PROTECTING IMMIGRANT FAMILIES

REDWOOD HEALTH COMMUNITY COALITION
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Public Charge Update: What Advocates Need to Know Now
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The "public charge" test has been part of federal immigration law for decades. It is designed to identify people who may depend on government benefits as their main source of support. If the test determines that someone is likely to become a "public charge," the government can deny admission to the United States or refuse an application for lawful permanent resident status (a "green card"). Recently, the Trump Administration has proposed changes to the public charge policy for immigrants applying for status both inside and outside the U.S.

The changes to the policy for immigrants applying for status *within* the U.S. were scheduled to take effect on October 15, 2019, under a final rule issued by the Department of Homeland Security (DHS). However, several federal courts issued *preliminary injunctions*, orders that stopped the rule from going into effect while legal cases challenging it proceed through the courts. Three of the preliminary injunctions stopped the rule from going into effect anywhere in the U.S. DHS appealed the courts' decisions to grant the preliminary injunctions, in one case appealing to the U.S. Supreme Court. The Supreme Court issued a *stay*, which blocked the last nationwide preliminary injunction that remained in effect. The Supreme Court's order allows the DHS regulations to go into effect everywhere in the U.S. except in Illinois, where a statewide preliminary injunction remains in effect. USCIS announced that the agency will only apply the Final Rule to applications and petitions submitted on or after **Feb. 24, 2020** (except for in the State of Illinois). DHS will not consider an immigrant's receipt of the newly listed benefits before Feb. 24, 2020 in the public charge determination.

The issue appealed to the Supreme Court was whether the trial courts should have decided to grant the preliminary injunctions. Litigation in multiple federal courts continues, and is now moving to the *merits*: whether the regulations or the manner in which they were adopted are legally valid. The DHS Public Charge rule could be found invalid on the merits.

The judges' rulings do **not** affect public charge determinations made by the Department of State (DOS), for non-U.S. citizens seeking visas or green cards from their home country before entering the U.S., and green card applicants who are required to leave the U.S. to seek status through consular processing. On October 11, the Department of State issued an interim final rule that aligns its definition of public charge to that contained in the DHS final rule. This rule was scheduled to take effect on October 15, but there are delays in implementing it. Until the interim final rule becomes effective, the public charge policy in the Foreign Affairs Manual (updated in January 2018) remains applicable. Read below for more information on this change, and stay tuned for new developments.

Key messages:

- **The DHS regulations do not apply to all immigrants - there are many exemptions**
- **Many benefits are not considered in the public charge assessment**
- **Different rules may apply to immigrants seeking visas from outside the U.S.**
- **We will continue to fight against the many attacks on immigrants and their families.**

The PIF Campaign is separately tracking potential changes to the public charge ground of deportability that may be proposed by the Department of Justice. The current test is extremely narrow and has been applied infrequently. Stay tuned for any updates on how to fight back if this moves forward.

Read below for information on the **current policies on the public charge ground of inadmissibility.**

Who does public charge apply to?

The "public charge inadmissibility test" affects people applying for admission to the country or for lawful permanent resident (LPR) status. It does not apply to humanitarian immigrants such as refugees; asylees; survivors of domestic violence, trafficking and other serious crimes; special immigrant juveniles; and certain individuals paroled into the U.S. Lawful permanent residents are not subject to a public charge determination when they apply for citizenship.

Who makes public charge decisions?

Decisions about applications for admission or LPR status *outside the U.S*. (at embassies or consular offices abroad) are guided by the Department of State (DOS) and are different from decisions on applications for LPR status *inside the U.S*., which are guided by regulations and policy from the U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS).

Current Public Charge Policy for Immigrants with Applications Processed Inside the U.S.

On August 14, 2019, the Trump Administration published a final rule that changes the definition of "public charge" and adds specific details about how immigration officials will take into account the applicant's income, health, age, education and family status. States, counties and non-profit organizations filed a total of nine legal challenges to the rule. Several courts issued preliminary injunctions, court orders that stop something from happening while a case is proceeding. On January 27, 2020, the Supreme Court blocked the last nationwide preliminary injunction that remained in effect. This decision allows the DHS regulations to go into effect. We do not yet know the effective date.

The issue appealed to the Supreme Court was whether the trial courts should have decided to grant the preliminary injunctions. The federal courts have not yet considered *the merits*: whether the DHS regulations themselves, or the manner in which they were adopted, are valid. Litigation in multiple federal courts is now moving to consideration of those issues. The DHS Public Charge rule could be found invalid on the merits.

Current Public Charge Policy for Immigrants with Applications Processed Outside The U.S.

On October 11, the Department of State (DOS) issued an interim final rule that aligns its definition of public charge to that contained in the DHS final rule. An interim final rule means that DOS is accepting comments on the rule, and could change it at a future date, but it will go into effect in the meantime. This rule was scheduled to take effect on October 15, however, the State Department had not yet published a revised version of the form it will use to process new applications, and delayed the effective date of the rule until the form was available. On October 24, the State Department announced that it was accepting public comment on the proposed Form DS-5540, Public Charge Questionnaire, until December 23, 2019. Until the interim final rule becomes effective, the public charge policy in the Foreign Affairs Manual (updated in January 2018) remains applicable.

The DOS rule affects non–U.S. citizens who go through processing in their home country before entering the U.S. This includes people seeking nonimmigrant visas, including tourist or employment-based visas, and people seeking to be admitted to the U.S. as lawful permanent residents. The changes also could affect green card applicants who are required to leave the U.S. to seek status through consular processing.

The DOS rule aligns the definition of "public charge" with the definition in the DHS final rule. Under the rule, public charge is defined as an immigrant "who receives one or more public benefits 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' worth of benefits)."

Once effective, the interim rule will supersede Foreign Affairs Manual (FAM) manual changes announced in January 2018.

There are several key differences between the FAM manual changes and the interim final rule:

- Under the interim final rule, receipt of benefits by a family member will not be considered.
- Additionally, benefits used in another country will not be considered.
- Benefits (other than cash assistance or long-term care) used before October 15, 2019 will not be considered.
- Receipt of named benefits will continue to be just one factor in the broader totality of circumstances test which considers an applicant's age, health, family status, income and resources, education and skills.

Individuals who expect to apply for a visa or have their green card interviews outside the U.S. should consult an immigration lawyer. To find help in your area, visit immigrationadvocates.org/nonprofit/legaldirectory.

For more information, please visit www.ProtectingImmigrantFamilies.org