

Practice Alert - DHS Public Charge Final Rule

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On Wednesday, August 14, 2019, DHS [published a final rule](#) governing the INA §212(a)(4) public charge grounds of inadmissibility. Unless litigation halts implementation of the rule, it will go into effect after 60 days, on October 15, 2019.

Summary of Rule

The DHS final rule dramatically changes the standard by which the Department determines whether an applicant for adjustment of status or admission is "likely at any time to become a public charge" and therefore inadmissible to the United States (note that some noncitizens, such as asylees and refugees, are exempt from public charge determinations). Under the final rule at 8 CFR 212.21(a), USCIS removes the consideration of whether an individual is primarily dependent on public benefits, redefining public charge as a noncitizen *who receives a specified public benefit for more than 12 months in the aggregate within any 36-month period* (such that, for instance, receipt of two benefits in one month counts as two months).

The final rule at 8 CFR 212.21(b) defines a public benefit as:

1. Any federal, state, local, or tribal cash assistance for income maintenance, including:
 - a. Social Security Income (SSI), 42 U.S.C. 1381 et seq.;
 - b. Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 et seq.;
 - c. Federal, state, or local cash benefits programs for income maintenance (often called "General Assistance" in the State context, but which also exist under other names);
2. Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. 2011 to 2036c;
3. Section 8 Housing Assistance under the Housing Choice Voucher Program as administered by HUD under 42 U.S.C. 1437f;
4. Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) under Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. 1437f);
5. Medicaid, with certain exceptions, such as benefits received by individuals under the age of 21 and pregnant women (or for a period of 60 days after the last day of pregnancy);
and
6. Public housing under section 9 of the U.S. Housing Act of 1937

A sufficient affidavit of support will not be outcome-determinative as to whether an individual is likely at any time in the future to become a public charge. Rather, to make that assessment, USCIS adjudicators will apply a complex totality of circumstances test that weighs the alien's age; health; family status; education and skills; and assets, resources, and financial status, taking into account a broad range of positive and negative factors. USCIS notes in the final rule that it

interprets "likely at any time" to mean that it is "more likely than not" that the individual at any time in the future will receive one or more public benefits as defined by the rule.

One heavily weighted negative factor is an applicant's receipt of specified public benefits for 12 or more months in the aggregate within any 36-month period, beginning no earlier than the 36 months prior to the application for adjustment of status or adjustment. Critically, however, DHS will not regard as a negative factor the receipt of specified benefits prior to the rule's effective date, with the exception of cash assistance and long-term institutionalization benefits that DHS already considers relevant to the public charge determination under current policy.

Under the final rule, DHS will also conduct a more limited public charge determination of nonimmigrants seeking a change or extension of status, by removing the future-looking requirement of the public charge determination, and only considering whether the noncitizen has received designated benefits for more than 12 months in the aggregate within a 36-month period since obtaining the nonimmigrant status they seek to change from or extend, through the adjudication of that request.

Consequences of Rule

The DHS final rule, which is vastly more restrictive than current policy, could result in significantly higher USCIS denial rates of adjustment of status applications subject to public charge determinations. Moreover, the multi-factor test will leave substantial discretion to adjudicators and could produce inconsistent and unpredictable decision-making. Additionally, the rule will prove burdensome for the public and DHS alike. It requires that adjustment applicants subject to public charge determinations prepare and submit lengthy [Forms I-944](#), *Declaration of Self-Sufficiency*, with their adjustment filings. USCIS's review of hundreds of thousands of these new forms each year will further slow the agency's already severely delayed case processing.

The rule will also compound the chilling effect felt throughout immigrant communities following publication of DHS's proposed public charge rule in 2018. A [recent Urban Institute Study](#) found that about 14% of adults in immigrants families disclosed that that they or a family member opted not to participate in a non-cash public benefit program in 2018 due to concern over jeopardizing their green card eligibility. The final rule will likely deter even greater numbers of individuals from obtaining vital medical assistance and meeting other basic needs, even when receipt of the benefits in questions is not penalized under the rule.

Relationship Between DHS Rule and Other Agencies' Public Charge Policies

In its final rule, DHS noted its expectation that the State Department will align its own public charge policy with DHS's. Even prior to DHS's publication of its proposed public charge rule in 2018, the State Department had changed its public charge policy significantly—changes that have resulted in a [striking rise in visa denials on public charge grounds](#). Further changes to State Department policy made to align with DHS's final rule could result in even higher rates of such visa denials. Separately from the DHS rule, [DOJ is developing a rule](#) that will change its policy regarding inadmissibility and deportability on public charge grounds. DHS states in its final rule

that it "will work with DOJ to ensure consistent application of the public charge ground of inadmissibility." AILA will continue to monitor, and keep members apprised of, the progress of the DOJ rule as well as further changes to State Department policy.

Litigation

On Tuesday, August 13, San Francisco and Santa Clara counties [sued DHS over the rule](#) in the U.S. District Court in the Northern District of California. Additionally, the National Immigration Law Center has [announced its intent to litigate the rule](#). AILA will monitor and notify members of litigation developments.

Additional Resources on the Rule Available to Members

AILA [maintains a webpage](#) dedicated to the public charge policies of USCIS, DOJ, and the State Department. A [webinar on Public Charge](#), recorded on July 31, is also available for download. AILA published a [QuickTake](#) on the Final Rule that can be shared widely to help inform your clients. In the coming weeks, AILA will post a practice pointer that will help members better understand and respond to DHS's new public charge policy. We will also post additional helpful materials developed by partner organizations. We encourage members to access these resources, as well as take advantage of any relevant training sessions that arise, to best navigate and advise clients on the shifting public charge landscape.

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