



DHS Public Charge Proposal: Green Card Applications Would Turn on Whether the Applicant is Likely to Use “One or More Public Benefit” at Any Time in the Future

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The public charge ground of inadmissibility in the Immigration and Nationality Act (INA) requires immigration officials to make forward-looking assessments about the likelihood that a non-U.S. national (alien) will become dependent on the government in the future. The [statute](#) renders an alien “inadmissible” if he or she is “likely at any time to become a public charge.” (Refugees, asylees, and some other groups of aliens are [exempt](#) from the public charge ground of inadmissibility.) As explained in a recent [CRS Report](#), under current executive branch practice, the provision has implications mainly for aliens who seek [lawful permanent resident](#) (LPR) or “green card” status by applying for [adjustment of status](#), if they are in the United States, or for an [immigrant visa](#) at a U.S. consulate abroad. The U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security (DHS) adjudicates adjustment of status applications; Department of State (DOS) consular officers adjudicate immigrant visa applications. Both types of applications can be denied if the applicant is found inadmissible on public charge grounds.

DHS has [proposed new regulations](#) that would define “public charge”—which the INA itself does not define—in a way that likely would render more adjustment of status applicants inadmissible under the forward-looking inquiry. Specifically, the proposed regulations would lower the level of public benefits that, if likely to be received by an applicant at any point in the future, would trigger the inadmissibility. Under current DHS public charge guidance, applicants typically are determined to be inadmissible only if they are found likely to become “primarily dependent” on welfare-type benefits in the future. Inadmissibility findings under this standard appear to be rare. DHS does not publish statistics on the

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denial of adjustment of status applications based on public charge grounds, but available DOS statistics on immigrant visas [issued](#) and [refused](#) under similar guidance show public charge denials in less than one percent of cases. Under the proposed regulations, however, applicants would be inadmissible if found likely to receive comparatively smaller amounts of a wider range of cash and federal non-cash benefits, including Medicaid and benefits received under the Supplemental Nutrition Assistance Program ([SNAP](#)).

In addition, the proposal would subject applicants for two types of temporary immigration benefits—[extension of nonimmigrant status](#) and [change of nonimmigrant status](#)—to public charge-type determinations. The proposed regulations would not bind DOS consular officers, but DHS has suggested that DOS would “[likely](#)” revise its guidance to consular officers to conform to the new regulations. (Under a [January 2018 revision](#) to the public charge guidance in the Foreign Affairs Manual, consular officers already consider non-cash benefits. In other respects, the guidance for consular officers still tracks the USCIS guidance.)

DHS published the proposed regulations in the *Federal Register* on October 10, 2018. The public comment period ended on December 10, 2018. DHS must now [review comments](#) and may revise the proposed regulations as a result of its review. Thereafter, DHS may publish a final rule in the *Federal Register* that could take effect [no earlier than](#) 60 days after publication or 60 days after Congress receives a report from DHS about the proposal under the [Congressional Review Act](#), whichever is later.

Overview of the DHS Proposal

The proposed regulations would change the DHS definition of “public charge” to mean a person who “receives one or more public benefit.” By contrast, the [current DHS guidance](#) in place since 1999 defines “public charge” to mean a person who is “primarily dependent” on public cash assistance for income maintenance (i.e., welfare-type assistance) or government-funded institutionalization for long-term care. Thus, under the current guidance, the USCIS officer must determine whether an applicant for adjustment of status is likely to become “primarily dependent” on public cash assistance or government-funded long-term care in the future. Under the proposed regulations, however, the officer would determine whether the applicant is likely to receive “one or more public benefit” in the future. Both determinations are prospective—they concern what benefits the applicant is likely to use in the future—but the proposed regulations would abrogate the threshold of “primary dependence” upon welfare or institutionalization to make the receipt of any “public benefit” (as defined in the proposal) the touchstone of the forward-looking assessment.

The proposed regulations would define “public benefit,” in turn, to mean certain, enumerated types of benefits—both cash and non-cash—if they are received above a specified dollar value or for more than a specified period. This complex definition of “public benefit,” summarized in a [USCIS FAQ](#), encompasses two important groups of benefits: (1) certain cash or “monetizable” non-cash benefits (such as SNAP benefits or federal housing assistance), if received in an amount exceeding about \$1,820 in one year (the exact amount depends on the applicable Federal Poverty Guidelines); and (2) Medicaid and other “non-monetizable” benefits if received for more than one year in a three-year period. Thus, the proposed regulations would change the prospective USCIS determination from one focused on the likelihood of an alien becoming primarily dependent on welfare-type benefits to one focused on the likelihood of an alien receiving more than about \$1,820 in SNAP benefits in one year (among other cash or monetizable benefits) or more than one year of Medicaid coverage (among other non-monetizable benefits).

As for its potential impacts, the proposal acknowledges that it would “[likely increase... the number of denials for adjustment of status applicants based on public charge inadmissibility determinations](#)” but states that DHS cannot estimate the increase “[with any degree of certainty](#).” Statistics about public benefits use [cited in the proposal](#) offer additional perspective. According to those statistics, 3.7% of all foreign-born persons (including both aliens and naturalized U.S. citizens) and 1.8% of noncitizens in the United States receive welfare-type assistance, while just over 20% of people in those groups receive the

forms of non-cash benefits that would be subject to consideration under the proposal (for native-born U.S. citizens, the figures are similar—3.4% receive welfare-type assistance and 20.4% receive non-cash benefits). Accordingly, the proposed regulations would transform the public charge inadmissibility assessment from a prediction about whether an applicant for adjustment of status will become primarily dependent on a relatively rare benefit into a prediction about whether the applicant will receive an appreciable amount of benefits that are more common.

Factor-by-Factor Framework for Assessing the Likelihood of Future Benefits Use

Aside from changing *what* USCIS officers must determine about an alien’s likely future benefits use, the proposed DHS regulations would also establish a new framework for *how* USCIS officers should make the forward-looking determination. The INA lists **five factors** that officials must “at a minimum” consider when making public charge inadmissibility determinations: age; health; family status; education and skills; and assets, resources, and financial status. Together these factors make up what is known as the “totality of the circumstances” test for public charge determinations. The proposed regulations set out **considerations** to frame the officer’s analysis of each of the statutory factors. For example, under “family status,” the proposed regulations state that “DHS will consider the alien’s household size... and whether the alien’s household size makes the alien more or less likely to become a public charge.” Under the “financial status” factor, the officer would be instructed to consider, among other issues, whether the alien’s household income “is at least 125 percent of the most recent Federal Poverty Guidelines.” The proposed regulations would also instruct officials to consider one additional factor not specified in the INA: the alien’s “prospective immigration status and expected period of admission.” Applicants for adjustment of status would have to fill out a new form called a “Declaration of Self-Sufficiency” to supply information relevant to each factor so as to “**facilitate USCIS’ public charge inadmissibility determination.**” (Aliens applying to extend or change a nonimmigrant status would have to fill out the form at the discretion of USCIS.)

For most factors, the proposed regulations go on to identify some types of evidence that officers should consider. Under “financial status,” for example, USCIS’s assessment would include the alien’s “credit history and credit score.” Under “health,” the assessment would include the report of a medical examination “by a civil surgeon or panel physician where such examination is required.”

The officer’s assessment of each factor would **lead to a determination** that the factor is “positive” or “negative” for the applicant. Some positive or negative determinations, however, would be “**heavily weighted**”:

Heavily weighted negative factors

- Unemployment: the applicant neither studies nor works despite authorization to do so, and lacks a “reasonable prospect of future employment”
- Public Benefits: the applicant currently receives or is approved to receive a “public benefit,” or has received a “public benefit” within the previous three years
- Inability to cover medical costs: the applicant “is likely to require extensive medical treatment” that she likely cannot afford and cannot cover with private insurance

Heavily weighted positive factors

- Household assets of “at least 250 percent of the Federal Poverty Guidelines”
- Annual income of “at least 250 percent of the Federal Poverty Guidelines” for the household

Officers would incorporate their positive and negative determinations into an overall, balancing-style assessment of the alien’s likelihood to use a public benefit in the future. If the **negatives outweigh the positives**, the alien would be deemed inadmissible. **Two case studies** in the proposal indicate that the

balancing analysis would not be mathematical. USCIS officers would reach determinations for each factor but proceed to make an overall determination based on the “facts and circumstances in the totality,” without tallying the positives and negatives into a precise score. Both case studies also suggest an emphasis upon whether the applicant is likely to require future medical treatment that he or she cannot cover or afford.

Consideration of the Applicant’s Past or Current Receipt of Some Federal Non-Cash Benefits

Past or current receipt of the [following federal non-cash benefits](#) that are not subject to USCIS consideration under the current guidance would become subject to consideration under the proposed regulations if the applicable time or value threshold is surpassed:

- Medicaid (with some exceptions, such as when received for emergency medical conditions)
- SNAP
- Some federal housing or rental assistance programs
- Medicare Part D prescription drug coverage

An alien’s receipt of any of these benefits, like receipt of cash benefits for income maintenance or government-funded long term care, over the applicable threshold within the prior three years would constitute a “heavily weighed negative factor,” as would current receipt of or approval for such benefits. But the expanded benefit list would only apply [prospectively](#). For benefit types that are not subject to consideration under the current guidance, receipt of benefits under the programs listed above would only factor into a public charge determination if the benefits are received or applied for at least 60 days after the publication of a finalized version of the new regulations.

This aspect of the proposed regulations—the proposal to consider past or current receipt of some federal non-cash benefits—has drawn significant [media attention](#). However, under the INA, aliens who are subject to USCIS public charge determinations (essentially, aliens who do not yet have LPR status and who do not fall into any of the exemptions to the public charge inadmissibility ground) [generally do not qualify](#) for the non-cash benefits that would become subject to consideration under the proposed regulations. Most overlap between benefits eligibility, on the one hand, and benefit use that would be considered under the new rules, on the other hand, would fall within three areas: (1) state welfare or general assistance (which is already subject to consideration under the current guidance); (2) Medicaid for “[lawfully residing](#)” pregnant women and children under 21, under [the state option](#) to extend coverage to such individuals; and (3) cash and non-cash benefits for aliens who are [paroled into the United States for more than one year](#).

Thus, past or current use of non-cash benefits seems unlikely to alter many USCIS public charge determinations under the new rules, except in some cases involving women or children covered by the Medicaid state option, or parolees. Some [commentary](#) has warned of a risk of over-deterrence: that is, the risk that the new regulations, given their complexity, may deter benefit use that would not be relevant to public charge determinations (such as benefits use by refugees, for example, or use of non-cash benefits like the [Special Supplemental Nutrition Program for Women, Infants, and Children](#) (WIC) that would not become subject to consideration under the proposed regulations). But the major impact of the DHS proposal on the outcomes of adjustment of status cases would probably result from its transformation of the prospective inquiry under the public charge ground of inadmissibility—from a determination centered on an alien’s likelihood of becoming primarily dependent on welfare to a determination of an alien’s likelihood of receiving “one or more public benefit” in the future, including Medicaid and SNAP—rather than the changes it would make to consideration of prior or current benefits use.

Considerations for Congress

Immigration adjudications often turn on broad, forward-looking assessments. Applications for [temporary visitor visas](#), for example—of which DOS adjudicated about [nine million in FY 2017](#)—typically come down to a judgment about the applicant’s plans. For instance, does the applicant intend to visit the United States for only a brief period of business or pleasure, in which case he may qualify for a tourist visa? Or does he intend to abandon his residence in a foreign country to remain in the United States indefinitely?

But in the context of immigrant visa and adjustment of status adjudications, where admission for LPR status is at stake, such prospective determinations have traditionally played a smaller role. The primary issues that such adjudications pose are whether the applicant has a [legal basis to immigrate](#) (such as a [qualifying family or employment relationship](#)) and whether he is barred by any [grounds of inadmissibility](#) (such as the provisions rendering aliens inadmissible if they have been convicted of certain crimes). And while some grounds of inadmissibility require forward-looking assessments—such as those barring aliens who “seek to enter the United States to engage” in activity that violates espionage laws or to engage in other unlawful activity—their narrow focus constrains the scope of the immigration official’s inquiry. The DHS public charge proposal, by changing the public charge inadmissibility inquiry to focus upon the likelihood that an applicant will at any point in the future use a relatively low level of federal benefits (compared to the level relevant under current guidance), would bring a prospective assessment to bear on adjustment of status applications that is much broader than exists under current policy.

If Congress disapproves of the DHS proposal, it has several legislative options. It could enact a joint resolution disapproving of the proposed regulations under the [Congressional Review Act](#), if and when the rulemaking process reaches the appropriate juncture. Alternatively, Congress could codify the existing DHS guidance, enact some other definition of “public charge” narrower than the DHS proposal, or change the statute to require an assessment of an applicant’s current self-sufficiency instead a predictive inquiry. Congress could also establish in more detail the factors that officials can and cannot consider when making the prospective assessment (e.g., specify that officials should not consider past or current use of certain types of benefits, such as Medicaid or other non-cash benefits). Or, as [one bill](#) proposes, Congress could preserve the status quo under the current guidance by prohibiting DHS from using funds to implement the proposed regulations.

On the other hand, if Congress agrees with the DHS proposal, it could codify it to obviate legal arguments that the proposal lacks adequate justification or unreasonably interprets the inadmissibility statute. If Congress finds the DHS proposal too permissive, it could codify a stricter definition of “public charge” or specify that officials making public charge determinations must consider an even broader list of public benefits received by aliens, such as non-cash benefits received from state and local governments.