

DHS Proposes New Public Charge Rule

October 11, 2018

Key Points

- Applicants for a green card and for most nonimmigrant visas (including work, student and tourist visas) will be subject to the new DHS rule on “public charge” determination. This will affect the processing of employment-based visas for foreign employees working at U.S. companies.
- Petitioners (sponsoring employers) and applicants for nonimmigrant visas may see an increase in requests for evidence, requiring the completion of a newly proposed form, “Declaration of Self-Sufficiency.” This process will likely delay the processing of extension and change of status applications and may affect non-citizen employees’ ability to continue working for their U.S. employers.
- DHS proposes to define “public charge” as an immigrant “who receives one or more public benefits,” and the determination seeks to establish whether the person is likely to receive public benefits at any time in the future. Whether foreign nationals work for U.S. employers or are sponsored by family members, they may need to provide additional information to prove that they are not likely to rely on government assistance.
- DHS proposes to expand the types of benefits that would make someone a public charge to include most types of public benefits, even if they are temporary in nature.
- Applicants for a green card will need to complete a Declaration of Self-Sufficiency to prove that they are not likely to rely on public benefits in the future. Applicants for nonimmigrant visas – including applicants for work visas sponsored by U.S. employers – may be required to complete such a declaration on a case-by-case basis.
- Applicants for a green card who are determined to be a public charge may, at the DHS discretion, post a bond of a minimum of \$10,000 to receive their green cards. The bond would be returned to them after five years if they have not used any public benefits.

On October 10, 2018, the Department of Homeland Security (DHS) published a **proposed rule** that would make considerable changes to the determination of immigrants and nonimmigrants likely to become a “public charge.” Most applicants for permanent residence (or a “green card”) and nonimmigrants seeking an extension of

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stay or change of status in the United States would be required to attest that they have not received, are not currently receiving, nor are likely to receive public benefits.

Who Is Affected?

An applicant for an immigrant visa or permanent residence (a “green card”) will be found ineligible if the consular officer or DHS officer, in their discretion, finds such applicant likely to become a public charge in the future. The burden of proof is on the applicant to show that he or she is self-sufficient and will not need to rely on governmental assistance.

Most categories of nonimmigrants—including holders of work visas like H-1B and L-1—as well as tourists, students and other non-citizens present in the United States temporarily will be subject to the proposed rule as well. Affected nonimmigrants will be required to provide information to DHS—directly or through their sponsoring employers—regarding prior receipt of any public benefits. Based on this information, along with other evidence of financial status (such as evidence of employment status), DHS will determine if nonimmigrants would need to submit a new proposed form, Declaration of Self-Sufficiency, to demonstrate that they are not likely to receive public benefits during their stay in the United States. This process will likely delay the processing of extension and change of status applications and may affect non-citizen employees’ ability to continue working for their U.S. employers.

Who is Exempt?

The public charge ineligibility determination does not apply to several categories of immigrants, including but not limited to refugees, those granted asylum, victims of crime and human trafficking protected under the Violence Against Women Act (VAWA), Special Immigrant Juveniles (SIJ) and those in Temporary Protected Status (TPS).

Notably, applicants for citizenship (or “naturalization”) are not subject to the public charge ineligibility determination. Furthermore, public benefits received by the applicants’ U.S. citizen family members, including minor children, are not taken into account during the public charge determination by DHS.

New Definition of “Public Charge”

Under current DHS guidance, applicants are considered inadmissible on public charge grounds, i.e., not eligible to become a permanent resident or to come to the United States temporarily, if they are “primarily dependent” on public benefits, i.e., receive more than 50 percent of their income and support from public benefits. In practice, pursuant to the 1999 Interim Field Guidance by legacy Immigration and Naturalization Service (INS), DHS currently primarily considers the receipt of what it calls “cash assistance,” including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and state and local cash assistance, often called “general assistance.” The current guidance excludes non-cash public benefits like food stamps, Medicaid and Section 8 housing from the determination if an applicant meets the definition of “public charge.”

Under the proposed rule, DHS seeks to define a public charge as an immigrant “who receives one or more public benefits.” Where the public benefit can be monetized, cumulative value that exceeds 15 percent of the Federal Poverty Guidelines (FPG)

would make the recipient a public charge. For benefits that cannot be monetized, benefits received for more than 12 months in the aggregate within a 36-month period will similarly make the recipient a public charge.

Types of Benefits Considered

The assessment of the likelihood of one becoming a public charge includes whether an individual has received certain means-tested public assistance for food, medical care and housing, thus considerably expanding the definition of public benefit. Under the proposed rule, public benefits include, but are not limited to, SSI, TANF, Supplemental Nutrition Assistance Program (SNAP, formerly known as “Food Stamps”, Section 8 housing assistance, Medicaid and premium cost-sharing subsidies for Medicare Part D (prescription drug plan for seniors). Currently, immigrants must be in the United States for at least five years to be eligible for most of these benefits.

DHS is also considering whether to include the Children’s Health Insurance Program (CHIP), which provides low-cost health coverage to children in families that earn too much money to qualify for Medicaid but are still in need of assistance to pay for healthcare. It is important to note that DHS states in the proposed rule that “while the number of children, including U.S. citizen children, may count towards ... household size for purposes of determining inadmissibility on the public charge ground, the direct receipt of public benefits by those children would not factor into the public charge inadmissibility determination.” DHS specifically requested public comment on whether to include CHIP in the final rule.

The proposed rule is prospective only: if an applicant received any of these public benefits prior to the effective date of the proposed rule, DHS would not take that into consideration in determining whether the person is likely to become a public charge in the future. However, DHS would look back over a 36-month period to review any receipt of public benefits and determine if it makes the person likely to receive public assistance in the future.

“Totality of Circumstances” Consideration

In addition to the receipt of public benefits, the proposed rule would allow DHS to consider the “totality of circumstances,” including the applicant’s employability, age, health, family status, education and skills, assets, resources and financial status. The receipt of public benefits is a “heavily weighted” negative factor under the proposed rule in the public charge determination. Income greater than 250 percent of the FPG is considered a “heavily weighted” positive factor in the public charge determination.

The chart below contains the calculation of 250 percent of the FPG for the 48 contiguous states and the District of Columbia:

Household Size	250% of 2018 FPG
1	\$30,350
2	\$41,150
3	\$51,950
4	\$62,750
5	\$73,550

Public Charge Bond

The impact on applicants for adjustment of status, or a “green card,” may also result in the need to post a public charge bond. If applicants for green cards are found ineligible based on public charge grounds, they may be allowed to post a bond, of a minimum of \$10,000, at the discretion of DHS. Employers and intending immigrants would be notified of the public charge finding through the issuance of a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID). At that time, DHS may request filing the new proposed Public Charge Bond form. While the proposed rule allows for various options for posting bonds, including cash and cash equivalents, DHS plans to initially allow only surety bonds.

What to Expect

Petitioners (sponsoring employers) and applicants for nonimmigrant visas may see an increase in requests for evidence, requiring the completion of the Declaration of Self-Sufficiency, particularly if they have household sizes and corresponding household incomes below 250 percent of the FPG.

In the proposed rule, DHS estimates that 2.5 percent of eligible immigrants would discontinue their public benefits, which would amount to about \$1.5 billion worth of federal funding per year. DHS also acknowledges that the change could result in “worse health outcomes,” “increased use of emergency rooms,” “increased prevalence of communicable diseases,” “increases in uncompensated care,” and “increased rates of poverty and housing instability,” among other concerns.

Comment Period and Likely Effective Date

Now that the rule has been published to the Federal Register, the public comment period before implementation of the rule is open for 60 days from the date of publication. Therefore, it is unlikely that the rule will become effective before 2019. Comments can be submitted electronically through the [Federal eRulemaking Portal](#).