International Trade Alert

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DHS Finalizes Public Charge Rule and Limits Its Applicability from Initially Proposed Regulation

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Key Points

- DHS has announced that it has finalized the previously proposed rule on what immigrants are considered a "public charge." The final rule was published in the Federal Register yesterday.
- The rule is effective on October 15, 2019, 60 days after publication.
- The rule applies to those seeking permanent residence in the United States (a "green card"), whether the applicant is sponsored by a family member or an employer. The rule also applies to nonimmigrants who apply for or seek to extend work, student or tourist visas.
- The rule defines the terms "public charge" and "public benefit" and authorizes denial of applications for permanent residence or for a nonimmigrant visa for those found to be a public charge or those determined likely to become a public charge at any time in the future.
- Pending immigration applications and those filed before October 15, 2019, are not subject to the rule.

Summary

On August 14, 2019, the Department of Homeland Security (DHS) published a final rule codifying some of the changes to the "public charge" determination previously proposed on October 10, 2018. We covered the proposed rule in detail in a previous alert. The rule changes how DHS interprets and implements the public charge ground of inadmissibility, i.e., how the agency determines who is ineligible for a visa, admission to the United States or a green card because they are established to be a public charge or are deemed likely to become a public charge at any time in the future.

Changes from the Proposed Rule

In response to over 266,000 public comments DHS received during the comment period, the agency modified and limited the application of the rule as follows:

- DHS's final definition of "public benefit" covers federal, state, local, or tribal cash assistance for income maintenance, including Social Security Income (SSI),

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Temporary Assistance for Needy Families (TANF), and federal, state, or local cash benefits programs for income maintenance (often called “General Assistance” in the state context); Supplemental Nutrition Assistance Program (SNAP, formerly known as “Food Stamps”); Section 8 Housing Assistance; Medicaid (other than Emergency Medicaid); and public housing under section 9 of the U.S. Housing Act of 1937.

- DHS clarified that the rule does not take into consideration public benefits received by U.S. citizens, military servicemembers and their families, individuals under 21 years of age, pregnant women and women for up to 60 days after giving birth.
- DHS also clarified that public benefits received on behalf of others, even if those receiving the benefits are family members of the applicant, are not taken into consideration either.
- DHS announced that it had decided against the inclusion of the Children’s Health Insurance Program (CHIP) in the public benefit definition, so receipt of CHIP benefits by immigrant children will not make them ineligible for permanent residence or nonimmigrant status.
- DHS confirmed that applicants for citizenship (or “naturalization”) are not subject to the public charge ineligibility determination.
- DHS confirmed exemptions from the rule for certain categories of immigrants, including those approved for asylum, refugees, Special Immigrant Juveniles (SIJ) and those in Temporary Protected Status (TPS).
- DHS corrected the rule to exempt several categories of immigrants in accordance with the Violence Against Women Act (VAWA): victims of severe forms of trafficking (T visa recipients), victims of criminal activity (U visa recipients) and abused spouses and children of U.S. citizens and permanent residents.
- DHS confirmed its “totality of circumstances” factors that immigration officers will use to make public charge determinations, including the applicant’s employability, age, health, family status, education and skills, assets, resources and financial status. The receipt of public benefits remained a “heavily weighted” negative factor in the public charge determination, but DHS added private health insurance as a “heavily weighted” positive factor in the same determination.
- For its “totality of circumstances” consideration, DHS had previously proposed taking into account receipt of public benefits that amount to over 15 percent of the Federal Poverty Guidelines (FPG) or over 12 months in the aggregate within a 36-month period. In the final rule, DHS adopted a single threshold of 12 months in the aggregate within the 36-month period immediately preceding the application for a green card or a nonimmigrant visa or status. However, receipt of each public benefit counts as one month, such that, for instance, receipt of two benefits in one month counts as two months.
- For nonimmigrants seeking to extend or change their status, DHS originally proposed to consider public benefits those individuals had received, were currently receiving or were likely to receive. In the final rule, DHS removed the forward-looking provision and will only consider benefits already received for more than 12 months in the immediately preceding 36 months.
- DHS reduced the minimum amount of a public charge bond to $8,100.

Who Will Be Primarily Affected by the Rule?

Due to the broad discretion provided to immigration and consular officers under the "totality of circumstances" factors, it remains to be seen how exactly the rule will be implemented by DHS and the Department of State—the two federal agencies tasked with making public charge determinations. Most nonimmigrants are ineligible for federal public benefits, so it is unclear how many applicants for permanent residence or extension/change of nonimmigrant status will be deemed inadmissible to the United States under the rule.

All applicants for green cards and some applicants for extension or change of nonimmigrant status will be required to complete Form I-944, Declaration of Self-Sufficiency. As of the publication of this alert, the form had not been finalized but a draft version released by DHS contained 19 pages. The form will be required for applications filed on or after October 15, 2019.

Lastly, several states and local governments have already filed lawsuits challenging the rule. In addition, several advocacy organizations have announced their intent to challenge the rule, so it is possible that the rule may be enjoined by a federal court, perhaps before it even takes effect on October 15, 2019.

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