



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
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Chapter 4 - Prospective Determination Based on Totality of the Circumstances

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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](#).

In general, the public charge inadmissibility determination (the determination whether an alien is likely at any time to become a public charge) is a discretionary and prospective determination based on the totality of an applicant's circumstances.^[1]

The burden of proof to establish admissibility during the process of seeking an immigration benefit is always on the applicant.^[2]

Evidence

USCIS reviews all information provided in the Application to Register Permanent Residence or Adjust Status ([Form I-485](#)), including the Declaration of Self-Sufficiency ([Form I-944](#)), and the Report of Medical Examination and Vaccination Record ([Form I-693](#)) or the medical examination report in the U.S. Department of State (DOS) Form DS-2054 or Form DS-7794, as well as any other information provided in the record to determine whether the applicant is inadmissible on the public charge ground.

Officers must use the public charge totality of circumstances framework to assist in this analysis.^[3]

A. Subjective Nature of the Public Charge Inadmissibility Determination

The Immigration and Nationality Act (INA)^[4] provides that an alien who, “in the opinion of” the Secretary is likely to become a public charge is inadmissible. The U.S. government has long interpreted the phrase “in the opinion of” as describing an assessment that is subjective and discretionary in nature.^[5]

While authorizing this subjective, discretionary assessment, Congress also mandated that the public charge determination must consider, at a minimum, an applicant’s age, health, family status, assets, resources, financial status, education, and skills.^[6] The regulation provides additional factors to consider, including Affidavit of Support Under Section 213A of the INA ([Form I-864](#)), the prospective immigration status and expected period of admission.^[7] Consideration of these mandatory factors requires a case-by-case determination based on the totality of the alien's circumstances.^[8] Therefore, an officer must review the factors as described below before making a public charge inadmissibility determination. However, to the extent that each applicant’s facts and circumstances are unique, officers’ public charge inadmissibility determinations will vary.

B. Prospective Determination

A public charge determination is based on an applicant’s likelihood at any time in the future to become a public charge.^[9] While past or current receipt of public benefits may make an applicant, at present, a public charge, the past or current receipt of public benefits, alone, is insufficient to sustain a finding that an alien is likely to become a public charge at any point in the future.^[10]

In determining whether an applicant is inadmissible on the public charge ground, USCIS must assess whether the applicant is likely to become a public charge in the future and not whether the applicant is currently a public charge or was a public charge in the past.^[11]

To this end, USCIS must determine:

- Whether the applicant is more likely than not to receive one or more public benefits^[12] at any time in the future; and
- Whether the applicant’s likely receipt of one or more of the public benefits^[13] at any time in the future is more likely than not to exceed 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in 1 month counts as 2 months).^[14]

If the applicant is more likely than not to receive one or more public benefits in the future, and such receipt is likely to exceed 12 months in the aggregate within a 36-month period, then the applicant is inadmissible on the public charge ground. Conversely, if the applicant is not more likely than not to receive public benefits in excess of 12 months in the aggregate within any 36-month period, then the applicant is not inadmissible on the public charge ground.

C. Totality of the Circumstances

There is no “bright-line” test in making a public charge inadmissibility determination. The mere presence of any one of the enumerated factors, alone, is not outcome determinative, except for the absence of a sufficient affidavit of support, where required. Instead, the officer must determine that the applicant's circumstances, assessed in their totality, suggest that the applicant is more likely than not to become a public charge.^[15]

Evaluating whether an applicant is inadmissible based on the totality of the applicant's circumstances^[16] means evaluating all of the information provided by the applicant on the declaration of self-sufficiency, the adjustment of status application, and other associated forms; evidence provided and in the record; and statements by an applicant during an interview, if applicable. The totality of the circumstances analysis involves weighing all the positive and negative factors related to the factors as outlined below, as they apply to the applicant.^[17]

1. Determining Whether Factors are Positive or Negative

When conducting a totality of the circumstances analysis, an officer must first evaluate all of the applicant's facts, circumstances, and evidence to determine whether factors in the analysis are positive or negative. Any factor that decreases the applicant's future likelihood of receiving one or more public benefits above the 12 months in the aggregate in a 36-month period threshold is positive. Any factor that increases the applicant's future likelihood of receiving one or more public benefits above the 12 aggregate months in a 36-month period threshold is negative.^[18]

The mere presence of any one enumerated factors does not, by itself, necessarily result in a specific finding in the public charge inadmissibility assessment, except that absence of a sufficient Form I-864, where required, leads to an inadmissibility finding.

In addition, officers are not limited in the factors they may consider for purposes of the totality of circumstances analysis. The applicant may present factors not listed in the statute, regulation, or this guidance.^[19]

2. Weight of the Factors

Beyond determining whether the factors are positive or negative, the officer must also weigh all factors individually and cumulatively. In particular, the officer must assess the weighted degree to which each factor is negative or positive – the extent to which the factor affects the likelihood that the alien will or will not receive one or more public benefits above the threshold. The weight given to an individual factor depends on the particular facts and circumstances of each case and the relationship of the individual factor to other factors in the analysis. A specific factor may weigh more heavily in one applicant's case than another, depending on what other factors exist in each case. Multiple factors also operate together to carry more weight as a whole, if those factors in tandem show that the alien is likely to, or not likely to,

become a public charge. However, factors are not both positive or negative and heavily weighted positive or negative.

In addition, certain enumerated factors generally weigh heavily in favor of or against a finding that an alien is likely to become a public charge.^[20] Only those factors specified in regulation may be considered heavily weighted. The existence of any heavily weighted factors does not necessarily require a certain outcome, as these factors can be overcome by other factors that are not heavily weighted. For example, a positive heavily weighted factor is not needed to overcome a heavily weighed negative factor.^[21] Further, heavily weighted factors are not required to find an applicant likely or not likely to become a public charge.^[22]

For example, a negative age factor of being over the age of 62,^[23] may be outweighed by other positive factors in the totality of the circumstances, including, but not limited to, if the applicant is:

- Employed with income sufficient to support him or herself and the household;
- Not employed, but the household income is sufficient to support the household and the applicant;
- Collecting a pension, earned Social Security benefits, or has a retirement account or other supportive income that replaces employment income.^[24]

A negative factor of health may be outweighed, for example, if:

- The applicant is under treatment and has a positive prognosis as indicated by a civil surgeon in the Form I-693; and
- The applicant has private health insurance or sufficient assets, resources, or income that cover the reasonable costs of the medical treatments.

3. Public Charge Inadmissibility Determination

Officers must consider all factors in the totality of the circumstances. USCIS' totality of circumstances assessment focuses on, for instance, the following considerations:

- *Ability to Earn a Living* – The ability of the applicant to earn sufficient income to pay for basic living needs (that is, food and nutrition, housing, and healthcare), as evidenced or impacted by, for example, the applicant's age, health, work history, current employment status, future employment prospects, education, and skills.
- *Sufficiency of Income, Assets, and Resources* – The sufficiency of the applicant's household income, assets, and resources to meet basic living needs (that is, food and nutrition, housing, and healthcare).
- *Sufficiency and Obligation of Sponsorship* – The legal sufficiency of the Form I-864, if required, and the likelihood that a sponsor would actually provide the statutorily-required amount of financial support to the applicant, and other related considerations.
- *Ability to Overcome Receipt of Public Benefits or Certification or Approval to Receive Public Benefits Above the Designated Threshold* – The ability of the applicant to overcome receipt of, or certification or approval to receive, one or more public benefits for more than 12 months in the aggregate in any 36-month period beginning no earlier than 36 months before the application for admission or adjustment of status.

Receipt of, or certification or approval to receive, one or more public benefits for more than 12 months in the aggregate in any 36-month period prior to the application for admission or adjustment of status is a heavily weighted factor in favor of a finding that the applicant is likely to become a public charge in the future.^[25] An applicant's ability to overcome this heavily weighted negative factor depends on the totality of the applicant's circumstances and the existence of positive factors that could outweigh this heavily weighted negative factor such that the applicant would not be found likely to become a public charge at any time in the future.

For example, the applicant's assets and resources being at or above 250 percent of the [Federal Poverty Guidelines](#) (FPG), the applicant being healthy and between the ages of 18 and 61, the applicant being currently employed, and evidence that the applicant has disenrolled or requested to disenroll from public benefits could play a significant role in outweighing recent receipt of, or certification or approval to receive, public benefits above the designated threshold.

Not Inadmissible Based on the Public Charge Ground

If the officer finds that the applicant's positive factors outweigh the applicant's negative factors, such that the applicant is not likely to receive one or more public benefits for more than 12 months in the aggregate within any 36-month period at any time in the future, then the officer must conclude that the alien is not inadmissible as likely at any time to become a public charge.

Inadmissible Based on the Public Charge Ground

On the other hand, if the officer finds that the applicant's negative factors outweigh the applicant's positive factors, such that the applicant is more likely than not to receive one or more public benefits above the designated threshold at any time in the future, then the officer must conclude that the alien is inadmissible as likely to become a public charge. Absent a waiver (if available) or the applicant posting a sufficient public charge bond (where permitted in USCIS' discretion), the applicant is inadmissible based on the public charge ground.^[26]

Footnotes

^[^1] See [INA 212\(a\)\(4\)](#). See [8 CFR 212.22](#).

^[^2] 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).

^[^3] See [Appendix: Totality of the Circumstances Framework](#).

^[^4] See [INA 212\(a\)\(4\)](#).

^[^5] See [Matter of Harutunian \(PDF\)](#), 14 I&N Dec. 583, 588 (Reg. Comm. 1974) (“[T]he determination of whether an alien falls into that category [as likely to become a public charge] rests within the discretion of the consular officers or the Commissioner . . . Congress inserted the words 'in the opinion of' (the consul or the Attorney General) with the manifest intention of putting borderline adverse determinations beyond the reach of judicial review.” (citation omitted)). See [Matter of Martinez-Lopez \(PDF\)](#), 10 I&N Dec. 409, 421 (A.G. 1962) (“[U]nder the statutory language the question for visa purposes seems to depend entirely on the consular officer's subjective opinion.”). Neither *Harutunian* nor *Martinez-Lopez* specifically limited the general understanding of public charge to only those who are “elderly, unemployed or unsponsored”

aliens; these decisions were based on the understanding that Congress intended to exclude those who were unable to support themselves and who received public benefits.

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

[^7] See [8 CFR 212.22](#).

[^8] See [8 CFR 212.22](#). See [84 FR 41292, 41396 \(PDF\)](#) (Aug. 14, 2019) (final rule), as amended by [84 FR 52357 \(PDF\)](#) (Oct. 2, 2019) (final rule; correction).

[^9] See [8 CFR 212.22\(a\)](#). See [Matter of Harutunian \(PDF\)](#), 14 I&N Dec. 583 (BIA 1974). See [Matter of Perez \(PDF\)](#), 15 I&N Dec. 136 (BIA 1974). In comparison, the public charge ground of removal under [INA 237\(a\)\(5\)](#) is predicated on actual events, that is, the alien has become a public charge. See [Matter of Viado \(PDF\)](#), 19 I&N Dec. 252, 253 (BIA 1985) (“The distinction is based on the fact that the determination of excludability involves a prediction of the likelihood of an alien becoming a public charge in the future, rather than an assessment of whether the alien has already become a public charge.”).

[^10] See [8 CFR 212.21\(a\)](#). See [84 FR 41292, 41397 \(PDF\)](#) (Aug. 14, 2019) (final rule), as amended by [84 FR 52357 \(PDF\)](#) (Oct. 2, 2019) (final rule; correction) and [Matter of Perez \(PDF\)](#), 15 I&N Dec. 136, 137 (BIA 1974) (“The fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge.”).

[^11] See [8 CFR 212.21\(a\)](#). See [84 FR 41292, 41353 \(PDF\)](#) (Aug. 14, 2019) (final rule), as amended by [84 FR 52357 \(PDF\)](#) (Oct. 2, 2019) (final rule; correction).

[^12] As defined in [8 CFR 212.21\(a\)](#). See Chapter 10, Public Benefits [[8 USCIS-PM G.10](#)].

[^13] As defined in [8 CFR 212.21\(a\)](#). See Chapter 10, Public Benefits [[8 USCIS-PM G.10](#)].

[^14] See [8 CFR 212.21\(a\)](#).

[^15] See [8 CFR 212.21\(a\)](#). See [84 FR 41292, 41397 \(PDF\)](#) (Aug. 14, 2019) (final rule), as amended by [84 FR 52357 \(PDF\)](#) (Oct. 2, 2019) (final rule; correction).

[^16] See [8 CFR 212.22\(a\)](#). See [Matter of Perez \(PDF\)](#), 15 I&N Dec. 136 (BIA 1974).

[^17] See [INA 212\(a\)\(4\)](#). See [8 CFR 212.22](#).

[^18] See [84 FR 41292, 41397 \(PDF\)](#) (Aug. 14, 2019) (final rule), as amended by [84 FR 52357 \(PDF\)](#) (Oct. 2, 2019) (final rule; correction).

[^19] See [8 CFR 212.22\(b\)](#).

[^20] See [8 CFR 212.22\(c\)](#).

[^21] See [83 FR 51114, 51221 \(PDF\)](#) (Oct. 10, 2018) (proposed rule). See [84 FR 41292, 41397 \(PDF\)](#) (Aug. 14, 2019) (final rule), as amended by [84 FR 52357 \(PDF\)](#) (Oct. 2, 2019) (final rule; correction).

[^22] For more information, see Chapter 5, Factors [[8 USCIS-PM G.5](#)] through Chapter 14, Heavily Weighted Factors [[8 USCIS-PM G.14](#)].

[^23] See Chapter 6, Age [[8 USCIS-PM G.6](#)].

[^24] For example, consistent income from remittances, royalties, or income from stocks and bonds.

[^25] See Chapter 14, Heavily Weighted Factors [[8 USCIS-PM G.14](#)].

[^26] See *Von Pervieux v. INS*, 572 F.2d 114, 118 (3rd Cir. 1978). See *Ameeriar v. INS*, 438 F.2d 1028, 1030 (3rd Cir. 1971). See *Matter of Marques*, 16 I&N Dec. 314 (BIA 1977). For information on availability on bond, see Chapter 18, Public Charge Bonds [[8 USCIS-PM G.18](#)].

Current as of February 10, 2021
