

Changes to “Public Charge” Instructions in the U.S. State Department’s Manual

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Since the first weeks of the Trump administration, when a draft executive order about immigrants and public benefits was leaked to the media, concerns about changes to “public charge” policies have caused considerable anxiety. On January 3, 2018, the U.S. Department of State published revised sections of its Foreign Affairs Manual (FAM) that deal with “public charge.” These State Department instructions underscore the administration’s interest in restricting family immigration and deterring families from securing critical services.

Some non–U.S. citizens who seek to enter the U.S. or who seek lawful permanent resident, or LPR, status must show that they are not likely to become dependent on the government for cash assistance or long-term care. Certain immigrants — including refugees; asylees; survivors of trafficking, domestic violence and other serious crimes; and other “humanitarian” immigrants are not subject to this public charge test.

The FAM provides instructions that officials in U.S. embassies and consulates abroad use to make decisions about whether to grant a person permission to enter the U.S. as an immigrant or on a nonimmigrant visa. It does not govern decisions made by immigration officials inside the U.S. However, the FAM revision foreshadows other changes that we may see this year.

What is the longstanding policy on public charge?

Federal law allows immigration authorities to deny entry to the U.S. to non–U.S. citizens who are likely in the future to depend on the government for subsistence by relying on cash assistance or long-term care at government expense (i.e., people who are likely to become a public charge). In making a public charge determination, the government must look at a person’s age, health, family situation, income, resources, education, and skills, and may also consider an affidavit of support or contract signed by a sponsor promising to support the immigrant. This “totality of the circumstances” test requires the government to look at all the factors together. It is a forward-looking test that may not be based solely on what happened in the past.

For more than one hundred years, the government has recognized that work supports such as health coverage and nutrition assistance help people remain healthy and productive. Thus, the use of these services has not been considered relevant in public charge determinations. Almost two decades ago, the government clarified that the use of services such as health coverage or nutrition assistance (such as Medicaid, the Children’s Health Insurance Program, or CHIP, and the Supplemental Nutrition Assistance Program, or SNAP, also known as “food stamps”) would *not* be considered in the public charge determination. Only the receipt of cash assistance for monthly income maintenance (such as Supplemental

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Security Income or Temporary Assistance for Needy Families) or government-funded long-term care could be considered. And any negative factor could be outweighed by positive factors — most importantly the sponsor’s affidavit of support — in determining whether the individual was likely to rely on cash assistance or long-term care in the future.

How do the new State Department instructions change the longstanding public charge policy?

The revised State Department instructions continue to focus on whether a person seeking to enter the U.S. is likely to become primarily dependent on cash assistance or long-term care in the future. And they continue to require that each factor (age, health, income, education, family situation, etc.) be considered in the public charge test. However, the instructions also include changes to the treatment of a sponsor’s affidavit of support, and the use of non-cash benefits by applicants, sponsors and family members.

It is too early to know how these changes will be implemented by each U.S. embassy or consular office. **See below** for more information about **how you can get updates on public charge** and **help us monitor** these changes.

Affidavit of support

Under previous policy, a sponsor’s affidavit of support ([Form I-864](#))¹ could — and normally did — overcome negative factors in a public charge determination. The new instructions emphasize that the affidavit of support is a positive factor in the totality of the circumstances test but is not sufficient on its own to protect an individual from being determined likely to become a public charge. The instructions allow officials to consider the past or current receipt of public benefits by a sponsor in determining whether the sponsor would be able to support the immigrant, depending on the type of assistance and when the sponsor received the public benefits. However, since neither the affidavit of support form nor the online visa application ([DS-260](#))² ask about the sponsor’s use of benefits, it’s not clear how this would be implemented. Federal laws generally protect information about benefit recipients from being shared or disclosed for purposes not directly related to determining eligibility or administering the program.

Use of noncash benefits by the applicant or a family member

The revised instructions allow the receipt of noncash benefits to be considered as part of the “totality” of the person’s circumstances, if relevant in predicting whether the person will rely on cash assistance or long-term care *in the future*.

The new instructions also allow State Department officials to consider whether an applicant’s family member has received public benefits as part of the public charge test. This factor can be overcome if the applicant can demonstrate that their prospective income and assets and the income and assets of others in the family are sufficient to support the family at 125 percent of the federal poverty level.

¹ <https://www.uscis.gov/i-864>.

² <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/forms/ds-160-online-nonimmigrant-visa-application.html>.

Factors that must be considered in the public charge test

The instructions offer more details about how State Department officials should evaluate the factors that must be considered in the public charge test, such as health, age, education, skills, income, resources, and family status. Although all these factors were relevant to the public charge determination in the past, in most cases, a valid affidavit of support has been sufficient to overcome this test. As noted earlier, it is too soon to know how the new instructions will be implemented by each U.S. embassy or consular office.

Health

Under the revised instructions, applicants — particularly those with a health condition — may need to provide proof of medical insurance or other ability to pay medical expenses in the U.S.

Age

Applicants under the age of 18 *who are not accompanying or following to join a parent or guardian* could be subject to more scrutiny under the new instructions, because officials can consider their age as a negative factor in the public charge test. And applicants who are 18 or older must demonstrate skills that make them employable in the U.S. State Department officials could view applicants' mature age as a negative factor if they believe it will hurt their chances of finding work or would increase their potential health care costs.

Education and skills

Under the new instructions, it is more likely that applicants will need to establish that they have job skills and provide information about their job history, as well as explain any periods of unemployment or job changes. They may also need to provide information about their plans for employment once they immigrate to the U.S., or whether they have a job offer.

Income, resources, and family status

The revised instructions may require both the sponsor and the applicant to meet specific income requirements. An applicant and a sponsor would each need to show that they can support the family, including a spouse and unmarried children under age 21 — at 125 percent of the federal poverty level.

Who is affected by the revised State Department instructions?

The revised instructions could affect non-U.S. citizens who go through consular 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 a lawful permanent resident. The instructions clarify that the conditions for obtaining a nonimmigrant visa are normally sufficient to overcome the public charge exclusion absent evidence that gives reason to believe a public charge issue exists.

The revised instructions do not affect the public charge determination for people already in the U.S. who apply for a green card (i.e., those who seek to *adjust* to lawful permanent resident status), because the State Department does not process these applications. Nor do these instructions apply to lawful permanent residents seeking U.S. citizenship.

How can you help us understand what these changes mean in practice?

Please stay tuned as we continue to learn how these changes work in practice. To learn about any changes to public charge policy, sign up for the Protecting Immigrant Families Campaign email list at <http://bit.ly/PIFCampaign>.

We need your help! To address these changes, as well as any proposed changes to the rules that govern public charge decisions by officials in the U.S., it will be important to monitor and document any changes in how State Department officials decide who enters the U.S. It will also be important to monitor how these changes (or rumors about these changes) are affecting individuals, families, communities, and community-based organizations in the U.S. Please share information with us via email at publiccharge@nilc.org.

How can you learn more?

More information on public charge is available in this NILC issue brief: www.nilc.org/public-charge-overview/.

You can also contact NILC's Jenny Rejeske at rejeske@nilc.org or the Center for Law and Social Policy's Madison Hardee at mhardee@clasp.org.