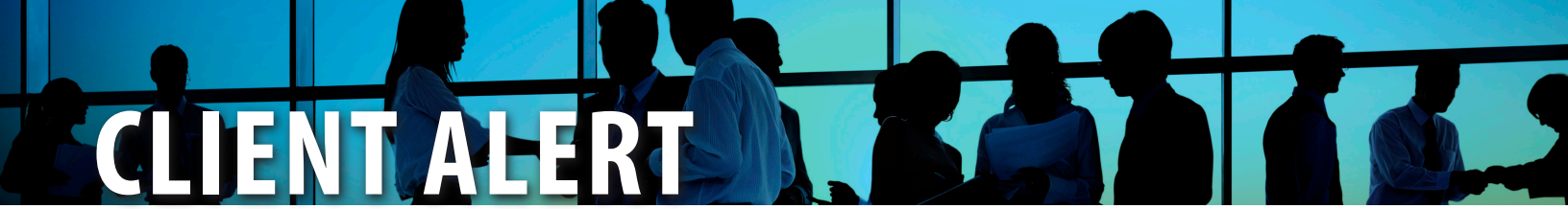

DHS PUBLISHES NEW FINAL RULE ENDING TRUMP-ERA PUBLIC CHARGE RESTRICTIONS

by Najah S. Allaham

Introduction

On September 9, 2022, the U.S. Department of Homeland Security (DHS) published a lengthy *Final Rule* concerning the implementation of the public charge ground of inadmissibility[1] after several years of federal court litigation. This *Final Rule* will be effective on December 23, 2022, and apply to applications postmarked (or electronically submitted) on or after that date. Until December 23, 2022, U.S. Citizenship and Immigration Services (USCIS) will continue to apply the USCIS 1999 Interim Field Guidance (1999 Field Guidance).[2] USCIS provides both a Public Charge webpage and a resources page with extensive FAQs for reference.

Noncitizens who apply for visas, admission to the United States (U.S.), or permanent residence must prove that they are not "likely at any time to become a public charge" unless Congress has specifically exempted them from the public charge ground of inadmissibility or allowed them to apply for a discretionary waiver of inadmissibility.

This Final Rule restores the historical approach taken by USCIS and confirms that USCIS will not penalize individuals for choosing to access the health benefits and other supplemental government assistance legally available. Under the currently applied 1999 Field Guidance and the new Final Rule, when implemented, a noncitizen would be considered "likely to become a public charge" if USCIS determines that they are "likely to become primarily dependent on the government for subsistence." The determination will be based on the following:

1. Age, health, family status, assets, resources, financial status, education, and skills of the noncitizen.

2. Filing of Form I-864, Affidavit of Support under INA §213A, if required; and

3. Prior or current receipt of Supplemental Security Income (SSI); cash assistance for income maintenance under Temporary Assistance for Needy Families (TANF); State, Tribal, territorial, or local cash benefit programs for income maintenance (often called "General Assistance"); or long-term institutionalization at government expense.

USICS confirms that the following WILL NOT be considered:

- Receipt by the noncitizen of certain non-cash benefits for which noncitizens may be eligible. These benefits include: Supplemental Nutrition Assistance Program (SNAP) or other nutrition programs, Children's Health Insurance Program (CHIP), Medicaid (other than for long-term institutionalization), housing benefits, any benefits related to immunizations or testing for communicable diseases, or other supplemental or special-purpose benefits.

In addition, applicants and petitioners are not required to provide information or evidence related solely to the Public Charge Final Rule. Thus, applicants for adjustment of status should not submit Form I-944, Declaration of Self Sufficiency, or any evidence or documentation required by Form I-944 when they file their Form I-485 adjustment application. Applicants and petitioners for extension of nonimmigrant stay and change of nonimmigrant status also 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).

I. What Prior Changes Did the Trump Administration Make to the Public Charge Rule?

On August 24, 2019, DHS issued a Final Rule entitled "Inadmissibility on Public Charge Grounds" (2019 Public Charge Final Rule),[3] which amended previous regulations by prescribing how DHS determined whether a foreign national applying for admission or adjustment of status is inadmissible to the U.S. under INA §212(a)(4). This final rule provided new key definitions, including "public charge" and "public benefits," and a multi-factor framework with evidentiary requirements to determine admissibility on public charge grounds. The 2019 Public Charge Final Rule expanded the definition of "public charge," imposing a heavy paperwork burden on both applicants and DHS officers, while also creating a widespread collateral effect on immigrants and their families.

Under this approach, an individual receiving or relying on non-cash benefits, including SNAP and Medicaid, could be deemed a public charge, resulting in an inadmissibility determination. Critics of the 2019 regulations argued that the regulation had a "chilling effect," resulting in immigrants forgoing public benefits, including Medicaid and SNAP, due to feared immigration consequences. Analysis of state-reported data showed that the announcement of public charge regulations was associated with an 18% drop in Medicaid participation and a 36% drop in SNAP participation.[4] Studies also showed an increased number of immigrants avoiding preventative care, resulting in exacerbated medical conditions, sicker patients, and greater reliance on hospital emergency rooms, which subsequently raised costs for all residents. The 2019 Public

[1] §212(a)(4) of the Immigration and Nationality Act, as amended (INA).
[2] See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 FR 28689, 28692 (May 26, 1999)

[3] 84 Fed. Reg. 41292 (August 14, 2019).
[4] Randy Capps et al., "Anticipated `Chilling Effects' of the Public-Charge Rule Are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families," Migration Policy Institute (Dec. 2020), https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real

Charge Final Rule was set to take effect on October 15, 2019, but was immediately challenged by numerous Plaintiffs in five district courts across four circuits.[5]

On November 2, 2020, the U.S. District Court for the Northern District of Illinois vacated the 2019 Public Charge Final Rule nationwide; this decision was stayed by the U.S. Court of Appeals for the Seventh Circuit. On March 9, 2021, the Seventh Circuit lifted its stay, and the U.S. District Court for the Northern District of Illinois' order vacating the 2019 Public Charge Final Rule went into effect. USCIS stopped applying the 2019 Public Charge Final Rule and returned to the 1999 Interim Field Guidance approach of considering statutory minimum factors in the totality of the circumstances to determine if an individual would likely become a public charge.

On February 2, 2021, President Biden signed three Executive Orders (EOs) on immigration reform, including one entitled "Inadmissibility on Public Charge Grounds." This EO ordered the Secretary of State, U.S. Attorney General, Secretary of Homeland Secretary, and the heads of other relevant agencies to review all agency actions related to the implementation of the Public Charge rule and examine the effects of the previous administration's harmful changes to the rule. The EO also ordered that they consult with the heads of relevant agencies, including the Secretary of Agriculture, Secretary of Health and Human Services, and Secretary of HUD, in considering the effects and implications of public charge policies. The EO also clarified that the 2019 Public Charge Rule would not apply to testing, screening, or treating infectious diseases, including COVID-19.

II. How Does the New Public Charge Final Rule Affect Documents and Information Provided to USCIS?

1. 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 I129CW (Part 6), Form I-539 (Part 5), and Form I-539A (Part 3)

2. Suppose an applicant or petitioner has already provided information related solely to the 2019 Public Charge Final Rule, and USCIS adjudicates the application or petition on or after March 9, 2021. In that case, USCIS will not consider any information that relates solely to the 2019 Public Charge Final Rule. Any other information, however, will be evaluated consistent with the statute, regulations, and policies in effect at the time of adjudication.
3. If an applicant received a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) requesting information that was solely required under the 2019 Public Charge rule, including but not limited to Form I-944, and a response is due on or after March 9, 2021, the applicant does not need to provide that information. Applicants must still respond to the aspects of the RFE or NOID that otherwise pertain to their eligibility for the immigration benefit(s) sought.

III. What if USCIS Denied My Case under the 2019 Public Charge Final Rule before the Vacatur of the Rule Went into Effect?

USCIS did not re-adjudicate benefit requests denied under the 2019 Public Charge Final Rule before that rule was vacated on March 9, 2021. However, eligible Applicants may file a new application or petition and USCIS will adjudicate the new application or petition under the 1999 Interim Field Guidance (in the case of an application for admission or adjustment of status) or under regulations that existed before the 2019 Public Charge Final Rule (in the case of an application or petition for an extension of stay or change of status).

ABOUT THE AUTHORS

Najah S. Allaham is an associate with Dickinson Wright's Immigration Practice Group. Najah has years of experience assisting employers obtain employment based immigrant visas, including PERM labor certifications, EB1, EB2, and EB3 immigrant visas as well as various nonimmigrant employment based visas including E-2, L-1,H-1B, H-2B, TN visas. She can be reached at 248.433.7579 or nallaham@dickinsonwright.com and her bio can be accessed here.

Kathleen Campbell Walker is a member in Dickinson Wright's El Paso office. She can be reached at 915.541.9360 or kwalker@dickinsonwright.com.

[5] *CASA de Maryland, Inc., et al.* v. *Trump,* 19-cv-2715 (D. Md.); *City and County of San Francisco, et al.* v. *DHS, et al.*, 19-cv-04717 (N.D.Ca.); *City of Gaithersburg, et al.* v. *Trump, et al.*, 19-cv-02851 (D. Md.); *Cook County et al.* v. *McAleenan et al.*, 19-cv-06334 (N.D. Ill.); *La Clinica De La Raza, et al.* v. *Trump, et al.*, 19-cv-4980 (N.D. Ca.); *Make the Road New York, et al.* v. *Cuccinelli, et al.*, 19-cv-07993 (S.D.N.Y.); *New York, et al.* v. *DHS, et al.*, 19-cv-07777 (S.D.N.Y.); *State of California, et al.* v. *DHS, et al.*, 19-cv-04975 (N.D. Cal.); *State of Washington, et al.* v. *DHS, et al.*, 19-cv-05210 (E.D. Wa.).