

Public Charge Rule: Considerations for HIV and Hepatitis Programs

February 2020

The “public charge” policy has been part of federal immigration law [for decades](#). However, [recent changes](#) to the public charge policy for immigrants applying for status inside the U.S. would expand the scope of what is considered in a public charge determination.

This fact sheet explains a recently finalized U.S. Citizenship and Immigration Services (USCIS) rule, “Inadmissibility on Public Charge Grounds” and considerations for people living with HIV. USCIS will [begin implementation](#) of the new rule on **February 24, 2020**. For questions, please contact [Dori Molozanov](#).

What is a public charge determination?

When someone is seeking to enter the country or make certain adjustments to their immigration status, the government evaluates whether they are likely to become a public charge—defined as primarily dependent on public programs—at any time in the future. It is a “totality of circumstances” test, meaning that the government looks at a number of factors—such as health status, disability, employment, education, age, use of public benefits, and financial status—to determine whether someone is likely to become a public charge at any time in the future. If so, they would be ineligible for admission or adjustment of their status. Some factors (like a serious medical condition) are considered negative factors and some (like high income) are considered positive factors.

Who is subject to public charge?

The overall population to whom public charge applies has not changed. The rule only applies to the following specific groups of immigrants:

- People seeking to enter the U.S. legally through the visa process
- People in the U.S. with visas who want to extend their stay, or change the type of visa they have (e.g., from a student to employment-based visa)
- People who are already in the U.S. legally and are applying a green card
- Green card holders returning to the U.S. after an extended stay abroad who are considered “applicants for admission” – for example, if they have been abroad for more than 180 days

Most commonly, public charge determinations apply to relatives coming to the U.S. to reunite with family members that already live here.

The rule does NOT apply to:

- Existing U.S. citizens or individuals applying for citizenship
- Green card renewals

- Special protected groups such as refugees, asylees, victims of sex trafficking, people with Cuban or Haitian entrant status, and certain victims of domestic violence
- Existing green card holders, with the exception of those who are returning to the U.S. after an extended stay abroad. The public charge rule does not apply to green card holders who leave the U.S. but are not considered applicants for admission upon their return—for example, because they were gone for a short period of time.
- Active duty military service members, and their spouses and children. If a servicemember has retired or otherwise been discharged from military service, receipt of benefits while in service will not be counted.
- Children who will acquire citizenship under [INA Section 320](#)

A full list of exemptions can be found [here](#). **It's important to note that most people subject to public charge are not eligible for federal benefits, although there are some [exceptions](#).**

Which benefits are considered in a public charge determination?

Although the population subject to public charge hasn't changed, the new rule expands the list of benefits considered in a public charge determination. A "heavily weighed" negative factor is prior receipt of public benefits, or approval or certification to receive public benefits. **Just being eligible for benefits is not enough, although having a low income—under 125% FPL—is also a negatively weighed factor.**

The rule doesn't apply to all benefits, but the new rule includes a number of benefits that previously were not considered in public charge determinations. Prior to the new rules, only a narrow list of public benefits were considered, and most critical health and social services were not among them. The recently finalized rule would expand the types of public programs that are considered negative factors in a public charge determination.

The list of benefits considered in public charge determinations is an exhaustive list. **This means that the government will ONLY consider the benefits listed in Table 1 below.**

For benefits that were previously considered in public charge determinations, USCIS will continue to consider these benefits and may consider benefits received prior to February 24, 2020. For benefits not considered in public charge determinations prior to the new rule, such as Medicaid and SNAP, only benefits received after February 24, 2020 will be considered.

Table 1: Public Benefits Considered in Public Charge Determinations Under New USCIS Rule

<u>Benefits considered in public charge determinations</u>	<u>Benefits excluded from public charge determinations</u>
<ul style="list-style-type: none"> • Cash assistance for income maintenance (SSI, TANF, General Assistance)* • Long-term care at government expense* • Supplemental Nutrition Assistance Program (SNAP) • Federal public housing and Section 8 assistance (but not HOPWA) • Medicaid (except for emergency Medicaid, Medicaid for pregnant women, Medicaid for individuals under 21, and Medicaid provided exclusively with state funds) 	<ul style="list-style-type: none"> • Ryan White HIV/AIDS Program, ADAP, and similar public health programs • Premium tax credits for Marketplace coverage (however, receiving tax credits disqualifies coverage as being considered a heavily weighed positive factor, as described in the next section) • School meals • WIC • Childcare benefits • Medicaid for pregnant women and children • CHIP • Emergency Medicaid (for immigrants who are not eligible for full Medicaid but receive emergency care paid for by Medicaid) • State or locally funded non-cash benefits, such as health and nutrition programs • Medicare Part D Low-Income Subsidy • HOPWA benefits • Any other benefit NOT explicitly included in the list

* Included under current public charge policy as well.

A few things to note:

- **The rule only applies to benefits received by the person applying for admission or adjustment.** Benefits received by family members are not considered. For example, if a parent has applied for benefits on behalf of their child, that would not count against the parent in a public charge determination.
- **The rule does not apply to benefits received while in a status that is exempt from a public charge determination.** For example, benefits received when an individual was a refugee (exempt from public charge) will not be held against them if they apply for admission to the U.S. or a green card at a later time.
- **The rule applies to federal, state, local, and tribal cash assistance programs, but non-cash programs are only considered in public charge determinations if they are funded using federal dollars.** Non-cash public benefits funded entirely by states, localities, or tribes will not be considered in a public charge determination (for example, [some states](#) provide Medicaid benefits to certain populations exclusively with state funds). However, cash assistance programs for income maintenance (such as SSI, TANF, and General Assistance) may be considered in a public charge determination even if they are funded by states, localities, or tribes.
- **The rule is not retroactive.** The new rule only applies to applications and petitions postmarked or submitted electronically on or after February 24, 2020. When

determining whether an alien is likely to become a public charge at any time in the future, USCIS will not consider person's application for, certification or approval to receive, or receipt of most public benefits before February 24, 2020.

- **However**, USCIS will consider some benefits received before February 24, 2020 in public charge determinations—this applies to benefits that were included in public charge determinations prior to the new rule (i.e., cash assistance such as SSI and TANF, and long-term care at government expense).
- **The rule has a limited lookback period.** The government only looks at the 36 months prior to the person's application for admission or adjustment of status. If a person has applied for, been certified or approved to receive, or received one or more of the included benefits for more than 12 months in the 36-month period prior to their application for admission or adjustment of status, this would be considered a heavily weighed negative factor when determining whether someone is going to be a public charge. A month in which a person receives two benefits counts as two months.
 - **However**, although receipt of benefits for under 12 months within the 36-month lookback period is not considered a negative factor, adjudicators may still “consider and give appropriate weight” to receipt of benefits under the 12-month threshold in the “totality of circumstances” when determining a person's likelihood of becoming a public charge at any time in the future.
- **The rule only applies to applications processed inside the U.S.** Applications processed outside the U.S. at embassies and consular offices are guided by the Department of State, not USCIS. The Department of State issued an interim final rule to align its public charge policy (for applications processed outside the U.S.) with the new USCIS rule (which applies only to applications processed inside the U.S.). The Department of State interim rule affects non-U.S. citizens seeking non-immigrant visas, including tourist or employment-based visas, and people seeking to be admitted to the U.S. as lawful permanent residents (green card holders). It could also affect green card applicants who are required to leave the U.S. to seek status through consular processing. 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. **Until the interim final rule becomes effective, the public charge policy in the Foreign Affairs Manual (updated January 2018) still applies.**
- **The rule applies only to admissibility on public charge grounds, but not to deportability.** Deportability is guided by the Department of Justice (DOJ), not USCIS. DOJ is expected to change its public charge rule, but it has not yet published a proposed rulemaking. Unlike the recently finalized USCIS rule, which addresses the public charge inadmissibility ground and affects people seeking entry into the U.S. or an adjustment to their immigration status, the DOJ rule would address the public charge deportability ground and would apply to people who have already been inspected and admitted to the U.S.

More information about consideration of public benefits in public charge determinations can be found in this [fact sheet](#).

What else is considered in a public charge determination?

It is important to remember that public charge is a totality of circumstances test. That means the government looks at a number of factors when making its determination. Receipt of the benefits listed above is a heavily weighed negative factor, but not an automatic disqualifier. Someone can still overcome a public charge determination even if they have received benefits or are approved to receive them in the future. Factors considered in the totality of circumstances test include: income, resources, and assets; age; health; family status; education and skills; and affidavit of support.

Table 2 below includes a non-exhaustive list of the types of evidence that could lead to a positive or negative finding for each factor.

Table 2: Factors Considered In a Public Charge Determination

<u>Factor</u>	<u>Evidence considered</u>
Income, resources, and assets	<p>Heavy negative weight: receipt of public benefits (as described above); being currently or recently unemployed, or unable to prove prospects for future employment (exceptions: primary caregivers and full-time students)</p> <p>Negative weight: having income below 125% FPL; lacking private health insurance</p> <p>Heavy positive weight: having income, assets, resources, and support from a sponsor that amount to at least 250% FPL; being authorized to work and currently employed in a legal industry with an annual income of at least 250% FPL</p>
Age	<p>Negative weight: being younger than 18 or older than the minimum early retirement age for Social Security</p> <p>Positive weight: being between the ages of 18 and 62</p>
Health	<p>Heavy negative weight: having a medical condition that could require extensive treatment or institutionalization, or interfere with ability to work, attend school, or care for oneself <u>AND</u> being uninsured or lacking financial resources to cover medical costs**</p> <p>Negative weight: having a medical condition that could require extensive treatment or institutionalization, or interfere with ability to work, attend school, or care for oneself</p> <p>Heavy positive weight: having private health insurance that is <u>NOT</u> subsidized by ACA premium tax credits*</p>
Family status	<p>Negative weight: large household size</p>
Education and skills	<p>Negative weight: having a low education and/or skill level; having limited English proficiency</p>

** If you receive premium tax credits for Marketplace coverage, this isn't considered a negative factor. However, it does disqualify your coverage from being considered a positive factor.*

*** The rule does not specifically mention HIV or hepatitis, but this language is broad and could have implications for people living with HIV or hepatitis who want to enter the U.S. or adjust their status.*

For more information about how these factors are weighed and the evidence considered in the totality of circumstances test, see the updated regulation [here](#).

The public charge policy “chilling effect.”

It is important to remember that most people subject to public charge determinations are not eligible for benefits like Medicaid, housing assistance, and SNAP. In most cases, a person can only get these benefits if they are already a green card holder or citizen, or if they have refugee or asylee status; however, these immigrants are exempt from public charge. (Note that some states expand benefits beyond the federal eligibility limits, so it is important to check what the rules are for these programs in your state). If someone is already in the U.S. on a visa and is applying for a green card, they are still subject to public charge but they most likely will not have a history of using most or any of the benefits considered. However, the rule could impact people not subject to public charge because of the rule’s chilling effect—people are afraid to interact with public programs, even programs excluded from public charge determinations, because they do not know that the policy does not apply to them and they do not want to take any risks. For example, immigrants have historically been wary of using public benefits if they have family members abroad who want to move to the U.S., and therefore avoid using benefits altogether. Even before this rule was finalized, the rhetoric around it already had a chilling effect on immigrant access to HIV and hepatitis prevention, care, and treatment.



The new public charge rule may make it challenging for immigrants who have received federal benefits to gain admission to the U.S. or make certain adjustments to their immigration status. However, it’s important to remember that most immigrants subject to the public charge rule are not eligible for federal benefits (although there are some [exceptions](#)). Information about immigrant eligibility for federal benefits can be found [here](#).

Health Department Considerations

There are a number of important considerations for health department staff to keep in mind when working with clients that may be subject to the public charge rule.

- **The application of the public charge rule is limited in a number of important ways.** Not all clients will be subject to a public charge determination, and most clients who do undergo a public charge determination will not have been eligible for federal benefits prior to their application for admission or adjustment of status (with some [exceptions](#)). Even if a client has received public benefits in the past, public charge determinations are a totality of the circumstances test and there will be a number of factors considered in each case.
- **Public charge determinations depend on individual circumstances.** If you are working with someone who may be subject to public charge and they have questions about their individual case, they should seek advice from an immigration attorney.

[Immigrationlawhelp.org](https://www.immigrationlawhelp.org) is a website that can help you find legal advice in your area. There are many non-profits across the country that do this type of legal work, so clients with lower incomes may be able to get help for free.

- **Clients may still be eligible for benefits that are exempt from public charge determinations.** Most public benefits, including Ryan White HIV/AIDS Program and ADAP services, are exempt from public charge. Health department staff can work with clients to apply for and access public benefits for which they may be eligible.

Resources

- [Protecting Immigrant Families Campaign](#) resources
- NILC: [Overview of Immigrant Eligibility for Federal Programs](#)
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- USCIS: [Final Rule on Public Charge Admissibility](#) (including information about who is subject to the rule which public benefits are considered, and more)
- Tool for finding legal services in your area: [ImmigrationLawHelp.org](https://www.immigrationlawhelp.org)
- Client outreach and education: [National Immigration Law Center](#) (NILC) and [Immigrant Legal Resource Center](#)