



PUBLIC CHARGE

UPDATE: On Monday, January 27, 2020, the U.S. Supreme Court lifted a nationwide injunction that had blocked the federal government from implementing the revised rules on public charge that the Department of Homeland Security (DHS) published in August 2019. As a result, the new rules were implemented beginning February 24, 2020. However, on July 29, 2020, in a case brought by New York State, NYC, other states and non-profits, the U.S. District Court for the Southern District of NY ruled that as long as there is a declared national health emergency related to COVID-19 the new public charge rule may not go into effect. However, on August 12th, 2020, a judge on the Second Circuit Court of Appeals narrowed the district court's order by indicating that the injunction will only apply for states in the 2nd circuit, that is, New York, Connecticut and Vermont. Thus, for now, the new public charge rule has been blocked from going into effect in these three states. Nevertheless, it remains important that immigrants seek legal counsel before taking any action, see below, *Where to Go for Help*.

For more information on this temporary injunction visit: <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule>.

Since the Department of Homeland Security (DHS) published new regulations on August 14, 2019 regarding who is likely to become a public charge there has been a surge of news articles and web pages discussing the regulations and the impact on immigrants. Some of the news and commentary is confusing, some of it is misleading, and some of it is simply wrong. It is important amid the confusion that immigrants, and the providers who serve them, get the facts straight before taking any action regarding an individual's use of public benefits.

This Q&A will help you learn what public charge means, how it is changing, what the changes mean, who it impacts, and resources for help.

This document contains general information for educational purposes only; it is not legal advice. Immigrants should consult with an experienced immigration attorney with questions or concerns or need representation.

WHAT IS PUBLIC CHARGE?

The "public charge" inadmissibility test was established by the U.S. Congress in 1883 and allows the U.S. government to deny an immigrant a green card, an extension of a visa or admission into the U.S. (Note: there are different public charge rules that govern applications processed at consular offices abroad.) When deciding whether to grant an applicant a green card or an extension of a visa, an immigration officer must determine whether the individual is likely to become a public charge, that is, primarily dependent on the government for support. DHS makes the determination based on the individual's 'totality of circumstances,' which includes the individual's age, health, family status, financial status, education and skills, as well as family members who may support them. Thus, no one factor is used to determine whether someone can be deemed likely to become a public charge.

It is important to note that the concept of public charge is not defined in statute. Since 1999 the INS (the former agency overseeing immigration matters) adopted the guiding principle that public charge is someone "primarily dependent on the government for subsistence," as demonstrated by either using federal or state public cash assistance or institutionalization for long-term care at government expense.



HOW IS THE PUBLIC CHARGE DETERMINATION CHANGING?

On August 14, 2019, the United States Citizenship and Immigration Services (USCIS), a division of DHS, published new rules which expand the current definition of public charge, potentially impacting thousands of immigrants who wish to obtain lawful permanent residency in the U.S. (a green card) or to extend their visa.

The new rules expand the list of benefits that USCIS can consider when determining whether someone is likely to become a public charge, see list below. In addition, the rules define someone who is likely to become a public charge as a person who receives any of a set list of public benefits for more than 12 months within any 36-month period. Each benefit used counts toward the 12-month calculation. For example, if an individual uses two benefits at the same time for a one-month period, it will count as two months' use of benefits. And the new rules identify characteristics it would deem as positive factors that would reduce the likelihood of becoming a public charge and negative factors that would increase the likelihood of becoming a public charge when reviewing the individual's totality of circumstances. For example, officials would consider a household with an income of at least 250% FPL as a heavily weighted positive factor, and receipt of public benefits within the previous 36 months as a heavily weighted negative factor. Effectively this would make it harder for lower income individuals and families to pass the public charge determination.

For a brief summary of the USCIS explanation of the new public charge rules visit:
<https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility>.

To view the new rule visit: <https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds>.

WHEN DOES THE NEW RULE GO INTO EFFECT?

The new rule goes into effect February 24, 2020. Under the new rule, benefits previously excluded from the public charge determination will only be considered if the applicant received them on or after February 24, 2020.

Note: Under the new rules, benefits previously excluded from the public charge determination will only be considered if the applicant received them after the date of implementation.

WHICH PUBLIC BENEFITS WILL BE INCLUDED IN THE NEW PUBLIC CHARGE DETERMINATION?

Prior to the publication of the new rules, public benefits used in determining public charge included SSI, TANF and state general assistance programs, as well as long-term institutionalization paid for by the government. Additional benefits under the new rule include non-emergency federally funded Medicaid, the Supplemental Nutrition Program (SNAP), Section 8 housing assistance, public housing, and state and local cash assistance.

WHICH PUBLIC BENEFITS WILL BE EXCLUDED FROM THE NEW PUBLIC CHARGE DETERMINATION?

Benefits **excluded** from the public charge determination include:

- Child Health Plus
- Medicare Part D Extra Help
- Qualified Health Plans on the Marketplace*
- Essential Plan in NYS
- Disaster relief
- WIC
- National school lunch programs
- Foster care and adoption



- Student and mortgage loans
- Energy assistance (HEAP)
- Food pantries or soup kitchens
- Homeless shelters, and
- Head Start, among others

*Receipt of the premium tax credit is also an excluded benefit in the listing of excluded benefits on the NYS of Health Marketplace. However, while having private health insurance is a positive factor in the public charge determination, receipt of the premium tax credit will eliminate any advantage of having private health insurance.

In addition, DHS will not consider Medicaid benefits received by children under the age of 21 or pregnant women or when used for the treatment of an emergency medical condition, state-funded Medicaid, or for services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act.

WHICH IMMIGRANTS ARE IMPACTED BY PUBLIC CHARGE?

The public charge inadmissibility test DOES NOT apply to all immigrants, many legally residing immigrants are specifically exempted from the public charge determination, see below. The consideration of public charge only applies to those immigrants who are not exempted and for those who are in the U.S. applying for a green card or requesting a visa extension to stay in the U.S. or to individuals who are applying to come to the U.S. from abroad.

In addition, DHS will only consider public benefits received directly by the applicant for the applicant themselves; receipt by other family members does not count against the applicant unless those family members are also applying for a green card.

WHICH IMMIGRANTS ARE EXEMPTED FROM THE PUBLIC CHARGE DETERMINATION?

The following individuals are exempt from having the public charge determination applied to them:

- Refugees
- Asylees
- Afghan and Iraqi nationals with special immigrant visas
- T visa holders
- U visas for certain crime victims
- Individuals applying for or granted status under the Violence Against Women Act (VAWA)
- Special immigrant juveniles
- Certain people paroled into the U.S.
- Those to whom DHS has granted a waiver of public charge inadmissibility
- Individuals who are enlisted in the U.S. armed forces or who are serving in active duty or in any of the Ready Reserve components of the U.S. armed forces. In addition, DHS will not consider the receipt of public benefits by the spouse and children of such service members.
- Current green card holders who are seeking U.S. citizenship.
 - That is, if a green card holder is in receipt of any public benefit and is seeking to become a citizen, receipt of such benefit will not prevent such individual from naturalizing, unless those benefits were received fraudulently.
 - However, green card holders who leave the country for more than six months and who seek to return to the U.S. **may** be subject to the public charge test. Green card holders should speak with an immigration attorney before leaving the country for an extended period.



Note: Many (although not all) of the immigrants who are subject to public charge are not eligible for the benefits that count under the new rule. Indeed, many of the immigrants who qualify for the benefit programs included in the new public charge regulations are the very immigrants who are exempt from the new public charge rule. For example, lawful permanent residents may qualify for the listed benefits, but they are exempt from the public charge rule, unless leaving the country for an extended period, as explained above. Likewise, refugees, asylees, and others may qualify for these benefits but are exempt from the new public charge rule. Therefore, it is important for individuals to confer with reputable immigration attorneys who can advise them before taking any steps to disenroll from a program or when enrolling for the first time to determine whether they are exempted from the new public charge rules.

HOW IS THE CHANGE AFFECTING THE IMMIGRANT COMMUNITY?

By expanding the definition of public charge, the current administration is creating uncertainty, confusion and fear. This leads to a chilling effect whereby individuals afraid of changes regarding public charge determinations may choose not to obtain needed benefits out of concern that receipt could jeopardize their immigration status, their ability to stay in this country, or result in separation from their families. Indeed, some reports suggest that immigrants disenrolled from benefit programs even before the rule was published, out of fear for their and their families' futures.

WHERE TO GO FOR HELP?

It is important amid the confusion, conflicting and misleading information that people get the facts straight before taking any action regarding their use of public benefits, such as disenrolling from a public benefit program or not enrolling for a benefit when entitled, or when leaving the country. Providers should refer individuals to an immigration expert to consult before taking any action. Helpful resources:

- New York State Office for New Americans at 800-566-7636 for free legal consultation on public charge and referrals to immigration legal services providers as needed.
- ActionNYC at 800-354-0365; <https://www1.nyc.gov/site/immigrants/help/legal-services/actionnyc.page>.
- National Immigration Legal Services Directory : <https://www.immigrationadvocates.org/nonprofit/legaldirectory/search?state=NY>.
- The Immigrant Defense Project at 212-725-6422 is a lawyer referral line, and has published resources for individuals, families and providers. Visit: <https://www.immigrantdefenseproject.org>.
- Protecting Immigrant Families is a campaign dedicated to providing materials on public charge. Visit <https://protectingimmigrantfamilies.org/know-your-rights> for more information.
- New York Immigration Coalition's fact sheet on public charge and public benefits: <https://protectingimmigrantfamilies.org/wp-content/uploads/2019/01/I-ARC-Practice-Advisory-Public-Charge.pdf>.
- The Legal Society has published a screening tool on public charge. Visit <https://static1.squarespace.com/static/59578aade110eba6434f4b72/t/5bfeb9f76d2a737720f245ad/1543420408161/Screening+Tool+%28ver+11-28-2018%29.pdf>.
- HRA's Public Charge Fact Sheet: <https://www1.nyc.gov/assets/immigrants/downloads/pdf/public-charge-half-page.pdf>
- Mayor's Office of Immigrant Affairs: <https://www1.nyc.gov/site/immigrants/help/legal-services/public-charge.page>