PUBLIC CHARGE INADMISSIBILITY AND LAWFUL PERMANENT RESIDENTS: WHAT ADVOCATES NEED TO KNOW

The Department of State (DOS) implemented new guidance on assessing public charge inadmissibility last year and U.S. Citizenship and Immigration Services (USCIS) published proposed regulations on the same issue. These FAQs describe the new developments and the circumstances in which they may impact on your lawful permanent resident (LPR) clients.

What is public charge inadmissibility?

Under INA § 212(a)(4) an applicant for admission or adjustment of status is inadmissible if she or he is likely to become a public charge. Based on the statute, public charge inadmissibility is determined by an assessment of the "totality of circumstances." This includes such factors as the applicant's age, education and skills, health, family status, and financial resources. In family-based immigration and certain employment-based immigration cases, applicants for LPR status must also submit an affidavit of support from the petitioner.

Example: Carolina is applying for an immigrant visa abroad as the spouse of an LPR, Manuel. In order for her application to be approved, the consular officer must determine that Carolina is not likely to become a public charge and Manuel must submit an affidavit of support on her behalf.

Is being a public charge also a ground of deportability?

Being a public charge is also a ground of deportability at INA § 237(a)(5), but it is assessed by very different factors than those used to determine public charge inadmissibility. Based on both the statute and case law, a non-citizen can only be deported on public charge grounds if she or he:

- Received public cash assistance for income maintenance or long-term care at government expense
- Needed assistance based on circumstances that existed before entry
- Received cash assistance or long-term care that created a legal debt or obligation to repay
- Received a demand to repay the debt within five years of admission, and
- Refused to repay.

Given these conditions on establishing deportability, this ground is highly unlikely to affect any LPR who is receiving public benefits.

Example: Jeanette, age 70, has been an LPR for 30 years and has been receiving SSI for the past five years. Although she is receiving needs-based cash assistance, she has no reason to be concerned about public charge deportability.

How has the DOS changed its assessment of public charge inadmissibility?

DOS modified several provisions of the Foreign Affairs Manual (FAM) in January 2018 as it relates to the assessment of public charge inadmissibility. The FAM contains the internal guidance used by consular officials in determining inadmissibility and eligibility for visa issuance. Under this new guidance, consular officers are

directed to place less reliance on a sponsor's affidavit of support and more reliance on the visa applicant's totality of the circumstances, described above. The new FAM guidance also allows for the consideration of any public benefits received by the sponsor and members of his or her household to determine the ability of the sponsor to support the applicant. As a result of the FAM guidance revisions, more visa applicants are being found inadmissible on public charge grounds and have to take additional steps to overcome inadmissibility, which may include:

- Obtaining a joint sponsor if the primary sponsor's income is just at or slightly above the required income amount for the household size
- Showing evidence of health insurance or ability to pay medical expenses if the visa applicant has a serious medical condition, and
- Explaining the relationship between the visa applicant and any joint sponsor who is not a family member.

Example: Carolina attends her consular interview in Mexico and presents an affidavit of support from her husband, Manuel. Although Manuel submitted a qualifying affidavit of support, his income is only $1,500 above the required amount for his household size. The consular officer finds Carolina inadmissible on public charge grounds and tells her she should find a joint sponsor, preferably a family member. Since Carolina's medical examination shows that she has diabetes and takes insulin, the officer also requires her to provide proof of how she will pay her medical expenses in the United States.

How would implementation of the USCIS proposed regulations change the assessment of public charge inadmissibility?

The 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 in those cases where an affidavit of support is required, it will still be considered. But the USCIS will also be analyzing the applicant's age, education and skills, health, family status, and financial resources. The proposed regulation will make it harder for low-income, elderly, disabled, and those with a health-related condition to overcome public charge. Unlike the revised FAM guidance, however, only public benefits received by the applicant are considered in assessing public charge inadmissibility.

Example: U.S. citizen Joseph wants his mother, Nadia, now visiting from Venezuela, to remain in the United States and apply for adjustment of status. Nadia is 75 years old and in good health, but she does not have a history of employment and does not plan to work. Joseph has been trying to find health insurance for her, but has not found any affordable options. Under the proposed regulations, it may be difficult for Nadia to establish that she is not likely to become a public charge.

Do these DOS and USCIS changes affect my LPR clients?

LPRs are generally not impacted by the grounds of inadmissibility because they have already been admitted to the United States. In some circumstances however, LPRs returning from travel abroad can be considered "applicants for admission" and be subject to the grounds of inadmissibility. These circumstances, set forth at INA § 101(a)(13)(C), include those LPRs who have:

- Abandoned LPR status
- Remained outside the United States for a continuous period in excess of 180 days

- Engaged in illegal activity after having departed the United States
- Departed the United States while in a legal process seeking removal of the LPR
- Committed an offense that falls within crime-based inadmissibility at INA § 212(a)(2), or
- Attempted to enter the United States without inspection.

If your LPR client falls within any of the categories listed above, she or he will be considered an applicant for admission when returning from travel abroad and be subject to the grounds of inadmissibility. Conversely, LPRs returning from travel abroad who do not fall within any of these categories are not applicants for admission and are not subject to screening for inadmissibility. As an advocate, you should always be sure that LPRs who have a criminal conviction receive immigration counseling before they travel abroad. Similarly, advocates should educate their LPR clients, particularly those receiving public benefits, that they can avoid exposure to public charge inadmissibility by limiting travel abroad to 180 days or fewer.

Example: Andrew, from England, has been an LPR since 1994. Two years ago, he was convicted of felony theft and received a sentence of two years of probation. Andrew is not deportable for this offense, but he faces being found inadmissible if he travels abroad, assuming his offense falls within a category of crime-based inadmissibility at INA § 212(a)(2). This would mean Andrew, an LPR, would be placed in removal proceedings and charged with being inadmissible under INA § 212(a)(2).

Example: LPR Jeanette has been receiving SSI for the past five years. After returning from an eight-month trip abroad to visit her family in Poland, Jeanette is questioned by a Customs and Border Protection (CBP) officer, who learns that Jeanette is dependent on SSI benefits. As an LPR returning from a trip abroad of 180 days or more, Jeanette is subject to the grounds of inadmissibility. She could be placed in removal proceedings and charged with inadmissibility under INA § 212(a)(4). Note that this outcome is possible without a change in USCIS policy because Jeanette is receiving the type of public benefit that USCIS already considers an indicator of public charge inadmissibility. In this case, the impact of new regulations is really more about a potential heightened scrutiny by CBP of public charge issues when inspecting LPRs returning from trips of 180 days or more.

In some limited circumstances, an LPR may need to apply for a Special Immigrant Visa (SB-1) at a U.S. consulate in order to return from an extended trip abroad. By regulation, an I-551 card ("green card") is not a valid document for admission following a trip abroad of a year or more. For this reason, LPRs who expect to be outside the United States for more than one year should seek a reentry permit. Where an LPR either stayed outside the United States for more than a year without obtaining a reentry permit, or overstayed the reentry permit authorized absence, the SB-1 visa may be a remedy to facilitate return to the United States. To qualify for the visa, however, the LPR must: (a) establish that she or he did not abandon LPR status, and (b) submit a new immigrant visa application. In this context, the returning LPR is exposed to an inadmissibility assessment, including the new pubic charge guidance.

Example: LPR Jeanette went to Poland to visit her family and stayed longer than anticipated because of recuperation from a car accident. By the time she was ready to return to the United States, she had already been abroad for 18 months and her I-551 card had expired. Since Jeanette lacks a valid document to board a return flight to the United States, she applied for an SB-1 visa at the U.S. consulate in Warsaw. She had to show that she did not abandon her LPR status and that she is not inadmissible as a public charge.

As a practical matter, many LPRs return to the United States after an absence of more than one year by simply presenting their LPR cards and explaining, if asked, the reason for the extended absence. The SB-1 option will most often be a remedy of last resort when the LPR's I-551 card is expired or lost.

Can my LPR client be subject to new public charge inadmissibility grounds if she or he does not travel abroad? Or if travel abroad is limited to 180 days or fewer?

An LPR who does not travel abroad cannot be subject to the grounds of inadmissibility. Unless your LPR client travels outside the United States and falls within a category described at INA § 101(a)(13)(C), the grounds of inadmissibility are inapplicable. For most LPRs, this means that limiting travel abroad to 180 days or fewer will protect the LPR from being subject to the grounds of inadmissibility.

Example: LPR Jeanette has been receiving SSI benefits for the past five years. After returning from a five-month trip abroad to visit her family in Poland, Jeanette is not treated by CBP as an applicant for admission because her trip abroad was not more than 180 days.

Can my LPR client be subject to public charge deportability based on new USCIS regulations?

The proposed public charge regulations only address public charge inadmissibility and would therefore have no impact on the existing test for public charge deportability. Unless and until there is a new statute or new case law interpreting public charge deportability, the current test for public charge deportability described above means that very few people can be subject to this deportability ground.

Will my LPR client's receipt of public benefits affect the beneficiary of a family-based petition filed by my client?

Many LPRs are petitioners for family members and, unless an exemption applies, are required to submit an affidavit of support for the family member beneficiary. Under the new FAM guidance, if the LPR petitioner or a member of his or her household is receiving public benefits, or has received public benefits within the last three years, this will be considered by the consular officer in evaluating the LPR's ability to support the family member beneficiary.

Example: Manuel must submit an affidavit of support because he is an LPR petitioning for his wife, Carolina. Three years ago, Manuel's ten-year-old son from a prior marriage received cash assistance and Medicaid while living with Manuel. The aid continued until last year. The consular officer could consider this receipt of benefits when determining whether Carolina is likely to become a public charge.

Note that there is no similar policy in the assessment of public charge inadmissibility for adjustment of status applicants, either currently or included in the USCIS proposed regulations.

Example: Same facts as above, only Carolina is applying for adjustment of status rather than an immigrant visa. The USCIS officer should not consider this receipt of benefits by Manuel's son when determining whether Carolina is likely to become a public charge.

Will my LPR client's receipt of public benefits affect her naturalization application?

Applicants for naturalization are not subject to the grounds of inadmissibility. Nor is it likely that they would be found deportable on public charge grounds. Advocates should, however, screen any naturalization applicant who receives or has received public benefits to make sure that the client was indeed eligible for those benefits.

The purpose is to eliminate any concern about possible criminal conduct in the receipt of public benefits and its potential impact on establishing good moral character. In addition, if your LPR client traveled abroad for more than 180 days while receiving public benefits, she or he may be exposed to a possible charge of deportability for being inadmissible at the time of admission. To date, however, there is no evidence that USCIS adjudicators have been screening naturalization applicants to identify this issue.

Example: Flora is an LPR who has been receiving food stamps and cash assistance for the past three years. She is now applying to naturalize. Last year, Flora traveled to see her family in Panama and she stayed with them for seven months. Although she was not questioned by CBP upon her return to the United States, there is a risk that a naturalization examiner my refer her to be placed in removal proceedings to be charged with being deportable for being inadmissible at the time of her last admission.

Where can I find out more about these new developments on public charge inadmissibility?

CLINIC's FAQs on public charge inadmissibility and the impact on new and proposed changes on intending immigrants can be found here. Additional resources in public benefits issues and developments can be found at cliniclegal.org/public-charge.