



The USCIS Policy Manual on Public Charge: Summary for Immigration Practitioners

The U.S. Citizenship and Immigration Services (USCIS), recently published Part G – Public Charge Ground of Inadmissibility in the USCIS Policy Manual as part of the agency’s implementation of the final public charge regulations. USCIS has announced that the new regulations will affect applications for adjustment of status postmarked on or after February 24, 2020. Overall, the new regulations and accompanying guidance will make it much more difficult for an applicant for adjustment of status or an immigrant visa to show that he or she is not likely to become a public charge. The summary below addresses how the agency is instructing USCIS adjudicating officers to implement these new regulations. By doing so, they also inform practitioners and applicants on how to complete the new I-944, Declaration of Self-Sufficiency, what supporting documents to include and how to prepare clients for questions regarding public charge at the adjustment interview. For more background information on the new public charge rule, see [The Public Charge Final Rule: FAQs for Immigration Practitioners](#).

Overview and General Thoughts

USCIS has attempted to provide guidance on how the “totality of the circumstances” test is to be applied and how the six statutory factors—age, health, family status, assets/resources/financial status, education/skills, and the affidavit of support—are to be defined. It explains which factors are positive, negative, heavily weighted positive and heavily weighted negative. It further categorizes the degree of positivity or negativity to be applied to various factors in given circumstances. It suggests or requires supporting documentation to accompany the Form I-944, Declaration of Self-Sufficiency, and Form I-485, Application to Register Permanent Residence or Adjust Status.

Most of the preliminary information in the Policy Manual is self-serving and discusses the need for immigrants to be self-sufficient rather than have “the public shoulder the burden of supporting” them. The rest of the guidance tries to quantify and objectify a decision-making process that has previously been straightforward—does the applicant have a sponsor who satisfies the income requirements—and which will soon become exponentially more complicated

and flexible. This the agency admits when it states that the assessment is “subjective and discretionary in nature,” and predicts that “officers’ public charge inadmissibility determinations will vary.” Included as an Appendix to the guidance is a “step-by-step approach” where the adjudicator is required to consider 45 separate factors, “individually and cumulatively,” and the weighted degree assigned to them as part of this balancing test. Should that list of factors prove inadequate, “officers are not limited in the factors that they may consider for purposes of the totality of the circumstances analysis.”

The underlying standard is whether the applicant is “more likely than not at any time in the future” to receive any of nine designated public benefit programs for more than 12 months in a 36-month period beginning on February 24, 2020. While much of the litigation and public discussion has centered on public benefits access and the effect of the new interpretation on benefit receipt, most low-income clients have not been receiving any of the nine affected programs and would not access them even after immigrating. Public benefit receipt or potential receipt, therefore, has very little to do with the new public charge interpretation and how it will be implemented. For that reason, this summary will focus on the various weight the agency assigns to the statutory factors and not on current receipt of or eligibility for benefit programs.

While the Form I-944 and Form I-485 require the submission of supporting evidence, practitioners should not feel constrained by the enumerated documents. The Policy Manual states that the officers will be reviewing these forms and documents “as well as any other information provided in the record to determine whether the applicant is inadmissible on public charge.” The applicant is encouraged to “present factors not listed in the statute, regulation, or this guidance.” In addition, it is assumed that the applicant will be supplementing the record with more current information—such as tax returns, salary, English proficiency and health insurance—at the time of the adjustment interview where “statements by the applicant” will also be relevant.

Finally, the guidance contains many errors, typos and internal inconsistencies. For example, agricultural work is considered unskilled and a negative factor in one chapter, while it is recognized as skilled labor and a positive factor in another. This reflects the agency’s rush to publicize the guidance and implement the new rule by the February 24, 2020 date.

1. Age

The age of an applicant who is under 18 or over 61 will be considered a negative factor. Being between the age of 18 to 61 is a positive factor. However, there are also mitigating factors. For example, children under 18 can neutralize the negative factor by evidence of full-time school attendance, English language proficiency, or employment history. Applicants over 61 can outweigh the negative age factor with evidence of current employment, total household income greater than 125% of the Federal Poverty Guidelines (FPG), or access to a pension, retirement account, Social Security, or other supportive income. Documentation: birth certificates; current employment, household income; school enrollment; access to retirement, pension, or other source of income.

2. Health

The absence of any major health problem is a positive factor. All applicants will be submitting Form I-693, Report of Medical Examination and Vaccination Record, performed by a civil surgeon. If the doctor makes a certification of a Class A medical condition, the applicant is inadmissible under the health-related ground of inadmissibility. If the doctor makes a Class B certification, that means that the applicant has a condition that is a departure from normal health. It is a negative factor if the condition is likely to require extensive medical treatment or institutionalization or will interfere with the applicant’s ability to go to school, to work, or to care for himself or herself. The USCIS officer must not “attempt to diagnose whether an applicant has a certain medical condition,” but instead must rely on the physician’s report. The applicant is encouraged to submit a report from his or her physician describing the medical condition, treatment, and prognosis. The applicant can also submit a statement from his or her employer verifying that the medical condition does not affect the applicant’s ability to perform job. Documentation: Form I-693; doctor’s

report and/or employer's statement. Ask the civil surgeon for a copy of the report and review it before it is submitted so you can prepare for any needed response or documentation.

3. Family Status

In order to measure income relative to the FPG, the applicant must first calculate the household size. The bigger the size, the greater the total income that is required. On the other hand, it is the total household income that counts. Household size for the applicant is measured differently than it is for the sponsor completing the affidavit of support. For example, applicants under 21 and unmarried in most cases must include each parent and any siblings, half-siblings and stepsiblings. It is a positive factor if the applicant's total household income is at or above 125% of FPG. It is a negative factor if the applicant's total household income is below 125% of FPG. See below for more information on calculating income and using assets. Documentation: birth certificates, marriage certificates and declarations showing relationship. See below for evidence of income.

4. Income

Income falls within the "assets, resources, and financial status" factor, as well as the "family status" factor. It is measured as total, gross, unadjusted income as reported on line 6 of the current IRS Form 1040 or line 1 of the W-2, Wage and Tax statement. The higher the income, the more positive the factor; the lower the income, the more negative. Total household income at or above 250% of FPG is a heavily weighted positive factor. Total household income at or above 125% of FPG is a positive factor. For applicants who are on active duty in the U.S. armed forces, other than active duty for training, the threshold is only 100% of FPG. If the income is below 125% of the FPG, the resources and assets of the household can be added together to make up for the shortfall. See below as to how those are defined, calculated and documented. Total household income below 125% of FPG is a negative factor. Income does not have to be earned by a worker who is employment authorized. The income does need to be from a lawful source (e.g. not from the sale or manufacture of marijuana, even in states where that has been legalized). If the applicant is employment authorized and has income at or above 250% of FPG, that is a heavily weighted positive factor. Alternatively, if the applicant is authorized to work, not a full-time student, but is unable to demonstrate current employment, recent job history, or a reasonable prospect of future employment, that is a heavily weighted negative factor.

Form I-944 requires the applicant to evidence income by submission of prior IRS tax transcripts, which is going to cause those who have been working here and not reporting that income to file late returns. If the applicant was not required to file a return—due to insufficient income or residence abroad—then he or she can submit pay stubs, wage receipts, a W-2, employer's letter, or a foreign tax return. Some income, such as child support, retirement benefits, gifts, is non-taxable and will not be included on the IRS tax transcript. If the applicant receives the non-taxable income on a continuing basis (weekly, monthly or annually), it may be included. And some income, such as interest and dividends or other income outside employment will not be reported on the W-2. Applicants may want to update the information provided on the I-944 at the adjustment interview with a more recent tax return or evidence of current income. Documentation: IRS tax transcripts for last three years; pay stubs, wage receipts, W-2s; employer letter; foreign tax return; evidence of non-taxable or non-employment income.

5. Assets and resources

If the applicant's total household income is below 125% of FPG, he or she can include significant assets and resources that can be converted into cash within one year. The most common assets include the following: money in a checking or savings account; stocks and bonds; certificates of deposit; annuities; retirement and educational accounts; real estate; and automobiles. Documentation must include proof of ownership, location and value. If it is real estate, it must include a recent appraisal from a licensed appraiser, plus the mortgage statement or lien showing the equity value. If it is a retirement account or annuity, show that the applicant has access to the full amount and disclose any penalties or taxes due upon withdrawal. If it is money in a checking or savings account, submit 12 months of bank statement. If it is an automobile, it can be counted only if there are at least two vehicles and only one

is being counted as an asset. Other assets could include commercial property, vacant land, boats, art, collectibles and jewelry. The total cash value of the assets must be five times the shortfall of required income (three times the shortfall if the applicant is a U.S. citizen's spouse or child between 18-21). Documentation: bank statements, portfolios, appraisals, mortgages.

6. Credit report and score

In most cases, only applicants who have opened a bank account or have a credit card will have a credit report. If the applicant has a credit report and score, he or she should submit it. Otherwise, submit a statement of no report from one of three credit agencies: Equifax, Experian, or TransUnion. A good credit report and/or a credit score of at least 670 is a positive factor. A bad credit report or a credit score below 580 is a negative factor. The applicant can also document financial responsibility by submission proof of regular payments of rent, utilities, or other expenses. Documentation: Credit report or statement of no report; proof of payment of bills.

7. Liabilities

Debt is considered a negative factor, but the degree of negativity depends on the type of debt. For example, the following are considered as a negative factor: mortgage, car loan, unpaid child or spousal support, unpaid taxes, and credit card debt. But a mortgage or car loan is weighed less negatively than the others because it is a "long-term investment." The absence of debt is a positive factor. Most applicants have never requested a fee waiver when applying for an immigration benefit that is subject to the public charge ground of inadmissibility. Most fee waivers are requested when filing I-90s and N-400s, so they would not be relevant for adjustment applicants. Having requested or received a fee waiver on or after February 24, 2020 is a negative factor; having not requested or received one is a positive factor. Any bankruptcies within the last two years is a negative factor. Documentation: credit reports or statement verifying no report exists; documentation verifying each liability or debt; documentation showing regular payment of routine expenses.

8. Health Insurance

Enrollment in U.S. health insurance is an important factor, although many applicants will not qualify for it due to their immigration status. Enrollment in one of the following is considered a heavily weighted positive factor: private health insurance provided by an employer; private health insurance purchased outside the Health Marketplace; insurance purchased through the Marketplace and Affordable Care Act (ACA) that is not subsidized; and Medicare. Enrollment in one of the following is considered a positive factor: Medicaid for children under 21 or pregnant women; Child Health Insurance Program (CHIP); state-only subsidized health insurance; foreign health insurance; and insurance purchased through the Marketplace and (ACA)that is subsidized. Lack of any health insurance is considered a negative factor. Current enrollment or enrollment within the last 36 months beginning on February 24, 2020 in Medicaid that is not within the two exceptions (e.g., over 21 and not pregnant) is considered a heavily weighted negative factor. If the applicant has a medical condition that is noted in the I-693 civil surgeon's report, he or she should evidence the household income, assets, and resources to pay for reasonably foreseeable medical costs. If the applicant has such income or resources, that is a positive factor. Adjudicators are instructed to look at the terms of coverage, premium, deductible, and the co-payment to determine if it is adequate and complies with ACA standards. Documentation: health insurance summary of benefits and coverage; Form 1095-B, Form 1095-C, state-subsidized health coverage, Medicaid or CHIP enrollment, letter from insurance company indicating future enrollment.

9. Public Benefits

As indicated, receipt of, application for, or certification to receive one of the nine designated public benefit programs will be a rarity. But the type of benefit and date of receipt/application/certification is important. Receipt of, application for, or certification to receive any of these four programs before February 24, 2020 will be considered a negative factor: Supplemental Security Income (SSI); Temporary Assistance to Needy Families (TANF) state general relief or general assistance; or a Medicaid program that covers institutionalization for long-term care. Receipt of,

application for, or certification to receive any of these four programs or any of the following five programs for more than 12 months in a 36-month period beginning on February 24, 2020 will be considered a heavily weighted negative factor: Medicaid other than for emergencies, for those under 21, or for pregnant women; Supplemental Nutrition and Assistance Program (SNAP (formerly food stamps); Section 8 Housing Choice Voucher Program; Section 8 Project-Based Rental Assistance; and public housing. Current or past receipt of any of these programs after February 24, 2020 for less than 12 months is only a negative factor. Only benefits received by the applicant are considered, not ones received by or applied for on behalf of other family members. Subsidized housing programs may be received by the family unit, but the applicant is not considered a recipient if his or her name is not listed as a beneficiary. Proof that the applicant is ineligible for any of the benefit programs due to income or immigration status is a positive factor. This can be accomplished, theoretically, by going to the benefit agency's web pages and printing the eligibility requirements. Documentation: proof of enrollment, receipt of, or application for one of nine public benefit programs; proof of ineligibility for benefit program.

10. Education and English Proficiency

The test is whether the applicant has adequate education and skills to either obtain or maintain lawful employment. Having a high school degree or GED is a positive factor; not having a high school degree is a negative factor. Any college or post-secondary degree or enrollment is a positive factor. Current enrollment in high school or taking a full course of study in college, language, or vocational school is a positive factor. Proficiency in English or having "basic English skills" is a positive factor. This can be demonstrated by certifications received from language schools or current enrollment. The ability to understand and speak basic English can also be established later at the adjustment interview where the adjudicator can measure the applicant's ability to understand and respond to questions. Proficiency in a language in addition to English that is needed at a job is also a positive factor. Limited or no English language proficiency is a negative factor, but the adjudicator can consider whether this affects the applicant's ability to obtain or maintain employment. Documentation: diplomas or degrees; certification of English language school enrollment or course completion; current enrollment in high school or post-secondary school (at least 12 hours of instruction/week or vocational school (at least 12-22 hours of instruction/week).

11. Employment and Job Skills

Being currently employed is a positive factor. Being unemployed or not having any employment history is a negative factor. Any employment history, even if it is without USCIS employment authorization, is a positive factor. Being employment authorized, not a student, and unable to demonstrate employment history or reasonable prospects of employment is a heavily weighted negative factor. Valid tentative job offers, even if the applicant is not authorized to accept employment, is a positive factor. Being the primary care provider for a child or parent or other household member is a positive factor and can mitigate the absence of income. Having a specific skill—such as mechanic, plumber, electrician, welder—is a positive factor, though the I-944 asks for formal licenses and certifications. Having no employment skill is a negative factor. Documentation: evidence of current employment, job history for last five years, job offers, primary caregiver of household member, licenses and certifications, or other evidence of occupational skill.

12. Affidavit of Support

Many applicants for adjustment of status, including most family-based applicants, are required to submit an I-864 Affidavit of Support from the petitioner. A qualifying I-864 must demonstrate that the sponsor can maintain the intending immigrant at an annual income of at least 125% of FPG. In cases where the petitioner is unable to demonstrate the required amount of income, a common strategy is to present an I-864 from a joint sponsor. While there is no legal requirement that a joint sponsor be related to the intending immigrant, the regulation and policy guidance directs the adjudicator to consider the likelihood that the sponsor will provide the required amount of support. To make this assessment, adjudicators must consider the sponsor's relationship to the applicant, whether the sponsor resides with the applicant, and whether the sponsor has submitted an I-864 for others. In addition, prior receipt of public benefits, bankruptcy, or a fee waiver by the sponsor will decrease the positive weight of

an otherwise qualifying affidavit of support, although there is nothing in the I-864 that requires the disclosure of this information. Overall, applicants need to prepare for scrutiny of the affidavit of support beyond the issue of demonstrating a qualifying amount of income. Where an adjudicator determines that the affidavit of support is inadequate, the applicant will be found inadmissible on public charge grounds without consideration of the I-944. Documentation: Form I-864; evidence of relationship between or residence of applicant and joint sponsor; evidence of joint sponsor's acknowledgement of obligation to support intending immigrant

13. Public Charge Bond

An applicant may be able to overcome a public charge inadmissibility finding by posting a public charge bond. The bond is available only at USCIS' discretion, under the condition that after adjustment to LPR status and before the bond is cancelled, the applicant will not receive any of the nine designated public benefit programs for more than 12 months in a 36-month period beginning on February 24, 2020. In some cases, additional conditions may be imposed. USCIS guidance states that in general officers will not exercise favorable discretion where there is a heavily weighted negative factor present. However, when deciding whether to allow an applicant to request bond, the officer must weigh the totality of the circumstances. In addition to the factors discussed above, heavily weighted positive factors can include "exceptional humanitarian considerations." USCIS does not define the term but notes that these factors are "unusual, rare and compelling." General "family unity" is not an exceptional consideration.

If USCIS decides to offer a public charge bond, the applicant must submit a request on Form I-945. Either a cash bond or a surety bond may be posted. However, there are no procedures currently in place to accept a cash bond. While a person, company, or other entity may act as an obligor for a cash bond, only certified surety companies (listed on the U.S. Treasury Department Circular 570) or their agents may post a surety bond. The bond amount is set by weighing the same factors that were present in the inadmissibility determination. The minimum bond amount is \$8,100.

The bond may be cancelled only when the applicant has satisfied all of the conditions and either naturalizes, permanently departs (abandons LPR status voluntarily or by operation of law and physically departs), dies, reaches the fifth anniversary of their adjustment of status, or obtains another status not subject to public charge.

Cancellation of the bond must be requested on Form I-356, which asks for information on the applicant's use of public benefits since obtaining LPR status. The form also requires applicants to authorize benefit granting agencies to provide DHS with information regarding the applicant's use of public benefits. Information gathered through the I-356 could indicate that the applicant has breached the conditions of the bond. If the bond is breached, the bond amount is forfeited to DHS as liquidated damages. The Policy Manual guidance includes information on appealing a breach determination.