I. Public Charge Basics: What the New Rule Does and Who It Affects

1. What is a “public charge”?

U.S. immigration law has long permitted the government to find a foreign national inadmissible as a “public charge” if it determines he or she is likely to become financially dependent on the U.S. government at any time in the future.

The public charge ground of inadmissibility applies to foreign nationals applying for lawful permanent residence (a “green card”) through the adjustment of status process, for immigrant and nonimmigrant visas at U.S. consulates abroad, and for admission to the United States at the U.S. border or port-of-entry. Some foreign nationals are exempt from the public charge ground of inadmissibility, such as those seeking asylum or refugee status in the United States.

2. How was public charge interpreted previously and what has changed under the new rule?

Under previous guidance, generally a person was deemed a public charge only if the government determined that he or she was likely to become primarily dependent on the U.S. government through the receipt of cash assistance or benefits for long-term institutionalization. The government would not consider any other type of benefit when reviewing whether a foreign national was likely to become a public charge. This existing policy will remain in place for several groups of applicants, as discussed below.

In the new rule, DHS has expanded the definition of public charge to include foreign nationals who use a much broader set of public benefits – including some non-cash benefits – for more than 12 months in a 36-month period. For foreign nationals seeking adjustment of status in the United States, the new rule also imposes a complex and more subjective “totality of the circumstances” test to determine whether a foreign national might become a public charge at any time in the future.
The rule also broadens the public charge inquiry to certain nonimmigrants in the United States seeking to extend or change their temporary status through USCIS. This class of foreign nationals had not previously been subject to public charge scrutiny when filing for extensions and changes of status but must now answer questions and provide documentation in connection with their receipt of certain public benefits. For this group, the rule creates a “public benefits condition” requiring foreign nationals to establish that, starting on February 24, 2020 (and since obtaining their current nonimmigrant status), they have not received or been certified to receive certain benefits for more than 12 months in a 36 month period.

3. **Are lawful permanent residents subject to the new public charge definition?**

The new rule primarily affects adjustment of status applicants and nonimmigrants who are seeking a change or extension of their status while in the United States.

The rule may also affect certain lawful permanent residents seeking admission to the United States, including those applying to enter after being out of the country for more than 180 days. However, it is not clear how Customs and Border Protection (CBP) officials might enforce the new standard with respect to these U.S. lawful permanent residents and no guidance has been provided. The DHS rule focuses almost exclusively on foreign nationals applying for benefits from within the United States through U.S. Immigrant and Citizenship Services (USCIS).

4. **Who is not affected by the new DHS public charge rules?**

The following classes of foreign national are not subject to the new rules:

- **Groups legally exempt from public charge:** Several classes of foreign national are exempt from the public charge ground of inadmissibility and thus are not affected by the new rule. This includes refugees, asylees, certain crime and trafficking victims, and other special humanitarian categories.

- **Visa applicants:** The DHS rule does not apply to foreign nationals seeking a visa from a U.S. Embassy or consulate abroad. However, a very similar Department of State regulation also takes effect on February 24. The State Department issued its own public charge rule in October 2019, but decided to delay implementation until a new form and process are finalized. The agency has now updated its policy guidance to reflect a February 24 implementation.

  According to that guidance, foreign nationals applying for immigrant visas, including diversity lottery visas, will be required to complete a new **DS-5540 questionnaire**, which collects information about an applicant’s income, financial assets and liabilities, health insurance coverage, and receipt of public benefits, among other questions. Requests for DS-5540 supporting documentation will be at the discretion of the consular officer. Consular officers would also have the discretion to require nonimmigrant visa applicants to complete the DS-5540 questionnaire.

  The State Department public charge rule is the subject of a pending lawsuit, and those challenging the rule have asked a federal court to bar implementation while the legal challenge continues. The court has not yet ruled on the matter, and for now, implementation takes effect on February 24.
• **Green card renewal applicants:** Lawful permanent residents applying to renew their Permanent Resident Cards are also not affected by the public charge rule. Green card holders who travel abroad for more than 180 days, however, could be subject to a public charge review, as noted above.

• **Naturalization applicants:** The new rule also does not affect naturalization applicants, unless there was error or misrepresentation in connection with a public charge determination in their green card adjudication. There is no additional public charge inquiry at the naturalization stage.

5. **What happens to adjustment applications and change/extension of status nonimmigrant petitions that are pending on February 24, 2020?**

The new public charge rule will only be applied to applications and petitions postmarked on or after February 24, 2020. Applications submitted before that date will be adjudicated under the old public charge standards and procedures, discussed above.

6. **How does the rule affect those in Illinois?**

Though a federal court issued an injunction prohibiting application of the public charge rule in Illinois, the Supreme Court has granted the Trump Administration’s request to stay the injunction. USCIS can now apply its new public charge rule to applicants, petitioning employers or beneficiaries who have a physical address in Illinois.

7. **What is the status of federal lawsuits against the public charge regulation?**

The public charge regulation is the subject of a number of legal challenges in federal court. Though temporary injunctions against the regulation have been lifted by the Supreme Court, the lawsuits continue. Fragomen is closely monitoring these cases and will provide updates on relevant court rulings.

II. **Public Benefits Covered by the New Rule**

8. **What are the public benefits DHS will consider in its public charge determination?**

The expanded definition of public charge includes a wide range of public benefits, not just cash assistance and long-term institutionalization. A foreign national who accepts or has been certified to receive any of the following public benefits may be subject to further scrutiny of their eligibility to adjust status or obtain a nonimmigrant change or extension of status:

• Federal, state, local or tribal cash assistance for income maintenance (including Supplemental Security Income, Temporary Assistance to Needy Families, and any general cash assistance for income maintenance);

• Federally-funded Medicaid (with exceptions for those under age 21, pregnant women and women up to 60 days after the last day of pregnancy, as well as for certain emergency and education-related services);
• Supplemental Nutrition Assistance Program (SNAP, or food stamps);
• Section 8 Housing Assistance under the Housing Choice Voucher Program;
• Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation); and
• Public Housing under Section 9 of the U.S Housing Act of 1937.

In order for cash assistance to be considered a public benefit under the new rule, USCIS policy guidance states that the benefit must be:

• received in cash or cash equivalent, such as a debit card or check;
• for a non-specific purpose – for example, the person would be able to use it for food, nutrition, or housing, etc.;
• means-tested, meaning granted based on an income threshold; and
• not otherwise explicitly excluded by USCIS in its public charge policy guidance.

9. If a foreign national has accepted one of the above benefits, is he or she automatically subject to the new public charge definition?

No. There are certain groups of foreign nationals whose receipt of benefits will not be considered in the government’s analysis under the public charge rule, as discussed below. However, excluded groups still need to report their receipt of or application for the covered benefits and then document their eligibility for the exclusion.

Generally, these groups include certain members of the armed forces and their family members, children of U.S. citizens seeking automatic citizenship under the Child Citizenship Act of 2000, and those who were exempt from the public charge ground at the time they received the benefits. If applicable to your case, your Fragomen team will provide guidance on the types of documentation accepted to claim these exclusions.

10. What if a foreign national accepted public benefits for a short time only? How does the government calculate the length of time a foreign national has received benefits?

The government will look to see if a foreign national has received one of the covered benefits for more than 12 months in the aggregate within a 36-month period. If a foreign national has received more than one covered benefit in one month, the government counts each additional benefit as another month of receipt. Therefore, if a foreign national receives two benefits in one month, it is counted as receipt of two consecutive months of benefits.

11. Does the rule cover every type of government benefit? Are there any public benefits that are not considered under the new rule?

In its agency policy guidance, USCIS has identified some benefits that are specifically excluded from consideration as a public benefit. For example, the agency explicitly states that it will not consider any tax-related cash benefit such as the Earned Income Credit or the Premium Tax credit, to be a covered benefit under the new standard.
The agency also provides a non-exhaustive list of benefits excluded because they are considered earned benefits. These include:

- Unemployment benefits;
- Worker’s compensation;
- Social Security retirement benefits;
- Medicare;
- Federal Old-Age, Survivors, and Disability Insurance Social Security benefits (SSDI);
- Veteran’s benefits including but not limited to HUD-VASH, and medical treatment through the Veteran’s Health Administration;
- Federal or state government pension benefits and healthcare;
- Federal and state disability insurance; and
- Any state-funded non-cash benefit, including health insurance or social services programs.

Further, USCIS provides a non-exhaustive list of a number of other benefits excluded from public charge review, including some commonly used programs listed below:

- Health Insurance through the Affordable Care Act (ACA);
- Children’s Health Insurance Program (CHIP) and State Children’s Health Insurance Program (SCHIP);
- Tax credits;
- Special Supplemental Nutrition Program for Women, Infants, and Children (WIC);
- Student loans and home mortgage loan programs;
- Foster care and adoption benefits;
- Educational benefits, including, but not limited to, benefits under the Head Start Act;
- Benefits through school lunch or other supplemental nutrition programs:
  - Short-term, non-cash, in-kind disaster-relief programs;
  - Programs, services, or assistance provided by local communities or through public or private nonprofit organizations, such as soup kitchens, crisis counseling and intervention, and short-term shelter;
  - Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases;
  - Summer Food Service program;
  - Childcare related services including the Child Care and Development Block Grant Program (CCDBGP);
  - Transportation vouchers or other non-cash transportation services;
• Certain housing assistance and energy benefits programs.

12. **Will benefits received by my family members count against me?**

No, only named beneficiaries of covered benefits will have these benefits considered in their public charge analysis.

13. **If a public benefit is not specifically listed by DHS, how can I determine whether it must be disclosed?**

If you have questions about a specific public benefit that you have received or are considering, you may need to seek specific legal advice from qualified benefits counsel.

III. **Impact on Adjustment of Status Applications**

14. **How will USCIS apply the public charge rule to adjustment of status applications?**

For adjustment of status applicants, USCIS will apply a forward-looking “totality of the circumstances” test to determine the likelihood of the foreign national becoming a public charge at any time in the future.

The totality test takes into account the following factors, at a minimum, for each applicant:

- Age;
- Household size;
- Assets, resources and financial status, including a review of the applicant's income, assets, liabilities, as well as their application for or receipt of certain public benefits;
- Health; and
- Education and skills.

To apply this public charge totality test, USCIS will require applicants to complete a new 18-page Form I-944, Declaration of Self-Sufficiency and submit detailed documentation in support of the information provided.

Unlike the prior adjustment of status process, applicants will be required to provide a credit report and credit score (or if none exists, proof of continued payment of bills); evidence of assets and liabilities like mortgage, credit card debt, and education loans; and detailed information about health insurance coverage, among other documents. Your Fragomen team will provide a list of documents required in support of the Form I-944.

The totality test also includes a review of any health conditions that may render an applicant unable to care for him- or herself. If your routine green card medical exam results in negative findings about a health condition, you may need to submit extra health or financial documentation to outweigh that negative factor.
15. I am applying for a green card through my employer. Does this rule apply to me?

Yes, this rule applies to employment-based green card applications. While a reasonable salary and employer-provided health insurance with minimal other “negative” public charge factors would likely suffice to prevent a public charge finding, employment-based adjustment applicants will still need to comply with all the information and documentation requirements of Form I-944. The new rule requires more detailed and personal information than most employment-based adjustment applicants have been accustomed to providing in connection with prior immigration processes.

16. My spouse and children are applying for adjustment of status with me. Are they subject to the new requirements?

Yes. Each person applying for adjustment of status, including spouses and children, will be required to submit their own Form I-944 and supporting documentation. Your children, however, will be reviewed in the context of your and/or your spouse’s financial support and status.

17. How will USCIS calculate the totality of the circumstances for this public charge analysis?

USCIS identifies certain factors as positive or negative in the totality analysis, discussed below. But it has not provided any quantitative method for calculating the totality of the circumstances to determine whether an applicant will be deemed inadmissible as a public charge. In general, the agency states that no one factor will control the determination in either a negative or positive direction. It is not yet clear how heavily USCIS will weigh any of the numerous factors in its totality analysis.

18. What are some positive and negative factors in the public charge totality test?

In general, positive factors include being of working age, being healthy, and earning an income or having access to resources sufficient to meet all financial obligations. Having the education and skills to earn that kind of income is also a positive factor.

One positive factor in the totality test is a household income of at least 125% of the Federal Poverty Guidelines (FPG). For 2020, 125% of the FPG for a household of one is $15,950; for a household size of four, it is $32,750.

Negative factors can include low income, poor credit, financial liabilities and obligations not outweighed by the household’s financial resources, lack of employability and having a medical condition that requires extensive treatment.

Certain factors are also identified in the public charge rule as “heavily weighted” positive or negative factors. For example, having an income or household resources exceeding 250% of the Federal Poverty Guidelines, or having private health insurance with no Affordable Care Act tax credit are considered heavily weighted positive factors. Having a medical condition likely to require extensive treatment may be a heavily weighted negative factor if the foreign national does not have health insurance and is unable to pay for related medical costs. But even these will not alone determine whether someone is deemed a public charge.
19. How will I know what documents I need to provide in support of my adjustment of status application?

Your Fragomen team will ask you to complete a questionnaire which gathers the public charge information requested by the government. Guidelines concerning supporting documentation are subject to change as USCIS begins to implement the public charge rule.

20. How will the new rule affect government processing times?

The new public charge rule adds a complex layer of analysis to adjustment of status applications. Employers and foreign nationals should expect adjustment of status processing times to increase as a result.

21. If I am found inadmissible as a “public charge,” will my green card application be denied?

In general, a public charge finding will result in a denial. Under certain circumstances, though, DHS has the discretion to override the public charge ground of inadmissibility provided that foreign national submits a bond of at least $8,100. It is not clear how DHS will exercise this discretion.

IV. Impact on Nonimmigrant Changes of Status and Extensions of Stay

22. Are nonimmigrants in the United States subject to the public charge ground of inadmissibility?

Nonimmigrants in the United States are not subject to the public charge ground of inadmissibility. However, the public charge rule imposes a new “public benefits condition” on nonimmigrants seeking to extend their stay or change their status from within the United States. This condition is much less impactful than the public charge totality test but does require some changes to the current Form I-129 and Form I-539 extensions and changes of status process.

23. What is the public benefits condition?

The public benefits condition requires nonimmigrants applying to extend their stay or change their status within the United States to demonstrate that they have not received one or more of the covered public benefits listed above for more than an aggregate of 12 months within 36 months of gaining their current nonimmigrant status. As with adjustment of status cases, if a foreign national received two benefits within one month, it is counted as the receipt of benefits for two consecutive months.

It is important to note, however, that USCIS will not consider any benefit received before February 24, 2020 for the public benefits condition, not even benefits that were previously considered under a public charge analysis (cash assistance for income maintenance and long-term institutionalization benefits).
24. If it takes 12 months of benefits to be ineligible under the public charge condition, and USCIS will not look at any benefit prior to February 24, 2020, why am I being asked about benefits now?

Starting February 24, 2020, nonimmigrants seeking extensions or changes of status will be asked about their use of the covered public benefits on Forms I-129 and I-539. They must report any receipt of the relevant benefits on or after February 24, 2020, regardless of the duration, even if it is below the 12-month threshold. Also, because multiple benefits received in one month will count as receipt for multiple months, a foreign national can reach the 12-month threshold in less than one year.

If a foreign national meets the 12-in-36-month threshold, their extension or change of status request will be denied. For Form I-129 nonimmigrant visa petitions, though, this does not necessarily mean that the underlying petition will be denied. Adjudication of the petition itself – seeking approval for a particular visa classification - is a separate determination.

25. Will USCIS consider whether an applicant for an extension of stay or change of status is likely to accept one of the covered public benefits in the future?

No. The public benefits condition does not include a forward-looking test. USCIS is only permitted to look backwards, from the date of adjudication to the date the foreign national’s current nonimmigrant status was obtained. And the government will only consider benefits received on or after February 24, 2020.

26. Are there any extra forms for the public benefits condition?

No, there are no additional forms for nonimmigrant cases. The public benefits condition questions are embedded in revised versions of Forms I-129 and I-539. A Form I-944, Declaration of Self Sufficiency is not required for these cases and will not be accepted.

27. Are applicants for an extension of stay or change of status subject to the totality of the circumstances test?

No. The public benefits condition inquiry is limited to whether the foreign national received one or more of the covered public benefits for an aggregate of 12 months within the 36-month period of gaining their nonimmigrant status (only if on or after February 24, 2020).

28. Why do Forms I-539 and I-129 ask if the applicant is currently certified to receive one of the covered public benefits if the public benefits condition does not involve a forward-looking analysis?

The question is phrased this way because the USCIS adjudicator’s review looks back from the date of final adjudication, not from the date the I-129 or I-539 is filed. USCIS is seeking information about benefits that may be received after the filing of an application. Upon adjudication, USCIS may ask for information about benefits received since the filing or could use government systems to review whether benefits have been received.

Where a foreign national has been certified to receive benefits, but has taken steps to disenroll from the benefits program, they should include evidence of their efforts to disenroll.
Fragomen is closely monitoring the public charge regulation and will provide updates as the government begins implementation. If you have questions about the impact of the public charge regulation on your case, please contact your designated Fragomen representative.

This FAQ is for informational purposes only. If you have any questions, please contact the immigration professional with whom you work at Fragomen.