



Proposed Public Charge Regulation Summary

Introduction

The Department of Homeland Security has issued proposed regulations that would redefine the meaning of the legal term “public charge” to reject immigrants applying for an immigrant visa (green card), or a temporary visa if they have previously accessed or are deemed likely to rely on certain forms of public assistance in the future. This proposed rule would make it more difficult for legal immigrants coming to the U.S. and likely will continue to have a chilling effect on immigrant families, who are eligible for assistance, and are contributing to America every day at work and in their communities. The proposed rule was published on October 10, 2018, with public comments accepted until December 10, 2018.

What is a “public charge,” and what does it have to do with immigration?

One of the grounds for which an immigrant may be denied admission to the U.S. is his or her likelihood to become a “public charge.” The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 made noncitizens ineligible for admission or adjustment of status if the government determined that a noncitizen was likely to become a public charge based on the immigrant’s circumstances — including his or her age; health; family status; assets, resources and financial status; and education and skills. That law also established the requirement that an immigrant’s sponsor sign an “affidavit of support” showing ability to support the sponsored immigrant at a minimum of 125 percent of the federal poverty level.

Regulations issued in 1999 interpreted “public charge” as meaning an individual who becomes *primarily dependent* on the government for subsistence. Dependence on the government is demonstrated by the use of *cash benefit programs*.

Who is currently subject to the public charge rule?

Under the Immigration and Nationality Act (INA), foreign nationals applying for a visa to come temporarily or permanently must show that they are not likely to become a public charge. The same goes for those already in the U.S. on a non-immigrant visa applying for a green card. Immigrants subject to the public charge test include immediate relatives of U.S. citizens (spouses, minor children, and parents); relatives of U.S. citizens eligible for a visa under family preference categories (adult children, brothers and sisters); spouses, minor children, and adult unmarried children of lawful permanent residents; foreign nationals coming on immigrant visas through employment preference categories; immigrants who have won a visa through the diversity visa lottery, fiancé(e)s, and certain nonimmigrants.

How will the new rule affect immigrants and their children?

If finalized, the rule could have a dramatic impact on legal immigration by limiting who can come to the U.S. and by slowing down the processing of those eligible to come to the U.S. or eligible to change visa status. DHS is proposing to significantly broaden the definition of who is “likely at any time to become a public charge.” It would change how the government considers factors including age, health, education and skills. It is also broadening who must meet the public charge test and will include those who are seeking to extend their visas and those who wish to change from one visa to another.

Because the rules for making public charge determinations are complicated, immigrants and their children may drop out of or forgo enrollment in benefits programs for which they are eligible, out of fear of the immigration consequences of using government assistance — even if the benefit program would have no impact on a public charge finding. A reduction in use of benefits by immigrant households could have a negative impact on children, including those with working parents. The proposed rule acknowledges that the proposed rules could lead to the following negative consequences arising from a drop in benefits usage: worse health outcomes, increased use of emergency rooms, increased prevalence of communicable diseases, and more. There are already widespread reports of immigrants disenrolling from nutritional and other programs for which they are eligible because they’ve heard news about the rule change.

Under the proposed rule, who will be subject to the public charge rule?

In addition to the above categories of immigrants and non-immigrants already subject to a public charge test, the new rule will apply determinations of inadmissibility based on public charge to individuals on non-immigrant visas who are applying to extend their stay or to change their status from one visa to another type of visa (or whose employers are applying for new visas for them). In all, more than three dozen categories of non-immigrants eligible to apply for an extension of stay or change of status may be subject to the new public charge rule. However, not every individual in these categories will have to prove that they are self-sufficient. Proof will be required at the discretion of the officer who is adjudicating the application. A new form I-944, “Declaration of Self-Sufficiency,” will be used to gather the required evidence.

Who will not be subject to the public charge rule?

Refugees, asylees, and several categories of immigrants in permanent or temporary statuses that are mostly humanitarian in nature — specifically, special vulnerable populations such as Cuban and Haitian entrants, juveniles who are eligible for special immigrant visas, applicants for temporary protected status, and several others. Exempt categories of permanent and temporary immigrants are listed in the proposed rule (beginning on page 51292 of the Federal Register). In addition, DHS proposes to exempt active duty servicemembers, including those in the Ready Reserved, as well as their families.

Additionally, although lawful permanent residents generally are not considered to be applicants for admission upon their return from a trip abroad, in certain limited circumstances (such as someone who has been outside the United States for a continuous period in excess of 180 days) a lawful permanent resident will be considered an applicant for admission and subject to the public charge test.

Will immigrants already living here as permanent residents be deported if they use public benefits?

This proposed rule will define public charge determinations for admissibility. It will not govern rules for deportability. The proposed rule states that “Department of Justice precedent decisions would continue to govern the standards regarding public charge deportability determinations.” DHS has said in a statement that the Justice Department will engage in parallel rulemaking to set the rules governing public charge and deportation. The Justice Department has not announced when it expects to issue proposed regulations on public charge.

How is public charge currently defined?

The term “public charge” is interpreted in current regulations to mean an individual who becomes *primarily dependent on the government* for subsistence. Dependence on the government is demonstrated by the use of *cash benefit programs* for income maintenance or by *institutionalization for long-term care* at government expense. Cash benefit programs include Supplementary Security Income (SSI) and Temporary Assistance for Needy Families (TANF); state or local cash general assistance programs; and long-term institutional care at government expense (for example, paid for by Medicaid). The use of *non-cash* public benefit programs, such as food stamps, as well as the use of certain limited cash assistance programs, has not been interpreted to make one a public charge.

Under the proposed rule, how will public benefit be defined?

During a public charge determination, an individual must use or receive more than a certain amount of specified benefits to be considered likely to become a public charge. For public benefits with a cash value, DHS will set the amount at 15 percent of the federal poverty guidelines for a household of one, (or \$1,821 in 2018) used or received within 12 consecutive months.

“Non-monetizable” public benefits are benefits for which DHS cannot determine the cash value. The public charge threshold for receipt of these benefits will be time-based, specifically, receipt of *one* of the specified benefits listed in the next section for a cumulative 12 months in a 36-month period. Receipt of *two* of these non-monetizable benefits counts double, *i.e.*, two months are accumulated toward the 12-month threshold for each month that an individual receives two of these benefits.

In cases where the individual receives a *combination* of monetizable and non-monetizable benefits, in which the amount received of the *monetizable* benefit totals *less* than 15 percent of the poverty threshold in a 12-month period, then the threshold for receipt of the *non-monetizable* benefit drops to 9 months in a 36-month period.

Under the proposed rule, receipt of which public benefits could lead to a finding that an immigrant is likely to become a public charge?

<p>“Monetizable” Public Benefits. These are benefits for which DHS can determine the cash value. Receipt of an amount more than 15 percent of the federal poverty guidelines (FPG) for a household of one will be a heavily weighted negative factor in a public charge determination. In 2018, 15 percent of the FPG was \$1,821.</p> <ul style="list-style-type: none"> • Supplemental Security Income • Temporary Assistance for Needy Families • Any other federal, state, or local cash benefit program for income maintenance • Supplemental Nutrition Assistance Program (SNAP) • Housing Choice Vouchers (Section 8 public housing) • Section 8 Project-Based Rental Assistance 	<p>“Non-Monetizable” Public Benefits. These are benefits for which DHS cannot determine the cash value. The threshold is time-based — a cumulative 12 months in a 36-month period, with receipt of two of these benefits counting double (2 for one month = two months) toward the 12-month threshold.</p> <ul style="list-style-type: none"> • Non-emergency Medicaid (except for Medicaid services provided by the Individuals with Disabilities Education Act and Medicaid services received by foreign-born adoptees) • Premium and cost-sharing subsidies for Medicare Part D • Institutionalization for long-term care at government expense • Subsidized housing under the Housing Act of 1937
<p>Combined Receipt of “Monetizable” and “Non-Monetizable” Benefits. In the case where an individual is <i>simultaneously</i> receiving <i>both</i> a benefit with determinable cash value (from the first column above) <i>and</i> a non-monetizable benefit (from the second column above), then the threshold for receipt of the “non-monetizable” benefit drops to 9 months in a 36-month period. (This applies to cases in which an individual uses less than an amount worth 15 percent of the FPG in a 12-month period.)</p>	

Under the proposed rule, which public benefits would an immigrant still be allowed to receive and not be found a public charge?

The proposed rule will exclude from the definition of “public charge” any non-cash public benefit not listed in the proposed rule. This includes forms of government assistance that are provided to the public more generally, as well as benefits that are excluded by law, for example, public education, disaster relief, tax credits and deductions available to the general public, public health assistance for immunizations, and certain benefits that the U.S. is required to pay by reciprocal agreements. It also excludes certain benefits such as Social Security based on work history, government pensions and other employee benefits, workers compensation, unemployment benefits, veterans benefits, certain disability insurance benefits, and general Medicare benefits. See the full description on page 51173 of the Federal Register.

What other factors, other than receipt of public benefits, are considered in determining whether an individual is likely to become a public charge?

When considering who is likely to become a public charge, the government considers the totality of the immigrant's circumstances — whether the immigrant has a financial sponsor, plus the immigrant's age, health, family status, assets, resources, financial status, education and skills.

Considering all these attributes, if negative factors and circumstances outweigh positive factors, DHS will consider the individual likely to become a public charge.

Under the proposed rule, how will the various factors be weighed when considering the likelihood that someone becomes a public charge?

Under current procedures, the public charge test involved consideration of the “totality of circumstances.” Certain of the factors described below will weigh heavily in making a public charge determination, according to the proposed rule. Heavily weighing in favor of an individual will be the possession of financial assets, resources, support or annual income of at least 250 percent of the federal poverty guidelines. For 2018, 250 percent of the federal poverty guidelines is \$30,350 for an individual and \$62,750 for a family of four.

Heavily weighing against an individual will be:

- absence of current employment, employment history, and reasonable prospect of employment;
- current receipt or use of one or more public benefits (as designated in the proposed rule) in the past 36 months;
- use of a fee waiver for an immigration benefit;
- a medical condition without private health insurance coverage or some other non-subsidized means of paying for treatment; and
- a previous finding of inadmissibility on public charge grounds.

The proposed rule defines with much more specificity how factors will be considered in determining admissibility.

- **Sponsorship:** Most family-sponsored immigrants and some employment-based immigrants are required by current law to have their sponsor sign an “affidavit of support,” promising to support the immigrant at least at the level of 125 percent of the federal poverty guidelines. Under the proposed rule, if the sponsor has not filed an affidavit of support, the immigrant will be considered inadmissible. Having an affidavit of support, however, is only a threshold factor in considering whether the immigrant is likely to become a public charge; it does not mean the immigrant will *not* be considered a public charge if there are other factors weighing against the individual.
- **Age:** DHS proposes to consider age in relation to the individual's ability to work. Specifically, DHS will consider whether the individual is between 18 and 61 years of age. A person's age under 18 (generally, the minimum age of full-time employment) and over 61 (with 62 being the “early retirement” age when an individual may begin collecting Social Security benefits) will be considered a negative factor.
- **Health:** DHS will consider whether the individual has a medical condition that may affect the individual's ability to work or that may otherwise make it more likely that the individual becomes a public charge.
- **Family Status:** DHS will consider whether the individual being a dependent or having dependents makes the individual more or less likely to become a public charge. The proposed rule cites data showing that the larger the family size, the more likely the

household is to receive public benefits. DHS will consider household size in making its public charge inadmissibility determination. An immigrant in a larger household will have to show greater income or assets — so all members of the household can be supported at least at the level of 125 percent of the federal poverty guidelines.

- **Assets, Resources and Financial Status:** At a minimum, the individual must have assets, resources, or annual income to support him or herself and all dependents at a level of at least 125 percent of the federal poverty level. In 2018, 125 percent of the federal poverty guidelines is \$15,175, and for a family of four it is \$31,375. In addition, DHS will consider whether any aspect of an individual’s financial situation other than assets and resources makes the person more or less likely to become a public charge. This includes an examination of *past receipt of public benefits* (but only after the effective date of the final rule), the use of *fee waivers for immigration benefits*, credit histories and credit scores, and private health insurance coverage or financial resources to pay for medical costs.
- **Education and Skills:** DHS will consider whether the individual will have sufficient education and skills to obtain or maintain full-time employment (if authorized for employment). DHS will include an individual’s English language ability in this assessment, because “an inability to speak and understand English may adversely affect whether an alien can obtain employment.”

When would the new rule about public charge go into effect?

The public will have until December 10 to comment on the proposed rule, after which the administration is legally required to consider each unique comment before finalizing the rule. Once the final rule is published, it will take effect 60 days after the publication date. The use of any of the expanded list of public benefits prior to the effective date will not be considered in public charge determinations. DHS states that the 60-day delay in the effective date will give individuals “time to stop accepting public benefits and obtain other means of support before filing for immigration benefits.”

Will there be exceptions to the public charge determinations?

In addition to the categories of immigrants and non-immigrants mentioned above who will not be subject to a public charge determination, certain categories are eligible for waivers of the public charge determination — for example, non-immigrants on T visas (victims of trafficking) and S visas (witnesses or informants). (These are listed on page 51157 of the Federal Register.) At the discretion of DHS (and in limited circumstances), an individual who has been determined to be inadmissible based on public charge grounds may be admitted after posting a minimum \$10,000 public charge bond.