FAQ on Public Charge for Intending Immigrants

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Both the Department of State (DOS) and U.S. Citizenship and Immigration Services (USCIS) took major steps in 2018 to alter the assessment of the public charge ground of inadmissibility. DOS has modified several provisions of the Foreign Affairs Manual (FAM) to direct consular officials to consider factors other than the affidavit of support when deciding whether a visa applicant is likely to become a public charge. USCIS has proposed changing the definition of public charge to expand the list of public benefits programs that can be considered and to place more importance on the applicant's satisfying the "totality of the circumstances" test. This means that if finalized as proposed, USCIS would still consider an affidavit of support when it is required, but it would place greater emphasis the applicant's age, education and skills, health, family status, and financial resources. The FAQ below addresses common issues of concern relating to these recent and proposed changes.

A. BACKGROUND ON PUBLIC CHARGE INADMISSIBILITY

1. Who is subject to the public charge ground of inadmissibility and when is it applied?

Non-citizens who are applying to be admitted into the United States or to adjust their status here are subject to the grounds of inadmissibility. The grounds of inadmissibility also apply to non-citizens who entered the United States without inspection or who were paroled into the United States and are placed in removal proceedings. One of the oldest grounds of inadmissibility applies to persons who are "likely at any time to become a public charge." Some non-citizens who are seeking to enter or adjust status are exempt from public charge.

The public charge ground is found at Immigration and Nationality Act (INA) § 212(a)(4) and applies to non-citizens seeking the following benefits:

- A visa at a U.S. consulate abroad;
- Admission at the border; and
- Immigration benefits that require the applicant to be admissible, including adjustment of status.

In most instances, lawful permanent residents (LPRs) returning to the United States from a trip abroad are not considered applicants for admission and are therefore not subject to the grounds of inadmissibility. There are some circumstances where an LPR may be considered an applicant for admission. Additional practice advisories on the issue are available at cliniclegal.org/public-charge.

2. Who is exempt from the public charge ground of inadmissibility?

Most family-based immigrants are subject to the public charge ground of inadmissibility. Persons applying for the following immigration benefits are exempt from public charge:

- Refugee or asylum status and adjustment of status for refugees or asylees
- Initial admission as Ameriasian
- Haitian Refugee and Immigrant Fairness Act
- Adjustment under Cuban Adjustment Act

- Nicaraguan Adjustment and Central American Relief Act
- T & U nonimmigrant status and adjustment of status for T and U visa holders
- Adjustment under Special Immigrant Juvenile Status
- Violence Against Women Act (VAWA) self-petitioning and adjustment of status for VAWA recipients
- Temporary Protected Status (TPS)
- Deferred Action for Childhood Arrivals (DACA)
- Adjustment of status under INA § 249 for persons who have resided in the United States since before January 1, 1972

3. How is the current ground of inadmissibility defined?

The USCIS defined public charge in 1999. Under that definition, a person must not be "primarily 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." 64 Fed. Reg. 28689 (May 26, 1999). The USCIS defined the term "public cash assistance for income maintenance" as including only three benefit programs:

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

In addition, immigration officials shall also consider five statutory factors that pertain to the applicant's:

- Age;
- Health;
- Family status;
- Assets resources, and financial status; and
- Education and skills.

An affidavit of support (Form I-864) is also a required component of the public charge inadmissibility assessment in all family-based and some employment-based immigration. In such cases, the sponsor must establish the ability to maintain his or her household and the intending immigrant at 125 percent of the federal poverty guidelines. If the applicant submits a sufficient affidavit of support, the applicant will usually pass the public charge test.

Under the new FAM guidance and the proposed USCIS regulations, however, the role of the affidavit of support in public charge determinations is diminished. Although the affidavit of support has played the primary role in public charge assessments for over 20 years, the FAM guidance now instructs consulates to place greater weight on the five statutory factors and not rely entirely on the affidavit of support. For USCIS

adjudications, the proposed regulations issued by DHS would also shift the focus from the affidavit of support to the five statutory factors, as well as add new public benefits to the list of those that would be considered in the public charge evaluation. Until the proposed rule is finalized, the current definition of public charge remains unchanged.

B. NEW DOS PUBLIC CHARGE GUIDANCE AND CONSULAR PROCESSING

4. How has the DOS changed its internal guidance on public charge?

The amended FAM 302.8-2(B) requires the consular officers to consider the five statutory factors. While the affidavit of support used to be sufficient proof of satisfying the public charge test, it is now merely "a positive factor." Another change is the addition of language encouraging the consular officer to consider the likelihood that the sponsor will support the visa applicant. This adds a new element to the analysis and more documentary requirements. The FAM now states: "a properly filed and sufficient, non-fraudulent Form I-864, may not necessarily satisfy the INA 212(a)(4) requirements, but may provide additional evidence in the review of public charge determination."

5. How has implementation of the new FAM provisions impacted immigrant visa applicants?

DOS refused almost four times as many immigrant visa applicants based on public charge in fiscal year 2018 than it did in 2017. Children, seniors, the unemployed, retired persons, persons with disabilities, and those with serious health conditions are at greater risk of a public charge finding. Applicants who have large families may also be at greater risk, since the number of children and other dependents will be considered. The FAM states: "an applicant generally should at least be able to support the number of dependents at 125 percent of the Federal Poverty Guidelines."

The applicant may have to submit prior tax returns, proof of assets, and evidence of current and future income. Applicants may need to demonstrate their job skills and job history, and explain any periods of unemployment. They may have to submit evidence of employment plans or job offers.

6. What steps can I take to help my client avoid a finding of public charge at the consular interview?

The applicant should be prepared to respond to questions concerning education, employment history, job skills and income. Most consulates are not requiring this type of proof, but it helps to be ready for such questioning. Take any documentation that would evidence this.

Under the FAM, health-related issues that "might affect employment, increase likelihood of future medical expenses, or otherwise affect the applicant's ability to adequately provide for himself or herself or dependents should increase the burden on the applicant to provide evidence that they will not become a public charge." The FAM goes on to suggest that applicants with health issues submit proof of medical insurance or the ability to pay medical expenses they may incur in the United States.

7. The intending immigrant is consular processing and has an approved provisional waiver. Should I take extra precautions regarding potential public charge?

A provisional waiver is necessary for those who have accrued unlawful presence in the United States. If they

did not obtain a waiver, they would be subject to a three- or ten-year bar after departing for the consular interview. Persons who can get this waived before they depart will not be found inadmissible for unlawful presence by the consulate. But to qualify for the provisional waiver, they cannot be found inadmissible for a separate ground, such as public charge. If they are found inadmissible for another ground, the provisional waiver will be revoked. If that happens, they would need to start over and file the unlawful presence waiver from abroad and wait for it to be granted.

Given the high stakes involved in provisional waiver cases, take extra precautions to avoid a public charge inadmissibility finding, such as:

- Carefully review your client's affidavit of support, even if the National Visa Center review did not identify any concerns. Make sure that the applicant has the sponsor's updated tax returns and proof of income.
- In borderline cases, include a cover letter explaining why your client is not likely to become a public charge and, where possible, be prepared to submit a new joint sponsor affidavit
- In cases where a joint sponsor has submitted an affidavit of support, include a separate statement from the joint sponsor explaining the relationship with the applicant and the motive for the support. Confirm that the applicant knows who the joint sponsor is and can respond to basic questions concerning the joint sponsor.
- Practice document submission with your client. Make sure your client has a clear understanding about whether and when to submit any additional documents, including a new joint sponsor affidavit of support. Do some roleplays with your client so that she or he is comfortable informing the official about new documents to present.

8. What remedies can I pursue if my client is found inadmissible on public charge?

There is no formal appeal of a consular refusal based on public charge. However, the applicant can submit additional documentation evidencing the sponsor's income or prior tax payments. The applicant may also submit an affidavit of support from a joint sponsor, or a second one if the first was unpersuasive. There is no deadline when these additional forms or documents must be submitted. If the applicant believes the refusal based on public charge was improper, he or she can request review by a senior consular official. If the refusal violates FAM provisions, the representative may also seek a legal interpretation from the Visa Office at legalnet@state.gov.

C. PROPOSED USCIS REGULATIONS ON PUBLIC CHARGE

9. How do the USCIS proposed regulations change the assessment of public charge inadmissibility?

The proposed rule expands the list of current cash assistance programs and identifies several non-cash programs that would also be considered. According to the proposed rule, it would be a negative factor if an applicant is receiving one or more of the following public 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)
- Section 8 Housing Choice Voucher Program
- Section 8 Project-Based Rental Assistance
- Public Housing

The proposed rule exempts receipt of public benefits by members of the U.S. armed forces serving in active duty or in any of the Ready Reserve components. It also would not consider Medicaid benefits received by foreign-born children of citizen parents who will be deriving citizenship under the Child Citizenship Act.

10. Under the proposed regulations, what circumstances place an adjustment applicant at greater risk of a finding of public charge inadmissibility?

The USCIS would only consider the past receipt or likely receipt of benefits if their value exceeds 15 percent of the Federal Poverty Guidelines for a household of one during a 12-month period.

For 2019, the equivalent dollar value would be $1,873. Some benefit programs can be monetized easily (SSI, TANF, SNAP, and section 8 vouchers and rental assistance). But for those benefits that cannot be monetized easily (Medicaid, the Medicare Part D Low Income Subsidy, and Public Housing), the agency will look to see if the applicant received or is likely to receive such benefits for more than 12 months in the aggregate within a 36-month period. Receipt of two non-monetizable benefits in one month counts as two months. If the agency determines that the applicant is likely to receive these "non-monetizable" benefits for more than 12 months in any 36-month period in the future, he or she would be inadmissible for public charge. To add to the complexity, the proposed rule also contains a third standard under which an applicant would be inadmissible for public charge if he or she is likely to receive a monetizable benefit below the threshold, plus one or more non-monetizable benefits for longer than nine months.

Adjudicators will also consider the five statutory factors when assessing whether the applicant is likely to become a public charge. In general, children, seniors, persons with disabilities, those who are low-income, unemployed, or retired, and those with serious medical conditions are at greater risk of a public charge inadmissibility finding.

Certain negative factors will "weigh heavily" in favor of a public charge finding. These include situations in which the applicant:

- Is not a full-time student and is authorized to work, but is unable to demonstrate current employment, and has no employment history or no reasonable prospect of future employment
- Is currently receiving or is currently certified or approved to receive one or more of the designated public benefits above the threshold
- Has received one or more of the designated public benefits above the threshold within the prior 36 months
- 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 for himself or herself, attend school, or work, and the applicant is uninsured and has no prospect of obtaining private health

insurance, or

- Had previously been found inadmissible or deportable based on public charge.

11. **If the proposed regulations go into effect, will they apply to pending cases? Should I recommend that clients stop using public benefits they are currently receiving to avoid public charge inadmissibility?**

The proposed rule has not yet gone into effect. Before it can be implemented, USCIS must review and consider each unique comment to the proposed rule.

Once the rule is published, the changes are likely to apply to cases pending with USCIS at the time the final regulation becomes effective. However, there should be time to submit additional documentation.

The new rule would likely allow the applicant 60 days from the date it is finalized to disenroll from public benefits received prior to its enactment. This would apply to benefits not currently considered under the public charge definition.

We do not recommend that clients disenroll from public benefits or disenroll their children. Clients should consider their family's needs and individual circumstances before deciding to stop using a public benefit that provides necessary food, cash, health, or housing assistance.

D. RESPONDING TO COMMON CLIENT QUESTIONS

12. **How should I counsel a sponsor who has a low income?**

In the past, a sufficient affidavit of support would be enough to avoid a public charge finding. With the 2018 changes to the FAM, sponsors whose income only satisfies the minimum requirement for the affidavit of support should be prepared for additional scrutiny.

In some situations it may be possible to include the intending immigrant's income with the sponsor's income. The intending immigrant's income can be counted if he or she is residing with the sponsor or is the spouse of the sponsor. In addition, the income must come from "lawful employment in the United States or from some other lawful source that will continue to be available to the intending immigrant after he or she acquires permanent resident status." 8 CFR § 213a.1. This means that the intending immigrant must be working with employment authorization.

The income of other relatives (the sponsor's married children, children over 21 years of age, parents or siblings) can also be counted if they are residing with the sponsor. These relatives must complete a separate Form I-864A and submit their last year's tax return.

The intending immigrant can also prepare to submit additional evidence to show that he or she is not likely to become a public charge. This could include proof of employment history and work skills, or proof of other assets.

13. **How should I counsel my client who will be consular processing and using a joint sponsor?**

Many low-income sponsors will need to use a joint sponsor. Some consular offices have started questioning the ability and likelihood that the joint sponsor will support the intending immigrant should it be necessary. These consulates have been asking for further proof that the joint sponsor knows the intending immigrant and has some motive to provide support. It is not a requirement that the joint sponsor be a family member. However, it may be helpful to submit a letter from the joint sponsor explaining his or her relationship with the intending immigrant and the reason for submitting the affidavit of support.

14. **How should I counsel my client who is retired and living on a Social Security pension?**

Retirement income is an acceptable source of income. This can include monthly Social Security payments, a pension, or dividends from stocks. The sponsor can count both taxable and non-taxable income to satisfy the 125 percent of income requirement.

15. **How should I counsel my client who receives public benefits?**

The proposed USCIS regulation does not treat sponsors negatively if they are currently receiving public benefits or received them in the past. However, the FAM change makes it harder for sponsors to demonstrate income that is at least 125 percent of the poverty income guidelines if they or any household members are currently receiving or have received means-tested public benefits within the last three years. Neither the USCIS nor the DOS allow the sponsor to count as income the money from cash-assistance programs such as SSI or TANF.

16. **The sponsor is self-employed and reported a large deduction on last year's income tax report. What should I expect?**

Sponsors who are self-employed must show that their taxable income, or their adjusted income after all deductions, is more than 125 percent of the poverty income guidelines. They cannot rely on their gross income. In addition, they should get an independent assessment of their current income, since they will not receive a W-2. It is usually more difficult for self-employed sponsors to qualify.

17. **How should I counsel my client who is a senior and retired?**

Neither the USCIS nor the DOS currently requires applicants to document their income or employment status. However, advanced age is a factor that could require the intending immigrant to show that he or she will be supported in the United States. This puts greater importance on the sponsor to show sufficient income. If the applicant is relying on a joint sponsor, it is recommended that that person be a family member or show some reason for entering into this financial commitment.

The USCIS and DOS policy differ regarding the treatment of seniors. For those who are consular processing, the FAM now states that advanced age is a "negative factor, if [the consular officer] believe[s] it adversely affects the person's employability and may increase the potential for healthcare costs." Seniors or retired persons who are consular processing may wish to provide additional evidence of income and other financial support. They may also want to show evidence of good health and lack of serious medical concerns, of medical insurance, or the ability to pay for healthcare.

Under the current USCIS policy, age, employment, and health conditions are all factors that may be considered in the totality of the circumstances. However, a sufficient affidavit of support generally carries the most weight. That may change if the regulation is implemented as proposed. If so, USCIS would apply a standard that is more similar to the one used in the FAM. The age of applicants 61 years or over would be presumed to be a "negative factor" unless the applicant is "working or has adequate means of support." It is therefore more important that seniors or retired applicants submit evidence of income and other financial support.

18. How should I counsel my client who is under age 18?

As with seniors, the USCIS and DOS policies differ with respect to young persons. For those who are consular processing, the FAM now states that applicants under the age of 18 who are not immigrating with a parent will be subject to heightened scrutiny. Youth is considered "a negative factor in the totality of the circumstances." In contrast, those aged 18 or older must demonstrate "what skills [he or she has] to make him or her employable in the United States."

Under the current USCIS policy, age, unemployment, and health conditions are all factors that may be considered in the totality of the circumstances. As long as the affidavit of support requirement is met, an applicant should be able to adjust despite being under 18 and/or unemployed. That may change if the regulation is implemented as proposed. USCIS would apply a similar standard as the FAM and applicants under 18 would be considered to be "more likely to qualify for and receive public benefits" Therefore, their age would be "a negative factor." Young applicants who are not immigrating with a parent would need to show they are working or have an outside means of support.

19. How should I counsel my client who received prenatal Medicaid for the delivery of her child?

Receipt of prenatal Medicaid is not considered in the current public charge evaluation. However, it would be considered if the proposed rule is implemented. The use of Medicaid for emergency medical services, including labor and delivery, would be exempt. Other health-related benefits that are not considered now or under the proposed rule include the Child Health Insurance Program (CHIP), emergency Medicaid, and the Women, Infants and Children (WIC) program.

20. How should I counsel my client whose children are receiving public benefits?

Under the current and proposed USCIS rule, public benefits received by a family member will not be counted against the intending immigrant. Receipt of public benefits by U.S. citizen children will not adversely affect the applicant's application for adjustment of status. When the public charge regulation is finalized, it may expand the number and types of programs that will be considered. However, it would only affect receipt by the intending immigrant and not his or her children.

The new FAM puts more emphasis on whether the applicant or a family member in the applicant's household is currently receiving or has received "public assistance of any type" from state, federal, or local sources. While the FAM maintains the distinction between cash and non-cash benefits, and states that the latter should not be considered as public cash assistance or income, it states that these supplemental benefits "may only be considered as part of the totality of the applicant's circumstances in determining whether the an applicant is likely to become a public charge." In other words, receipt of food stamps (SNAP), CHIP, WIC, Medicaid, or other health-related benefits may be taken into account. However, to date we have not heard reports that receipt of benefits by the applicant's children has resulted in a public charge finding.

21. When should I counsel my intending immigrant clients to obtain health insurance?

Neither the USCIS nor the DOS currently requires that applicants in good health prove that they have health insurance. Those who are residing abroad will have a difficult time securing such insurance without undergoing a medical screening or showing residence in the United States. Those who have a serious medical condition may need to show that they have the resources to pay for any needed health care. Those who are residing in the United States may be able to secure such health insurance from a private insurer. Those who are residing abroad may be able to show the type of insurance they would be eligible for upon immigrating and the cost of such insurance. They may also need to show adequate resources to pay for treatment not covered by insurance.

22. How should I counsel my client who is unemployed and has few job skills?

Neither the USCIS nor the DOS currently requires that applicants document their income or employment status. Although income, education, and job skills are factors set forth in the statute, the USCIS and DOS are not questioning applicants on these issues at the present time. That could change, however, when the USCIS rule defining public charge is published in final form. The proposed rule would require the applicant to submit proof of income, employment, education, and job skills.

E. RESPONDING TO QUESTIONS FROM YOUR LPR CLIENTS

CLINIC has addressed the impact on public charge inadmissibility charges on LPRs in a separate FAQ available at cliniclegal.org/public-charge.