



DHS Final Rule on Public Charge: Overview and Considerations for Congress

Ben Harrington

Legislative Attorney

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On August 14, 2019, the Department of Homeland Security (DHS) published a [final rule](#) that contains new regulations interpreting the public charge ground of inadmissibility in the Immigration and Nationality Act (INA). The rule would likely bar more non-U.S. nationals (aliens) from becoming [lawful permanent residents](#) (LPRs) due to their potential future use of public benefits. Specifically, the rule would render aliens inadmissible to the United States—and thus ineligible to obtain LPR status—if they are “more likely than not at any time in the future to receive one or more public benefits . . . for more than 12 months within any 36-month period.” Some non-cash federal benefits, including most forms of Medicaid and benefits received under the Supplemental Nutrition Assistance Program ([SNAP](#)), would count as “public benefits” under the final rule, in contrast to pre-existing law.

The rule is to take effect on October 15, 2019—60 days from the publication date—barring legislative or judicial action to the contrary. At least two lawsuits [have been filed](#) challenging the legality of the public charge rule and seeking a preliminary injunction to prevent DHS from enforcing it during litigation.

This Legal Sidebar addresses legal aspects of the new public charge rule—specifically, how it would change current law and, to a lesser extent, the arguments concerning the rule’s legality. The Sidebar does not focus on the policy arguments for and against the rule.

Background on Public Charge and Pre-Existing DHS Guidance

The public charge ground of inadmissibility requires immigration officials to make forward-looking assessments about the likelihood that an alien, if admitted into the United States, will become dependent on public assistance in the future. The [INA](#) renders an alien “inadmissible” if he or she is “likely at any

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time to become a public charge.” (Refugees, asylees, and some other groups of aliens are [exempt](#) from the public charge ground of inadmissibility.) As a [CRS Report](#) explains, under longstanding executive branch practice, the provision has implications mainly for aliens who seek LPR status either by applying for [adjustment of status](#), if they are already in the United States, or by applying for an [immigrant visa](#) at a U.S. consulate, if they are abroad. The U.S. Citizenship and Immigration Services (USCIS) within 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.

The INA does not define what it means to be a “public charge.” Under the [DHS guidance](#) currently in effect, which has been in place since 1999 but would be superseded if the final rule goes into effect, applicants are inadmissible on public charge grounds only if they are likely to become “primarily dependent” on one of two types of public benefits: (1) public cash assistance for income maintenance (i.e., cash benefits received through state general assistance programs or federal programs such as the Supplemental Security Income (SSI) program), or (2) government-funded institutionalization for long-term care. DHS officials do not consider past, current, or likely future receipt of any other benefits, such as Medicaid or SNAP, when making this determination. Inadmissibility findings under this guidance appear to be rare. DHS does not publish statistics on the denial of adjustment of status applications based on public charge grounds, but available DOS statistics on immigrant visas [issued](#) and [refused](#) in fiscal year 2017, during a period when DOS closely followed the DHS guidance, show public charge denials occurred in less than one percent of cases.

Since 2018, DOS public charge guidance to consular officers has deviated in some respects from the DHS guidance. DOS’s [Foreign Affairs Manual](#) (FAM), which provides guidance to consular officers abroad, follows the longstanding DHS guidance in establishing that aliens are inadmissible on public charge grounds only if they are likely to become primarily dependent on public cash assistance or government-funded institutionalization for long-term care. In [January 2018](#), however, DOS revised the FAM to instruct consular officers to consider an alien’s “[p]ast or current receipt of public assistance of any type”—including all types of state and federal non-cash benefits—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. In other words, consular officers (unlike DHS officers) take into account an alien’s past use of non-cash benefits when forecasting the likelihood that the alien will, at some point in the future, come to depend on public cash assistance or government-funded long-term care. Some [reporting](#) indicates that this consideration of prior use of non-cash benefits, along with other aspects of the January 2018 FAM changes, has led to a marked increase in the refusal of immigrant visa applications on public charge grounds.

Overview of New Regulations

The new regulations would change DHS’s definition of “public charge” to render aliens inadmissible if they are “[more likely than not at any time in the future to receive one or more public benefits . . . for more than 12 months within any 36-month period.](#)” Public benefits, as [defined](#) in the regulations, would include not only public cash assistance and government-funded institutionalization for long-term care, but also the following federal non-cash benefits:

- Medicaid (with some exceptions, such as when received for emergency medical conditions or when received by pregnant women or people under age 21)
 - SNAP
 - Some federal housing or rental assistance programs
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No benefits received by certain groups, such as members of the U.S. Armed Forces and their spouses and children, would count as “public benefits” under the regulations.

Thus, under the new regulations, instead of determining whether an alien is likely to become “primarily dependent” on public cash assistance or government-funded institutionalization for long-term care, USCIS officers would have to determine the likelihood of an alien receiving a benefit from this expanded list for more than a year in the aggregate during any future three-year period.

In addition, the new regulations would subject applicants for two types of temporary immigration benefits—[extension of nonimmigrant status](#) and [change of nonimmigrant status](#)—to public charge-type determinations. Although the regulations are directed at DHS officials, DHS has suggested that DOS will “likely” revise its guidance to consular officers and that DHS is “[working with DOS to ensure that the \[FAM\] appropriately reflects](#)” the new regulations. Thus, the new DHS regulations, if they take effect, may ultimately impact visa applications as well.

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

Aside from changing *what* immigration officers must determine about an alien’s likely future benefits use, the new regulations would also establish a new framework for *how* 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. The statute also allows officials to consider an [affidavit of support](#) submitted on behalf of the alien, which may indicate that the alien can count on financial support from a relative. Together these factors make up what is known as the “totality of the circumstances” test for public charge determinations.

The new DHS regulations set out [considerations](#) to frame the officer’s analysis of each of the statutory factors. For example, under “family status,” the regulations state that “DHS will consider the alien’s household size... and whether the alien’s household size makes the alien more likely than not 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 Guideline.” The new 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. (Aliens applying to extend or change a nonimmigrant status would have to answer [new questions](#) about public benefits use on their application forms but would not submit the Declaration of Self-Sufficiency.)

For most factors, the new 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 has received or has been approved to receive a “public benefit” for more than 12 of the previous 36 months
- 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
- A prior immigration court determination that the alien is a public charge

Heavily weighted positive factors

- Household income or assets of “at least 250 percent of the Federal Poverty Guidelines”
- Individual annual income of “at least 250 percent of the Federal Poverty Guidelines” for the alien’s household size
- Private health insurance (not including subsidized insurance under the Patient Protection and Affordable Care Act)

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.

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

The aspect of the new regulations that would subject some non-cash benefits to public charge consideration would only apply [prospectively](#). Thus, even if the regulations go into effect, an alien’s receipt of relevant non-cash benefits (SNAP, federal housing assistance, and Medicaid, with exceptions) before the effective date would not factor into a public charge determination. Going forward, receipt of or approval for any relevant non-cash benefit for more than 12 of the prior 36 months would constitute a “heavily weighed negative factor.” USCIS would count months separately for each benefit received, [“such that, for instance, receipt of two benefits in one month counts as two months.”](#) If the alien has received the non-cash benefits for a period under the 12-month threshold, USCIS would still consider the benefits use but not count it as a “heavily weighted negative factor.” (The same rules would apply to the types of benefits subject to consideration under the pre-existing guidance—public cash assistance and government-funded institutionalization for long-term care—except that receipt of or approval for these types of benefits before the effective date of the regulations would count as a negative but not heavily-weighted factor.)

Eligibility rules for the relevant non-cash federal benefits also suggest that an alien’s past use of these benefits may be less likely to impact public charge determinations under the new regulations than immigration officers’ projections of the likelihood that the alien will use the benefits in the *future*. Under the INA, aliens who are subject to 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, such as the exemptions for asylees and refugees) [generally do not qualify](#) for the relevant non-cash federal benefits. Yet, even when an alien applying for adjustment of status has not received Medicaid, SNAP, or federal housing assistance in the past, the USCIS officer would still have to determine, under the new regulations, whether it is more likely than not that the alien will receive these benefits for more than one year in any future three-year period.

The scope of this prospective determination could result in more inadmissibility findings than under the pre-existing guidance. As DHS [asserted](#) when it initially proposed the new regulations in October 2018, aliens and citizens alike are far more likely to use the relevant non-cash benefits than the public cash assistance that is the focus of public charge determinations under the pre-existing guidance. According to statistics cited in the proposal, 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 public cash assistance. In contrast, just over 20% of people in those groups receive the forms of non-cash benefits that would become subject to consideration under the new regulations (for native-born U.S. citizens, the figures are similar—3.4% receive public cash assistance and 20.4% receive non-cash benefits). Accordingly, the new 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 much more common.

In a different vein, some [commentary](#) has suggested that the new regulations may deter use of benefits for which non-LPR aliens do qualify and which 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 new regulations).

Law suits

At least [two lawsuits](#) have been filed in federal court challenging the legality of the new regulations. The first lawsuit was filed by two California counties in the U.S. District Court for the Northern District of California; the second was filed by a group of thirteen states in the U.S. District Court for the Eastern District of Washington. The lawsuits make various arguments against the regulations, including the following:

- That the reduced threshold of benefits use sufficient to render an alien inadmissible under the new regulations—more than 12 months’ use of any relevant public benefit during any three-year period—violates the plain meaning of the term “public charge” in the INA, which plaintiffs argue connotes a person “[primarily](#)” dependent on public benefits.
- That the regulations would frustrate family unification, in violation of the INA’s “broader system” of prioritizing family unification.
- That the regulations are “arbitrary, capricious, and an abuse of discretion” under the [Administrative Procedure Act](#) (APA) because, among other reasons, DHS did not provide an adequate explanation for abandoning its pre-existing public charge guidance and because various aspects of the regulations, such as the 12-month threshold, are irrational.
- That DHS lacks authority to apply the public charge ground of inadmissibility to applicants for extension or change of nonimmigrant status, as the new regulations contemplate.
- That the new regulations violate the Equal Protection component of the Fifth Amendment because they “[will cause Latinos and other people of color to be disproportionately excluded from the United States under the INA’s public charge provision.](#)”

The complaints request a preliminary injunction that, if granted by either district court on a [nationwide](#) basis, could prevent the rule from taking effect on October 15, 2019.

At this juncture, it is difficult to assess the likely outcome of these lawsuits. There is not a significant body of federal case law governing the scope of DHS’s authority to define “public charge” by regulation. In some recent cases, however, plaintiffs have obtained preliminary injunctions against other immigration policies pursued by the Trump Administration, including the [decision to terminate](#) the Deferred Action for Childhood Arrivals (DACA) initiative and the recent [asylum bar](#) for third-country transit, on the ground that the policies were arbitrary and capricious under the APA.

Considerations for Congress

Immigration adjudications often turn on broad, forward-looking assessments. Applications for [temporary visitor visas](#), for example—of which DOS adjudicated about [ten million](#) in FY2018—typically come down to a judgment about the applicant’s plans. If the applicant intends to visit the United States for a brief period of business or pleasure, he may qualify for a tourist visa. If he intends to abandon his residence in a foreign country to remain in the United States indefinitely, then he does not qualify.

But in the context of immigrant visa and adjustment of status adjudications, where 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 falls within 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 new DHS regulations would bring a prospective assessment to bear on adjustment of status applications that is much broader than exists under current policy, because the regulations would change the public charge inquiry to focus upon a lower threshold of likely future benefits use.

If Congress disapproves of the new regulations, it has several legislative options. It could enact a joint resolution disapproving of the regulations under the [Congressional Review Act](#). Alternatively, Congress could codify the pre-existing DHS guidance, enact some other definition of “public charge” narrower than that contained in the regulations, 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 two bills [introduced](#) in the [House](#) propose, Congress could preserve the status quo under the current guidance by prohibiting DHS from using funds to implement the new regulations.

On the other hand, if Congress agrees with the new regulations, it could codify them to obviate legal arguments that the regulations lack adequate justification or unreasonably interpret the inadmissibility statute. If Congress finds the DHS regulations 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.

Author Contact Information

Ben Harrington
Legislative Attorney
