

PUBLIC CHARGE? The New Rule Took Effect Feb. 24, 2020

Screening Tool and Attorney Referral Information for Community-Based, Social Services, and Advocacy Organizations¹

Disclaimer: This document is not legal advice, and does not substitute for the advice of an immigration expert.

What is “public charge”? Public charge is a technical legal term used in immigration law. It is part of a screening process used by U.S. immigration officials primarily with non-citizens who are applying for lawful permanent resident (LPR) status, commonly also called getting a green card. If someone is considered to be a public charge or likely to become a public charge, they won’t be able to get a green card.

Who should use this screening tool? This screening tool is designed to be used by advocates and case workers who interface with people who are concerned about the impact receiving public benefits may have on their immigration options, including people who are subject to public charge because they are in the process of adjusting their status here in the U.S. and are not in an exempt category, as well as non-citizens who are not subject to public charge but nonetheless fear that receiving benefits may affect their immigration status.

What is the purpose of the tool? The tool will (a) help identify people who are going to face a public charge determination so that they can be referred for legal help if they need it; (b) help assure people who are not subject to public charge that there are no adverse immigration consequences related to their use of benefits; and (c) make sure people have accurate information about the current state of the law on public charge.

Is there a new public charge Rule in effect? Yes, as of **February 24, 2020**. A new Rule on public charge was issued by the Department of Homeland Security (“DHS”) on August 14, 2019 (the “Rule”). The U.S. Supreme Court has issued two decisions which allow the government to start using the Rule across the country, despite continued litigation in *Make the Road New York, et al. v. Cuccinelli, et al.* and other cases in which courts had blocked the new Rule from taking effect. Because of the Supreme Court’s decisions, **while the litigation plays out in the courts, people who face public charge will be subject to the new Rule.**

Overview: To assist you in answering client questions about how receiving government benefits may affect their immigration status, this packet contains the following tools:

- A **screening tool** that staff members from community, social services, and advocacy organizations can use to help answer clients’ questions about whether receiving government benefits will affect their immigration status.
- A list of **frequently asked questions and answers** that will help you respond to client questions relating to the receipt of government benefits and expected changes to the rules.
- **Lawyer referral information.** Some issues require a lawyer's expertise. If the person you are screening does not already have a lawyer and your organization does not have legal staff or partners available to answer client questions, this packet contains information about how to reach a lawyer, and in what circumstances a lawyer's help may be especially important.

Instructions: Start by taking the client through the multi-step screening tool:

- When the person you are screening reaches a green light like this  **you are done screening them, and they are not at risk under current rules. But review answers to frequently asked questions.**
- When you see a yellow light like this  **go to the next step.**
- When you see a red light like this  **refer the client to a lawyer.**
- When you see ***ASK***, it means you may need to ask a lawyer for help during the screening.

What if the person does not want screening but is concerned about how receiving benefits may affect their status? Persons concerned about public charge should go through the screening first to understand their level of risk before seeking a legal consultation. *Instructions about how to reach a lawyer are on page 6.*

¹ This document was prepared by The Legal Aid Society, Make the Road New York, and the Empire Justice Center.

SCREENING FOR RISK OF PUBLIC CHARGE

Step 1: Check to see if the person being screened is subject to a public charge determination based on current immigration status.

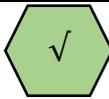
Background: Not everyone undergoes a public charge screening by immigration officials. For example, persons who are already green card holders, naturalized citizens, or in an “exempt” status **do not have to worry about public charge**. This means that **they can use any type of benefit without worrying about it affecting their immigration status**.

Screening Question 1: <i>Are you currently a Lawful Permanent Resident (LPR, or green card holder) or naturalized citizen?</i>	
If YES: 	The person being screened can use any type of benefit. (Review frequently asked questions (FAQs) with person being screened). Advise LPRs being screened to consult an immigration attorney if they are planning to travel abroad, if (a) the trip might exceed 180 days or (b) they have any criminal convictions.
If NO: 	Continue.

Check any boxes below that apply and answer screening Question 2:

Exempt statuses that may lead to a green card: People who have the following status are **not** subject to public charge screening: (**ASK** if you or the person being screened doesn't know their current status)

- | | |
|---|--|
| <input type="checkbox"/> Refugees | <input type="checkbox"/> Persons eligible to adjust under the Cuban Adjustment Act (CAA) |
| <input type="checkbox"/> Asylees | <input type="checkbox"/> Persons eligible to adjust under the Nicaraguan Adjustment & Central American Relief Act (NACARA) |
| <input type="checkbox"/> Special Immigrant Juveniles (SIJ) | <input type="checkbox"/> Persons applying for or granted status as a battered immigrant under VAWA (victim of domestic violence) |
| <input type="checkbox"/> T Visa applicants and holders (trafficking survivors) | <input type="checkbox"/> Persons eligible to adjust under the Haitian Refugee Immigration Fairness Act (HRIFA) |
| <input type="checkbox"/> U Visa applicants or holders (for certain crime victims) | <input type="checkbox"/> Special Immigrant Visa Holder (Afghan or Iraqi nationals who have helped the US) |
| <input type="checkbox"/> Noncitizens who have continuously lived in the US since before 1/1/72, who are eligible to apply for a green card because they have been in the US for so long | |

Screening Question 2: <i>Are you exempt from public charge (e.g., are any of the boxes indicating an exempt category checked)?</i>	
If YES: 	The person being screened is not at risk of public charge, and can use any type of benefit. (Review FAQs with person being screened).
If NO: 	Go to the next step.

Step 2: Check to see if the person being screened has already applied for an immigration status that requires a public charge determination.

Background: Under current law, non-citizens are at risk if they are in the process of applying for permanent resident/LPR/green card status and are not in an exempt category. Anyone who submits a **Form I-485 (application for permanent residence/green card) before February 24, 2020** is subject to the old public charge test (not the new Rule).

If the person being screened is not in an exempt category and is in the process of applying for a green card now, or is planning to do so in the near future, they will usually know about it or have one of the following forms (check as applicable):

- Notice I-797 where the fine print (likely under the case type) says receipt for filing I-485; and/or
- Form I-485 (application for LPR/green card status).

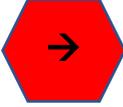
Tip: Clients who have already filed the Form I-485 based on a family relationship usually also have submitted a signed Form I-864 affidavit of support from their sponsor.

Screening Question 3: <i>Have you submitted your green card application (one or both boxes above are checked)?</i>	
<p>If YES:</p> 	<p>If yes, the person may be in the process of adjusting and is subject to the old public charge rule, not the new Rule. If they have already filed their application the new Rule does not apply to them. Use of benefits like federal Medicaid, SNAP, Section 8/public housing will not count against them. If they have questions about the status of their pending application, they should ask their lawyer or be referred to a lawyer for more information. Review FAQs with person being screened.</p>
<p>If NO:</p> 	<p>If the person has NOT already applied, go to the next step.</p>

Step 3: Determine if the person being screened will possibly be subject to the new public charge Rule in the future.

Background: Unless an applicant’s I-485 was postmarked prior to Feb. 24, 2020, they will be subject to the new Rule if they file to adjust. Persons in the following categories will likely be subject to the new Rule in the future. Check any boxes that apply to the person being screened:

- A family-member has already filed an I-130 petition for the person being screened (the “applicant”); an employer has filed an I-140 petition for the applicant; the applicant has been selected for the diversity visa lottery; or the applicant is otherwise eligible to adjust their status.
- No I-130 petition has been filed, but (1) the person being screened is the immediate family member of one of the following: (a) U.S. citizen spouse; (b) a U.S. citizen adult child (21 or older); (c) a U.S. citizen parent and the person being screened is an unmarried child under 21, or (2) the person being screened has a NON immediate family member (“preference relative”) who can file an I-130 on their behalf.
- A petition (I-140 or ETA 750) was already filed by an employer, but an application (I-485) has not yet been filed.
- The person has a non-immigrant visa that they will soon need to extend or change. **Note:** Persons who seek to change or extend a non-immigrant visa may be subject to questions about past and future benefits use but are not subject to the full Rule.

Screening Question 4: <i>Are you possibly subject to the new public charge Rule in the future (checked one of the boxes above)?</i>	
<p>If YES: </p>	<p>Refer to lawyer. If the person being screened already has an immigration lawyer, they should contact their lawyer and ask how the new public charge Rule will affect their application. If the person does not have a lawyer, they should be referred to one to learn how the new Rule will affect any application they submit.</p>
<p>If NO: </p>	<p>If the person being screened is not eligible now, but may be in the future, they may want to consult with a lawyer about what steps they can take now that would help them either obtain a green card or change or extend their non-immigrant visa in the future under the new Rule, including how the use of public benefits may affect their options in the future.</p>

Frequently Asked Questions

Background:

Persons NOT at current risk of public charge may nonetheless be concerned about the risk of receiving benefits for which they are eligible, despite getting a green light on the screening. **This is a serious matter, because if they forego needed assistance for rent, food, or health, they could be facing an emergency quickly.** If this is the case, use the questions and answers below to help address the person's concerns.

What is "public charge"? Public charge is a legal term in immigration law that applies to someone who wishes to apply for Lawful Permanent Resident status (LPR status/green card/immigrant visa), or to extend or change their nonimmigrant visa, or to enter the country on an immigrant or non-immigrant visa, and who the government decides is or is likely to be too dependent on the government for financial support. It does not apply to every non-citizen. There are many classes of non-citizens whose applications for a green card or nonimmigrant visa are not subject to a public charge evaluation (see exempt list under Step 1, above). Public charge is an issue for only specific categories of non-citizens.

When did the rules change? The rules changed for applications to get a green card or to extend or change a nonimmigrant visa from within the U.S. on February 24, 2020. The Department of State (DOS) has also issued a new public charge Rule that applies to people undergoing consular processing (people who are outside the U.S. and trying to get a green card or nonimmigrant visa). The DOS Rule also went into effect on February 24, 2020, but there are ongoing efforts to block it that may affect the implementation of that rule.

Is there any litigation to stop the DHS Rule from going into effect? Yes. Numerous states, localities, and non-profit organizations have sued to have the Rule stopped from going into effect and declared unlawful. Many courts have found the Rule to be likely unlawful and issued orders to prevent it from taking effect, but the U.S. Supreme Court said the Rule can take effect while the litigation plays out in the courts. On January 31, 2020, USCIS announced that the Rule would take effect on February 24, 2020. The litigation continues, and could affect whether the DHS Rule stays in effect.

What happens to I-485 applications filed before February 24, 2020? They are considered under the old rules.

QUESTIONS ABOUT WHO PUBLIC CHARGE APPLIES TO

Who in the U.S. should be worried about public charge? Primarily non-citizens who are applying for a green card through a family member, including, but not limited to, persons applying as an "immediate relative" of a U.S. citizen: a spouse of a U.S. citizen; a parent of an adult U.S. citizen son or daughter (≥ 21); the minor (< 21), unmarried child of a U.S. citizen; or in any of the family-based preference categories. In addition, people being sponsored by an employer, including a small business owned by their family, will be subject to public charge. Note: persons sponsored by an employer likely face lower risk of denial

under the new public charge Rule because they have already secured employment which is a positive fact under for the purposes of the public charge analysis. Persons selected for the diversity visa lottery are also subject to public charge. In addition, a person who already has a green card, and who is returning to the U.S. after traveling outside the U.S. (a) for more than 180 days, or (b) has certain criminal convictions, will be subject to public charge. Applicants to change or extend a non-immigrant visa may also be subject to questions about past, current, or future benefits use consistent with the Rule.

Who in the U.S. is NOT subject to public charge? People who already have green cards (unless they have traveled outside the U.S (a) for more than 180 days or (b) have certain criminal convictions), including those-applying for citizenship/naturalization; and whole groups of immigrants who are "exempt" under the law from having to show immigration that they will not need financial help, such as refugees, VAWA self-petitioners and victims of violent crimes. For a list of who is exempt and not subject to public charge, see exemption list under Step 1 above.

Have the rules already changed for people seeking a visa to enter the U.S. at the consulate office in their country? Yes, the rules affecting public charge had already changed at the U.S. consulates in other countries in certain ways, and the DOS public charge rule effectuated additional changes that went into effect on February 24, 2020. *If a sponsored family member is expected to be scheduled for a consular interview, the person being screened should consult an immigration lawyer about how the changes might affect their relative.*

What if the person being screened has a long work history, or a spouse or parent with a long work history? If the person being screened has worked and paid taxes for 10 or more years (or if they can be credited with qualifying work performed by their spouse or parent), they may be exempt from needing a sponsor. Having a long work history will likely be treated as a favorable fact in the public charge analysis, but technically the person being screened will still be subject to public charge.

Will the categories of people considered exempt from public charge remain the same? People who are currently not subject to public charge based on their exempt status will continue to remain exempt from public charge screening when they apply to adjust their status, even under the new Rule.

Does the Rule apply to sponsors? No. Sponsors still have to have income at or over 125% of the poverty level. USCIS says it will look at sponsors' income more closely under the new Rule, including whether the sponsor uses public benefits that count under the new Rule and whether the sponsor lives with the green card applicant. Though sponsors are not automatically disqualified from sponsorship if they receive benefits or do not reside with the applicant, the applicant may need to seek a joint sponsor to help ensure the likelihood that the application will be approved.

QUESTIONS ABOUT THE NEW DHS RULE

What are some of the changes that took effect on February 24, 2020?

- **New Benefits Count to Determine Public Charge.** The new Rule includes the following benefits in addition to Cash Assistance and long-term institutional care funded by the government: federal Medicaid for a very limited group of immigrants (most immigrants who receive federal Medicaid are exempt), SNAP, Section 8, and Public Housing. To count, a benefit must be received for 12 months out of a 36-month period (if two benefits received, the benefits count if received for 6 months out of a 36-month period; if three benefits received, the benefits count if received for 4 months out of a 36-month period).
- **Who Do the Changes Impact?** In addition to green card applicants based on a family-based petitions, certain employment-based petitions, and diversity lottery winners, people seeking to renew or extend their non-immigrant visas are also subject to certain aspects of the new public charge Rule.
- **New Factors Considered.** The Rule treats as negative factors new circumstances presented by the applicant, including being unemployed, having less than 125% of the poverty level in income, having a disability, being limited English proficient, being under 18 or over 61, having debt or a low credit score, and others. The only heavily weighted positive factors are being in a household that has income or resources over 250 percent of the poverty level or being authorized to work and having such income (approximately \$65,000 for a family of four) or having private health insurance (not including health insurance for which the applicant receives subsidies in the form of premium tax credits under the Affordable Care Act).

Does past use of benefits that count for public charge under the new Rule count against a person applying for a green card on or after February 24, 2020? Use of benefits that count only under the new Rule – SNAP, federal Medicaid, and Section 8/public housing – only counts against an applicant who receives those benefits for themselves (not on behalf of children) **on or after February 24, 2020**. However, new applicants are asked to list all benefits they have received since October 15, 2019 on the new Form I-944 Declaration of Self-Sufficiency, which is confusing. **Any** use of cash assistance (or long-term institutional care) **before** or **after** the Rule becomes effective on February 24, 2020, counts as a negative factor.

How does the person being screened know if they have federal Medicaid? Under the new Rule, federal Medicaid is considered under the public charge analysis depending on the length of time a person receives it. Very few immigrants who are subject to public charge are eligible for federal Medicaid. In New York State, the only immigrants who are not LPRs or naturalized citizens who are eligible for federal Medicaid are those who are pregnant, within 60 days postpartum, or under 21 years of age. This means that if the applicant receives health insurance from the government, it is State Medicaid or the Essential Plan or Child Health Plus. Even under the new Rule, these three programs do NOT count for public charge. On or after February 24, 2020, if the applicant is pregnant or within 60 days postpartum or under 21 years of age, their federal Medicaid receipt does not count for public charge. Also, if the applicant has ever received Emergency Medicaid, this does not count for public charge. Other programs like NYC Care, H+H Options, or other forms of hospital charity care or other charity care also do not count for public charge.

What if the person being screened has TPS or DACA and is receiving Cash Assistance? If the person being screened is currently receiving Cash Assistance because they have TPS or DACA, there is no danger of losing TPS or DACA status merely because of receipt of benefits. However, if the client may be eligible to apply for a green card now or in the future (see Step 2, above), they will be subject to public charge at that point. Under the new Rule, Cash Assistance received by someone with TPS does not count against them when they seek to adjust.

What if the person being screened plans to apply for a green card in a non-exempt category and asks if they should close their benefits case or not apply for benefits because they are worried about changes to the public charge rules? Very few immigrants who are subject to public charge are eligible for benefits that are actually included under the new Rule. Therefore, individuals should talk to an advocate before deciding to close their benefits case or not apply for benefits.

What about clients who fear removal/deportation on public charge grounds? For the last several decades, removal based on public charge has been very, very rare. The only people who have been at risk are those who have already obtained LPR status through a family member, who have had their LPR status for less than five years, and who are still required to have a financial sponsor. However, as of October 1, 2018, USCIS started serving a Notice to Appear (which is the summons for removal proceedings in immigration court) in the event an immigration application is denied and the applicant has no lawful status. This includes applicants seeking to get their green cards through family members. For this reason, anyone subject to public charge who is considering adjustment of status should speak with a lawyer to carefully assess their eligibility for adjustment **before** applying.

ATTORNEY REFERRAL INFORMATION:

If your organization does not have staff or a partner that provides legal services for your non-citizen clients, here are some resources:

New York City:

- City of New York:
Action NYC Hotline, 800-354-0365, M-F, from 9am-5pm, or call 311 and say “Action NYC”
- The Legal Aid Society:
Immigration Helpline, 844-955-3425, M-F, from 9am -5pm

Rest of New York State:

- Office for New Americans Hotline, 1-800-566-7636
- Empire Justice Center, 631-650-2306 (Long Island)
- New York Immigration Coalition state-wide list of legal resources, <https://www.nyic.org/providers/>