



Tuesday, February 11, 2020

## U.S. Citizenship & Immigration Services to Implement Public Charge Inadmissibility Rule

*What is it?*

On August 14, 2019, the U.S. Department of Homeland Security (“DHS”) published the Inadmissibility on Public Charge Grounds rule (“Public Charge Rule”), which codified the public charge grounds of inadmissibility found in the Immigration and Nationality Act (“INA”) at §212(a)(4). INA §212(a)(4) reads in relevant part: “***Any alien who***, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, ***is likely at any time to become a public charge is inadmissible***... In determining whether an alien is inadmissible under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's age; health; family status; assets, resources, and financial status; and education and skills.” (Emphasis added)

*Who does it apply to?*

The Public Charge Rule applies to foreign nationals seeking admission to the United States as either immigrants (permanent residents) or nonimmigrants (temporary workers), applicants for adjustment of status to lawful permanent resident status, and foreign nationals in the United States who apply for a change or extension of their nonimmigrant status.

DHS will only apply the Public Charge Rule to the direct receipt of benefits by a foreign national for their own benefit, or where the foreign national is a listed beneficiary of a public benefit. DHS will also not attribute the receipt of a public benefit by one or more members of the foreign national’s household to the foreign national unless they are also a listed beneficiary of the public benefit. Any income derived from such benefits received by other household members will not be considered as part of the foreign national’s household income.

The Public Charge Rule does not apply to the following groups: U.S. citizens, even if they are related to the foreign national who is subject to the Public Charge rule; Refugees; Asylees; Afghans and Iraqis with special immigrant visas; Certain nonimmigrant trafficking and crime victims, individuals applying under the Violence Against Women Act; Special immigrant juveniles (“SIJ”); a foreign national (and their spouse and/or children) who received designated public benefits (listed below) who is enlisted in the U.S. armed forces, is serving in active duty, or in any of the Ready Reserve components of the U.S. armed forces; Children, including adopted children, who will acquire U.S. citizenship under INA section 320, 8 USC §1431; or other foreign nationals who DHS has granted a waiver of public charge inadmissibility.

*When does it go into effect?*

On February 24, 2020, U.S Citizenship & Immigration Services (“USCIS”) will implement the Public Charge Rule, except in Illinois, where the rule remains enjoined by a federal court as of January 30, 2020<sup>1</sup>. The final rule

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<sup>1</sup> <https://www.uscis.gov/green-card/public-charge-inadmissibility-determinations-illinois>

will apply only to applications and petitions postmarked (or submitted electronically) on or after February 24, 2020.

The applications and petitions effected by this rule require foreign nationals to report information related to their receipt of public benefits, including whether the foreign national applied for, was certified or approved to receive, or received certain non-cash public benefits. These new forms include the following, which must be used for all applicable cases filed on or after February 24, 2020:

- Form I-129, Petition for a Nonimmigrant Worker
- Form I-129CW, Petition for a CNMI-Only Nonimmigrant Worker
- Form I-485, Application to Register Permanent Residence or Adjust Status
- Form I-485 Supplement A, Supplement A to Form I-485, Adjustment of Status Under Section 245(i)
- Form I-485J, Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j)
- Form I-539, Application to Extend/Change Nonimmigrant Status
- Form I-539A, Supplemental Information for Application to Extend/Change Nonimmigrant Status (PDF)
- Form I-601, Application for Waiver of Grounds of Inadmissibility
- Form I-864, Affidavit of Support Under Section 213A of the INA
- Form I-864A, Contract Between Sponsor and Household Member
- Form I-864EZ, Affidavit of Support Under Section 213A of the INA
- Form I-912, Request for Fee Waiver

In addition to the forms listed above, applicants for adjustment of status (those who file a Form I-485) must file an accompanying Form I-944, Declaration of Self-Sufficiency<sup>2</sup>. The Form I-944 requires adjustment of status applicants to provide *a detailed report of their sources of income (whether from employment or illegal activities such as gambling and drug sales), their receipt of public benefits, and their possession of health insurance. Applicants must disclose whether they ever applied for or received a fee waiver for an immigration benefit from USCIS. In addition, applicants must provide a copy of their credit report and provide details of their negative credit history, including liabilities and debts, delinquent accounts, debt collections, chart-offs, repossessions, foreclosures, judgements, tax liens, and bankruptcies.*

*What types of public assistance/benefits are included?*

Public Assistance / Benefits INCLUDED in Public Charge Inadmissibility Rule	Public Assistance / Benefits NOT INCLUDED in the Public Charge Inadmissibility Rule
<ul style="list-style-type: none"> <li>• Any federal, state, local, or tribal <i>cash</i> assistance for income maintenance</li> <li>• Supplemental Security Income (SSI)</li> <li>• Temporary Assistance for Needy Families (TANF)</li> <li>• Federal, state or local cash benefit programs for income maintenance (often called “General Assistance” in the state context, but which may exist under other names)</li> <li>• Supplemental Nutrition Assistance Program (SNAP, or formerly called “Food Stamps”)</li> <li>• Section 8 Housing Assistance under the Housing Choice Voucher Program</li> </ul>	<ul style="list-style-type: none"> <li>• State, local or tribal non-cash assistance programs</li> <li>• Emergency medical assistance</li> <li>• Disaster relief</li> <li>• CHIP and WIC</li> <li>• National school lunch programs</li> <li>• Foster care and adoption</li> <li>• Student and mortgage loans</li> <li>• Energy assistance</li> <li>• Food pantries and homeless shelters</li> <li>• Head Start</li> <li>• Tax credits</li> </ul>

<sup>2</sup> Not required for applicants who live in the State of Illinois due to the continuing federal court injunction.

<ul style="list-style-type: none"> <li>• Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation)</li> <li>• Public Housing under section 9 the Housing Act of 1937, 42 U.S.C. 1437 et seq.</li> <li>• Federally funded Medicaid (with certain exceptions)<sup>3</sup></li> </ul>	
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*How will DHS determine if someone is inadmissible?*

The Public Charge Rule considers a foreign national to be a public charge if they receive certain public benefits (detailed below) for more than 12 months in the aggregate in any 36-month period, where the receipt of two benefits in one month counts as two months. For example, if a foreign national receives both SNAP and Section 8 Housing assistance from March 2020 to September 2020 (six calendar months), the foreign national will meet the definition of public charge because they will have received, in the aggregate, 12 months of public benefits.

Inadmissibility based on the Public Charge Rule is determined by looking at the factors set forth below and making a determination of the foreign national’s likelihood of becoming a public charge ***at any time in the future*** based on the totality of the circumstances. This means that the Consular Officer at a U.S. Embassy abroad or a USCIS adjudicating officer in the United States must weigh both positive and negative factors when determining whether a foreign national is more likely than not at any time in the future to become a public charge. The Consular Officer or USCIS Adjudicator must consider the foreign national’s age, health, family status, assets, resources, financial status, education and employment skills, prospective immigration status, expected period of admission, and sufficiency of Form I-864, Affidavit of Support, where applicable.

If the Consular Officer or USCIS Adjudicator determines a foreign national to be a public charge, then the agency can prohibit the foreign national from entering the United States as either a nonimmigrant or immigrant; deny the foreign national’s application for adjustment of status, thereby potentially making them removable from the United States; and/or deny the application for extension of status or change of status, thereby potentially making them removable from the United States.

Consular Officers and USCIS Adjudicators will weigh the following factors heavily in making their public charge determination:

<b>Foreign National IS Likely To Become A Public Charge – Inadmissible / No Approvable for Benefits</b>	<b>Foreign National Is NOT Likely to Become a Public Charge – Admissible / Approvable for Benefits</b>
<ul style="list-style-type: none"> <li>• the foreign national is not a full-time student and is authorized to work but <i>cannot show current employment, recent employment history, or a reasonable prospect of future employment</i>;</li> <li>• the foreign national has <i>received, or has been certified or approved to receive, one or more public benefits for more than 12 months in the aggregate within any 36-month period,</i></li> </ul>	<ul style="list-style-type: none"> <li>• the foreign national has <i>household income, assets, resources, and support from a sponsor, excluding any income from illegal activities or from public benefits, of at least 250% of the Federal Poverty Guidelines for their household size</i><sup>4</sup>;</li> <li>• the foreign national is <i>authorized to work and is currently employed in a legal industry with an annual income of at least 250% of the</i></li> </ul>

<sup>3</sup> DHS will not consider the Medicaid benefits received: (1) for the treatment of an “emergency medical condition”; (2) as services or benefits provided in connection with the Individuals with Disabilities Education Act; (3) as school-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under State or local law; (4) by foreign nationals under the age of 21; and (5) by pregnant women and by women within the 60-day period beginning on the last day of the pregnancy.

<sup>4</sup> <https://www.uscis.gov/i-864p> [For a family of 2, the threshold annual household income would be at least \$42,274].

<p>beginning no earlier than 36 months before the alien applied for admission or adjustment of status on or after February 24, 2020;</p> <ul style="list-style-type: none"> <li>• the foreign national has been <i>diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with their ability to provide for themselves, attend school, or work and they are uninsured and has neither the prospect of obtaining private health insurance nor the financial resources to pay for reasonably foreseeable medical costs related to a medical condition</i>; or</li> <li>• the foreign national <i>has previously been found by an immigration judge or the Board of Immigration Appeals to be inadmissible or deportable based on public charge grounds.</i></li> </ul>	<p><i>Federal Poverty Guidelines for a household of their household size</i>; and</p> <ul style="list-style-type: none"> <li>• the foreign national has <i>private health insurance appropriate for the expected period of admission</i>, so long as the alien does not receive subsidies in the form of premium tax credits under the Patient Protection and Affordable Care Act to pay for such health insurance</li> </ul>
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**HR Tip**

The implementation of the Public Charge Rule can significantly impact a company’s foreign national employees and their family members, not only leading to potential separation of families but also a disruption in employment as well as a possible loss of immigrant/nonimmigrant status. Individuals in the United States who are adjudged to be public charges face deportation/removal, while individuals seeking admission to the United States could be prohibited from entry. It is better to plan ahead and consult with an attorney before filing any applications for adjustment of status, extension of status or change of status on behalf of foreign national employees, or before a foreign national employee travels abroad, in order to determine the potential consequences if such employees have received public benefits. Accordingly, we would recommend that U.S. employers and foreign national employees speak with an attorney in advance of immigration processing to identify any issues or challenges that may be encountered.

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