

New Public Charge Rule Now In Effect After U.S. Supreme Court Overturns Nationwide Injunction

On October 15, 2019, the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) intended to implement a new rule on “public charge inadmissibility.” On October 11, 2019, multiple U.S. District Courts enjoined and restrained DHS and USCIS from implementing the new rule. However, on January 27, 2020, the U.S. Supreme Court overturned the injunction and is allowing the DHS and USCIS to proceed in implementing the new rule. We discuss the new rule and its impact below.

What the new Regulation Mean

The regulation changes how the DHS interprets and implements the public charge ground of inadmissibility. The *Immigration and Nationality Act* renders any foreign national who has become a public charge inadmissible and therefore:

1. ineligible for a non-immigrant visa,
2. ineligible for admission, and
3. ineligible for adjustment of status to that of a lawful permanent resident.

The new rule will require that individuals seeking to obtain immigrant (“green card”) or non-immigrant status in the US are self-sufficient and have not applied for and accepted certain taxpayer-funded public benefits. The rule makes non-immigrants ineligible for extension of stay and change of status, if they have received certain public benefits after obtaining non-immigrant status.

The regulation defines “public charge” and sets forth the basis for DHS to determine whether an individual is inadmissible to the US based on the likelihood of becoming a public charge.

How Public Charge Is Defined

DHS defines “public charge” to mean certain aliens who receives one or more designated public benefits for more than 12 months in total, within any 36-month period. Public benefits include both cash and noncash benefits. Benefits can include cash assistance for income maintenance, Supplemental Social Security (SSI), Temporary Assistance to Needy Families (TANF), Supplemental Nutritional Assistance Program (SNAP), most forms of Medicaid, Section 8 Housing Assistance, Section 8 Project-Based Rental Assistance, and subsidized public housing.

Only those public benefits specifically listed in the rule will be considered. Public benefits not listed in the rule are not considered in the public charge inadmissibility determination.

The regulation does not include as a public benefit: consideration of emergency medical assistance, disaster relief, and national school lunch programs, foster care and adoption, Head Start, or student and home mortgage loans. It also excludes from the definition any benefits received by those in active duty or in the reserves in the armed forces and public benefits received by the children and spouse of these service members.

DHS will only consider public benefits received directly by a foreign national for his or her own benefit, or where the individual is listed as the beneficiary. Benefits received by family members of the immigrant will not be considered as grounds for the immigrant's inadmissibility but would affect the family members if they apply for their own immigration benefits.

Determination of Public Charge

In making a determination of inadmissibility on public charge grounds, DHS will consider the totality of circumstances. Receipt of public benefits alone is not conclusive in making a determination of inadmissibility. An individual's age, health, family status, assets, resources, financial status, education, and skills are also taken under consideration. However, the current or prior use of public benefits is a heavily weighed factor.

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Impacted USCIS Forms

- I-129, Petition for a Non-immigrant Worker
- I-539/I-539A, Application to Extend/Change Non-immigrant Status
- I-485, Application to Register Permanent Residence or Adjust Status
- I-864, Affidavit of Support Under Section 213(A) of the INA
- I-864EZ, Affidavit of Support Under Section 213(A) of the Act
- I-944, Declaration of Self Sufficiency (I-485 Applicants only)

New Form I-944

According to the regulation, applicants for adjustment of status who are subject to the public charge ground of inadmissibility must include a Declaration of Self-Sufficiency (Form I-944) with their Application to Register Permanent Residence or Adjust Status (Form I-485) to demonstrate they are not likely to become a public charge. The Form I-944 only applies to adjustment applicants and not applicants for admission at a port of entry.

If a DHS Officer determines that an applicant is inadmissible on public charge grounds, they can direct the individual to file a Form I-945 Application for Public Charge Bond. The DHS Officer has discretion to require the applicant to pay a bond (up to \$8,100 annually), as a surety that the individual will not request public assistance after being granted admission or adjustment of status to permanent residency.

Applicability

The final rule stated that it was to apply only to applications submitted on or after October 15, 2019. Applications and petitions filed and pending with USCIS prior to the effective date will not be affected.

Following the District Court injunction on October 11, 2019 which delayed the effective date of the final rule, and in light of the U.S. Supreme Court's ruling overturning the injunction on January 27, 2020, we are monitoring USCIS instructions on when the public charge rule will take effect.

Who is Exempt?

Those who have enlisted in the U.S. Armed Forces, or serving in Active Duty or in the Ready Reserve component, as well as their spouse and children, are not subject to inadmissibility on receiving public benefits. Similarly, the children of U.S. Citizens whose lawful admission for permanent residence will result in automatically acquiring citizenship are exempt.

Ozisk PLLC Can Help

Ozisk PLLC attorneys can help you understand the new rule and how it might impact your case.