account, the applicant must provide bank statements covering at least 12 months prior to filing the application.

- **Civil liabilities**

The agency will also consider the applicant’s civil liabilities, which could include mortgages, unpaid child or spousal support, unpaid taxes, liens, credit card debt, and car or any other loans.

- **Credit history**

Applicants must also provide information concerning their credit history, which includes a U.S. credit report from one of the three credit reporting agencies and the credit score. Information on obtaining a credit report can be found by going to [usa.gov/credit-reports](https://www.usa.gov/credit-reports). The instructions to the Form I-944 require applicants who do not have a credit report or score to submit a statement from one of the three agencies verifying that they do not have one. For example, applicants residing and working abroad will likely not have a U.S. credit report. They can provide evidence, instead, of continued payment of bills.

- **Receipt of public benefits**

The applicant must report **any** past receipt of the nine public benefit programs designated below, as well as applications for or certifications to receive any of them. An applicant who has received any of the designated public benefits described below for more than 12 months in the aggregate in any 36-month period will be found inadmissible on public charge grounds. If the applicant has withdrawn the application for or disenrolled from any of these benefits, he or she must indicate that and provide the date of disenrollment. The applicant may also submit evidence from an administering public benefit agency that he or she has been identified as not qualifying for such a benefit due to his or her income or prospective LPR status.

- **Fee waiver applications**

Application for or receipt of a fee waiver for an immigration benefit must be noted on the I-944. But this applies only to fee waivers received on or after the effective date and for immigration programs that are subject to the public charge ground of inadmissibility. For example, applications for TPS, VAWA status, naturalization, or green card renewal are not subject to the public charge inadmissibility ground. The applicant is also allowed to explain the circumstances causing the application for the fee waiver and whether those circumstances have changed.

- **Bankruptcy filings**

The applicant must report any bankruptcy filings and their resolution, but neither the I-944 nor the instructions indicate what weight they will be given.

- **Heavily weighted positive factor**

The final rule provides that household income, assets, or resources and “support” of at least 250 percent of the FPG is a “heavily weighted” positive factor. “Support” would likely not include income from the sponsor who submits an affidavit of support unless the income is from the petitioner or a household member. The applicant can count income from unauthorized employment to satisfy this factor. It will also be viewed as a heavily weighted positive factor if the applicant is authorized to work and is currently employed with an annual income of at least 250 percent of the FPG.

6. What education and skills must the applicant evidence?

The regulations state only that the USCIS will consider whether the applicant “has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being more likely than not to become a public charge.” Based on the draft I-944, the adjudicator will be considering the applicant’s current employment and any employment history that is recorded on the I-485.

- **Education**

In addition, the draft I-944 includes questions regarding the applicant’s education and occupational skills. It asks specifically whether the applicant has a high school diploma or equivalent degree, as well as any higher degrees. Evidence of these degrees or certifications can include any transcripts, diplomas, or letters from the issuing institutions. The I-944 instructions state that “foreign education should include an evaluation of equivalency to education or degrees acquired at accredited” schools in the United States. It directs applicants to the National Association of Accredited Evaluation Services for a list of organizations that provide equivalency evaluations at naces.org/members.htm.

Applicants who are over 18 and currently unemployed, but who are the primary caregiver of a child, elderly person, or ill or disabled individual should submit a statement explaining why that has limited their ability to work. The person for whom they are providing care must be a household member, so this will benefit stay-at-home parents, but not those whose job it is to care for others outside the home.

- **English proficiency**

The regulations list as evidence of education and skills whether the applicant is proficient in English or proficient in other languages in addition to English. But the draft

I-944 allows the applicant to list only information on certifications or courses in English or other languages. The form asks the applicant to list the certifications or literacy courses attended or currently attending, the dates the certificates were obtained, and the name of the person who issued them. This could include high school diplomas and college degrees. The form does not allow the applicant to demonstrate English proficiency with other documentation.

7. What is the role of the affidavit of support in the assessment of public charge inadmissibility?

The sixth statutory factor is the requirement that the applicant has submitted an affidavit of support (Form I-864) from the petitioner. If the petitioner/sponsor's income and assets are below the 125 percent of FPG level, then the petitioner can also submit an I-864 executed by a joint sponsor. This joint sponsor does not have to be a family member, but must be at least 18 years of age, a U.S. citizen or LPR, and domiciled in the United States. It has been common for low-income petitioners to use a joint sponsor to satisfy the affidavit of support requirement. Under the new rule, however, USCIS will consider "the likelihood that the sponsor would actually provide the statutorily-required amount of financial support to the alien, and any other related considerations." In addition, the joint sponsor will need to provide evidence of "relationship to the applicant, including but not limited to whether the sponsor lives with the alien; and... [w]hether the sponsor has submitted an affidavit of support with respect to other individuals." These new directives imply that I-864s from joint sponsors who are not family members, not residing with the applicant, or who have already sponsored other intending immigrants will be given less weight and could be rejected.

- **Form I-864W**

The Form I-864W, Request for Exemption for Intending immigrant's Affidavit of Support, will be eliminated. This form has been used by applicants to "waive" the I-864 requirements if they have earned or been credited with 40 qualifying quarters under Social Security law, are widows, are domestic violence victims, or are children who will derive citizenship upon immigrating. The information regarding eligibility to waive the I-864 will now be captured on the Form I-485, Application to Register Permanent Residence or Adjust Status. While VAWA applicants and VAWA recipients applying for adjustment of status are exempt from the public charge ground of inadmissibility, the other three I-864W applicants are not. Therefore, widows, children deriving citizenship,

and those who have acquired 40 qualifying quarters may still be required to submit the I-944 and be subject to potential public charge inadmissibility.

8. How will this new public charge rule affect religious workers?

The new public charge rule may create serious problems for many religious workers based upon the unique circumstances of their work. For example, there is no formal education requirement for religious sisters, and some religious orders rely upon free healthcare provided by local Catholic hospitals in lieu of private health insurance. In addition, being over age 61 would be considered a “negative factor,” and many religious sisters come to the U.S. in their 60s for leadership positions. If they have medical issues and no private health insurance, they could face significant scrutiny under the public charge rule.

Religious workers in the Religious Vocation category may be affected since they make a formal Vow of Poverty. In the Religious Occupation category, foreign nationals who are coming for formation also live by the rules of the Vow of Poverty. For these members of religious communities, lack of income, formal education or training, assets, and resources could result in a public charge finding. Also, the wide range of education and skills that vowed members hold might be inconsistently factored in when determining public charge. This is especially true if the work or duties being performed by the vowed member are deemed not income-producing, such as praying and meditation.

4. Assessment of Public Charge Inadmissibility: Receipt of Public Benefits

1. What are the nine designated programs and when is their receipt a factor?

The final rule states that the applicant is a public charge if he or she has received or is more likely than not to receive any of nine public benefit programs for more than 12 months in the aggregate within any 36-month period. The programs can be divided into two groups. The first group consists of four programs that were considered under the 1999 Interim Guidance and their receipt or potential receipt is not affected by the effective date. Cash benefits received or certified for receipt before this date will be considered a negative factor, as it is under the 1999 Interim Guidance, but not a heavily weighted negative factor. These programs are:

- Supplemental Security Income (SSI)

- Temporary Assistance to Needy Families (TANF)
- State or local general relief or general assistance, and
- Institutionalization for long-term care.

The second group of five programs were added by the new rule:

- Medicaid
- Supplemental Nutrition and Assistance Program (SNAP or food stamps)
- Section 8 Housing Choice Voucher Program
- Section 8 Project-Based Rental Assistance, and
- Public Housing.

The 36-month period would not begin before the effective date for the five programs added by the new public charge rule. Therefore, receipt of any of these benefits before the effective date would not be considered.

There are three important exceptions to the receipt of Medicaid benefits: (1) by those who are under 21; (2) by those who are pregnant; or (3) for emergency medical services. There is a fourth exception, for school-based services (including services provided under the Individuals with Disabilities Education Act), but this overlaps with the exception for children under 21.

These exceptions cover almost all the non-citizens who are currently eligible to receive Medicaid benefits and who may be subject to a public charge determination. Similarly, most adjustment applicants are not eligible for other designated federal benefit programs, such as SSI, TANF, SNAP, or Public Housing/Section 8. The Department of Housing and Urban Development has proposed eliminating housing benefits for households that include an ineligible non-citizen family member.

2. Which benefit programs will *not* be considered?

Receipt of benefit programs that are not among the nine listed ones will not be considered. The rule clarified that the following common federal benefit programs are not included: Special Supplemental Nutrition Program for *Women, Infants, and Children (WIC)*; Medicare; disaster relief; national school lunch or school breakfast programs; foster care and adoption; Head Start; Children's Health Insurance Program (CHIP); AIDS Drug Assistance Program (*ADAP*); Premium Tax Credit under the ACA; and the Earned Income Tax Credit (EITC) or Child Tax Credit.

3. Which state or local benefit programs *may* be considered?

State or local “general relief” or “general assistance” cash assistance programs are considered one of the designated nine. But other state and local programs, like health care, nutrition or other non-cash services funded entirely by states or localities should not be considered. For example, some cities or counties provide medical coverage for low-income individuals with only local funding. Use of these services would not be counted. It may not be obvious from the name, however, whether it is a state or a federal program. For example, in California the Medicaid program is called Medi-Cal, regardless of whether the services are federally matched or funded only with state dollars. Most immigrants who are subject to the rule are eligible only for *state-funded* Medi-Cal. To find out which immigrants are eligible for federal Medicaid, see the National Immigration Law Center’s table at nilc.org/wp-content/uploads/2015/11/tbl1_ovrvw-fed-pgms.pdf.

4. What is the impact of the *applicant’s* receiving any of the nine public benefits?

The public charge determination is based on the applicant’s receipt or likely receipt of one or more of the nine programs. If the applicant has received or has been certified or approved to receive one or more of the listed benefits for more than 12 months in the aggregate within any 36-month period, this will be considered a heavily weighted negative factor. Receipt of two benefits in one month counts as two months.

Past receipt of a designated public benefit during periods while the applicant was present in an immigration category that is exempted from the public charge ground of inadmissibility will not be considered. For example, benefits received by an asylum applicant would not be considered if the applicant were to apply for adjustment based on marriage to a U.S. citizen or LPR.

Benefits received by applicants serving in active duty or in the Ready Reserve component of the U.S. Armed Forces will not be considered. Nor will benefits received by applicants who are the spouses and children of these service members. Benefits received by international adoptees or children of U.S. citizens who will be deriving U.S. citizenship upon becoming LPRs will also not be considered.

An applicant’s receipt of public benefits solely on behalf of another individual does not constitute receipt. For example, a parent may apply for SNAP or TANF benefits on behalf of a U.S. citizen child.

5. What is the impact of the *applicant's family members* receiving benefits?

Benefits received or likely to be received by the applicant's spouse, children, or other family members are **not** considered in determining whether the applicant is likely to become a public charge. But the fact that the household qualifies for a designated public benefit program may indicate that the applicant has a low income, in addition to other possible negative factors.

Similarly, receipt of benefits by the sponsor on an affidavit of support will not be counted against the applicant. However, the sponsor may not count any federal means-tested benefits as income. These include SNAP, SSI, Medicaid, TANF, or CHIP.

5. Consular Processing

1. Will the new public charge rule apply to immigrant visa applicants?

The new DHS rule affects only adjustment of status applicants and other DHS determinations of public charge. It does not affect decisions by the Department of State (DOS). That agency published an interim final rule re-defining public charge for immigrant visa applicants on October 11, 2019, but the agency has stated that it will delay implementation until it finalizes a new Form DS-5540, Public Charge Questionnaire. When DOS does implement it, the new standards will affect those applying for immigrant and nonimmigrant visas abroad. Organizations, including CLINIC, have sued the Department of State in district court in New York seeking to enjoin implementation of that agency's interim final rule. A separate FAQ that is being developed will address the DOS interim final rule.

The DOS already amended the FAM in January 2018 to shift the public charge analysis away from the sponsor and onto the intending immigrant and the other five statutory factors. Immigrant visa applicants will need to submit a Form DS-5540, which will likely be pre-screened by the National Visa Center. Only after the NVC considers the applicant "documentarily qualified" will it schedule an immigrant visa interview and forward the file to the consular post.

Will DOS apply the same effective date?

We assume that DOS will be working to finalize the DS-5540 and implement its final rule soon, given that the DHS rule has been implemented. At the present time, there is

no updated information about when DOS will implement its rule. Implementation could also be affected by the legal challenge pending in the Southern District of New York.

6. Mechanics and Impact of Public Charge Assessment

1. What is the effective date and to what applications does it apply?

Applications for adjustment of status (Form I-485) postmarked or submitted electronically on or after February 24, 2020 will be subject to the new public charge rule. Applications filed with the USCIS before that date will be adjudicated based on the 1999 Interim Guidance, which only considered whether the applicant was likely to become “primarily dependent” on three cash assistance programs and long-term institutionalization. Adjudications that occur in the future will use either the new rule or the 1999 Interim Guidance depending on the date of filing—not the date of the interview or the date of the adjudication. This includes adjustment of status adjudications that occur in proceedings by immigration judges.

The grounds of inadmissibility do not apply to the adjudication of Form I-130, Petition for Alien Relative. Therefore, filing the Form I-130 before February 24, 2020 would not protect against application of the new public charge standard.

2. How will the public charge inadmissibility assessment be made?

Beginning on the effective date, applicants for adjustment of status will need to submit a Form I-944, Declaration of Self-Sufficiency. Adjustment applications and supporting forms are first reviewed for sufficiency by the National Benefits Center (NBC). The NBC notifies the applicant if the application packet is deficient by sending a Request for Evidence (RFE) and providing time to correct the deficiency. Just as it does now with the affidavit of support (Form I-864), it is anticipated that the NBC will review the I-944 and inform the applicant of any missing information or documentation. But the agency also has the power to simply deny an application without issuing an RFE if the applicant fails to include required documentation or forms that are listed in the instructions to the forms.

Most applicants for adjustment of status are interviewed by USCIS at a local district office. Adjudicators will be basing their decision on public charge inadmissibility on the information provided on forms I-864 and I-944 and their supporting documents, in addition to any responses from the applicant or sponsor during the interview. It is hoped

that in cases where the applicant has not provided enough documentation to overcome the public charge ground of inadmissibility, the adjudicator will issue an RFE and allow the applicant additional time to provide it before denying the application. But in cases where it is clear the applicant will not be able to overcome a public charge finding through the allowance of additional time, the adjudicator could make a finding and deny the application without issuing an RFE.

3. Can a finding of public charge inadmissibility be overcome?

The public charge ground of inadmissibility is not waivable, except for witnesses or informants applying for an S nonimmigrant visa, including S visa recipients applying for adjustment of status.

The USCIS has the discretion, however, to allow the applicant to post a bond after an initial finding of public charge inadmissibility. The regulations do not provide guidance as to when the USCIS should exercise this discretion, except it cannot be offered if the applicant was determined to have a heavily weighted negative factor. Nor do the regulations indicate at what amount the bond should be set, except it must be no less than \$8,100. Finally, USCIS officials have complete discretion to decide the type of bond—either surety or cash—it will accept. Any decision to offer or not offer the posting of a public charge bond, as well as the bond amount or type, are unappealable.

The final rule details the procedure for the posting and canceling such bonds. The bond can be posted using Form I-945. The bond may be cancelled only upon the immigrant's death, permanent departure, five years as a lawful permanent resident, or naturalization. The bond can be cancelled using Form I-356. The bond will be considered breached if the immigrant receives any of the nine programs for more than 12 months in the aggregate within any 36-month period.

4. What is the impact of a denial of adjustment based on public charge?

The USCIS can issue a Notice to Appear (NTA) and commence removal proceedings to applicants who are denied adjustment of status and who are not “lawfully present.” There is no appeal of a denial of adjustment of status, although applicants may file a motion to reopen or motion to reconsider (Form I-129B). Adjustment applicants who are placed into removal proceedings will be able to renew their applications before an immigration judge, who will give “de novo” review. Applicants who are not placed in

proceedings may consider re-applying for adjustment of status, particularly if their income has increased or there are new positive factors that may alter the public charge determination.

5. How will the new public charge regulation impact on adjudication times? Will the processing time for adjustment of status lengthen?

Adjudicators will need to review all the information on the new I-944 and its supporting documentation, as well as the I-864, in order to make a public charge determination. This will naturally lengthen the adjustment of status processing time. We cannot predict at this time how this will affect the NBC processing or the district office adjudication.

7. Nonimmigrants

1. What is the impact on nonimmigrants?

Nonimmigrants who are applying to extend or change their status must demonstrate that they have not received one or more of the designated nine public benefits for more than 12 months in the aggregate within any 36-month period while in nonimmigrant status. This will apply to change or extension of status applications filed or postmarked on or after the effective date and will apply to benefits received on or after that date. It is not a forward-looking test (likely to receive) and does not require the nonimmigrant to submit an I-944. In addition, nonimmigrants who are specifically exempted from the public charge ground of inadmissibility will not be affected.

8. What are the known unknowns?

Litigation: Five district courts have determined that the DHS final rule violates the statute, the Administrative Procedures Act, and the Constitution. Those cases are currently on appeal and will likely be decided by the U.S. Supreme Court. When the Court granted the government's application for a stay of the injunction, it did not rule on the merits of the case.

Internal Policy Guidance: Another important factor that will determine how the rule is applied will be the guidance that the agency creates for its adjudicators in the USCIS Policy Manual. The agency plans to update the manual and inform adjudicators as to how to best determine "whether the alien is more likely than not to receive one or more public benefits, as defined in 8 CFR 212.21(b), at any time in the future; and whether

the alien’s likely receipt of one or more of the enumerated public benefits is more likely than not to exceed 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) at any time in the future.”

It will also be very important to see if the USCIS gives any further guidance as to whether each of the six factors should be given equal weight. For example, what about an applicant who has three negative and three positive factors? Or one who has one heavily weighted negative factor and one heavily weighted positive? The agency’s current response is that “the weight given to an individual factor not designated a heavily weighted factor depends on the particular facts and circumstances of each case and the relationship of the individual factor to other factors in the analysis.” That is the equivalent of saying it is up to the discretion of each adjudicator as to how much weight to give each factor, which confirms that it is a highly subjective test. But to make it more objective and apply an equal weight to each factor would result in some applicants—such as children, the retired, or the disabled—almost certainly being found inadmissible. For example, applicants who are under 18 and do not yet have any income, work skills, employment history, assets, high school diploma, English proficiency, or positive credit score would already have at least four negative factors.

New Forms: While the USCIS has published several new editions to current forms—including the I-864 and I-485—and a new Form I-944, none of these have been promulgated in final form. For the Form I-944, it will be very important to see what questions are asked, what documentary evidence will be requested, and how the instructions are written.

Impact of the Final Rule: A study from the Migration Policy Institute found that of the over two million applicants granted LPR status in the past five years (between 2012 and 2016), 69 percent of them (excluding asylees, refugees or other humanitarian admissions) would have had at least one negative factor under the new public charge definition, 43 percent at least two negative factors, and 17 percent had at least three negative factors. The study concluded that 39 percent of recent LPRs spoke English poorly or not at all, 33 percent had household incomes below 125 percent of the FPG, 25 percent did not have a high school diploma, and 12 percent were under age 18 or over age 61. The implication of this study is that many of these LPRs would have been

denied based on public charge under this new rule. The biggest unknown is whether this will be born out.