U.S. Citizenship and Immigration Services

Alert

On Nov. 2, 2020, the U.S. District Court for the Northern District of Illinois vacated the Inadmissibility on Public Charge Grounds final rule, 84 Fed. Reg. 41,292 (Aug. 14, 2019), as amended by Inadmissibility on Public Charge Grounds; Correction, 84 Fed. Reg. 52,357 (Oct. 2, 2019) ("Public Charge Final Rule") nationwide. That decision was stayed by the U.S. Court of Appeals for the Seventh Circuit. On Mar. 9, 2021, the Seventh Circuit lifted its stay and the U.S. District Court for the Northern District of Illinois' order vacating the Public Charge Final Rule went into effect.

USCIS immediately stopped applying the Public Charge Final Rule to all pending applications and petitions that would have been subject to the rule. USCIS continues to apply the public charge inadmissibility statute, including consideration of the statutory minimum factors in the totality of the circumstances, in accordance with the 1999 Interim Field Guidance that was in place before the Public Charge Final Rule was implemented on Feb. 24, 2020, to the adjudication of any application for adjustment of status. In addition, USCIS will no longer apply the separate, but related, "public benefits condition" to applications or petitions for extension of nonimmigrant stay and change of nonimmigrant status.

On or after Mar. 9, 2021, applicants and petitioners should not provide information required solely by the Public Charge Final Rule. That means that applicants for adjustment of status should not provide the Form I-944, Declaration of Self-Sufficiency, or any evidence or documentation required on that form with their Form I-485. Applicants and petitioners for extension of nonimmigrant stay and change of nonimmigrant status should not provide information related to the receipt of public benefits on Form I-129 (Part 6), Form I-129CW (Part 6), Form I-539 (Part 5), and Form I-539A (Part 3).

If an applicant or petitioner has already provided such information, and USCIS adjudicates the application or petition on or after Mar. 9, 2021, USCIS will not consider any information provided that relates solely to the Public Charge Final Rule, including, for example, information provided on the Form I-944, evidence or documentation submitted with Form I-944, or information on the receipt of public benefits on Form I-129 (Part 6), Form I-129CW (Part 6), Form I-539 (Part 5), and Form I-539A (Part 3).

If you received a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) requesting information that is solely required by the Public Charge Final Rule, including but not limited to Form I-944, and your response is due on or after Mar. 9, 2021, you need not provide the information solely required by the Public Charge Final Rule. You do, however, need to respond to the aspects of the RFE or NOID that otherwise pertain to the eligibility for the immigration benefit sought. If USCIS requires additional information or evidence to make a public charge inadmissibility determination under the statute and consistent with the 1999 Interim Field Guidance, it will issue a subsequent RFE or NOID. or information about the relevant court decisions, please see the litigation summary.

USCIS will issue additional guidance regarding the use of affected forms. In the interim, USCIS will not reject any Form I-485 on the basis of the inclusion or exclusion of Form I-944, and will not reject Form I-129, Form I-129CW, Form I-539, or Form I-539A based on whether the public benefits questions (Form I-129 (Part 6), Form I-129CW (Part 6), Form I-539 (Part 5), and Form I-539A (Part 3) have been completed or left blank.

U.S. Citizenship and Immigration Services

Chapter 2 - Public Charge Inadmissibility Ground

Alert

On Sept. 11, 2020, the U.S. Court of Appeals for the Second Circuit issued a decision that allows DHS to resume implementing the Public Charge Ground of Inadmissibility final rule nationwide, including in New York, Connecticut and Vermont. The decision stays the July 29, 2020, injunction, issued during the coronavirus (COVID-19) pandemic, that prevented DHS from enforcing the public charge final rule during a national health emergency.

Therefore, we will apply the public charge final rule and related guidance in the USCIS Policy Manual, Volumes 2, 8 and 12, to all applications and petitions postmarked (or submitted electronically) on or after Feb. 24, 2020. If you send your application or petition by commercial courier (for example, UPS, FedEx, or DHL), we will use the date on the courier receipt as the postmark date.

For information about the relevant court decisions, please see the public charge injunction webpage.

A. Public Charge

Neither the Immigration and Nationality Act (INA) nor case law has defined the phrase "public charge." The regulations define a public charge[1] as an alien who receives one or more public benefits, as defined in the regulations,[2] for more than 12 months in the aggregate within any 36-month period.[3] "Public benefits" are defined in the regulations as an enumerated list of benefits.[4]

B. Likely at Any Time to Become a Public Charge[5] and Burden of Proof

An alien is inadmissible on the public charge ground if the officer is of the opinion that the alien is, at the time of admission or at the time of adjustment of status, "likely at any time to become a public charge."[6] Congress did not define or otherwise explain "likely at any time to become a public charge." However, in using the terms "become" and "likely at any time," Congress clearly indicated that the public charge inadmissibility determination is a predictive assessment that is based on factors that tend to show whether the public is likely to shoulder the burden of supporting the alien.[7]

Therefore, the DHS regulations that define an alien to be "likely at any time to become a public charge" as "more likely than not at any time in the future to become a public charge, as defined in 8 CFR 212.21(a), based on the totality of the alien's circumstances."[8]

An alien is more likely than not at any time in the future to become a public charge if it is probable[9] that, given the totality of the alien's circumstances, he or she will receive, at any time in the future, one or more public benefits for more than 12 months in the aggregate within any 36-month period.[10]

This definition of likely at any time to become a public charge, however, does not alter the burden that aliens bear in demonstrating admissibility. The burden of proof to establish admissibility during the process of seeking an immigration benefit is on the applicant.[11] An applicant for adjustment of status must demonstrate that he or she is clearly and beyond doubt admissible to the United States. [12]

Footnotes

[^ 1] See 8 CFR 212.21(b).

[^ 2] See 8 CFR 212.21(b).

[^ 3] Before DHS published the rule, public charge was not defined in regulations. Additionally, there is a scarcity of legislative guidance and case law defining public charge. However, the legislative history and case law have suggested a link between public charge and the receipt of public benefits. For a detailed outline of the legislative history and case law that framed the public charge definition in 8 CFR 212.21, see 83 FR 51114, 51221 (PDF) (Oct. 10, 2018) (proposed rule).

[^ 4] As discussed in Chapter 10, Public Benefits [8 USCIS-PM G.10].

[^ 5] See 8 CFR 212.21(c).

[^ 6] See INA 212(a)(4)(A).

[^ 7] See, for example, *Matter of Martinez-Lopez (PDF)*, 10 I&N Dec. 421 (A.G. 1964). See 83 FR 51114, 51178-79 (PDF)(Oct. 10, 2018) (proposed rule). See 84 FR 41292, 41392 (PDF), 41392 (Aug. 14, 2019) (final rule), as amended by 84 FR 52357 (PDF) (Oct. 2, 2019) (final rule; correction).

[^ 8] See 8 CFR 212.21(c).

[^ 9] See, for example, *Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431 (9th Cir. 1986) ("First, the FTC must show probable, not possible, deception ('*likely* to mislead,' not '*tendency and capacity* to mislead')."

(emphasis in the original)), *cert. denied*, 479 U.S. 828 (1986); *Fermin v. Pfizer Inc.*, 215 F. Supp. 3d 209, 211 (E.D.N.Y. 2016) ("The term 'likely' indicates that deception must be probable, not just possible."); *Siderca, S.A.I.C. v. United States*, 28 C.I.T. 1782, 350 F. Supp.2d 1223, 1226 (Ct. Int'l Trade 2004) ("The common meaning of 'likely' is 'probable,' or, to put it another way, 'more likely than not.'"); *In re G.H.*, 781 N.W.2d 438, 445 (Neb. 2010) (holding that "'probable,' in other words, more likely than not" satisfies the "likely to engage in repeat acts of sexual violence" standard under Nebraska law.).

[^ 10] DHS believes that defining likely at any time to mean "more likely than not" is consistent with how the DHS regulations implementing withholding of removal and deferral of removal under the Convention Against Torture have used "more likely than not" interchangeably with "likely." Compare 8 CFR 208.16(c)(4) ("If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture.") with 8 CFR 208.17(b)(2) ("The immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured."). See generally *Matter of Chawathe* (PDF), 25 I&N Dec. 369, 376 (2010) (discussing the more likely than not standard in the context of the alien's burden of proof to establish his residence in the United States for purposes of INA 316(b)).

[^ 11] See INA 291. See *Matter of Bett* (PDF), 26 I&N Dec. 437 (BIA 2014). The burden never shifts to the government during the adjudication process. See *Matter of Arthur* (PDF), 16 I&N Dec. 558 (BIA 1978).

[^ 12] See *Matter of Bett* (PDF), 26 I&N Dec. 437 (BIA 2014). See, generally, *House v. Bell, 547 U.S. 518, 538* (2006) (discussing habeas petitioner's burden of showing "more likely than not" with the standard of "no reasonable juror would find him guilty beyond a reasonable doubt.").

Current as of February 10, 2021