FAQ: USCIS Releases Draft Proposal Defining "Public Charge" Inadmissibility Ground

Executive Summary

On September 22, the Department of Homeland Security (DHS) published on its website a draft Notice of Proposed Rulemaking entitled "Inadmissibility on Public Charge Grounds." The proposal defines "public charge" for purposes of a provision in the Immigration and Nationality Act (INA) that makes applicants ineligible for a visa or green card if they are likely to become dependent on government assistance. The proposal would broaden the types of public benefits DHS may consider in determining whether an applicant is likely to become a public charge.

DHS will publish the proposed rule in the Federal Register, and members of the public will have a 60-day period in which to submit comments to the agency. After the comment period, the agency will then review the comments, formulate the final rule, and publish it in the Federal Register with a 60-day delayed effective date.

What is the public charge statutory ground of inadmissibility?

The public charge ground makes inadmissible to the U.S. "[a]ny alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge."[1] The government determines whether this ground applies to individuals (1) seeking admission to the U.S. on immigrant or nonimmigrant visas and (2) applying for lawful permanent resident status (i.e. a green card).

How do the regulations today implement the public charge ground of inadmissibility?

Though the public charge ground of inadmissibility has been law since the 1800s, the government has never issued a regulation that interprets or defines "public charge." In 1999, under the Clinton administration, the former Immigration and Naturalization Service (INS) released field guidance[2] that is still in effect, but has never been formalized by regulation. This guidance, which is also incorporated in the State Department Foreign Affairs Manual (FAM),[3] defined "public charge" as being "dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."

The guidance specified that non-cash public benefits or the receipt of cash benefits for purposes other than income maintenance may not be considered in making the determination. Officers must also apply a "totality of circumstances" test and consider factors including the person's age, health, family status, assets, resources, financial status, and education and skills. Cash benefits, which are currently considered in the public charge determination, refer to:

[1] Immigration and Nationality Act § 212(a)(4).
[2] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (Mar. 26, 1999), available at https://www.gpo.gov/fdsys/pkg/FR-1999-05-26/pdf/99-13202.pdf. This guidance is also incorporated in the State Department Foreign Affairs Manual (FAM) at 9 FAM 302.8-2(B)(1).
[3] 9 FAM 302.8-2(B)(1).

- Supplemental Security Income (SSI) for the aged, blind, and disabled;
- Temporary Assistance for Needy Families (TANF) cash assistance; and
- State and local cash assistance programs.

How would the proposed regulation change the standard?

The public charge determination will still be made "based on the totality of the alien's circumstances by weighing all factors that make the alien more or less likely at any time in the future to become a public charge." Officers must consider these factors: the person's age, health, family status, assets, resources, financial status, education, and skills.

The proposed regulation broadens the types of benefits that may be considered. Government adjudicators may consider the receipt of both cash and the following non-cash benefits:

- Medicaid (except for "emergency Medicaid" and certain disability services related to education);
- Medicare Part D Low Income Subsidy;
- Supplemental Nutrition Assistance Program (SNAP, formerly food stamps);
- Benefits provided for institutionalization for long-term care at government expense; and
- Section 8 Housing Choice Voucher Program, Section 8 Project-Based Rental Assistance, and Subsidized Public Housing.

The proposed rule sets out three different threshold tests for officials to apply. The receipt of benefits does not automatically disqualify an applicant, but would be considered a "heavily weighted negative factor" in the "totality of the circumstances" determination. Even if an applicant has never received public benefits, the proposal would give immigration officers discretion to make a determination that an applicant is still *likely* to need benefits in the future.

Which benefits can be considered?

Only benefits received directly by the applicant may be considered. The government would not consider benefits received by dependents or other household members.

In determining whether a foreign national will be a public charge, will the government consider the receipt of federal or state benefits that occur prior to publication of the final regulation?

No, the government will not consider any receipt of benefits that are being *added* by the new regulation prior to the effective date of the final regulation. However, public benefits that are already considered in these determinations today under current guidance, such as TANF and SSI, will still be considered.

When will the new regulation go into effect?

We project that the earliest a final rule could take effect is March 2019. DHS will publish the proposed regulation in the Federal Register, at which point the public will have a 60-day period to submit comments. After the 60 days, DHS will review the comments and publish a final rule in the Federal Register, likely with a 60-day delayed effective date.

The notice and comment process is intended to inform and shape the government's thinking about the policy proposal. It is not uncommon for the government to revise or drop regulatory requirements as a result of feedback from the public. These timelines do not take into effect the possibility of litigation, which could delay the rule's implementation.

Under the proposed regulation, will an employment-based nonimmigrant or immigrant be required to meet the new requirement?

Yes. The proposal would generally apply to applicants for adjustment of status to lawful permanent residence (i.e. green card), visas, and extensions or changes of nonimmigrant status, with certain exceptions.

How will a nonimmigrant (e.g., H-1B or L-1 worker) establish that he or she will not be a public charge?

The draft proposal would require individuals who apply for extensions of stay or changes of status by filing the Form I-129, Petition for a Nonimmigrant Worker, or Form I-539, Application to Extend/Change Status, to attest that they have not received public benefits during their time in that status and are not likely to receive them in the future, with some exceptions. U.S. Citizenship and Immigration Services (USCIS) would have discretion to issue a Request for Evidence (RFE) requiring the applicant to submit the new Form I-944, Declaration of Self-Sufficiency.

The Form I-944 collects information such as age; health; family status; assets, resources and financial status; and education and skills, to allow USCIS to determine whether an applicant would be inadmissible under the public charge ground. This form would be required for adjustment of status applicants, but would only be required for extension of stay or change of status applicants if USCIS elects to request it through an RFE.

How likely is it that the new standards, when in effect, will result in the government denying a green card or request to extend status filed by a high-skilled worker (e.g., H or L visa holder)?

High-skilled immigrants will need to pay much more attention to this issue on a going forward basis. However, absent individualized circumstances, we anticipate that most high-skilled workers will be able to establish that they are unlikely to become a public charge.

Are there exemptions from the public charge requirement?

Yes. The following groups are exempted from this ground of inadmissibility: refugees, asylees, Afghans and Iraqis with special immigrant visas, nonimmigrant trafficking and crime victims, individuals applying under the Violence Against Women Act, and special immigrant juveniles.

Is it possible to overcome a finding of public charge inadmissibility?

The proposed regulation allows the Secretary of Homeland Security to exercise discretion to admit an individual who has been found likely to become a public charge if he or she submits a "public charge bond" of $10,000. That bond would be forfeited if the individual later receives public benefits.