

Public Charge Final Rule Practice Advisory

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I. INTRODUCTION

Earlier this year, the Supreme Court of the United States lifted a nationwide injunction, which allowed the Department of Homeland Security to implement the new public charge rule while the case continues to be litigated on appeal. Practitioners should be aware of several changes in the immigration process. This practitioner guide is meant to help identify which clients are most likely to fall under the new rule.

II. WHO DOES THE PUBLIC CHARGE RULE APPLY TO?

The new public charge rule applies to those applying for admission or adjustment of status, with some exceptions.

The new rule does not apply to those seeking U, T, VAWA, asylum, and/or, refugee status. Also, members of the United States armed forces and certain family members are not affected by these new public charge rules. However, it is important to keep in mind that individuals seeking an immigration relief that is not subject to the public charge rule may also simultaneously or at later time, pursue a form of relief that is subject to the public charge rule. In which case, the public charge test described below, would apply to the applicant.

USCIS has stated that COVID-19 treatment and preventive services will not be factored into public charge calculations.

If your client was receiving benefits while pregnant, under the age of 21, institutionalized at government expense, or received services provided under the Individuals with Disabilities Education Act, the new rule may not apply to them, or at least, some benefits they received will not be considered.

III. BENEFITS CONSIDERED IN PUBLIC CHARGE DETERMINATION

The following are benefits that are considered to determine whether someone is a public charge: cash benefits for income maintenance, SNAP (food stamps), most forms of Medicaid (see exceptions below), premium and cost sharing subsidies for Medicare Part D (Medicare Part D LIS), Section 8 Housing Assistance under the HCV Program, Section 8 Project-Based Rental Assistance, and certain forms of subsidized housing.

The following are benefits that are NOT considered to determine whether someone is a public charge: institutionalization for long-term care at government expense, Medicare Part D Low-Income Subsidy, emergency Medicaid or Medicaid received for services provided under the Individuals with Disabilities Education Act (IDEA), school-based benefits provided to individuals who are at or below the maximum eligible age for secondary education, as determined under state law, Medicaid benefits received by “aliens” under the age of 21, Medicaid received by pregnant women, Medicaid benefits received by women for 60 days after end of pregnancy, public benefits received by an “alien” who at the time of receipt of the public benefit, filing, or adjudication, is enlisted in the U.S. Armed Forces, serving in the active duty or in the Ready Reserve component of the U.S. Armed Forces, or is the spouse or child of such service member, benefits not directly received by the applicant for the applicant’s own benefit, or a public benefit received by a household member unless the applicant is listed as a beneficiary of the public benefit.

The exclusion for members of the armed forces and select family members applies to applications for admission, adjustment of status, and extension of stay or change of status.

IV. THE FOLLOWING FACTORS ARE CONSIDERED WHEN DECIDING WHETHER AN APPLICANT IS A PUBLIC CHARGE

An immigration officer will balance a variety of factors and implement the formula listed below to decide whether the rule applies to your client.

If your client has received one or more applicable public benefits for an aggregate of 12 months in a 36-month period, then the client is subject to the public charge rule. See *8 CFR 212.21(a)*. Note that falling outside of this threshold does not mean your client will automatically avoid a public charge determination.

It is extremely important to remember that receiving multiple benefits at once means that each benefit received during that time period will be aggregated.

Example:

John has received SNAP, Medicaid, and Section 8 Housing Assistance for the past 3 months. Under the new public charge rule, he has received 9 months of public benefits in the aggregate. Therefore, he does not fall under the new public charge rules.

If John had received the same benefits for 4 months instead of 3, then he would have received benefits for an aggregate period of 12 months and fallen under the new public charge rule.

Immigration officers will also weigh various positive and negative factors to determine whether someone is a public charge. No single factor makes anyone a public charge. Rather, the immigration officer will weigh the factors and consider the totality of the circumstances.

Furthermore, immigration officers will consider two sets of factors. The first set of factors is mandatory and are considered in all public charge determinations. The second is still important, but discretionary. Also, some factors will be given greater weight than others.

Mandatory Factors - 8 U.S.C. § 1182(a)(4)

- **Age - 8 CFR 212.22(b)(1)**
 - Whether the applicant is between the age of 18 and “early retirement age” as defined for Social Security
 - The definition of early retirement age can be found at *42 USC 416(l)(2)*. Currently “62 in the case of an old-age, wife’s, or husband’s insurance benefit, and age 60 in the case of a widow’s or widower’s insurance benefit.”
 - Whether the applicant’s age affects their ability to work
- **Health - 8 CFR 212.22(b)(2)**
 - Whether the applicant been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization, or that will interfere with the ability to provide for oneself, attend school, or to work upon admission or adjustment of status
 - **Evidence:** A report of an immigration medical examination performed by a civil surgeon or panel physician where such examination is required (to which [USCIS](#) will generally defer absent [evidence](#) that such report is incomplete); OR
 - Some other evidence that indicates the existence of a medical condition described above
- **Family Status - 8 CFR 212.22(b)(3)**
 - Family size and whether or not it will make the applicant more likely to become a public charge. See *8 CFR 212.21(d)*.
- **Assets and Resources and Financial status - 8 CFR §212.22 (b)(4)**

PRACTICE TIP:
Consider requesting that your client bring documents and relevant evidence, including records for: tax returns, wage statements (if household not subject to taxation), any additional income, household bank accounts, non-cash assets (such as a house, outstanding mortgage), retirement or educational accounts, or anything else that can be “easily...converted into cash...within 12 months.” Please also consult 8 CFR 212.22, because under each listed factor, there will be sub-sections listing evidence USCIS will consider in a public charge determination.

- Excludes income from illegal activities and public benefits
- Whether the applicant's annual gross household income exceeds 125% of the Federal Poverty Guideline (100% for active duty military)
- Whether the applicant possesses significant assets i.e. savings, stocks, bonds, CDs, real estate etc.
 - See 8 CFR §212.22 (b)(4)(B) for the formula to determine if the applicant's real assets are enough to offset the difference in income and the poverty guideline.
- **Education and Skills - 8 CFR 212.22(b)(5)**
 - Whether the applicant has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being more likely than not to become a public charge
 - Whether the applicant is a primary caregiver for another person in their household, for example a child or elderly relative
 - This factor is intended to account for difficult-to-monetize contributions by applicants who may lack current employment or an employment history due to their full-time, unpaid care of household members.



Heavily Weighted Factors – The presence of any of these factors are likely to factor heavily in adjudication (either positively or negatively).

Negative factors (make someone more likely to be deemed a public charge) - 8 CFR 212.22(c)(1)

- The applicant is not a full-time student and is authorized to work, but is unable to demonstrate current employment, recent employment history, or a reasonable prospect of future employment;
- The applicant has received or has been certified or approved to receive one or more public benefits, as defined in §212.21 (b), 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), beginning no earlier than 36 months prior to the applicant's application for admission or adjustment of status on or after February 24, 2020;
- The applicant has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the applicant's ability to provide for themselves, attend school, or work; and
- The applicant is uninsured and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition; or
- The applicant was previously found inadmissible or deportable on public charge grounds by an Immigration Judge or the Board of Immigration Appeals.

Positive factors (make someone less likely to be deemed a public charge) - 8 CFR 212.22(c)(2)

- Household income, assets, resources, and support (excluding illegal proceeds and public benefits) are at least 250% of the Federal Poverty Guidelines (FPG).
- Applicant is authorized to work and employed with an annual income of at least 250% of the FPG.
- Applicant has private health insurance, appropriate for the expected period of admission. Note: This does *not* include insurance subsidized by premium tax credits under the ACA.

V. Updated USCIS Forms

The following forms have been updated and are available at <https://www.uscis.gov/forms>.

- 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](#)

The following new forms are now available at <https://www.uscis.gov/forms>.

- Applicants subject to the public charge rules who are applying for adjustment of status must submit [Form I-944, Declaration of Self Sufficiency](#). For this form, individuals must provide information about whether they applied for, were approved for, and/or received public benefits since October 15, 2019. Applicants required to submit a public charge bond must submit [Form I-945, Public Charge Bond](#) or [Form I-356, Request for Cancellation of Public Charge Bond](#), to request cancellation of a public charge bond.

Please Note:

Due to litigation-related delays in the rule's implementation, USCIS is applying all references to Oct. 15, 2019, as though they refer to Feb. 24, 2020. Petitioners and applicants should do the same. In other words, clients do not need to report the application, certification or approval to receive, or receipt of certain non-cash public benefits that occurred before Feb. 24, 2020 on Form I-944. Similarly, petitioners and applicants do not need to report an applicant's receipt of any public benefits on Forms I-129, I-129CW, and I-539 if the benefits were received before Feb. 24, 2020.