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Immigration: Frequently Asked Questions about "Public Charge"

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Summary

Immigration law in the United States has long contained exclusion and removal provisions designed to limit government spending on indigent non-U.S. nationals (aliens). Under the Immigration and Nationality Act (INA), an alien may be denied admission into the United States or adjustment to lawful permanent resident (LPR) status if he or she is "likely at any time to become a public charge." An admitted alien may also be subject to removal from the United States based on a separate public charge ground of deportability, but this ground is rarely employed. Certain categories of aliens, such as refugees and asylees, are exempted from application of the public charge grounds.

The Department of Homeland Security (DHS) and the Department of State (DOS) have primary responsibility for implementing the INA's public charge provisions. DHS's U.S. Citizenship and Immigration and Services may make a public charge determination when an alien applies to adjust to LPR status. Abroad, DOS consular officers may make a public charge determination when an alien applies for a visa.

Although the INA does not explicitly define the term "public charge," since 1999, agency guidance has defined it to mean a person who is or is likely to become "primarily dependent" on "public cash assistance for income maintenance" or "institutionaliz[ed] for long-term care at government expense." However, new public charge rules for DHS are expected to be published in the *Federal Register*, according to the Unified Agenda of the Office of Management and Budget (OMB). In addition, in January 2018, DOS revised the Foreign Affairs Manual (FAM) to instruct consular officers to consider a wider range of public benefits when determining whether visa applicants who have received or are currently receiving benefits are inadmissible on public charge grounds.

This report provides answers to frequently asked questions about current public charge policy, including the sources of laws that govern public charge determinations, who is subject to determinations, factors that are considered in determinations, and the consequences of determinations.

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Introduction

Immigration law has long contained exclusion and removal provisions designed to limit government spending on indigent non-U.S. nationals (aliens). Even before the advent of federal immigration regulation in the second half of the 19th century, the laws of some states restricted the entry or continued presence of "foreign paupers."[1] Federal law has imposed immigration restrictions of this nature since one of the earliest federal immigration statutes—the Immigration Act of August 3, 1882—provided for the exclusion of "any person unable to take care of himself or herself without becoming a public charge."[2]

In current law, the Immigration and Nationality Act (INA) renders an alien inadmissible to the United States if he or she "is likely at any time to become a public charge."[3] In practice, this provision is most relevant to aliens applying for immigrant visas abroad and to aliens in the United States applying for adjustment of status to become lawful permanent residents (LPRs).[4] The INA also contains a provision that subjects aliens admitted into the United States who become public charges to deportation in some circumstances,[5] but in practice and under controlling case law the deportation provision is rarely applied.[6]

The Department of Homeland Security (DHS) and the Department of State (DOS) have primary responsibility for implementing the INA's public charge provisions. DHS's U.S. Citizenship and Immigration and Services (USCIS) may make a public charge determination when an alien applies to adjust to LPR status.[7] Abroad, DOS consular officers may make a public charge determination when an alien applies for a visa.[8]

Because the INA does not define the term "public charge," the determination of whether an alien seeking an immigrant visa or adjustment of status is inadmissible on public charge grounds turns largely on standards set forth in agency guidance materials.[9] Currently, that guidance defines a "public charge" as a person who becomes or is likely to become primarily dependent on either of two types of public benefits: (1) public cash assistance for income maintenance, or (2) government-funded institutionalization for long-term care.[10]

The INA's public charge provisions have drawn heightened attention recently in light of indications that the Trump Administration intends to establish new rules for their interpretation

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[1] Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1847 (1993).

[2] Act of Aug. 3, 1882, 47 Cong. ch. 376, § 2, 22 Stat. 214. The Act also barred the entry of convicts. *Id*.

[3] 8 U.S.C. § 1182(a)(4).

[4] *See infra* "Who is subject to a public charge determination of inadmissibility? Who makes the determination?".

[5] 8 U.S.C. § 1227(a)(5).

[6] Department of Justice (DOJ), Immigration & Naturalization Serv., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (May 26, 1999) ("Deportations based on public charge grounds have been rare."), https://go.usa.gov/xUP56 [hereinafter *INS Field Guidance*].

[7] *See, e.g.*, Scheerer v. U.S. Atty. Gen., 513 F.3d 1244, 1251 n.6 (11th Cir. 2008) (explaining that USCIS adjudicates adjustment of status applications following the transfer of adjudicatory functions from the former Immigration and Naturalization Service to the Department of Homeland Security); DHS, USCIS, *Public Charge Fact Sheet*, Apr. 29, 2011, https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet (last visited Sept. 7, 2018) [hereinafter *USCIS Public Charge Fact Sheet*] (quoting *INS Field Guidance*, *supra* note 6).

[8] *See* 8 U.S.C. § 1201(a); 9 FAM 302.8.

[9] *See USCIS Public Charge Fact Sheet*, *supra* note 7; 9 FAM 302.8-2(B)(1).

[10] *See USCIS Public Charge Fact Sheet*, *supra* note 7; 9 FAM 302.8-2(B)(1); *infra* notes 22-23.

and application.[11] Specifically, DHS has informed the Office of Management and Budget (OMB) that it "will propose regulatory provisions guiding the inadmissibility determination on whether an alien is likely at any time to become a public charge."[12] The new rules have not been published yet. In addition, in January 2018, DOS revised the Foreign Affairs Manual (FAM) to instruct consular officers to consider a wider range of public benefits when determining whether visa applicants who have received or are currently receiving benefits are inadmissible on public charge grounds. This report analyzes frequently asked questions (FAQs) regarding the scope of the INA public charge provisions under current law, including the agency guidance that currently governs DHS and DOS officials who determine whether individual aliens are inadmissible as public charges.

What is public charge? How and where is it defined?

The INA contains two public charge provisions: a ground of inadmissibility,[13] and a ground of deportability.[14] The first applies generally to aliens who have not been admitted into the United States[15] or are physically present in the United States (regardless of whether they were lawfully admitted) and are applying for adjustment to LPR status;[16] the second applies generally to aliens who are in the United States following admission.[17]

As for the ground of inadmissibility, Section 212 of the INA states that "[a]ny alien who … is likely at any time to become a public charge is inadmissible."[18] The statute specifies that immigration officials applying the provision must consider, "at a minimum," the alien's age, health, family status, financial resources, and skills and education.[19] But the statute does not define the term "public charge" or establish what it means to "become a public charge."[20] As a result, agency guidance supplies the working definition.[21]

USCIS, the agency within DHS that adjudicates applications for adjustment to LPR status of certain aliens in the United States, defines "public charge" for inadmissibility purposes as covering "an individual 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 institutionalization for long-term care at government expense.'"[22] DOS's Foreign Affairs Manual (FAM), which provides guidance to consular officers who adjudicate visas

[11] *See, e.g.,* Nick Miroff, *Trump proposal would penalize immigrants who use tax credits and other benefits*, WASH. POST (Mar. 28, 2018).

[12] Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), *Inadmissibility on Public Charge Grounds - Spring 2018*, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1615-AA22 [hereinafter *OMB Notice*].

[13] 8 U.S.C. § 1182(a)(4).

[14] *Id*. § 1227(a)(5).

[15] *See id.* § 1182(a).

[16] *See id*. § 1255 (a) (imposing admissibility for permanent residence as a requirement for adjustment of status).

[17] *See id*. § 1227(a) (applicable to aliens "in and admitted to the United States").

[18] *Id*. § 1182(a)(4).

[19] *Id*. § 1182(a)(4)(B).

[20] *See id*.

[21] *See* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 74-75 (14TH ED. 2014) (reviewing agency definitions).

[22] *USCIS Public Charge Fact Sheet*, *supra* note 7.

abroad, defines "public charge" in substantially the same way as USCIS.[23] However, as discussed further below, the FAM diverges from the USCIS guidance in instructing consular officers to consider an alien's past receipt of *any* type of public assistance (not just cash assistance for income maintenance) when determining whether an alien is likely to become dependent *in the future* on cash assistance for income maintenance or government-funded long-term care.[24]

As for deportability, Section 237 of the INA states that "any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."[25] However, under longstanding case law of the Board of Immigration Appeals, an alien can only be deported under this provision if the elements of a three-part test are satisfied: (1) a "[s]tate or other governing body must … impose a charge for [] services rendered to the alien," (2) "authorities must make demand for payment of the charges" within five years of the alien's entry into the United States, and (3) the alien must fail to pay.[26] Deportations on public charge grounds under this test have rarely occurred.[27]

Who is subject to a public charge determination of inadmissibility? Who makes the determination?

Most aliens applying for an immigrant visa, for admission at a port of entry, or for adjustment to LPR status are subject to a determination of inadmissibility based on public charge grounds.[28]

As previously noted, a public charge determination of inadmissibility typically is made by a USCIS immigration official (when an alien residing in the United States applies for adjustment to LPR status)[29] or by a DOS consular officer (when an alien applies for an immigrant visa abroad to seek admission to the United States as an LPR).[30]

The public charge ground of inadmissibility also applies to aliens applying for nonimmigrant visas to be admitted to the United States temporarily for a particular purpose, such as tourism, study, or temporary work.[31] In practice, however, DOS consular officers rarely make public

[23] *See* 9 FAM 302.8-2(B)(1).

[24] *Id*. at 302.8-2(B)(2)(f)(1)(b)(i) ("Past or current receipt of public assistance of any type by the visa applicant or a family member in the visa applicant's household is relevant to determining whether the applicant is likely to become a public charge in the future but the determination must be made on the present circumstances."); see *infra* "Which public benefits are currently considered in public charge determinations of inadmissibility?".

[25] 8 U.S.C. § 1227(a)(5).

[26] Matter of B—, 3 I. & N. Dec. 323, 326 (BIA 1948). The Board of Immigration Appeals reviews decisions by immigration judges and is the highest administrative tribunal in the immigration bureaucracy. Mulyani v. Holder, 771 F.3d 190, 196 (1st Cir. 2014); Dep't of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, http://www.usdoj.gov/eoir/biainfo.htm (last visited Aug. 31, 2018).

[27] *INS Field Guidance*, *supra* note 6, at 28691-92.

[28] *See* 8 U.S.C. § 1182(a) ("[A]liens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States....), (a)(4).

[29] *USCIS Public Charge Fact Sheet*, *supra* note 7.

[30] 9 FAM 302.8 (providing guidance to consular officers making public charge determinations) (last revised May 30, 2018). Immigration judges may also have occasion to interpret and apply the public charge ground of inadmissibility in some circumstances, such as where USCIS denies an adjustment of status application on public charge grounds and then refers the applicant to removal proceedings. *See* 8 C.F.R. § 245.2(a)(5)(ii).

[31] *See* 8 U.S.C. § 1182(a)(4)(A); 9 FAM 302.8-2(A) ("All immigrant visa (IV) and nonimmigrant visa (NIV) applicants, except those mentioned in 9 FAM 302.8-2(B)(6), are subject to a public charge ineligibility.").

charge determinations for aliens seeking admission as nonimmigrants.[32] Most applicants for nonimmigrant visas who would be deemed likely to become dependent on public cash assistance or government-funded long-term care are also inadmissible under Section 214(b) of the INA as presumptive immigrants—a much broader ground of inadmissibility than public charge.[33] The FAM instructs consular officers that "[i]n almost all cases, a[] [nonimmigrant visa] applicant who is ineligible under INA 212(a)(4) will likely also be ineligible under INA 214(b)"[34] and that "if an applicant cannot overcome INA 214(b), [the officer] should not expend resources on pursuing a possible INA 212(a)(4) ineligibility."[35]

Who is exempt from public charge determinations of inadmissibility?

Some categories of aliens are not subject to the public charge determination when applying for visas, seeking admission to the United States, or applying for adjustment of status. These categories include the following:

- Applicants for refugee status or asylum, as well as refugees and asylees seeking adjustment to LPR status;[36]
- Amerasian aliens seeking admission pursuant to the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988;[37]
- Cuban and Haitian entrants seeking admission or adjustment of status as described in the Immigration Reform and Control Act of 1986;[38]
- Nicaraguans and other Central Americans adjusting status as described in the Nicaraguan Adjustment and Central American Relief Act of 1997;[39]
- Victims of certain crimes assisting law enforcement (U-visa applicants);[40]

[32] *See infra* "How often have public charge grounds been applied to visa applications and applications to adjust status?" (explaining that in FY2017, DOS consular officers refused 51 nonimmigrant visa applications on public charge grounds out of a total of more than 13 million nonimmigrant visa applications adjudicated that fiscal year).

[33] *See* 8 U.S.C. § 1184(b) (Every alien ... shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a [nonimmigrant] visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status.... "). In particular, nonimmigrant visa applicants who are likely to become dependent on public benefits in the United States in most cases would struggle to demonstrate that they have a residence abroad that they have no intention of abandoning—a requirement for most nonimmigrant visa categories. *See* 9 FAM 302.1-2(B)(6) ("The most common reason that an applicant fails to qualify [under § 1184(b)] is a failure to show the sufficient ties to his or her home country that are required for most NIV classifications.").

[34] 9 FAM 302.8-2(E)(2).

[35] *Id*. at 302.8-2(B)(4). The public charge inadmissibility also applies to any alien subject to the grounds of inadmissibility, including aliens present in the United States without having been admitted or paroled. *See* 8 U.S.C. § 1182(a) (rendering the grounds of inadmissibility applicable to aliens not yet admitted to the United States). As in the case of nonimmigrant visa applicants, however, the other grounds of inadmissibility to which these aliens are subject render public charge considerations less relevant to their cases in practice. *See id*. § 1182(a)(6)(A)(i) (rendering any alien "present in the United States without being admitted or paroled" inadmissible on that basis alone).

[36] *See* 8 U.S.C. §§ 1157(c)(3), 1159(c), 1612(a)(2)(A) & (M).

[37] P.L. 100-202, § 584(a)(2), 101 Stat. 1329-183 (Dec. 22, 1987).

[38] P.L. 99-603, § 202(a)(2), 100 Stat. 3404 (Nov. 6, 1986).

[39] P.L. 105-100, § 202(a)(1)(B), 111 Stat. 2193 (Nov. 19, 1997).

[40] 8 U.S.C. § 1182(a)(4)(E)(ii).

- Victims of human trafficking assisting law enforcement (T-visa applicants);[41]
- Victims of abuse, abandonment, or neglect by a parent (special immigrant juveniles applying for adjustment of status);[42]
- Syrian asylees adjusting status pursuant to P.L. 106-378;[43]
- certain "aged, blind, or disabled" applicants adjusting status under Section 245A of the INA;[44] and
- other exempt classes.[45]

What factors do officials consider in their determination of inadmissibility based on public charge grounds?

Immigration authorities are required by statute to "at a minimum" consider the following factors when determining whether aliens are inadmissible or ineligible for adjustment of status on public charge grounds: age, health, family status; assets, resources, and financial status; and education and skills.[46] Immigration and consular officers may also consider an affidavit of support submitted by an alien's petitioner, which may demonstrate that the applicant can rely on the financial support of a sponsor and thus mitigate concerns that the applicant will come to rely upon government-funded assistance, as discussed below.[47] (The statute makes affidavits of support mandatory for some immigrant visa applicants, including family-based immigrants, by rendering the applicant automatically inadmissible if the petitioner fails to provide an affidavit.[48]) These factors fall within the *totality of the circumstances* that officials consider in making the prospective determination of whether an alien is likely to become a public charge and is therefore inadmissible.[49]

[41] *Id*. § 1182(d)(13)(A).

[42] *Id*. § 1255(h)(2).

[43] 8 C.F.R. § 1245.20(c).

[44] *Id*. § 245a.3 (g)(3)(ii) (certain aged, blind, or disabled applicants).

[45] *See, e.g.*, P.L. 105-277, § 902(a)(1)(B), 112 Stat. 2681-538 (Oct. 21, 1988) (Haitians adjusting status as described in the Haitian Refugee Immigration Fairness Act of 1998); 8 U.S.C. §§ 1259 (aliens who entered the United States prior to January 1, 1972, and who meet other conditions for being granted LPR status under the registry statute, Section 249 of the INA), 1182(a)(4)(E)(i) (certain VAWA self-petitioners for adjustment of status).

[46] 8 U.S.C. § 1182(a)(4)(B)(i).

[47] *Id*. § 1182(a)(4)(B)(ii).

[48] *See id*. § 1182(a)(4)(C), (D).

[49] *See* Matter of A-, 19 I. & N. Dec. 867, 869 (BIA 1988) ("The traditional test ... to determine whether an alien is likely to become a public charge is 'a prediction based on the totality of the alien's circumstances' as presented in the individual case."); *USCIS Public Charge Fact Sheet*, *supra* note 7 ("Each [public charge] determination is made on a case-by-case basis in the context of the totality of the circumstances."); 9 FAM 302.8-2(B)(1) ("When considering the likelihood of an applicant becoming a public charge, you must take into account the totality of the alien's circumstances at the time of visa application, including at a minimum, age, health, family status, assets, resources, financial status, education, and skills.").

What is an affidavit of support? How is it related to public charge?

The affidavit of support form[50] is an enforceable contract between the visa applicant, the applicant's sponsor (usually the petitioner), and the government.[51] Most family-based and certain employment-based immigrants are required to submit this form when applying for an immigrant visa or adjusting to LPR status.[52]

An affidavit of support is intended to guard against the risk that a visa applicant will become a public charge if admitted to the United States or granted LPR status.[53] In executing an affidavit, a sponsor agrees to provide support to maintain the applicant at an annual income not less than 125% of the federal poverty line and reimburse government entities for any "means-tested public benefit" that the government provides to the alien, until specified conditions are met (e.g., the immigrant naturalizes or works for a certain period of time).[54]

If the petitioner fails to submit an affidavit of support where one is required, the alien is considered to fall under the public charge ground of inadmissibility on that basis alone.[55] As noted above, in cases where an affidavit is submitted, it becomes one of the multiple factors for consideration under the totality of the circumstances test for public charge determinations.[56] In the past, DOS had advised consular officers that "a properly filed, nonfraudulent I-864 (affidavit of support) shall normally be considered sufficient to overcome the [public charge] requirements."[57] But DOS changed this guidance in January 2018 to require officers to "consider such affidavits as *one* factor in the totality of the circumstances," making clear that a visa applicant can be deemed inadmissible as a public charge notwithstanding the submission of an affidavit.[58]

Which public benefits are currently considered in public charge determinations of inadmissibility?

USCIS and DOS differ from each other as to the range of benefits they consider when making public charge determinations (see **Table 1**).

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[50] USCIS FORM I-864, AFFIDAVIT OF SUPPORT UNDER SECTION 213A OF THE INA, https://www.uscis.gov/i-864.

[51] *See* 8 U.S.C. § 1183a(a)(1) (describing affidavit of support as a "contract ... that is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State ... or by any other entity that provides any means-tested public benefit"); Wenfang Liu v. Mund, 686 F.3d 418, 423 (7th Cir. 2012) (holding affidavit enforceable against sponsor for support payment to sponsored alien).

[52] *See* 8 U.S.C. § 1182(a)(4)(C),(D).

[53] *See id*. § 1183a.

[54] *Id*. §§ 1182(a)(4)(B)(ii), 1183a.

[55] *See id*. § 1182(a)(4)(C), (D); *USCIS Public Charge Fact Sheet*, *supra* note 7 ("No single factor, other than the lack of an affidavit of support, if required, will determine whether an individual is a public charge.").

[56] 8 U.S.C. § 1182(a)(4)(B)(ii).

[57] KURZBAN, *supra* note 21, at 74 (14th ed. 2014) (quoting internal DOS guidance).

[58] DOS Cable, "Public Charge" Update to 9 FAM 302.8 (Jan. 4, 2018); 9 FAM 302.8-2(B)(3)(b)(1)(a) ("A properly filed and sufficient, non-fraudulent Form I-864, may not necessarily satisfy the INA 212(a)(4) requirements, but may provide additional evidence in the review of public charge determination.").

USCIS, in making public charge determinations for aliens applying for adjustment to LPR status, only considers cash income-maintenance benefits and government-funded institutionalization for long-term care.[59] Cash assistance for income maintenance, according to USCIS guidance, "includes Supplemental Security Income (SSI), cash assistance from the Temporary Assistance for Needy Families (TANF) program and state or local cash assistance programs for income maintenance, often called 'general assistance' programs."[60] Currently, an alien's past or current receipt of these benefits or of government-funded long-term care does not automatically lead to a determination of inadmissibility, but instead only factors into the prospective analysis under the totality of the circumstances test.[61] In contrast, USCIS does not consider an alien's past or current receipt of other benefits when making public charge determinations for adjustment of status applicants—not even as a consideration under the totality of the circumstances test.[62]

Until recently, public cash benefits and government-funded institutionalization for long-term care were also the only public benefits that DOS consular officers considered in making public charge determinations for visa applicants. The FAM, in its public charge-related guidance to consular officers who adjudicate visas abroad, tracks the USCIS definition of "public charge" for inadmissibility purposes.[63] In January 2018, however, DOS revised the FAM to require consular officers applying this definition in individual cases to consider, under the totality of the circumstances test, "[p]ast or current receipt of public assistance of any type" by the alien or the alien's family.[64] The FAM revisions did not change DOS's definition of "public charge"—which continues to mirror the USCIS definition—but instead changed only the scope of public benefits that consular officers must consider when applying that definition.[65] As a result, in determining under the totality of the circumstances whether an alien is likely to become dependent on public cash assistance or government-funded long-term care in the future, consular officers now must consider (among other factors) the alien's receipt of any type of public benefits in the past or present.[66]

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[59] *USCIS Public Charge Fact Sheet*, *supra* note 7.

[60] *Id*.

[61] *Id*.

[62] *INS Field Guidance*, *supra* note 6, at 28690 ("Past receipt of non-cash benefits (other than institutionalization for long-term care) should not be taken into account under the totality of the circumstances test. Similarly, past receipt of special-purpose cash benefits not for income maintenance should be not taken into account."). The field guidance lists examples of non-cash benefits that should be excluded from public charge determinations, including Medicaid; CHIP; nutrition programs; housing benefits; child care services; energy assistance; emergency disaster relief; foster care and adoption assistance; educational assistance; job training programs; and in-kind, community-based programs. *Id*. at 28693. In addition, "state and local programs that are similar to the federal programs listed should also be excluded from consideration for public charge purposes." *Id*.

[63] 9 FAM 302.8-2(B)(1)(a) ("An applicant is likely to become a public charge if he or she is likely, at any time after admission, to become primarily dependent on the U.S. Government (Federal, state, or local) for subsistence ... This means ... [r]eceipt of public cash assistance for income maintenance [or] ... [i]nstitutionalization for long-term care at U.S. Government expense.... ").

[64] 9 FAM 302.8-2(B)(2)(f)(1); "Public Charge" Update to 9 FAM 302.8, *supra* note 58.

[65] 9 FAM 302.8-2(B)(1)(a), (2)(f)(1).

[66] *See id*. The FAM creates some confusion on this point. The FAM's definition of "public charge" makes clear that someone is a public charge only if he or she becomes dependent on public cash assistance or institutionalized on long-term care at government expense. 9 FAM 302.8-2(B)(1). Nonetheless, further on, the same section of the FAM tells consular officers that they must determine, under the totality of the circumstances, "whether the alien is likely to obtain public benefits if he or she enters the United States," without specifying that likely future receipt of other benefits—beyond the two kinds of benefits specified in the public charge definition—does not render someone a public charge under the definition. 9 FAM 302.8-2(B)(2)(f)(1).

In summary, under current agency guidance, receipt of benefits other than cash assistance for income maintenance or government-funded long-term care does not affect consideration of adjustment of status applications by USCIS, but may affect DOS's assessment of immigrant visa applications.

Table 1. Public Benefits Considered in DHS and DOS Public Charge Determinations

	DHS	DOS[a]
Public Cash Benefits		
Supplemental Security Income (SSI)	Yes	Yes
Temporary Assistance to Needy Families (TANF)	Yes	Yes
State or local cash benefit programs for income maintenance	Yes	Yes
Public Non-cash Benefits[b]		
Programs (including Medicaid) supporting institutionalization for long-term at the government's expense (e.g., a nursing home or mental health institution)	Yes	Yes
Medicaid (other than long-term institutional care)	No	Yes
Children's Health Insurance Program (CHIP)	No	Yes
Supplemental Nutrition Assistance Program (SNAP)	No	Yes
Special Supplemental Nutrition Assistance Program for Women, Infants, and Children (WIC)	No	Yes
Supplementary and emergency food assistance programs	No	Yes
National School Lunch and School Breakfast Program	No	Yes
Housing benefits	No	Yes
Child care services	No	Yes
Energy assistance, such as the Low Income Home Energy Assistance Program (LIHEAP)	No	Yes
Emergency disaster relief	No	Yes
Foster care and adoption assistance	No	Yes
Education assistance, Head Start Act, or aid for elementary, secondary, or higher education	No	Yes
Job training and job-training programs	No	Yes
In-kind emergency community services, such as soup kitchens and crisis counseling	No	Yes

Source: DOJ, Immigration and Naturalization Service, Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28692 (May 26, 1999); 9 FAM § 302.8-2(B)(1)(d).

a. As of January 2018, the FAM instructs DOS consular officers to consider an alien's receipt of any type of public assistance—including non-cash benefits—as relevant to public charge determination. *See supra* "Which public benefits are currently considered in public charge determinations of inadmissibility?"

b. Non-cash benefits may not be limited to this list but reflect both DHS and DOS guidance documents.

Why do USCIS and DOS consider different ranges of benefits when making public charge inadmissibility determinations under the same statute?

As discussed above, both USCIS and DOS administer the INA provision that establishes the public charge ground of inadmissibility—USCIS administers the provision with respect to applications for adjustment of status, and DOS administers it with respect to visa applications.[67] Where more than one agency is charged with administering the same statute, the agencies' interpretations of the statute may and sometimes do diverge from each other.[68] A federal court may sometimes resolve such agency divergence by ruling on the proper interpretation of the statute in a decision that constitutes controlling authority for multiple agencies.[69] For example, with respect to the divergent USCIS and DOS guidance on the scope of benefits that immigration officials should consider when making public charge determinations, a decision by a federal court on the proper scope of benefits subject to consideration under the statute could constitute controlling authority for both agencies.[70] Up to this point, however, no federal court appears to

[67] *See supra* text at notes 7-8.

[68] *See* Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. 53, 97 (2018) ("'[A]s a practical matter, two agencies might well interpret the statute differently.... '") (quoting WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 284 (5th ed. 2016)); *see also* DeNaples v. Office of Comptroller of Currency, 706 F.3d 481, 488 (D.C. Cir. 2013) (discussing divergent agency interpretations of the same statute).

[69] *DeNaples*, 706 F.3d at 488 ("Accepting the possibility of multiple coexisting [agency] interpretations ... [gives rise to] a compelling need for interpretive uniformity."). To facilitate the uniform interpretations of statutes administered by multiple agencies, federal courts do not defer to any single agency's interpretation of such a statute. *Id*. ("We have repeatedly pointed to the agencies' joint administrative authority under [the statute] to justify refusing deference to their interpretations."); Rapaport v. Dep't of the Treasury, Office of Thrift Supervision, 59 F.3d 212, 216–17 (D.C. Cir. 1995) (explaining that courts do not defer to the statutory interpretation of an agency that shares responsibility for administering the statute with other agencies because such deference "would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all").

[70] *See, e.g., DeNaples*, 706 F.3d at 488 (deciding not to defer to agency interpretation of statute enforced by multiple agencies so as bring "interpretive uniformity" to multiple agencies' enforcement actions). The INA also grants the Attorney General power to make legal determinations that bind other immigration agencies, 8 U.S.C. § 1103(a) ("[A] determination and ruling by the Attorney General with respect to all questions of law shall be controlling."), but this power appears to have limited effect in practice on visa decisions. *See* Garcia v. Baker, 765 F. Supp. 426, 428 (N.D. Ill. 1990) ("Any decision we might render ordering the Secretary of State to follow the Attorney General's interpretation of law would not affect consular officers' [visa] decisions, because only consular officers can find facts or apply the law to facts with respect to visa applications. Neither the Attorney General nor the Secretary of State can require consular officers to grant or deny visa applications.").

have decided whether either agency's current guidance on the scope of benefits subject to consideration complies with the statute,[71] perhaps because, as discussed below, the public charge determinations of both USCIS and DOS are subject to judicial review only in limited circumstances.[72]

If public charge is determined, can it be overturned?

If a USCIS officer denies an adjustment of status application based on a determination that the alien is inadmissible on public charge grounds, and the alien is thereafter placed in removal proceedings, in most circumstances the alien may renew the application before an immigration judge in those proceedings and request that the public charge determination be revisited.[73] If the alien is not placed in removal proceedings, the law governing the availability of an appeal from USCIS's denial of an adjustment application is "complicated and varied."[74] In short, there is no direct administrative appeal available from such a denial,[75] and federal courts are divided as to whether they possess jurisdiction to review such denials.[76]

Immigrant visa denials on public charge grounds by DOS generally are not subject to formal appeal or judicial review.[77] However, the FAM states that applicants may overcome the public charge determination "by presenting evidence to convince [the consular officer] that the

[71] *Cf.* Perales v. Thornburgh, 967 F.2d 798, 808 (2d Cir. 1992) (holding that legacy INS regulations concerning public charge determinations made under a special public charge rule for legalization applications under the Immigration Reform and Control Act of 1986 (IRCA) violated IRCA) ("Under IRCA's Special Rule for Determination of Public Charge ... , an alien 'is not ineligible for adjustment of status' on public charge grounds where she 'demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.' 8 U.S.C. § 1255a(d)(2)(B)(iii) (Supp. II 1990). This provision requires an alien to show that she is *self*-supporting. The May 1, 1987 [INS] public charge regulations, on the other hand, excluded self-supporting aliens if they could not simultaneously support their families. In so doing, they violated the statute.") (emphasis in original), *vacated on jurisdictional grounds sub nom.*, Reno v. Perales, 509 U.S. 917, 917 (1993); *INS Field Guidance*, *supra* note 6, at 28690 n.3 (contending that federal courts considering the IRCA regulations "endorsed th[e] 'totality of the circumstances' test").

[72] *See infra* "If public charge is determined, can it be overturned?"

[73] 8 C.F.R. § 245.2(a)(5)(ii) ("[T]he applicant [for adjustment of status], if not an arriving alien, retains the right to renew his or her application in [removal] proceedings.... "). The public charge ground of inadmissibility or deportability can also serve as the basis for the initiation of removal proceedings against aliens who have not applied for adjustment of status, but as explained above, such removal proceedings appear to be rare. See *supra* text at notes 26-27 (discussing rare use of deportability ground), note 35 (discussing limited relevance of public charge ground of inadmissibility to aliens present in the United States without admission or parole).

[74] Anne J. Greer, *The Path to Adjustment: Jurisdiction over Selected Applications to Adjust Status*, 10-04 IMMIGR. BRIEFINGS 1 (2010).

[75] *Id.* ("No appeal lies from the denial of an application [for adjustment of status].... "). Nonetheless, USCIS's Administrative Appeals Office (AAO) may review the denial in some circumstances through a procedure known as certification. *See* 8 C.F.R. § 103.4(a)(4).

[76] Lee v. U.S. Citizenship & Immigration Servs., 592 F.3d 612, 621 (4th Cir. 2010) (noting circuit split as to whether federal courts have jurisdiction over challenges to a USCIS denial of adjustment of status).

[77] *See, e.g.*, Saavedra Bruno v. Albright, 197 F.3d 1159 (D.C. Cir. 1999) ("[C]ourts have applied what has become known as the doctrine of consular nonreviewability. The doctrine holds that a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise."); CRS Report R44969, *Overview of the Federal Government's Power to Exclude Aliens*, by Ben Harrington, at 6-7 (discussing the doctrine of consular nonreviewability).

inadmissibility no longer applies."[78] Consular officers may consider such evidence if it is submitted within one year from the date of the visa denial.[79]

What is a public charge bond?

The INA authorizes the admission of aliens who are inadmissible as public charges if they post a bond in an amount that is determined to be "suitable and proper" and are otherwise admissible.[80] Despite this statutory authorization, USCIS officers and DOS consular officers appear to employ public charge bonds only rarely.[81]

How often have public charge grounds been applied to visa applications and applications to adjust status?

The number of aliens denied visas or adjustment of status due to a determination of inadmissibility on public charge grounds is difficult to quantify precisely. DHS does not compile statistics and share publicly the number of adjustment of status applications denied upon particular grounds of inadmissibility.[82]

However, in the visa application context, DOS reports on the total number of immigrant and nonimmigrant visa refusals, and also breaks out the refusals by specific grounds of inadmissibility.[83] In FY2017, there were 3,237 immigrant visa applications refused on public charge grounds. In that same year, just over 2,016 public charge refusals were overcome.[84] In contrast, 51 nonimmigrant visa applications were refused on public charge grounds (out of a total of more than 13 million nonimmigrant visa applications), and 4 had that determination overcome in FY2017.[85] However, refusals made in one fiscal year may be overcome in a subsequent fiscal

[78] 9 FAM 302.8(E)(1).

[79] *Id*. at 504.11-4(A)(b).

[80] 8 U.S.C. § 1183.

[81] *See* USCIS, ADJUDICATOR'S FIELD MANUAL, 61.1 POSTING, CANCELLATION AND BREACHING OF PUBLIC CHARGE BONDS, https://go.usa.gov/xUPRc ("Although USCIS has the authority to require a public charge bond, such authority is rarely exercised.... "); 9 FAM 302.8-2(B)(2)(g) ("The public charge bond should be used sparingly. When an applicant appears likely on the facts to become a public charge (for example because of an acute physical condition and lack of adequate resources), the filing of a bond would not serve any purpose if the needs of the applicant would easily overcome the value of the bond.").

[82] For data on the total number of aliens determined inadmissible, without specifying individual grounds of inadmissibility, see DHS, OFFICE OF IMMIGRATION STATISTICS, 2016 YEARBOOK OF IMMIGRATION STATISTICS, Table 36: Aliens Determined Inadmissible: Fiscal Years 2005 to 2016, (presenting data on), https://www.dhs.gov/immigration-statistics/yearbook/2016/table36. However, these statistics refer largely to aliens presenting at a port of entry.

[83] The total number of applications refused does not necessarily reflect the number of persons refused during the year. One applicant can apply and be found ineligible more than one time in a fiscal year.

[84] The total number of ineligibilities overcome may not necessarily represent the same visa applicants found ineligible and recorded in the total of ineligibility findings. A visa may be refused in one fiscal year and be overcome in the next year. A refusal can be overcome by evidence that the ineligibility does not apply, by approval of a waiver, or by any other relief as provided by law.

[85] DOS, REPORT OF THE VISA OFFICE 2017, *supra* note 87, at Table XX. As mentioned above, although nonimmigrant visa applicants are technically subject to a public charge determination, they are much more likely to be refused based on a failure to establish entitlement to nonimmigrant status. *See* 9 FAM 302.8-2(E)(2) ("In almost all cases, an NIV

year, making it difficult to determine from these statistics exactly how many visas were denied definitively on public charge grounds in a given year.[86]

To put the number of refusals due to public charge determination into context, in FY2017, there were 280,835 immigrant visa applications refused in total, and 204,720 of those refusals were overcome (by the submission of additional "evidence that the ineligibility did not apply, by approval of a waiver, or by other relief as provided by law such as a bond").[87] In contrast, the total number of nonimmigrant visa applications refused was 3,450,673, and 738,098 of those were overcome.[88]

Is the receipt of public benefits by family members of applicants considered in a public charge determination?

USCIS cites as the basis for its public charge policies long-standing agency guidance that states, in most circumstances, benefits received by the child or other family member of an applicant for adjustment of status do not bear on the public charge analysis:

> Service officers should not attribute cash benefits received by U.S. citizen or alien children or other family members to alien applicants for purposes of determining whether the applicant is likely to become a public charge, absent evidence that the family is reliant on the family member's benefits as its *sole* means of support.[89]

Thus, if an alien applies for adjustment of status, the receipt of benefits by someone in the alien's family does not enter into USCIS's public charge analysis unless the alien's family has no other means of support.[90]

DOS takes a different approach for visa applications. Following revisions that took effect in January 2018, the FAM instructs DOS consular officers making public charge determinations to give broader consideration to benefits received by an applicant's family member:

> A dependent family member's receipt of public benefits is a heavily negative factor in the totality of circumstances unless the applicant can demonstrate that his or her prospective

applicant who is ineligible under INA 212(a)(4) will likely also be ineligible under INA 214(b) [for failure to establish nonimmigrant status].... ").

[86] *See id*.

[87] DOS, REPORT OF THE VISA OFFICE 2017, Table XX: Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the Immigration and Nationality Act) Fiscal Year 2017, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf; *see also* 9 FAM 302.8-2(E)(1) ("Applicants may overcome the [public charge] finding by presenting evidence to convince [the consular officer] that the inadmissibility no longer applies. While there are provisions for overcoming the inadmissibility by posting a bond or undertaking with DHS, the applicant is still subject to Affidavit of Support and income requirements. Consequently, there are few circumstances in which a bond would be offered as an alternative to the Affidavit of Support.").

[88] DOS, REPORT OF THE VISA OFFICE 2017, *supra* note 87, at Table XX.

[89] *INS Field Guidance*, *supra* note 6, at 28692 (emphasis in original) (cited in *USCIS Public Charge Fact Sheet*, *supra* note 22).

[90] *Id*.; *see also* Matter of Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, AAU MSC 02 245 62586, 2008 WL 5745448, at *7 (AAU 2008) ("The fact that the applicant is a single mother whose qualified U.S. citizen child receives public benefits does not lead to the conclusion that she is likely to become a public charge if her status is adjusted to that of lawful permanent resident.").

> income and assets with the income and assets of the others in the family will be sufficient for the family to overcome the poverty income guideline for the family.[91]

Accordingly, unlike USCIS officers adjudicating adjustment of status applications, DOS consular officers adjudicating immigrant visa applications must consider a family member's receipt of public benefits as a "heavily negative factor" in the public charge analysis unless the applicant affirmatively shows that the family income will exceed the poverty threshold.[92]

When will the Trump Administration's new rules be issued?

It is uncertain if or when the new rules will be issued. DHS has notified OMB that it plans to submit drafts of the proposed regulations for review.[93] After the review is completed, a Notice of Proposed Rulemaking will be published in the *Federal Register* and the proposed regulations will most likely undergo the notice and comment process of agency rulemaking. That process takes a minimum of two months and can take much longer before the rule becomes final.[94]

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Disclaimer

[91] 9 FAM 302.8-2(B)(2).

[92] *Id*.

[93] *OMB Notice*, *supra* note 12.

[94] CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey ("Although the APA does not specify the length of th[e] public comment period, agencies commonly allow at least 30 days. Public comments as well as other supporting materials (e.g., hearing records or agency regulatory studies but generally not internal memoranda) are placed in a rulemaking 'docket' which must be available for public inspection. Finally, the APA states that the final rule cannot become effective until at least 30 days after its publication unless (1) the rule grants or recognizes an exemption or relieves a restriction, (2) the rule is an interpretative rule or a statement of policy, or (3) the agency determines that the rule should take effect sooner for good cause, and publishes that determination with the rule.").

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