

Proposed changes to ‘public charge’: A guide for advocates and service providers

What is ‘public charge’?

“Public charge” is a term used in immigration law to refer to a person who is likely to become dependent on the government for financial and material support. A person who the government determines is likely to become a “public charge” may be denied admission to the U.S. or Lawful Permanent Resident status. This issue most often arises for people applying for admission through a family petition, and does not apply to refugees, asylees, Special Immigrant Juveniles, U and T visa beneficiaries, and those who are self-petitioning through the Violence Against Women Act.

Since 1999, the government has defined a public charge as someone who is likely to become “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalized for long-term care at government expense.”ⁱ Under current policy, this is limited only to those likely to rely on cash assistance programs such as Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or any similar state cash assistance programs as well as those likely to rely on Medicaid for long-term institutional care. Receipt of such benefits is not fatal to an application, but rather is a factor to be considered in the totality of the circumstances.

Procedure

In January 2017, a draft Executive Order was leaked to the public that would have made significant changes to public charge determinations that would be deeply harmful to our communities. Although this EO was never signed, the Department of Homeland Security has published proposed regulations that follow the EO. These proposed regulations will go through a 60-day public comment period before being finalized by the administration. Once finalized, we expect that implementation will be delayed due to lawsuits arising from violations of the Administrative Procedures Act and other statutory and constitutional violations.

Definitions

The proposed regulations would redefine “public charge” as someone “who is likely at any time to use or receive one or more public benefits.”

It also proposes to define “public benefit” to mean “any government assistance in the form of cash, checks or other forms of money transfers, or instrument and non-cash government assistance in the form of aid, services, or other relief, that is means-tested...or intended to help the individual meet basic living requirement such as housing, food, utilities, or medical care.”

This definition encompasses *all* means-tested benefits (see next page for details), but does not include benefits such as Federal Old-Age Survivors, Disability Insurance, veteran’s benefits, pensions, worker’s compensation, disability and similar benefits. It also excludes services or benefits that are available to the community as a whole.

Public charge determinations

The proposed regulations would make significant changes in the way that public charge determinations are made. Perhaps most significant is the weight given to Affidavits of Support (Form I-864), which is usually filed by the sponsor of a family petition.

With the Affidavit of Support, the sponsor is proving that they can support the incoming family member at 125% of the federal poverty line or more. Traditionally, a properly filed Affidavit has been sufficient for the

government to find that a person will not be a public charge. However, under the proposed regulations, an Affidavit of Support is only one of many factors to be considered in a “totality of the circumstances.”

The proposed regulations reduce reliance on the Affidavit so much that the government would only consider income of at least 250% of the federal poverty line to be a heavily weighted positive factor. A heavily weighted *negative* factor would be if an individual is of employable age, but does not have current employment regardless of the existence of an Affidavit of Support or the level of support, unless the individual is a full-time student.

As noted above, the proposed regulations would also drastically expand the range of public benefits to be considered in a finding of public charge, to include many benefits that are explicitly excluded under current policy, such as:

- Certain benefits under Medicaid;
- Premium subsidies under the Affordable Care Act;
- Supplemental Nutrition Assistance Program (SNAP);
- Women, Infants and Children (WIC) Nutrition Program;
- State Children’s Health Insurance Program (CHIP);
- Transportation vouchers;
- Housing assistance;
- Low Income Energy Assistance Program (LIEP); and
- Earned income tax credit, or similar tax credit, where the credit exceeds the tax liability.

Under the proposed regulations, the definition of public benefit includes *any means-tested benefit*, meaning any benefit for which eligibility is determined by income. In addition, the government would also consider not only benefits received by the immigrant, but also those received by dependents, even if those dependents are U.S. citizens.

Consideration of receipt of benefits would not go into effect until 60 days after publication of the final rule in the Federal Register, and any benefits received before that would not count towards a finding of public charge. Please encourage individuals and families who are currently receiving benefits to continue receiving them until publication of the final rule!

Deportability

The proposed regulations also make clear the intent to include a provision to make those determined to be a public charge deportable, but the language has not been finalized. INA§237(a)(5) does allow for the deportation of those who have become a public charge within five years of admission, unless the cause of becoming a public charge arose after entry (ex. person employed at time of admission, but laid off within five years of entry).

Non-immigrant

Applicants for most non-immigrant statuses must also prove that they are not likely to become public charges while in the United States. The administration proposes to apply the above criteria not only to those who are applying for a non-immigrant visa, but also to those individuals seeking to extend or change their non-immigrant classification.

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ⁱ See “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 FR 28689 (May 26, 1999).