

New Proposed Public Charge Rule Codifies 1999 Guidance

March 2022

On February 24, 2022, the Department of Homeland Security (DHS) issued a notice of proposed rulemaking for determining immigrant admissibility on public charge grounds under the Immigration and Nationality Act (INA), [8 U.S.C. 1182\(a\)\(4\)\(A\)-\(B\)](#). Often referred to as the “public charge rule”, this is a determination made by U.S. Citizenship and Immigration Services (USCIS) when evaluating certain immigrants’ application for a visa or green card. USCIS currently relies on the [1999 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds](#) to administer the public charge ground of inadmissibility. This 1999 guidance has been used in public charge determinations since it was issued, except for a brief period between February 2020 and March 2021, when a new public charge rule making it more difficult to obtain a visa or green card was in effect (the 2018 Public Charge Final Rule). This proposed rule establishes the 1999 guidance as the requirement by codifying it in the Code of Federal Regulations without substantive changes.

As a refresher, the INA applies the public charge rule to individuals applying for a visa to come to the United States temporarily or permanently, for admission, or for adjustment of status to become a lawful permanent resident. If USCIS determines that the applicant is “likely at any time to become a public charge”, their application will not be approved. The INA requires that USCIS consider the following in a public charge determination:

1. The applicant’s age; health; family status; assets, resources, and financial status; and education and skills;
2. An affidavit of support (if required); and
3. The applicant’s current and/or past receipt of public benefits.

No single factor, other than the lack of a sufficient affidavit of support, if required, will be the sole criterion for determining if an alien is likely to become a public charge. The proposed rule rejects the concept introduced by the 2018 Public Charge Final Rule of “heavily weighting” certain factors over others, instead directing USCIS to consider all of the factors in a “totality of the circumstances” approach. The proposed rule would allow DHS to periodically issue guidance to USCIS to inform the totality of the circumstances assessment.

With respect to an applicant’s receipt of public benefits, the proposed rule follows the 1999

guidance by defining public charge as a person “who is likely at any time to become primarily dependent on the government for subsistence, as demonstrated by either the past or current receipt of public cash assistance for income maintenance or long-term institutionalization at government expense.” The proposed rule maintains the definition of public cash assistance for income maintenance that is in the 1999 guidance: SSI, TANF, and state, tribal, territorial, or local cash benefit programs for income maintenance (often called “General Assistance”, but which also exist under other names). **Most services provided by CAAs, including those funded by CSBG, Head Start, Weatherization, and LIHEAP, do not count towards a public charge determination under the proposed rule.** Neither does participation in programs such as SNAP, Section 8, and Medicaid.

Like the existing guidance, the proposed rule does not count supplemental, special purpose cash assistance towards a public charge determination, reasoning that this type of assistance does not tend to indicate primary dependence on the government for subsistence. The proposed rule cites cash payments for childcare assistance and pandemic/disaster relief as examples of supplemental, special purpose cash assistance programs that would not count against applicants in public charge inadmissibility determinations. It also excludes earned cash benefits, such as government pension benefits, unemployment insurance payments, and veterans’ benefits, as well as any benefits received via a tax credit or deduction.

By statute, some categories of noncitizens are exempt from the public charge determination, while others may apply for a waiver of the public charge inadmissibility ground. The proposed rule adds a new section to the regulations, [8 CFR § 212.23](#), which lists the categories of immigrants exempted from the public charge rule by statute or regulation, including refugees and asylees. It also clarifies that receipt of public benefits while present in the United States and in a category exempt from the public charge ground of inadmissibility will not count towards a future public charge determination.

DHS will be accepting comments on the proposed rule on or before April 25, 2022. You may submit comments through the [Federal Register](#) or the [Federal eRulemaking Portal](#).

This publication is part of the Community Services Block Grant (CSBG) Legal Training and Technical Assistance (T/TA) Center. It was created by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services Cooperative Agreement – Award Number 90ET0482-02. Any opinion, findings, conclusions, or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of HHS and ACF. The contents of this publication are intended to convey general information only and do not constitute legal advice. Any communication through this publication or through CAPLAW’s website does not constitute or create an attorney-client relationship. If you need legal advice, please contact CAPLAW or another attorney directly.