

PROPOSED CHANGES TO PUBLIC CHARGE: ANALYSIS and FREQUENTLY ASKED QUESTIONS

ANALYSIS

See page 5 for Frequently Asked Questions

How the public charge policy is applied today

The current definition of “public charge” is a person who has become or is likely to become primarily dependent on the government for subsistence. Under the current policy, which USCIS has not changed and will not change for some time, the only benefits considered in the public charge test are:

- Cash assistance such as Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF) and comparable state or local programs.
- Government-funded long-term institutional care.

How the public charge policy could change

On October 10, 2018, the Department of Homeland Security (DHS) [posted a proposed public charge regulation](#) (a Notice of Proposed Rulemaking) in the Federal Register, and asked the public to submit comments by December 10, 2018.

If the regulation is finalized in its proposed form, it would mark a significant and harmful departure from the current policy. For over a hundred years, the government has recognized that work supports like health care, nutrition and housing assistance help families thrive and remain productive. And decades ago, the government clarified that immigrant families can seek health care, nutrition and housing assistance without fear that doing so will harm their immigration cases. **If this rule is finalized, we can no longer offer that assurance.**

The proposal weighs a range of factors in deciding whether a person is likely to use certain public benefits in the future, and would make it much more difficult for low and moderate-income immigrants to get a green card, extend or change their temporary status in the US. The proposed test would weigh each of the following *negatively* in public charge decisions: earning less than 125% of the federal poverty level (FPL), being a child or a senior, having certain health conditions, limited English ability, less than a high school education, a poor credit history, and other factors.

Key points from the proposed rule

- It dramatically changes the definition of public charge to apply to anyone who is likely to use more than a minimal amount of certain cash, health, nutrition or housing programs.
- It applies a similar test to bar extensions of non-immigrant visas, and changes of non-immigrant status (e.g., from a student visa to an employment visa).

New standards and heavily weighted factors

- The proposed rule adopts new income thresholds for households seeking to overcome a “public charge” test - by giving negative weight to immigrants who earn less than 125 percent of the Federal Poverty Level (\$31,375 for a family of four) - and by weighing as “heavily positive” a household income of 250 percent of the Federal Poverty Level. To reach that threshold, a family of 4 would need to earn nearly \$63,000 annually.
- In evaluating criteria that include age, health, family status, and education, the proposed rules give negative weight to children or seniors, persons with limited English proficiency, poor credit history, limited education, or a large family. The proposed rule also considers whether an applicant sought or obtained a fee waiver in applying for an immigration benefit – on or after the effective date of the final rule.
- The proposed regulations establish “heavily negative” factors, including health conditions that require extensive treatment or that affect an applicant’s ability to work, attend school or care for themselves – unless they have access to private health insurance or resources to pay for treatment.
- Receipt of the listed benefits during the 36 months prior to applying for admission or a “green card” also would be counted as heavily weighted negative factors in the public charge determination. Benefits used prior to the effective date of the final rule would not be considered in this “look back” period, except for the two benefits considered under the current policy: cash assistance and long-term care.

The single heavily weighted positive factor is having income or resources of over 250 percent of the federal poverty level -- nearly \$63,000 a year for a family of four.

Benefits

The proposal expands the types of benefits that could be considered in a “public charge” determination to include key programs that provide no income support but merely help participants address their basic needs. These programs include:

- Medicaid (with limited exceptions including Medicaid coverage of an "emergency medical condition," and certain disability services related to education);
- Supplemental Nutrition Assistance Program (SNAP)(formerly called food stamps);
- Medicare Part D Low Income Subsidy (assistance in purchasing medicine);
- Federal Public Housing, Section 8 housing vouchers and Section 8 Project Based rental assistance.

Note: DHS asks for input on inclusion of the Children’s Health Insurance Program (CHIP), but this program is not included in the proposed regulatory text.

- The threshold for counting these benefits is based on the amount of benefits for which the value can be quantified, and on the length of time received for other programs.
 - For benefits that can be quantified (“monetizable benefits”), the threshold would be 15% of the poverty level for a single person (currently \$1,821) in a 12-month period.

- For benefits with an undetermined value (“nonmonetizable benefits”) the limit would be 12 months in a 36-month period or 9 months if an applicant received both kinds of benefits.
- DHS will not consider benefits received by an applicant’s family members, or any programs not specifically listed in the rule.
- DHS will not consider programs funded entirely by states, localities or tribes, with exceptions for cash assistance and long-term care programs.
- The regulation also proposes to exclude benefits received by active duty servicemembers, military reservists and their spouses and children.
- The rule would not be retroactive. This means that benefits -- other than cash or long-term care at government expense -- that are used before the rule is final and effective will not be considered in the public charge determination.
- Benefits not listed, such as education, child development, disaster assistance, employment and job training programs, and legal assistance are also excluded. **See table below.**

Benefits Included for Public Charge	Benefits Excluded from Public Charge
<ul style="list-style-type: none"> ● Cash Support for Income Maintenance* ● Long Term Institutional Care at Government Expense* ● Non-Emergency Medicaid** ● Supplemental Nutrition Assistance Program (SNAP or Food Stamps) ● Medicare Part D Low Income Subsidy ● Housing Assistance (Public Housing or Section 8 Housing Vouchers and Rental Assistance) <p><i>* Included under current policy as well</i> <i>** Exception for certain disability services offered in school. DHS is asked for input on inclusion of CHIP, but the program is not included in the regulatory text</i></p>	<p><i>ANY benefits not on the included list will not be applied toward the public charge test, such as:</i></p> <ul style="list-style-type: none"> ● Disaster relief ● Emergency medical assistance ● Entirely state, local or tribal programs (other than cash assistance or institutionalization for long-term care) ● Benefits received by immigrant’s family members ● CHIP* ● Women Infants and Children (WIC) ● School Breakfast and Lunch ● Energy Assistance (LIHEAP) ● Transportation vouchers or non cash transportation services ● Non-cash TANF benefits ● Federal Earned Income Tax Credit and Child Tax Credit ● Student Loans <p><i>*DHS is asked for input on inclusion of CHIP, but the program is not included in the regulatory text.</i></p>

Other issues

The proposed rule offers only one way for an immigrant to cure a public charge issue: paying a public charge bond. This means that people deemed likely to become a public charge, because of their moderate income, a health condition like cancer, or other factors, may be required to pay a minimum of \$10,000 for admission (or higher if private bond companies are allowed to charge them fees for advancing bond money) and would risk losing this bond if they use any public benefits listed in the rule.

The proposed rule does not interpret or expand the public charge ground of deportability. Under current law, a person who has become a public charge can be deported only in extremely rare circumstances. The Department of Justice may propose a separate rule that addresses this ground.

How does this differ from previous drafts of the rule?

In some ways, the proposed rule is narrower than the drafts leaked to the media this spring. However, the proposed changes would make it significantly more difficult for low and moderate-income families, and those with any of the negatively weighed factors to immigrate. It will also chill access to critical services broadly – with devastating impacts on children, families and communities. Children will be harmed under this proposal, as parent and child health are inextricably linked. If adults avoid seeking nutrition assistance under SNAP for themselves or their children, the family will have less access to nutritious food.

Immigrant families already have been dropping off programs in response to press accounts about public charge. Even though the proposed changes would not take effect until months after the rule is finalized - and would apply only to benefits received after that point -- the threat of changes will cause more fear and confusion about how this test works.

Things to keep in mind

Some immigrant groups are not subject to “public charge.” Certain immigrants—such as refugees, asylees, survivors of domestic violence, and other protected groups—are not subject to “public charge” determinations and would not be affected by this proposed rule if they seek status or a green card through these pathways. Public charge is also not a consideration when lawful permanent residents (green card holders) apply to become U.S. citizens.

Immigration officials must consider all of an immigrant’s circumstances. The public charge statute — which cannot be changed by regulations — requires immigration officials to look at all factors that relate to noncitizens’ ability to support themselves, including their age, health, income, assets, resources, education/skills, family members they support, and family who will support them. They may also consider whether a sponsor has signed an affidavit of support (a contract) promising to support the noncitizen. Since the test looks at the person’s overall circumstances prospectively, no one factor is definitive. Any negative factor, such as not having a job, can be overcome by positive factors, such as having completed training for a new profession or having college-educated children who will help support the family.

What happens next?

After DHS considers public comments received on the proposed rule, DHS will likely issue a final public charge rule that will include an effective date at least 60 days after the date the *final* rule is published. In the meantime, and until a final rule is in effect, USCIS will continue to apply the current public charge policy (i.e., the [1999 INS Interim Field Guidance](#)).

FREQUENTLY ASKED QUESTIONS

When is a public charge determination made?

An assessment of whether a person is likely to become a public charge is made at two points: when the person applies for admission to the U.S. and when the person applies for lawful permanent resident (LPR) status. There is no public charge assessment when a person applies to become a naturalized citizen.

Who is affected by the proposed public charge regulations?

The proposed regulations would affect anyone in the United States who is not exempt from public charge and is applying for admission to the country or lawful permanent resident (LPR) status. It would also affect people with non-immigrant visas who are applying to extend their visa or change its category. Decisions about people applying for admission or LPR status outside the U.S. are guided by the Foreign Affairs Manual, published by the State Department. Once the regulations become final, we expect the State Department to revise the Foreign Affairs Manual to conform to them.

How can the rule affect people who aren't eligible for the listed benefits?

Anybody in the U.S. who is applying for admission or to adjust to LPR status, who isn't exempt from public charge, could be affected because the public charge assessment is forward-looking. The USCIS officer is looking at whether the applicant is likely at any point in the future to become a public charge, based on an array of factors that include their income and resources, education and employment history, age and health. A person's current benefits eligibility does not limit this inquiry, since they may become eligible for benefits in the future.

Which immigrants are exempt from public charge?

The following categories of noncitizens are not subject to a public charge test or can qualify for a waiver of that test: refugees; asylees; survivors of trafficking, domestic violence, or other serious crimes (T or U visa applicants/holders); VAWA self-petitioners; special immigrant juveniles; certain people paroled into the U.S.; and several other categories of immigrants.

What categories of immigrants are both eligible for the programs in the rule, and also potentially subject to public charge grounds of inadmissibility?

Although many immigrants who are eligible for the listed programs are not subject to public charge determinations, some individuals could be penalized for using benefits for which they are eligible. Here is an overview of the groups that could be harmed by the use of benefits factor in the proposed test:

Examples include:

- All programs: Lawful permanent residents who leave the US for more than 6 months and attempt to reenter the country.
- Medicaid/SNAP/Housing: Some people granted parole, withholding of removal, and a subset of Cuban/Haitian entrants may have a pathway to permanent status that subjects them to public charge (like a family-based visa petition).

- Medicaid: Over 30 states offer Medicaid to lawfully residing children and/or pregnant women who may be subject to public charge determinations when they seek a green card or attempt to extend or change their temporary non-immigrant status.
- Housing: Citizens of Micronesia, Marshall Islands or Palau who are eligible for housing subsidies could be subject to public charge determinations if they leave the US and attempt to reenter, or if they seek a green card through a family-based visa petition or another pathway where public charge is applied.
- Medicare Part D: In addition to LPRs who have resided continuously in the US for at least 5 years, subsidies may be available to some lawfully present immigrants with a lengthy work history in the US. Some of these individuals could be affected by the test.
- *And - some otherwise exempt individuals who decide to adjust status through a family relationship instead of a pathway for which a public charge exemption exists.*

Many more families will likely be deterred from using benefits for themselves or their families, even if they are not subject to a public charge test. These families are likely to forego critical health, nutrition or housing programs that they need to remain healthy and employed. We have already seen people withdrawing from benefit programs due to fear, even though the proposed rule has not gone into effect. *Even if an immigrant isn't currently eligible for a benefit, since the public charge test considers whether a person is likely at any time to become a public charge. Immigration officials could consider whether an individual is likely to use those benefits in the future -- including after they have obtained a green card or even citizenship.*

Does the public charge determination apply to non-immigrant visas too? Or only applicants for immigrant visas?

People applying for immigrant and non-immigrant visas at consulates abroad are assessed to determine whether they are likely to become a public charge. However, that determination is made by consular officials following guidance from the State Department in the Foreign Affairs Manual (FAM). [The FAM guidance](#) uses the current definition of public charge (likely to rely primarily on cash assistance or long-term care). It allows the officials to consider a broad range of benefits used by the applicants, their dependents or sponsors in making this determination. If this NPRM is finalized, however, the State Department will likely change its policy to align with the USCIS rule.

The proposed rule would apply a test that is similar to the public charge test to people in the U.S. who seek to extend a temporary non-immigrant visa, as well as those seeking to change the category of their non-immigrant visa (for example from a student to an employment-based visa).

Will this rule affect immigrants who are already green card holders or U.S. citizens?

The proposed rule would not affect individuals who have already become US Citizens. Lawful permanent residents (green card holders) will not be subject to a public charge inadmissibility determination when they apply to become a U.S. citizen. Under both current law and the proposed rule, green card holders who are outside the U.S. for more than 180 consecutive days (6 months) may be subject to a determination of admissibility, including a public charge assessment, when seeking to re-enter the U.S. and should consult with an immigration attorney prior to departure. LPRs are also subject to an admissibility determination in cases where they have abandoned their residency, commit certain crimes, or left the country while in removal proceedings.

I understand the public charge test does not apply to renewals of permanent resident cards, would that still be the case under the proposed rule?

A person's lawful permanent residence does not expire when the green card expires. Since there is no new admissions test when people renew their green card, the public charge ground of inadmissibility would not apply at that stage.

THE PUBLIC CHARGE TEST

Who makes the decision of whether someone is likely to become a public charge?

For individuals applying to enter the US from abroad, consular officials (employed by the State Department) make the public charge determination based on criteria in the Foreign Affairs Manual (FAM). For individuals in the US applying for a green card or applying to extend/change their non-immigrant status, the public charge determination is made by USCIS based on criteria in the statute, any implementing regulations and field guidance. In some cases, individuals in the U.S. may be required to leave and go through consular processing to secure lawful permanent residence.

Will this rule be binding on both USCIS cases where immigrant seeks adjustment of status in the U.S. and cases for those who seek admission through a U.S consulate abroad?

This rule applies to USCIS and covers applicants for adjustment of status in the U.S. as well as nonimmigrants in the U.S. seeking to extend or change their nonimmigrant status in the US. The State Department recently revised its instructions in the Foreign Affairs Manual (FAM) for consular officials considering individuals seeking to enter the U.S. The FAM guidance uses the current definition of public charge (likely to rely primarily on cash assistance or long-term care). It allows the officials to consider a broad range of benefits used by the applicants, their dependents or sponsors in making this determination. More information on the FAM changes is [available here](#). It's likely that the State Department will revise its policies again to conform with USCIS rules if and when they become final.

Can a public charge determination be retroactive?

The public charge determination will remain a forward-looking/prospective test based on the totality of the applicant's circumstances. However, the government may consider the past use of benefits to make prospective public charge determinations. Benefits that were previously excluded from the public charge test (anything other than cash or long-term institutional care) will NOT be considered *unless received after the final rule is effective*. Thus, the use of non-cash benefits like SNAP, Medicaid or housing assistance before the rule is finalized cannot be considered in the prospective public charge determination. Since there will be at least 60 days between when the rule is finalized and when the rule becomes effective, individuals will have an opportunity to decide whether to disenroll from federal benefits they may be receiving.

A heavily weighed negative factor is the receipt of a public benefit within the past 36 months. How does this intersect with the rule not being retroactive? For example, if the rule takes effect

on 2/1/19, and an individual has been enrolled in Medicaid since 10/1/18, won't DHS look at their Medicaid enrollment and count it against this individual?

Only cash assistance and long-term care used prior the final rule's effective date can be considered. Receipt of any other benefits (Medicaid, SNAP, housing assistance, Medicare LIS) could not be considered until the rule's effective date. Thus, USCIS will not be able to do a complete 3-year look back on the health care, nutrition and housing benefits added by the proposed rule until 3 years after the rule's effective date.

How soon could the rule take effect?

The rule cannot take effect until at least 60 days after DHS publishes a final rule, which cannot be published until after the comment period ends on December 10th. The final published rule may have a later effective date; DHS asks for input in the NPRM whether additional transition time is needed. Under usual circumstances, it would take at least six months and possibly a year or more for an agency to review and respond to comments on a rule this complicated. However, it is possible that this Administration may try to rush the approval process and post a final rule more quickly.

Does the rule include any language about exempting pregnancy Medicaid?

The rule does not include any exemption for pregnancy-related services paid by Medicaid, however, emergency services exempted by the rule include labor and delivery services.

Is a dependent's use of benefits considered in the immigrant's public charge test (e.g. if a US citizen child uses Medicaid, but the noncitizen parent uses no benefits, does the child's use of Medicaid still affect the parent's green card application)?

No. In the proposed rule, only the applicant's use of benefits is taken into consideration. Receipt of benefits by dependents and other household members would not be considered in determining whether the immigrant applicant is likely to become a public charge. In cases where other members of a household may be eligible for a benefit (such as SNAP or Public Housing), only benefits received by the immigrant applying for status - not their household members - would be considered.

How will non-benefits issues, like income thresholds and English proficiency, be considered?

The public charge assessment takes into consideration all the factors relevant to a person's ability to support themselves and any dependents. Immigration law provides a list of factors that USCIS must consider in a public charge determination: age, health, family status, assets, resources and income and education and skills. The proposed rules add 'evidentiary factors' to each of those statutory factors, and also add heavily weighted factors. Among the evidentiary factors to be considered are whether a person has an income over 125% of the federal poverty level, whether they are working age, defined as between 18 and 61 years old and whether they are proficient in English. The heavily weighted factors are similar, and also include whether a person has been previously determined to be a public charge or likely to become a public charge. Five of the six heavily weighted factors are negative, the only factor weighed heavily positive is whether the person's household has income or assets greater than 250% of the federal poverty level, nearly \$63,000 for a family of four.

By giving negative weight to immigrants (not just sponsors) who earn under 125% of the Federal Poverty Level, is this setting an income floor for obtaining LPR status? Does income of 250% of the Federal Poverty line mean that an immigrant cannot be a public charge?

Under the rule, people earning under 125% percent of the federal poverty level (\$31,375 annually for a family of 4) would be weighed negatively. Earning over 250% of the federal poverty level (\$62,750 annually for a family of 4) would be a heavily weighted positive factor. Public charge remains a totality of circumstances test. Household income carries weight but will not necessarily be dispositive.

ADMISSION FROM ABROAD

Related to the FAM changes, is it still the case that refugees, trafficking victims, etc. (those who were excluded previously) will not be subject to public charge abroad before they enter the US?

Yes. Congress has exempted certain classes of immigrants from the public charge ground of inadmissibility. Under federal law, which cannot be changed by issuing a regulation or administrative guidance, the following categories of noncitizens are not subject to a public charge test or can qualify for a waiver of that test if they apply for status through these specific pathways: refugees; asylees; survivors of trafficking, domestic violence, or other serious crimes (T or U visa applicants/holders); VAWA self-petitioners; special immigrant juveniles; certain people paroled into the U.S.; and several other categories of immigrants.

Could H2A visa applicants be denied their visa if they plan to enroll in the ACA? Are they subject to the public charge rule for admission the U.S.?

Subsidized ACA coverage is not considered in the public charge analysis set forth in the proposed rule. However, people applying for nonimmigrant visas (like H2A work visas) at consulates abroad will be assessed to determine whether they are likely to become a public charge under the policies set forth in the Foreign Affairs Manual (FAM). It's not clear whether the State Dept is currently assessing a visa applicant's likelihood of using ACA subsidies in the public charge determination. If this DHS rule were finalized as drafted, the State Dept would likely change its policy to conform.

DEPORTATION

Does the immigration law allow DHS to deport an individual (as opposed to simply prevent admission) if they become dependent on public benefits? Could a finding of public charge make an immigrant removable? Will the NPRM change this?

Immigration law provides that a person who has become a public charge, within five years of their last entry to the U.S., for reasons that existed before they entered the country may be deportable. Department of Justice decisions additionally require that all of the following be present before a person could be deported on public charge grounds:

- The person or sponsor had a legal obligation to repay the cost of a benefit

- The person or sponsor received notice of the repayment obligation within five years of the person's last entry to the U.S.
- The benefits-granting agency has obtained a legal judgment requiring repayment of the benefit, and has not received repayment

While the NPRM interprets the public charge grounds of inadmissibility, and not public charge deportability, it states that "Department of Justice precedent decisions would continue to govern the standards regarding public charge deportability determinations." DHS also released a Q&A document which states that "The Department of Justice intends to conduct a parallel rulemaking on public charge deportability". Although DOJ is seeking to change the public charge definition to conform with the DHS rule (when finalized), we don't know if it will seek codification of existing case law and guidance, or if it will attempt to lower the bar.

The Department of Justice (DOJ) is working on a proposed rule related to deportation on public charge grounds. For more information on the DOJ proposed rule please continue to our [Public Charge and Deportation FAQ for Advocates and Community Members](#).