

PROTECTING IMMIGRANT FAMILIES

Washington State



PUBLIC CHARGE: FREQUENTLY ASKED QUESTIONS

On October 10, the Department of Homeland Security (DHS) posted a proposed public charge regulation in the federal register, asking the public to submit comments by December 10, 2018. The public charge test has been a part of immigration law for decades and allows the government to deny lawful permanent resident (“Green Card”) status and entry into the U.S. to certain immigrants who appear likely to become a public charge in the future. Although the public charge law is not new, the federal government is seeking to change the rules on how the public charge test is applied.

Changing this rule is a long process that could take several months, and it’s critical to remember that as of November 21, 2018, **nothing has changed** for immigrants who are eligible to apply for lawful permanent resident (“Green Card”) status within the U.S., rather than having to travel to a consulate abroad. People *outside the U.S.* who are seeking to enter as nonimmigrants or lawful permanent residents, or who must go abroad to have their application for lawful permanent resident status processed at a consulate, are subject to the U.S. State Department Foreign Affairs Manual (FAM) and the changes made to its public charge provisions in January 2018.¹

Why does “public charge” matter?

In immigration law, if the government determines that someone is “likely at any time to become a public charge” they can deny an application for entry into the U.S. or adjustment of status (green card).

What does “public charge” mean?

In immigration policy, the current definition of “public charge” is a person who primarily depends or is likely to become primarily dependent on public assistance to live. The proposal changes this to mean a person who is likely to use of any of the listed public benefits.

Does the public charge test apply to ALL immigrants?

NO. It primarily applies to immigrants applying for a green card through a petition filed by a family member, or in some cases, through an employer. The proposal adds a public charge determination to people who seek to extend their visa or change their visa type (e.g., from a student to employment visa).

¹ The City of Baltimore filed a lawsuit on Nov. 28, 2018 to block the State Department from using the updated public charge instructions in the Foreign Affairs Manual (FAM). As of now, it is unclear how this lawsuit will impact the FAM public charge instructions.

Who is NOT subject to a public charge determination?

- People who already have green cards (are already lawful permanent residents), as long as they do not leave the country for more than 180 days at any one time.
- People applying for U.S. citizenship.
- People who have received immigration status on humanitarian grounds, such as:
 - Refugee status
 - Asylum
 - Relief under the Violence Against Women Act (VAWA)
 - U visas (for victims of serious crimes)
 - T visas (for victims of human trafficking)
 - Temporary Protected Status (for people who cannot return to their home countries because of dangerous conditions)

What is the public charge test currently?

Immigration officials must consider multiple factors, referred to as the *totality of the circumstances*, to evaluate whether the person might become a public charge. Immigration officials consider the person's age, health, family status, assets, resources, and financial status, as well as education and skills. In addition, only use of two types of government assistance are considered "negative factors" for the public charge test:

- If the person received **cash** help to supplement their income (including Temporary Assistance for Needy Families, Supplemental Security Income).
- If the person received government support (such as Medicaid) to pay for the costs of long-term care in a residential setting, such as a nursing home or mental health institution.

Under current policy, a family member's use of benefits is only considered if they are the family's sole source of support.

How does the proposal attempt to change the public charge test?

The proposal includes new income thresholds and evidentiary factors to be considered in the "totality of the circumstances" test, establishes heavily weighted negative factors, and a 36-month look back period for use of listed public benefits, in addition to expanding the types of benefits to be considered in a public charge determination.

What public benefits does the federal government want to include in the rule?

The federal government wants to drastically expand the benefits that immigration officials use to consider whether someone is likely to become a public charge. The proposal ADDS applying for or using the following benefits as a "negative factor" in the public charge test:

- Food stamps (also known as SNAP, EBT, or WA Basic Food in Washington State)
- Medicaid (Washington Apple Health)
- Subsidized housing, Section 8 vouchers or rental assistance
- Medicare Part D Subsidies ("Extra Help")

The government is seeking input on whether to include the Children's Health Insurance Program (CHIP) in the public charge determination.

The proposed rule specifically EXCLUDES certain benefits from being considered in the public charge test. This means that even if the proposed rule is finalized, using these services and benefits would NOT be considered in a public charge determination for individuals adjusting status within the U.S.:

- Benefits received by the applicant’s children or dependent family members
- Disaster relief
- Food banks, community centers and public libraries
- Calling 911, the police or the fire department in case of an emergency
- Emergency Medicaid
- Education services such as head start, pre-school, or attending a K-12 public school
- In-state tuition and government-funded student loans
- Women Infants and Children (WIC)
- School breakfast and lunch
- Federal Earned Income Tax Credit and Child Tax Credit
- Transportation vouchers
- Energy Assistance (LIHEAP)
- Using benefits that have been earned through work or military service, such as Social Security for retirees, disability benefits, veterans’ benefits, and Medicare

The January 2018 changes to the U.S. State Department Foreign Affairs Manual (FAM) may result in consideration of benefit use by individuals seeking to sponsor a family member to the U.S. through the family visa process. See below under “Do the proposals mean that continuing to receive benefits could hurt someone’s immigration status?” for more information on the FAM changes.

What additional negative factors are included in the proposal?

The proposal ADDS additional negative evidentiary factors for consideration in the public charge “totality of the circumstances” test, including:

- Applying for or receiving a fee waiver for immigration applications
- Limited English proficiency
- Income less than 125% of the federal poverty level (FPL)
- Age under 18 or above 61
- Serious or chronic medical conditions

The affidavit of support from a sponsor will no longer be sufficient on its own to overcome negative factors. The only heavily weighted positive factor is income greater than 250% FPL.

Has the policy changed?

The interpretation of the public charge grounds of inadmissibility for immigrants who are eligible to apply for lawful permanent resident status within the U.S., rather than having to travel to a consulate abroad, have not yet changed. This is only a proposal and it will take time for the government to finalize the proposal after the close of the public comment period on December 10, 2018. However, even though the policy has not changed, the proposed changes have created a chilling effect that leaves immigrants afraid to utilize vital health, food, and housing assistance that they are legally permitted to use.

People who are outside the U.S. who are seeking to enter as nonimmigrants or lawful permanent residents, or those who must go abroad to have their application for lawful permanent resident status processed at a consulate are subject to the January 2018 changes to the U.S. State Department Foreign Affairs Manual (FAM). Consular officials are permitted to consider benefits other than cash assistance and benefits a person’s family member has received in deciding whether a person seeking to enter the U.S. is likely to become a public charge. Consular officials must still consider the “totality of the circumstances” in making a public charge determination.

What about public charge grounds for removal?

The proposal does not change anything regarding the public charge grounds of deportability. Immigration law provides that a person may be deportable on public charge grounds if that person becomes a public charge within five years of their last entry to the U.S., for reasons that existed before they entered the country. Certain additional requirements must be met before someone could be deported on public charge grounds. There may be a future rulemaking from the Department of Justice on the public charge grounds of deportability.

If the proposed rule goes into effect, do immigrants need to pay back DSHS or other agencies for the benefits they have received?

NO. The proposed rules will not impact whether an immigrant must pay back benefits received. However, there are separate sponsor-deeming rules that determine whether a sponsor may be held financially responsible for benefits a sponsored immigrant receives.

Do the proposals mean that continuing to receive benefits could hurt someone's immigration status?

IT DEPENDS. Currently there are two different public charge tests being used; one for those eligible to apply for a green card *within* the U.S. and another used for people outside of the U.S. seeking to enter either as an immigrant or on a non-immigrant visa (e.g., student or work visa). At this time, there is no reason for people who are eligible to apply for a green card within the U.S. to stop benefits that they or their families currently receive legally. The proposal will not be finalized until after the close of the public comment period on December 10, 2018 and only after the government has read and considered each unique comment. As currently written, the proposed rule excludes consideration of benefits received before the rule is finalized. This means even if the rules change, people will not be punished for receiving benefits before the change took effect. Once the rule is finalized, there will be a 60-day window before which the criteria in the new rule will be applied.

People who must go abroad to have their application for lawful permanent resident status processed at a consulate are subject to the January 2018 changes to the U.S. State Department Foreign Affairs Manual (FAM). The FAM instructions on public charge were revised to allow consular officials to consider benefits other than cash assistance in deciding whether a person seeking to immigrate is likely to become a public charge. The instructions also allow consideration of benefits received by the person's family members. Consular officials must still consider several factors in applying the public charge test and cannot base their decision solely on the use of benefits by the person or their family members.

The changes to the FAM may result in consideration of benefit use by individuals seeking to sponsor a family member to the U.S. through the family visa process.

What's Next?

- The proposed regulation was published in the federal register on October 10 and is open for public comment until December 10, 2018. The law requires that the government review and respond to **each and every unique comment**. For template comments to help get you started, see bit.ly/PIFWA
- Individuals and organizations can submit public comments and share their stories about how the proposed rules will affect them and the communities they serve through the PIFWA easy comment portal at <https://p2a.co/5a0V0h4>

Last Updated November 28, 2018. This publication provides general information and is not legal advice. If you have questions about your specific circumstances, speak with an immigration attorney.

PUBLIC CHARGE: LEGAL RESOURCES

Free/low-cost Immigration Attorneys

Colectiva Legal del Pueblo
201 SW 153rd Street, Burien, WA
<http://www.colectivalegal.org>
(206) 931-1514
info@colectivalegal.org

Eastside Legal Assistance Program (ELAP)
Immigration Legal Clinic – Bellevue, WA
www.elap.org
425-747-7274, info@elap.org

Kitsap Immigrant Assistance Center
3627 Wheaton Way, Bremerton, WA
<http://kitsapiac.org>
(360) 616-0479, Spanish line (360) 616-2722
kiacl@kitsapiac.org

Lutheran Community Services Northwest
<https://lcsnw.org/program/immigration-counseling-and-advocacy-program/>
Seattle Office
911 Stewart Street, Seattle, WA
(206) 694-5742

Vancouver Office
3600 Main Street, Suite 200, Vancouver, WA
(360) 694-5624

Northwest Immigrant Rights Project
<http://www.nwirp.org>
Wenatchee Office
620 N. Emerson Avenue, Suite 201,
Wenatchee, WA
(509) 570-0054 or (866) 271-2084

Granger Office
121 Sunnyside Ave, Suite 146, Granger, WA
(509) 854-2100 or (888) 756-3641

Seattle Office, serves King County and North
615 2nd Ave, Suite 400, Seattle, WA
(206) 587-4009 or (800) 445-5771

Tacoma Office, serves Pierce County and
Southwest Washington
402 Tacoma Ave S., Suite 300, Tacoma, WA
(206) 816-3893 or (888) 493-4273

Free/low-cost Civil Legal Assistance (for issues including public benefits)

Call Coordinated Legal Education, Advice and Referral or “CLEAR” — Washington's toll-free, centralized intake, advice and referral service for low-income people seeking free legal assistance with civil legal problems.

King County
Call 211, (206) 461-3200, or (877) 211-WASH (9274)
www.resourcehouse.com/win211/

Outside King County
(888) 201-1014 weekdays from 9:15 a.m. until 12:15 p.m.

Persons 60 and over may call CLEAR*Sr at (888) 387-7111

Self-help materials available at
<https://www.washingtonlawhelp.org/>

Please note, this is not an exhaustive list. If you are able to pay for legal services, you can search for an immigration attorney in your area through the American Immigration Lawyers Association (AILA) at <https://www.ailalawyer.com/>.

Please see the PIF – WA coalition page for additional resources at bit.ly/PIFWA