

What is 'public charge' and when does it apply?

“Public charge” is a term used in immigration law to refer to a person who is likely to become dependent on the government for financial and material support. A person who the government determines is likely to become a “public charge” may be denied admission to the U.S. or Lawful Permanent Resident status.

This issue most often arises for people applying for admission through a family petition, and does not apply to individuals adjusting as refugees, asylees, Special Immigrant Juveniles, U and T visa beneficiaries, and those who are self-petitioning through the Violence Against Women Act.

Since 1999, the government has defined a public charge as someone who is likely to become “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalized for long-term care at government expense.”

Under current policy, this is limited only to those likely to rely on cash assistance programs such as Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or any similar state cash assistance programs as well as those likely to rely on Medicaid for long-term institutional care. Receipt of such benefits is not fatal to an application, but rather is a factor to be considered in the totality of the circumstances.

Procedure

In January 2017, a draft Executive Order was leaked to the public that would have made significant changes to public charge determinations that would be deeply harmful to our communities. Although the order was never signed, the U.S. Department of Homeland Security announced on Sept. 22, 2018, that it will publish proposed regulations that follow the intent of the order.

These proposed regulations will go through a 60-day public comment period before being finalized. Once finalized, we expect that implementation will be delayed due to lawsuits arising from violations of the Administrative Procedures Act and other statutory and constitutional violations.

Definitions

The proposed regulations would expand the definition of “public charge” to include those individuals who receive, or are likely at any time to receive, non-cash benefits such as:

- Where the value of benefit received over a 12-month period exceeds 15% of the federal poverty level for an individual (\$1,821 for 2018):
 - Supplemental Nutritional Assistance Program (SNAP);
 - Section 8 Housing Assistance;
 - Supplemental Security Income (SSI);
 - Temporary Assistance for Needy Families (TANF); and
 - Other federal, state, or local cash assistance programs for income maintenance.
- Certain benefits received for an aggregate 12 months during a 36-month period:
 - Non-Emergency Medicaid;
 - Subsidies under Medicare Part D;

- Subsidized housing;
- Any benefit for institutionalization for long-term care at government expense.

The proposed regulations exclude consideration of any benefits received within 60 days of the publication of the final rule. However, the proposed rule requires the government to look at the totality of the circumstances to determine whether an individual is likely to become a public charge in the future. Past receipt of benefits could be included as part of that determination.

Public charge determinations

The proposed regulations would make significant changes in the way that public charge determinations are made. Perhaps most significant is the weight given to Affidavits of Support (Form I-864), which is usually filed by the sponsor of a family petition. With the Affidavit of Support, the sponsor is proving that they can support the incoming family member at 125% of the federal poverty line or more.

Traditionally, a properly filed Affidavit has been sufficient for the government to find that a person will not be a public charge. However, under the proposed regulations, an Affidavit of Support is only one of many factors to be considered in a “totality of the circumstances.” The proposed regulations reduce reliance on the Affidavit so much that the government would only consider income of at least 250% of the federal poverty line to be a heavily weighted positive factor.

The proposed regulations also set minimum factors to be considered, including whether the individual is of employable age, their health, family status, whether they have a high school diploma, and their ability to speak English.

Risk of removal

Although earlier drafts of the proposed regulations would have made it possible to deport existing green card holders if they can be deemed to be a “public charge” within 5 years of being granted permanent residency, the draft issued on Sept. 22, 2018, does not include that provision.

However, new rules adopted by U.S. Citizenship and Immigration Services (USCIS) in June 2018 require that anyone who is deemed inadmissible or deportable be automatically issued a Notice to Appear in immigration court. That means someone who is denied a green card on the basis of “public charge” is almost certain to be placed in removal proceedings.

An individual with a green card who has been outside of the United States for at least 6 months is considered to be seeking admission when they try to re-enter the country and could be denied entry based on being a public charge.

Public charge determinations do not apply when an individual is applying for citizenship or for renewal of a green card.

Non-immigrant

Applicants for most non-immigrant statuses must also prove that they are not likely to become public charges while in the United States. The administration proposes to apply the above criteria not only to those who are applying for a non-immigrant visa, but also to those individuals seeking to extend or change their non-immigrant classification.

Note: This overview was written by Sarang Sekhavat, federal policy director at MIRA. It was last updated on Sept. 26, 2018.