

Public Charge Update: What Advocates Need to Know Now March 4, 2022

UPDATE: On February 24, 2022, US Citizenship and Immigration Services (USCIS) published a [Notice of Proposed Rulemaking](#) (NPRM) on the public charge ground of inadmissibility. The comment period for the NPRM closed April 25, 2022. The 1999 Guidance will continue to govern public charge inadmissibility adjudications in the U.S. until a new final rule goes into effect.

On March 15, 2021, USCIS published a [final rule](#) that removed its 2019 public charge regulations from the Federal Register, discontinued the Form I-944 Declaration of Self-Sufficiency and other forms used to implement the 2019 rule and called for the revision of the Form I-485 Application to Register Permanent Residence or Adjust Status and forms related to Affidavits of Support. These changes, which implement USCIS' reinstatement of the [1999 field guidance](#), went into effect on March 9, 2021.

On March 15, USCIS also posted a [notice](#) declaring that it stopped applying the 2019 public charge rule to all pending applications and petitions on March 9th, and advising applicants that they no longer need to provide information or evidence that is solely related to the 2019 public charge rule, including the Form I-944.

March 9th is the date that an order vacating the USCIS 2019 public charge rule went into effect, after the Government informed the Supreme Court that it will no longer defend the public charge rule issued by the Department of Homeland Security (DHS) under the Trump Administration.

The "public charge" inadmissibility test has been part of federal immigration law for over a hundred years. It is designed to identify people who may depend on the government as their main source of support in the future. If an immigration or consular official determines that someone is likely to become a "public charge," the government can deny that person's application for admission to the United States or an application for lawful permanent resident status (LPR status, also called a "green card").

During the Trump Administration, the Departments of State (DOS) and Homeland Security (DHS) promulgated regulations that dramatically changed the meaning and application of the public charge ground of inadmissibility. Although the Department of Justice was developing regulations addressing the public charge ground of deportability, they were never proposed or published.

Once the Trump Administration published the final DHS regulations, states, counties and non-profit organizations filed a total of nine legal challenges to the rule. Several courts issued nationwide preliminary injunctions, legal orders that blocked DHS from implementing the regulations. The government asked courts of appeal to stay, or halt, these orders, ultimately asking the Supreme Court to stay the remaining nationwide injunctions, which it subsequently did, allowing the DHS regulations to go into effect nationwide. DHS asked the Supreme Court to review the Second, Seventh, and Ninth Circuits' decisions upholding the preliminary injunctions, which had been stayed while the Supreme Court considered DHS' petition. In one of the cases, the court issued a final order finding that the rule violates the Administrative Procedure Act and must be vacated—a nationwide remedy. The government appealed this ruling.

On March 9, 2021, the new administration filed motions asking the Supreme Court to dismiss its appeals. The motions were granted, leaving the Circuit court orders in place. This allowed the Seventh Circuit to dismiss the appeal of the lower court's final order, which then enabled the district court to effectively vacate the rule. DHS issued a [statement](#) that it would return to the public charge policy detailed in the [1999 Field Guidance](#) published by the (prior) Immigration and Naturalization Service.

DHS' statement linked the decision to withdraw the cases to an Executive Order (EO) issued by President Biden on February 2, 2021, '[Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans](#).' The EO directed the Secretary of State, the Attorney General, the Secretary of Homeland Security and the heads of other relevant agencies to review all agency actions related to implementation of the public charge ground of [inadmissibility](#) and [deportability](#). This review was to be undertaken in consultation with the heads of relevant agencies, including the Departments of Health and Human Services, Agriculture, and Housing and Urban Development, and guided by principles that include welcoming immigrants, restoring the integrity of the immigration system, promoting public health and reducing fear. The EO requires the Secretary of State, the Attorney General and the Secretary of Homeland Security to submit a report on their recommendations to the President within 60 days after its execution.

Another case challenged the Department of State's (DOS) public charge rules. The District Court in New York issued a preliminary injunction blocking the DOS rules, the 2018 revisions to the Foreign Affairs Manual (FAM) and the [President's Health Insurance Proclamation](#). This preliminary injunction is still in effect nationwide.

Read below for information on the public charge ground of inadmissibility under the 1999 Field Guidance.

Who does public charge apply to?

The "public charge inadmissibility test" affects people applying for admission to the country or for lawful permanent resident (LPR) status. It does not apply to humanitarian immigrants including refugees; asylees; survivors of domestic violence, trafficking and other serious crimes; special immigrant juveniles; and certain individuals paroled into the U.S. A complete list is set forth at [8 CFR §212.23\(a\)](#) as set forth at [84 Fed. Reg. 41504](#).

Why are there two sets of regulations?

Decisions about applications for admission or LPR status processed *outside the U.S.* (at embassies or consular offices abroad) are made by State Department officials. The DOS regulations affect people seeking immigrant and nonimmigrant visas and people seeking to be admitted to the U.S. as LPRs. The changes also affect applicants for LPR status who are required to leave the U.S. to seek status through consular processing.

Decisions about applications for admission and adjustment to LPR status processed *inside the U.S.* are made by officials of U.S. Citizenship and Immigration Services, which is part of DHS.

What is the definition of a public charge under the 1999 Field Guidance?



Under the Guidance, a public charge is a person who is or has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) “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.”

What public benefits are considered under the 1999 Field Guidance?

The only benefits considered are ‘cash assistance for income maintenance’ and ‘institutionalization for long-term care at government expense. Short-term and special purpose cash payments and institutionalization for short periods of rehabilitation are not considered. Food and nutrition programs, including SNAP, and housing programs, including section 8, and utility assistance including the Emergency Broadband Benefits (EBB) are not considered. Medicaid is considered only if it is used to pay for long-term care.

[Stay tuned](#) - we will continue to update information about this evolving situation.

Key Messages to Share

- **The public charge inadmissibility test does not apply to all immigrants - many immigrants are exempt from a public charge test.**
- **Most immigrants who are subject to public charge are not eligible for the benefits that count under the test, and many benefits are not considered in the public charge assessment.**

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What did the Trump regulations change?

The “public charge” inadmissibility test was designed to identify people who may depend on the government as their *primary* source of support in the future. If the government determines that a person is “likely at any time to become a public charge,” it can deny that person admission to the U.S. or lawful permanent residence (or “green card” status). The statute requires adjudicators to predict whether a person will become a public charge in the future based on their current characteristics, including their age, health, family status, income and resources and skills and education.

([Immigration and Naturalization Act section 212\(a\)\(4\), 8 USC 1182\(a\)\(4\)](#)). The analysis of these factors is called the “totality of circumstances” test.

The Trump administration regulations redefined a “public charge” as a non-citizen who receives one or more public benefits specified at [8 CFR §212.21\(b\)](#) for more than 12 months in the aggregate within any 36-month period. Receiving two benefits in one month is counted as two months of benefits under this test.

The regulations added standards and evidentiary requirements that made it more difficult for low- and moderate- income people to immigrate. The regulations treated each of the following *negatively* in public charge decisions: a household income below 125% of the U.S. 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, prior receipt of certain benefits, and other factors. The rule also expanded the list of public assistance programs that may be considered as negative factors in a “public charge” determination, excluding anyone who is deemed more likely than not to use the enumerated cash, health care, nutrition, or housing programs in the future.

Individuals who expect to apply for a visa or lawful permanent resident status should consult an immigration lawyer. To find help in your area, visit immigrationadvocates.org/nonprofit/legaldirectory.

For more information, please visit www.ProtectingImmigrantFamilies.org