

CHANGES TO PUBLIC CHARGE: ANALYSIS AND FREQUENTLY ASKED QUESTIONS

Updated March 13, 2020

Two federal agencies' regulations on the public charge grounds of inadmissibility went into effect on February 24, 2020. Department of Homeland Security (DHS) regulations will apply to U.S. Citizenship and Immigration Services processing in the U.S. of applications for adjustment to Lawful Permanent Resident (LPR) status submitted electronically or postmarked on or after February 24th. State Department regulations apply immediately to applications for visas and LPR status processed at U.S. consulates outside of the country.

Not every immigrant is subject to the public charge test. Refugees, asylees and many other categories of humanitarian immigrants are [exempt](#).

For a community-facing FAQ and other community education documents, please go to <https://protectingimmigrantfamilies.org/know-your-rights/>.

View our [Public Charge Dictionary](#) for common terms used when discussing immigrant eligibility for public programs.

Brief Overview of How Public Charge Policy Has Changed

The public charge ground of inadmissibility has been a part of U.S. immigration policy since the late 1800s. Historically, a public charge has been interpreted to mean a person who is primarily dependent on the government for subsistence. Individuals may be denied a visa to come to the U.S. or the ability to become a Lawful Permanent Resident (LPR, also called getting a green card) if they are deemed likely to become a public charge in the future. In determining whether individuals are likely to become a public charge, immigration officials review their current situation and characteristics, codified as a "totality of the circumstances" test at [8 USC §1182\(a\)\(4\)](#). This test requires officials to consider, at a minimum, an intending immigrant's age, health, family status, income and resources, education and skills, as well as the legal sufficiency of an affidavit of support if the person is required to have one.

The DHS and State Department regulations make three major changes to the meaning and application of public charge policy. The regulations:

- change the definition of a public charge;
- Add to the totality of circumstances factors standards and evidentiary requirements that disadvantage low- and moderate- income applicants;
- Designate essential nutrition, health care and housing benefits, as well as cash assistance for income maintenance, as benefits to be considered in the public charge assessment.

In addition, the DHS regulations introduce a new test for non-immigrants seeking extensions of their visas or a change to another nonimmigrant status (e.g., from a student visa to an employment visa), penalizing those who have used a listed benefit for twelve months in the aggregate out of the 36 months prior to their application.

The regulations introduce significant and harmful changes that will fundamentally alter the immigration system, making it much harder for low- and moderate- income immigrants to obtain LPR status (become a “green card holder”) and ultimately citizenship.

The regulations caused significant harm even before they took effect. Fear and confusion - known as the “chilling effect” - have been causing people to disenroll from programs or to forgo benefits for which they are eligible. According to a December 2018 nationwide survey, about one in seven adults in immigrant families reported a chilling effect where individuals did not participate in a government program for fear of risking future green card status. Several states have reported drops in participation. The potential impact is far-reaching, given that 13.7 percent of the U.S. population is foreign-born and one in four children in the U.S. has at least one foreign-born parent.

Definition of Public Charge

Part of federal immigration law for over a hundred years, the “public charge” inadmissibility test was designed to identify people who may depend on the government as their primary source of support. If the government determines that a person is “likely at any time to become a public charge” in the future, it can deny a person admission to the U.S. or lawful permanent residence (or “green card” status). ([Immigration and Naturalization Act section 212\(a\)\(4\), 8 USC 1182\(a\)\(4\)](#))

The DHS and State Department regulations redefine a “public charge” as a non-citizen who receives or is likely to receive one or more of the specified public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). The benefits considered are cash assistance for income maintenance from any level of government, SNAP (formerly Food Stamps), public housing, Section 8 housing assistance, and Medicaid (with exceptions for persons under age 21, women during pregnancy and for 60 days after the pregnancy ends and emergency services).

Totality of Circumstances Test: New Standards and Heavily Weighted Factors

***NOTE:** This summary does not include all of the details in the regulations and should not be considered or used for providing legal advice.*

The public charge inadmissibility test is forward-looking. An immigration officer assesses whether a person is likely to become a public charge in the future. This determination is made based on the totality of circumstances assessment that considers the applicant’s age, health, family status, income and resources, education and skills, and the validity of any affidavit of support.

The regulations add many factors and evidentiary standards to the totality of circumstances test, and create heavily weighted positive and negative factors.

- **INCOME & ASSETS** | The regulations adopt new income thresholds for households seeking to overcome a “public charge” test, and introduce specific factors to consider.
Negative factors include:
 - A household income below 125 percent of the Federal Poverty Level (\$32,750 for a family of four), unless the household has significant assets.
 - Application for or receipt of one of the benefit programs specified in the rule (after February 24, 2020).
 - Application or receipt of a fee waiver to obtain an immigration status that is subject to the public charge determination (after February 24, 2020).Positive factors include:
 - Health insurance that is not classified as a public benefit under the regulations or assets and resources sufficient to cover “any reasonably foreseeable medical costs.”
 - Heavily positive weight is applied only to households earning over 250 percent of the Federal Poverty Level (\$64,375 annually for a family of 4).
- **AGE** | The regulations:
 - Assign negative weight to persons who are younger than 18 or older than 61.
 - Assign positive weight to persons between the ages of 18 and 61.
- **HEALTH** | The regulations considers:
 - Whether the applicant has been diagnosed with one or more health conditions that could require extensive treatment in the future, or that could affect their ability to work, attend school, or care for themselves. If the applicant has such a condition and does not have health insurance or sufficient resources to pay for ‘reasonably foreseeable medical expenses,’ heavily negative weight will be assigned.
 - Heavy positive weight is given to persons who have private *unsubsidized* health insurance, which the rule defines as not including ACA plans supported by Advanced Premium Tax Credits.
- **FAMILY STATUS** | The regulations consider:
 - An applicant’s household size, including immediate family members as well as anyone else to whom the applicant provides at least half of their support, or who provides the applicant with half of their support, or who lists them as a dependent on their tax returns
- **EDUCATION & SKILLS** | The regulations consider whether the person has:
 - A history of employment (e.g. 3 years of tax returns)
 - A high school degree or equivalent, higher education, occupational skills and certificates or licenses
 - Proficiency in English or in other languages in addition to English
 - A role as the primary caretaker of someone in the household who is a child, senior, or a person who is ill or who has disabilities.

- **AFFIDAVIT OF SUPPORT** | An affidavit of support is a contract that a sponsor – usually a family member – signs to accept financial responsibility for an applicant and his/her dependents. In addition to considering the applicant's income or resources, the regulations consider whether the sponsor is likely to support the individual, based on:
 - The sponsor's relationship to the immigrant, including whether the sponsor is residing in the same household as the applicant

Benefits Considered

The regulations expand the types of benefits that could be considered in a "public charge" determination, adding several widely-used programs that help low- and moderate-income working families. These programs that can be counted under the regulations are:

- Any Federal, State, Local or Tribal cash assistance for income maintenance, including TANF, SSI and general assistance programs (considered under the previous rule as well);
- Medicaid (with exceptions including coverage for emergency services, children under 21 years old, pregnant women including 60 days of post-partum services);
- Supplemental Nutrition Assistance Program (SNAP, formerly called "food stamps");
- Federal Public Housing, Section 8 housing vouchers and Section 8 project-based rental assistance.

Use of cash assistance programs or long-term institutional care before February 24, 2020, will be considered in public charge determinations. Use of any amount of the programs listed above for any period of time on or after February 24, 2020, will be considered as a negative factor in the totality of circumstances, with a heavy negative weight assigned to people who use one or more programs for twelve months in the aggregate out of 36 months. Note however that:

- DHS will not consider any benefits not listed in the rule (see table below).
- DHS will not consider benefits received by persons other than the applicant, even if the applicant requested the benefits on their behalf.
- DHS will not consider non-cash programs funded *entirely* by states, localities or tribes.

The regulations also exclude benefits received by active duty servicemembers, members of the Ready Reserve and their spouses and unmarried minor children. (Benefits received by veterans or their families are not excluded).

Benefits received by immigrants while in a status that is exempt from a public charge determination (e.g., while a refugee, VAWA self-petitioner, etc.) will not be considered if they apply for admission into the U.S. or LPR status under a pathway like a family-based visa petition, where public charge applies.

NOTE: The regulations are not retroactive. This means that benefits -- other than cash or long-term care at government expense -- that were used before the regulations became effective on February 24, 2020, will not be considered in the public charge determination.

Benefits Included for Public Charge	Benefits Excluded from Public Charge
· Cash Support for Income Maintenance* · Non-Emergency Medicaid** · Supplemental Nutrition Assistance Program (SNAP or Food Stamps) · Housing Assistance (Public Housing or Section 8 Housing Vouchers and Rental Assistance) * Included under current policy as well; ** Exception for coverage of children under 21, pregnant women (including 60 days post-partum) and emergency services	ANY benefits <u>not</u> on the included list will not be applied toward the public charge test. Examples include: · Disaster relief · Entirely state, local or tribal programs (other than cash assistance) · Benefits received by the applicant's family members · CHIP · Special Supplemental Nutrition for Women Infants and Children (WIC) · School Breakfast and Lunch · Energy Assistance (LIHEAP) · Transportation vouchers or non-cash transportation services · Non-cash TANF benefits · Tax credits, including the Earned Income Tax Credit and Child Tax Credit · Advance premium tax credits under the Affordable Care Act · Pell grants and student Loans · Any other program not listed in the left column

Other Notable Issues

Most immigrants who are subject to a public charge inadmissibility assessment are not eligible for the benefits considered under the regulations. A USCIS or consular official will be considering whether a particular applicant is likely to use the specified benefits in the future.

The regulations do not address or change the public charge ground of deportability. Under current law and policy, a person who has become a public charge within 5 years after entering the U.S. for reasons that existed prior to their entry can be deportable, but only in extremely rare circumstances. The Department of Justice [may propose](#) regulations that change this policy. To learn more, review our [FAQ on Public Charge and Deportation](#).

Things to Keep in Mind

1. **Some immigrant groups are not subject to “public charge.”** Certain immigrants are not subject to “public charge” inadmissibility determinations and would not be affected by these regulations. [Exempt](#) immigrants include: refugees; asylees; survivors of trafficking, domestic violence, or other serious crimes (T or U visa applicants/holders); VAWA self-petitioners; special immigrant juveniles and certain other “humanitarian” immigrants.

Public benefits received while a person is in an exempt status will not be counted negatively if the person later seeks to adjust to LPR status through a non-exempt pathway, such as a family-based petition.

A public charge assessment is not part of the naturalization process. In addition, there is no public charge assessment when LPRs renew their ‘green card’.

2. **Immigration officials must weigh positive factors against negative factors.** The public charge statute requires immigration officials to look at all aspects of a person’s situation. Any negative factor, such as having a low income, can be outweighed by positive factors, such as having completed training for a new profession or having college-educated children who will help support the family.

FREQUENTLY ASKED QUESTIONS

THE PUBLIC CHARGE TEST

When is a public charge determination made?

Whether a person is likely to become a public charge is typically assessed when a person: 1) applies for admission to the U.S. (e.g., applies for a visa or undergoes consular processing for a green card from abroad), or 2) applies for lawful permanent resident (LPR) status. A lawful permanent resident who leaves the country for over 180 days and seeks to reenter may also be subject to a public charge determination. There is no public charge assessment when a lawful permanent resident applies to become a naturalized citizen.

Which immigrants are exempt from public charge?

Some categories of noncitizens are not subject to a public charge test, including: refugees; asylees; survivors of trafficking, domestic violence, or other serious crimes (T or U visa applicants/holders); VAWA self-petitioners; special immigrant juveniles and certain other “humanitarian” immigrants.

Does the public charge test apply to renewals of green cards?

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

Does the new rule apply to non-immigrants?

The DHS regulations apply a new 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 (e.g., from a student to an employment-based visa). It looks only at whether the person has used a listed benefit for more than a total of 12 months during a 36-month period since the nonimmigrant status was granted. Non-immigrants are generally not eligible for the listed benefits.

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

The rule does not affect individuals who have already become U.S. citizens. Lawful permanent residents (green card holders) also are not subject to a public charge inadmissibility determination when they apply to become a U.S. citizen.

However, green card holders who leave 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. They should consult with an immigration attorney prior to departure.

Does public charge apply to DACA recipients?

There is no public charge assessment when people renew their DACA grants. However, DACA recipients are not exempt from public charge. DACA recipients who have a pathway to becoming an LPR that is not exempt from public charge, such as marriage to a citizen, would be subject to a public charge assessment. If they apply for status through an exempt pathway such as a U visa, they would not be subject to a public charge test.

Who decides whether someone is likely to become a public charge?

For individuals applying to enter the U.S. from abroad or who need to go abroad for their green card interview, consular officials (employed by the State Department) make the public charge determination. For individuals who have their green card application decided in the U.S. or who apply to extend/change their non-immigrant status, U.S. Citizenship and Immigration Services officials make the decision.

Can a public charge determination be retroactive?

The public charge determination is a forward-looking test based on the totality of the applicant's circumstances. DHS and the State Department may consider the past use of certain benefits but their ability to do so is limited by the regulations' effective dates.

- The applicant's use of cash assistance for income maintenance, from any level of government, can be considered without regard to when it was received.
- The applicant's institutionalization for long-term care at government expense can only be considered before February 24, 2020, unless one of the benefits included in the regulations, such as Medicaid, paid for the long-term care.
- Benefits that were previously excluded from the public charge test (benefits other than cash assistance or long-term care) will NOT be considered *unless received after the regulations' effective date (February 24, 2020).*

Which categories of immigrants are eligible for the benefit programs included in the regulations, and also potentially subject to public charge grounds of inadmissibility?

Although most immigrants who are eligible for the specified benefit programs are not subject to public charge inadmissibility determinations, a small group of individuals could be penalized for using benefits for which they are eligible.

Examples include:

- All programs: Lawful permanent residents (green card holders) who leave the U.S. for more than 6 months and attempt to re-enter the country can be subject to an inadmissibility determination, which could include a public charge test.
- Medicaid/SNAP: Some people granted parole, withholding of removal, and a small subset of Cuban/Haitian entrants *if they seek adjustment based on a family-based visa petition or other non-exempt pathway*.
- SNAP: In addition to the groups listed above, some members of the Hmong and Lao communities that helped the U.S. during the Vietnam War *if they seek adjustment based on a family-based visa petition or other non-exempt pathway*.
- Public Housing or Section 8: Some people granted parole or withholding of removal are eligible for housing programs and would be subject to a public charge test *if they seek adjustment based on a family-based visa petition or other non-exempt pathway*. In addition, Citizens of Micronesia, the Marshall Islands or Palau could be subject to a public charge determination if they leave the U.S. and attempt to reenter, or if they seek a green card through a pathway that isn't exempt from public charge.

Will seeking coronavirus testing or preventative treatment be counted in an immigrant's public charge determination?

On March 13, [USCIS announced](#) that testing, prevention, or treatment for COVID-19, also called Coronavirus, would **NOT** be used against immigrants in a public charge test. This means that immigrant families should seek the care they need during this difficult time.

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

Immigration and consular officials will consider whether, in their judgment, the person is likely to use the threshold amount of the specified benefits at any point *in the future*, when they may become eligible. This determination is based on the totality of circumstances factors discussed above.

Are there special rules for members of the U.S. Armed Forces and their families?

The regulations include some special provisions for members of the U.S. Armed Forces and their families. Receipt of public benefits is not counted in the public charge determination if, at the time of receipt of the benefit OR when applying for admission or adjustment of status, the non-citizen who received the benefits is enlisted in the U.S. Armed Forces and serving in active duty or the Ready Reserve, or is the spouse or unmarried minor child of such an individual. In addition, the income threshold under the totality of circumstances test is 100% of the federal poverty level, rather than 125%.

Are there special rules for veterans of the U.S. Armed Forces and their families?

The rule does not make any special provisions for veterans of the U.S. Armed Forces or their families.

The receipt of one or more public benefits for a total of 12 months within the past 36 months is assigned a “heavily negative” weight in the new rule. Does this mean they can look at benefits used prior to February 24, 2020?

Only cash assistance and long-term care used prior to the regulations’s effective date can be considered. Receipt of any newly named benefits (Medicaid, SNAP, housing assistance) could not be considered until the rule’s effective date, February 24, 2020. 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.

Will the rule consider benefits used for less than 12 months?

Any amount of the specified benefits used after the regulations’ effective date, and cash assistance used at any time, can be considered a negative factor in the totality of circumstances.

Does the rule exempt benefits for pregnant women and new mothers?

The regulations explicitly excludes Medicaid received by pregnant women, and for 60 days post-partum. In addition, the rule does not consider labor and delivery services covered by emergency Medicaid. There are no similar exemptions for cash assistance, SNAP or housing programs.

Does the rule exclude children’s use of benefits?

The rule excludes Medicaid and any other health benefits received by children under 21 from being considered in the public charge test. It does not exclude cash assistance, housing or SNAP benefits received by immigrant children. These benefits may be taken into account if the child is applying for admission or LPR status.

Is a dependent’s use of benefits considered in the immigrant's public charge test (e.g., does a U.S. citizen child’s use of SNAP (food stamps) affect a parent's green card application, if the parent wasn’t receiving the benefit)?

No. In the regulations, 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.

Are advance premium tax credits (subsidies) under the Affordable Care Act counted in the public charge test?

Receipt of advance premium tax credits (subsidies) under the Affordable Care Act (ACA) is **not** counted as receipt of a public benefit. And having subsidized health coverage under the ACA or other private health insurance can help overcome a negative weight based on a person’s health condition. But, only private insurance *without subsidies* is weighed as a heavily *positive* factor.

Are state- or local-funded programs counted?

State, local and tribally funded programs cash assistance programs for income maintenance are considered. State, local and tribally funded non-cash programs, such as health care and state-funded housing assistance, are not counted.

In many states, people applying for health insurance on the exchange, or seeking state-funded health insurance, are automatically reviewed for Medicaid eligibility. Is this considered an application for Medicaid? Must it be reported?

Where programs (either under the ACA or state funded health programs) require a Medicaid screening prior to an eligibility determination, this may be considered an application. However, immigrants will also have the opportunity to provide evidence that they were denied these benefits, and why.

Do the regulations establish 125% of the Federal Poverty Level as an income requirement for admission/LPR status? Does having an income of 250% of the Federal Poverty line mean that an immigrant cannot be a public charge?

A household income under 125% percent of the federal poverty level is a negative factor. A household income over 250% of the federal poverty level is a heavily-weighted positive factor. But the public charge test considers all of a person's circumstances, weighing positive factors against any negative factors. Household income carries weight but will not necessarily be dispositive.

How does this rule change the U.S. immigration system?

Drawing upon analysis of U.S. Census Bureau data, [MPI researchers](#) applied the administration's expanded "totality of circumstances" test under the proposed rule to immigrants who had received LPR status within the past five years. They found that 69 percent had at least one negative factor under the administration's proposed test, while just 39 percent had income at or above 250 percent of the federal poverty level. MPI finds the new test would have a disproportionate effect on women, children, and seniors. It is also likely to disproportionately exclude immigrants from Latin American countries and favor immigration from Europe. This Administration has sought legislative approval to restrict family-based immigration, and this rule is a back-door attempt to accomplish what Congress has rejected.

Can the DHS rule be stopped with litigation?

At least nine cases challenging the rule are currently pending across the country. Although multiple courts initially prohibited the government from implementing the rule, the Supreme Court allowed it to go into effect while the cases proceed. The rule is likely to be in effect during the next several months at a minimum.

Are refugees and trafficking victims exempt from public charge determinations if they apply to enter the US at consular offices abroad?

Yes. The same categories of humanitarian immigrants who are exempt from the application of the DHS regulations are also [exempt](#) from the State Department regulations.

Does the immigration law allow the government to deport lawful permanent residents if they become dependent on public benefits?

Immigration law provides that individuals who have become a public charge within five years of their entry to the U.S., for reasons that existed before they entered the country may become [deportable](#) as a public charge. Administrative decisions require that all of the following be present before a person can be deported on public charge grounds:

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

The DHS and State Department regulations interpret the public charge grounds of inadmissibility, and do not address the public charge ground of deportability. However, the Department of Justice (DOJ) has been developing public charge regulations, which are expected to address deportation on public charge grounds. The DOJ has not yet posted a proposed rule addressing the public charge ground of deportability.

When would the public charge deportability ground apply?

The public charge ground of deportability applies to people who already have been inspected and admitted to the US, including people granted LPR status. By contrast, the public charge ground of inadmissibility applies to people seeking admission to the United States (including lawful permanent residents who seek reentry after an absence of more than 180 days), an immigrant or nonimmigrant visa at a consulate abroad, or adjustment to lawful permanent resident status. As previously noted, the final DHS rule applies a similar test to nonimmigrants seeking to extend or change nonimmigrant status in the US.

For updates on the expected DOJ proposed rule please stay tuned to www.protectingimmigrants.org. For more information on the existing policy, see [Public Charge and Deportation FAQ for Advocates and Community Members](#).