



A series of common legal questions and answers for the CAA network

## Public Charge: Understanding the New Rule and its Implications for CAA Clients

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After a lengthy comment process and the litigation of several preliminary injunctions attempting to block its implementation, the Department of Homeland Security's new "public charge rule" is currently in effect in all states other than Illinois, New York, Connecticut, and Vermont.<sup>1</sup> With the COVID-19 pandemic and accompanying economic downturn resulting in increased demand for services offered by Community Action Agencies (CAAs), CAPLAW has developed the following FAQ to inform CAAs and their clients about how a client's receipt of certain public benefits under the rule may impact their future immigration status. This resource addresses who is covered by the rule, how officials determine whether an individual is likely to become a public charge, and what effect a public charge determination may have on an individual's green card application. This FAQ is not authorized or approved by the federal Office of Community Services or the Department of Homeland Security (DHS) and does not constitute legal advice.

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## 1. What is the public charge rule?

The public charge rule is a prospective test derived from the 1952 Immigration and Nationality Act that immigration officials apply to green card and certain visa applicants. The test allows an official to deny the applicant's petition if they are "likely at any time to become a public charge".<sup>2</sup> While the specific elements of the test have changed over time, some form of the federal public charge rule has existed since the 1800s.<sup>3</sup> Under the federal statute, an immigration official must consider, at a minimum, an individual's (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills when determining whether such individual is inadmissible on public charge grounds.<sup>4</sup> DHS has the authority to issue rules and guidance that establish what factors may be considered under each element of the five-element test, also known as the "totality of the circumstances test."

## 2. What is the history of the 2018 rule?

On October 10, 2018, DHS published a Notice of Proposed Rulemaking in the Federal Register announcing a new public charge rule that would supersede the 1999 guidance that immigration officials were using to make public charge determinations (the "1999 Rule").<sup>5</sup> The proposed rule received a large number of public comments, which delayed publication of the final version until August 14, 2019.<sup>6</sup> Before the final rule (the "2018 Rule") could go into effect, however, advocacy groups sought and won preliminary injunctions that blocked the 2018 Rule from being enforced anywhere in the United States.<sup>7</sup> The injunctions were appealed all the way up to the U.S. Supreme Court, which sent the cases back down to the lower courts for consideration on the merits.<sup>8</sup> Practically speaking, this allowed DHS to proceed with implementing and enforcing the 2018 Rule in every state except for Illinois, which was subject to a separate injunction that was not part of the Supreme Court's review.<sup>9</sup> U.S. Citizenship and Immigration Services (USCIS) started applying the 2018 Rule on February 24, 2020.<sup>10</sup>

Just over a month after implementing the 2018 Rule, USCIS issued an alert excluding COVID-19 testing and treatment from consideration in public charge determinations.<sup>11</sup> Nevertheless, the plaintiffs in the New York case made a renewed request for a nationwide preliminary injunction in light of the pandemic, and their request was granted on July 29, 2020.<sup>12</sup> On August 13, 2020 the Second Circuit narrowed the scope of the injunction to apply only in the states of New York, Connecticut, and Vermont, which, along with Illinois, now comprise the jurisdictions in which the rule is enjoined, i.e., not in effect.<sup>13</sup>

## 3. Which rule is currently in effect?

In all states except for Illinois, New York, Connecticut, and Vermont, the 2018 Rule is currently in effect. Immigration officials will apply the 1999 Rule in the four states where the 2018 Rule is enjoined, pending further legal action.

## 4. What has changed under the 2018 rule?

The new public charge rule makes it more difficult for immigrants who use federal, state, or local government benefits to receive visas and green cards. It changes the definition of "public charge", adds programs to the list of benefits that count against an applicant in a public charge determination, and designates the receipt of public benefits as one of several "heavily weighted" factors that make it more likely that the individual will be found inadmissible.

Under the 1999 Rule, a “public charge” was defined as a person who was “primarily dependent on the government for subsistence”.<sup>14</sup> This was widely understood to mean that they received more than 50% of their income from public benefits. Under the 2018 Rule, a “public charge” is someone “who receives one or more public benefits … for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)”.<sup>15</sup> Other circumstances being equal, this change dramatically reduces the amount of benefits that an applicant may receive before being considered a public charge. If the applicant has received 12 months’ worth of covered public benefits within a 36-month period, their receipt of those benefits will weigh heavily in favor of a finding that they are likely to become a public charge.<sup>16</sup> Even if the 12-month threshold is not met, officials may still consider the benefits an applicant has received as part of the totality of the circumstances test.<sup>17</sup>

The 2018 Rule also expands the list of federal benefits that are considered “public benefits” for purposes of the public charge test. Under the 1999 Rule, the only benefits considered were: (1) cash benefits used for income maintenance (such as TANF and state “General Assistance” programs) and (2) long-term institutionalization at the government’s expense.<sup>18</sup> The 2018 Rule adds the Supplemental Nutrition Assistance Program (SNAP, or food stamps), Medicaid, and housing assistance to that list.<sup>19</sup>

Finally, the 2018 Rule contains guidelines for what factors may be considered under each element of the totality of the circumstances test, as well as how certain factors should be weighed when assessing if an individual is likely to become a public charge. The five elements—age, health, family status, assets/resources/financial status, and education/skills—are based on the federal immigration statute and thus have not changed. While officials still need to consider all of the elements, the new rule requires that some factors be heavily weighted.<sup>20</sup> The presence of a heavily weighted factor will not on its own be dispositive, but it is unclear how an immigration official should decide a case that has both heavily weighted negative and positive factors.<sup>21</sup>

## **5. Who does the public charge rule apply to?**

The public charge test is applied to individuals seeking a visa for entry into the United States or a green card for permanent residence within the United States, usually on the basis of family relationship with a U.S. citizen. However, there are a number of immigrant groups that are exempt from the public charge rule, including refugees, asylees, U and T visa applicants, VAWA self-petitioners, special immigrant juveniles, and other humanitarian immigrants.<sup>22</sup> Each of these exemptions is established by statute, which means that Congress alone has the ability to change them. Further, green card holders are not subject to the public charge test when applying for green card renewal or for U.S. citizenship.<sup>23</sup> Also, the rule does not apply to individuals applying to renew their DACA status.<sup>24</sup>

### **The public charge test does NOT apply to:**

- Refugees and asylees
- VAWA self-petitioners
- Survivors of domestic violence, trafficking, or other serious crimes (U or T visa applicants)
- Special Immigrant Juveniles
- TPS applicants
- Lawful permanent residents (i.e., green card holders) applying for citizenship or to renew their green card
- DACA renewal applicants

## 6. What benefits are counted under the public charge rule?

As mentioned in [Question 4](#) above, the 2018 Rule adds to the list of public benefits which, if received for an aggregate of 12 months within a 36-month period, will heavily weigh against an applicant in a public charge determination. The following programs are counted as public benefits under the 2018 Rule:

- A) Supplemental Security Income (SSI), [42 U.S.C. 1831](#) et seq.;
- B) Temporary Assistance to Needy Families (TANF), [42 U.S.C. 601](#) et seq.;
- C) Federal, state, and local cash benefits for income maintenance (often called "General Assistance" in the state context, but which also exist under other names);
- D) Supplemental Nutrition Assistance Program (SNAP, or food stamps), [7 U.S.C. 2011 - 2036c](#);
- E) Medicaid (other than emergency medical services and certain disability services provided by schools, with an additional exclusion for Medicaid benefits received by immigrants under the age of 21 and pregnant women during pregnancy and 60 days after pregnancy), [42 U.S.C. 1396](#) et seq.;
- F) Section 8 Housing Choice Vouchers, [42 U.S.C. 1437f](#);
- G) Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation), [42 U.S.C. 1437f](#); and
- H) Public housing under Section 9 of the U.S. Housing Act of 1937.

The new rule is not retroactive, which means that if someone received one of the listed benefits before February 24, 2020, it will not be considered in their public charge determination unless the benefit counted under the 1999 Rule (only programs A-C above were counted under the 1999 Rule).<sup>25</sup> Officials may also consider benefits that an applicant has applied for or is certified to receive, but has yet to receive, as part of the totality of the circumstances test.<sup>26</sup>

### Programs NOT counted under the new public charge rule:

- CSBG
- LIHEAP
- Head Start and Early Head Start
- WAP
- Women, Infants, and Children (WIC)
- Employment or job-training
- School breakfast and lunch
- Transportation vouchers or non-cash transportation services
- Non-cash TANF benefits
- Federal Earned Income Tax Credit and Child Tax Credit
- Disaster relief
- Emergency medical assistance
- Non-cash state, local, or tribal programs

Any program not specifically listed in the new public charge rule will not be considered in public charge determinations. Many programs commonly administered by CAAs, including Community Services Block Grant (CSBG)-funded programs, the Low Income Home Energy Assistance Program (LIHEAP), Head Start, Early Head Start, and Weatherization (WAP), do not appear in the rule and are therefore excluded. The same goes for COVID-19-related relief such as stimulus payments, pandemic EBT, and unemployment insurance.<sup>27</sup> USCIS has also announced that testing, prevention, and treatment for COVID-19 will not count against applicants subject to a public charge determination, so immigrant families should seek the care they need during the pandemic.<sup>28</sup>

Understanding which programs will count towards an immigrant client's public charge determination is important for CAA staff who work with program intake and referrals. Clients should be made aware of any potential immigration-related consequences of their receipt of public benefits, as well as any alternative services that are available.

## 7. Do state and local benefit programs count?

State and local cash benefits, or General Assistance programs, continue to count as “public benefits” under the public charge rule. However, state and local non-cash aid programs do not count as “public benefits”.<sup>29</sup>

## 8. What about mixed-status households? Will benefits received by someone with a green card or U.S. citizenship count against their family member applying for a visa or green card?

Public benefits received by or for the benefit of other members of an applicant’s household, regardless of their immigration status, will not count against the applicant unless the applicant is also a listed beneficiary of the benefit.<sup>30</sup> For example, if an individual lives in project-based public housing with other family members, immigration officials will not consider their receipt of housing assistance in a public charge determination unless the specific individual is listed on the contract, lease, or other documentation.

Though their family members’ receipt of public benefits will not count towards their 12-month threshold, an applicant’s household size may play a role in their public charge determination. Officials may consider the applicant’s household’s annual gross income under the assets, resources, and financial status element of the totality of the circumstances test.<sup>31</sup> A total household income below 125% of the federal poverty level will count against an applicant in a public charge determination.<sup>32</sup>

## 9. How is the “aggregate of 12 months within a 36-month period” calculated?

As mentioned in [Question 4](#), the 2018 Rule changes the definition of “public charge” to someone “who receives one or more public benefits … for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)”.<sup>33</sup> Each of the covered benefits, whether received for a full month or just part of a month, will be added together to determine if the applicant has reached the 12-month threshold.<sup>34</sup> However, DHS may also consider public benefits received for less than 12 months within a 36-month period under the totality of the circumstances test.<sup>35</sup> In considering how much weight to give the receipt of benefits below the threshold, an officer may consider the dollar amount and duration of the benefit received.<sup>36</sup> Immigration officials may not find an applicant inadmissible solely based on the receipt of a public benefit, but must consider all positive and negative factors within the totality of the applicant’s circumstances.<sup>37</sup> The below examples demonstrate how the 12-month threshold is calculated:

- Ana lives in Washington and receives Medicaid and SNAP continuously for six months prior to her green card application. Since two benefits received in one month equals two months of benefits under the new rule, Ana has received public benefits for an aggregate of 12 months within a 36-month period, which will be heavily weighted against her, but not determinative, in her public charge determination.
- Bernard has lived in Section 8 housing in Arizona for the last two years, but receives no other public benefits. His green card application is being considered on September 30, 2020. Since housing assistance did not count as a public benefit under the prior rule, Bernard’s receipt of that benefit prior to February 24, 2020 will not count against him

in a public charge determination. However, his receipt of housing assistance since February will count against him. It will not be heavily weighted, since he has not received the public benefit for an aggregate of 12 months, but it will be considered within the totality of the circumstances. An official could also consider the amount of the benefit, as well as the fact that he is still receiving it at the time of the determination.

## 10. What are some of the other things considered in the public charge determination?

Receipt of public benefits is only one factor within the totality of the circumstances test that immigration officials use to determine who is likely to become a public charge.<sup>38</sup> The 2018 Rule contains additional guidance on what constitutes a positive or negative factor, as well as what should be heavily weighted.<sup>39</sup> The table below shows some of the factors that fall under each element of the test. Heavily weighted factors are in green.

Elements of Totality of Circumstances Test	Positive Factors	Negative Factors
Age	+ Age 18-60	- Younger than 18 - Older than 60
Health	+ No known health conditions + Private health insurance	- Diagnosed medical condition that interferes with ability to earn a living, work, or attend school - No private health insurance - Health condition without private insurance or funds to afford care
Family Status	+ Few dependents	- Many dependents
Assets, Resources, and Financial Status	+ Household income at or greater than 250% of federal poverty line + Resources to cover reasonably foreseeable medical costs	- No employment or prospects - Household income at or below 125% of federal poverty line - No significant assets - Application, certification, or receipt of public benefits, as defined in the 2018 Rule, for 12 months within a 36-month period - Receipt of any public benefit, as defined in the 2018 Rule - Application for fee waiver for immigration benefits - Negative credit history or low credit score
Education and skills	+ High school, college or graduate degrees + Occupational skills, certifications, and licenses + English proficiency	- No high school degree - No English proficiency

## 11. Will receiving benefits prevent someone from getting a green card?

Not necessarily. Even if a green card applicant has received public benefits for an aggregate of 12 months within a 36-month period, their receipt of benefits is only one heavily weighted factor that will be considered as part of the totality of the circumstances test.<sup>40</sup> Under the 2018 Rule, the presence of one heavily weighted factor in an applicant's public charge determination will not, on its own, determine that the applicant is likely to become a public charge.<sup>41</sup> However, CSBG-eligible clients are likely to have additional negative factors applicable to their totality of the circumstances analysis, such as an income at or below 125% of the federal poverty line. The presiding official will weigh all factors, heavily weighted or not, to make the determination. For reference, USCIS has included five hypothetical public charge determinations in its [Policy Manual](#) to demonstrate how to apply the test.<sup>42</sup>

## 12. Does my CAA need to verify immigration status when taking on a new client?

It depends on what type of assistance the client is applying to receive. CSBG, Head Start, and Early Head Start do not require any verification of a client's immigration status for eligibility purposes, so CAAs do not need to inquire into or collect any immigration information in relation to those programs.<sup>43</sup> Other programs, like LIHEAP and WAP, are only available to certain groups of immigrants and have program- and often state-specific requirements for immigration verification.<sup>44</sup> In the case of CSBG, Head Start, Early Head Start, LIHEAP, and WAP, CAAs may inform clients that their receipt of such benefits will not count against them in a public charge determination. For other programs, like SNAP, CAA employees who are verifying immigration status for eligibility purposes should be aware that receipt of SNAP could affect the recipient's future green card application.

## 13. Where can I find more information about the public charge rule?

There are many free online resources that can help CAA employees and clients understand the public charge rule. Here are some materials that CAPLAW has found useful:

- [Know Your Rights materials](#) in multiple languages from the [Protecting Immigrant Families Project](#)
- [Keep Your Benefits](#) interactive tool, available in English, Spanish and Chinese, where you can enter information anonymously to find out whether the public charge rule will apply to a particular case
- [Public Charge page](#) from the [Immigrant Legal Resource Center](#), which contains regularly updated information about public charge litigation and practice alerts for attorneys

Remember that the public charge rule is still being litigated in the courts, so its enforceability is subject to change. You can check the websites of any of the organizations listed above for updates, or reach out to CAPLAW directly.

## ENDNOTES

<sup>1</sup> As of the date of this publication, multiple lawsuits challenging the new public charge rule remain pending in the federal court system. The [Seventh](#) and [Second](#) Circuit Courts of Appeals have upheld orders temporarily barring the federal government from enforcing the public charge rule in Illinois, New York, Connecticut, and Vermont. Recently, when faced with another nationwide injunction barring enforcement of the rule during the COVID-19 pandemic, the Second Circuit also limited the order to New York, Connecticut and Vermont. The [Fourth](#) and [Ninth](#) Circuits have also considered preliminary injunctions, but have allowed the rule to take effect, creating a circuit split that the Supreme Court may choose to address. For more information about the litigation, see [Question 2](#).

<sup>2</sup> [8 U.S.C. § 1182\(a\)\(4\)\(A\)](#).

<sup>3</sup> [Public Charge Provisions of Immigration Law: A Brief Historical Background](#), USCIS.gov.

<sup>4</sup> [8 U.S.C. § 1182\(a\)\(4\)\(B\)](#).

<sup>5</sup> [83 Fed. Reg. 51114 et seq.](#)

<sup>6</sup> [84 Fed. Reg. 41292 et seq.](#)

<sup>7</sup> See 419 F.Supp.3d 647, 668 (S.D.N.Y. 2019), 408 F.Supp.3d 1191, 1199 (E.D. Wash. 2019), 408 F.Supp.3d 1057, 1073 (N.D. Cal. 2019), 414 F.Supp.3d 760, 767 (D. Md. 2019); 417 F.Supp.3d 1008, 1014 (N.D. Ill. 2019).

<sup>8</sup> [140 S.Ct. 599 \(2020\)](#).

<sup>9</sup> *Id.*

<sup>10</sup> [USCIS, Public Charge](#).

<sup>11</sup> *Id.*

<sup>12</sup> [2020 WL 4347264](#).

<sup>13</sup> [Order No. 20-2537 \(August 12, 2020\)](#).

<sup>14</sup> [Field Guidance on Deportability and Inadmissibility on Public Charge Grounds](#), Immigration and Naturalization Service.

<sup>15</sup> [8 CFR § 212.21\(a\)](#).

<sup>16</sup> [8 CFR § 212.22\(c\)\(1\)\(ii\)](#).

<sup>17</sup> [8 CFR § 212.22\(a\)](#).

<sup>18</sup> See FN 14.

<sup>19</sup> [8 CFR § 212.21\(b\)](#).

<sup>20</sup> [8 CFR § 212.22\(c\)](#).

<sup>21</sup> *Id.*

<sup>22</sup> [8 CFR § 212.23\(a\)](#); 8 U.S.C. § [1157-59](#), [1182\(a\)\(4\)\(E\)](#), [1255\(h\)](#).

<sup>23</sup> [PIF Campaign, Public Charge Analysis and FAQ \(Updated March 13, 2020\)](#).

<sup>24</sup> [USCIS, Frequently Asked Questions, Renewal of DACA](#).

<sup>25</sup> [USCIS Policy Manual, Volume 8, Chapter 9](#).

<sup>26</sup> *Id.*

<sup>27</sup> [PIF Campaign, Immigrant Eligibility for Public Programs During COVID-19 \(Updated April 6, 2020\)](#).

<sup>28</sup> [USCIS, Public Charge](#).

<sup>29</sup> See FN 6.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> [8 CFR § 212.21\(a\)](#).

<sup>34</sup> FN 25.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> [8 CFR § 212.22](#).

<sup>39</sup> FN 6.

<sup>40</sup> *Id.*

<sup>41</sup> [8 CFR § 212.22\(c\)](#).

<sup>42</sup> [USCIS Policy Manual, Volume 8, Chapter 15](#).

<sup>43</sup> See [CSBG IM 30, 45 CFR § 1302.12, ACYF-HS-PI-04-03](#).

<sup>44</sup> [Low-Income Home Energy and Weatherization Assistance Programs, Guide to Immigrant Eligibility for Federal Programs](#), National Immigration Law Center.

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