



# TOTALITY OF THE CIRCUMSTANCES: ASSESSING THE PUBLIC CHARGE GROUND OF INADMISSIBILITY

By Em Puhl

## I. Overview of Public Charge

Public charge has been a concept in immigration law since the Immigration Act of 1882. Historically, this test has been used to discriminatorily exclude certain groups of people, such as women, children, elderly individuals, and people from countries perceived as poor, based on the idea that they were incapable of—or unwilling to—work to support themselves.<sup>1</sup> For the last twenty years, a “public charge” has been defined as a person “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.”<sup>2</sup>

Today, only some groups of people must overcome a public charge test in order to receive an immigration benefit. Individuals applying for admission to the United States or adjustment of status are subject to the public charge ground of inadmissibility unless they fall under certain statutorily exempted categories. Primarily, people subject to a public charge test are applicants for an immigrant visa or green card through a family-based petition, and people applying for most nonimmigrant visas. Many groups of people are either exempt from public charge or may apply for a waiver of the public charge ground of inadmissibility when applying for admission to the United States, a green card, or other immigration benefits. These groups include refugees and asylees, people applying to renew Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS), and applicants for humanitarian forms of relief, such as U visas, T visas, or relief under the Violence Against Women Act (VAWA).<sup>3</sup>

This advisory provides an overview of how adjudicators have applied the “totality of the circumstances” test in the public charge context. As is explained below, this test evolved during the 20th century and may be poised to change under the current administration. Understanding this analysis will help advocates best counsel their clients and prepare applications in this climate of uncertainty.

\* Thanks to Erin Quinn for help with the content of this advisory.

<sup>1</sup> See, e.g., *Matter of Harutunian*, 14 I. & N. Dec. 583, 589–90 (BIA 1974).

<sup>2</sup> Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).

<sup>3</sup> For a complete list of groups who are not subject to public charge, see ILRC, *An Overview of Public Charge* (December 2018), [https://www.ilrc.org/sites/default/files/resources/overview\\_of\\_public\\_charge-20181214.pdf](https://www.ilrc.org/sites/default/files/resources/overview_of_public_charge-20181214.pdf).

## II. Beyond the Affidavit of Support: Evaluating the “Totality of the Circumstances” Standard.

There are two tests that immigration officials use to assess public charge, as outlined in the Immigration and Nationality Act (INA). The first test is a “totality of the circumstances” test, which considers several factors listed at INA § 212(a)(4)(B). The second test requires certain applicants to submit a contract signed by the petitioner, Form I-864 Affidavit of Support, and, if necessary, an affidavit by an additional joint sponsor.<sup>4</sup>

**Example:** Jean is a U.S. citizen who is petitioning for her spouse, Marie. Because Marie is applying for a family-based green card, Marie must show that she is not likely to become a public charge. Jean, as the petitioner, will also have to submit an affidavit of support, Form I-864, showing that Jean has sufficient resources to support Marie. If Jean does not have sufficient income or assets, Marie may be inadmissible because she is likely to become a “public charge.” Jean and Marie can avoid a public charge finding if they can convince another person to be a joint sponsor for Marie.

In recent decades, an applicant for admission could easily avoid a public charge finding by submitting an affidavit of support showing sufficient income and assets or by submitting an affidavit from a joint sponsor. However, this form has been given less weight in new policies implemented by the Department of State<sup>5</sup> and in a recent proposed regulation from U.S. Citizenship and Immigration Services (USCIS).<sup>6</sup> Instead, more emphasis is placed on the individual factors of each case to determine on a case-by-case basis whether or not the applicant is likely to become a public charge. Therefore, it is important that advocates understand the totality of the circumstances test in the context of public charge so they can ensure that their clients avoid a public charge finding in the future.

### A. The “Totality of the Circumstances” Test

The traditional public charge test requires immigration officials to consider the factors outlined by Congress at INA § 212(a)(4)(B). Adjudicators shall, “at a minimum,” consider the person’s **age, health, family status, assets, resources, financial status, education, and skills**, and can also consider an affidavit of support.<sup>7</sup> “The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge.”<sup>8</sup> Instead, the adjudicator should consider all factors relevant in an individual’s case, and should assess whether there is a likelihood that the person will become a public charge based on the totality of all the factors. No one negative factor should be dispositive of a person’s individual case. The requirement that the adjudicator consider and balance all factors is referred to as a “totality of the circumstances” standard or test.

Current USCIS guidance requires that an officer identify specific factors that demonstrate a likelihood the applicant will become dependent on the government in order to make a public charge finding. It explains that a public charge finding requires “some specific circumstances, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public....”<sup>9</sup> Mere receipt of public benefits alone does not show a likelihood of dependence on the government for public charge purposes.

Under the totality of the circumstances test, a person “who is incapable of earning a livelihood, who does not have sufficient funds in the United States for his support, and has no person in the United States willing and

<sup>4</sup> INA § 212(a)(4)(C)-(D).

<sup>5</sup> 9 FAM 302.8-2(B).

<sup>6</sup> Inadmissibility on Public Charge Grounds, 83 FR 51114-01 (Oct. 10, 2018).

<sup>7</sup> INA § 212(a)(4)(B); see also *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974).

<sup>8</sup> 8 C.F.R. § 245a.18(d)(1); Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28690 (May 26, 1999).

<sup>9</sup> Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).

able to assure that he will not need public support is excludable as likely to become a public charge.”<sup>10</sup> A healthy person “in the prime of life” cannot ordinarily be considered likely to become a public charge, “especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency.”<sup>11</sup> Thus, in most cases before USCIS, the affidavit of support requirement ensures the applicant will not be found to be a public charge.

**PROPOSED CHANGES:** In October 2018, the Trump Administration published a Notice of Proposed Rulemaking (NPRM) to propose a new regulation that would redefine public charge as a person “who receives one or more public benefits.”<sup>12</sup> The proposed rule also intends to impose new penalties on families who have accepted forms public assistance beyond cash benefits and long-term institutionalization at government expense.<sup>13</sup> Although this proposal has no legal effect, this is causing many families to decline needed health and other benefits. At the time of publication, this proposed new regulation remains just that—a proposal. Thus, until a final rule is published, USCIS must continue to define public charge as a person who is “primarily dependent on the government for subsistence,<sup>14</sup> as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.” For updated information, check ILRC’s Public Charge website at [www.ilrc.org/public-charge](http://www.ilrc.org/public-charge).

### 1. Current Factors Must Indicate *Future* Likelihood

The public charge evaluation should be “a prospective evaluation based on the alien’s age, health, family status, assets, resources, education and skills.”<sup>15</sup> The Board and federal courts have held that a likelihood “requires more than a showing of a possibility that [the applicant] will require public support.”<sup>16</sup> Because this test is forward-looking, the officer is supposed to consider all factors as they relate to *future* likelihood that the person will become dependent on the government.

A finding that an applicant is likely to become a public charge must be based on evidence in the record of specific circumstances “at the time of [the person’s] application.”<sup>17</sup> Therefore, the finding cannot be based on speculation or conjecture by the official.<sup>18</sup> The evidence must indicate permanent personal conditions in the applicant’s case that cannot be remedied and cannot be based on “circumstances beyond the control of the [applicant] which temporarily prevent [a person] from joining the workforce,” such as local employment conditions.<sup>19</sup>

<sup>10</sup> *Matter of Harutunian*, 14 I. & N. Dec. at 589–90.

<sup>11</sup> *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421–22 (BIA 1962).

<sup>12</sup> Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114-01 (Oct. 10, 2018).

<sup>13</sup> See NILC, *FREQUENTLY ASKED QUESTIONS: Proposed Changes to the Public Charge Rule* (Nov. 2018), <https://www.nilc.org/issues/economic-support/pubcharge/proposed-changes-to-public-charge-rule-faq/#10>.

<sup>14</sup> Note that mere use of cash benefits alone does not make an applicant “primarily dependent” on the government for subsistence. See subsection A.3 below.

<sup>15</sup> 8 C.F.R. § 245a.18(d)(1); Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28690 (May 26, 1999) attached as Appendix B.

<sup>16</sup> *Martinez-Lopez*, 10 I. & N. Dec. at 421–22.

<sup>17</sup> *U.S. ex rel. Duner v. Curran*, 10 F.2d 38, 41 (2d Cir. 1925); see also *Martinez-Lopez*, 10 I. & N. Dec. at 421 (“Some specific circumstances, such as mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public, must be present.”); Applicant: (IDENTIFYING INFORMATION REDACTED BY AGENCY) APPLICATION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114, 2008 WL 5745448, at \*6–7.

<sup>18</sup> *U.S. ex rel. Mantler v. Comm’r of Immigration*, 3 F.2d 234, 235–36 (2d Cir. 1924).

<sup>19</sup> *Matter of A-*, 19 I. & N. Dec. 867, 870 (BIA 1988); see also *Geglow v. Uhl*, 239 U.S. 3, 10 (1915).

## 2. Work History and Ability to Work as a Factor

Cases that have assessed public charge typically look at whether an applicant has been able to work in the past or has potential to work in the future.<sup>20</sup> Applicants are considered not likely to be a public charge if they are of working age or are healthy enough to engage in work.<sup>21</sup> Courts have also looked positively on applicants who have employable skills, work history, a job offer, or have recently begun working.<sup>22</sup> Applicants who are working are also less likely to be considered a public charge when they also have their own assets, such as property or savings, or have affidavits of support from family or friends.<sup>23</sup>

However, even if the applicant is not working at the time of applying for admission, they may still avoid a public charge finding.<sup>24</sup> Individuals who are not currently working may not be considered a public charge if they are children supported by family members<sup>25</sup> or if there are outside factors that make it unreasonable for the applicant to work. For example, the Board has found that a woman is not likely to become a public charge for lack of employment if she remains home to care for young children who have not started school.<sup>26</sup> The Board also explained that an applicant should not be faulted for a lack of work when they “live[] in an area where jobs are scarce and [they have] been unable to find a job.”<sup>27</sup> Finally, the promise of a job “is not stated as an absolute prerequisite” if there are sufficient funds or “assurances of support by relatives or friends in the United States.”<sup>28</sup>

**Example:** Olga is twelve years old. She attends school full-time and is not legally allowed to work in her country. Her mother filed a petition for Olga to come to the United States on an immigrant visa. Olga would not likely be a public charge if she can prove she will be supported by her mother and, if necessary, other family or friends while she lives in the United States.

## 3. Prior Use of Public Benefits as a Factor

Although reliance on public benefits for one’s entire financial support can make an applicant a public charge,<sup>29</sup> mere receipt of public benefits alone does not automatically make an individual a public charge.

<sup>20</sup> *Matter of Harutunian*, 14 I. & N. Dec. at 589–90.

<sup>21</sup> See, e.g., *Matter of A-*, 19 I. & N. Dec. at 869–70; *Matter of Martinez-Lopez*, 10 I. & N. Dec. at 421–22; see also *Ex parte Mitchell*, 256 F. 229, 235 (N.D.N.Y. 1919) (finding applicant is not a public charge because she “is a person capable of and fully able to earn her own living and provide for herself”); *Ex parte Sturgess*, 13 F.2d 624, 625 (6th Cir. 1926); *U.S. ex rel. Mantler*, 3 F.2d at 235–36.

<sup>22</sup> See *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974); *Matter of Martinez-Lopez*, 10 I. & N. Dec. at 422–23; *Ex parte Hosaye Sakaguchi*, 277 F. 913, 916 (9th Cir. 1922); *In re Wysback*, 292 F. 761, 763 (D. Mass. 1923) (disapproving of “the preposterous finding that aliens who had supported themselves for eight years were likely to become public charges”); see also 8 C.F.R. § 245a.18(d)(2) (“An alien who has a consistent employment history that shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable” as a public charge.).

<sup>23</sup> *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421–22 (BIA 1962) (“A healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency.”).

<sup>24</sup> See *Matter of Perez*, 15 I. & N. Dec. at 137 (finding that the applicant was not a public charge because she was “capable of finding employment” and had family support).

<sup>25</sup> *U.S. ex rel. De Sousa v. Day*, 22 F.2d 472, 473–74 (2d Cir. 1927); *Duner*, 10 F.2d at 41; *Hughes v. U.S. ex rel. Branzetti*, 1 F.2d 417, 418 (3d Cir. 1924); *U.S. ex rel. Berman v. Curran*, 13 F.2d 96, 97–98 (3d Cir. 1926).

<sup>26</sup> *Matter of A-*, 19 I. & N. at 870.

<sup>27</sup> *Id.*; see also *Gegjow v. Uhl*, 239 U.S. 3, 10 (1915) (reversing finding of public charge because a person who is a public charge must “be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions”).

<sup>28</sup> *Matter of Martinez-Lopez*, 10 I. & N. Dec. at 422; see also *De Sousa*, 22 F.2d at 473–74.

<sup>29</sup> *Matter of Harutunian*, 14 I. & N. Dec. at 590; *Matter of Vindman*, 16 I. & N. Dec. at 132 (making public charge finding where applicants were sixty-six and fifty-four years old, had no work history or future work prospects in the United States, and both received state and federal cash assistance for approximately three years); *United States v. Tod*,

This is because the officer must consider all circumstances and should not rely on any single factor, such as past receipt of public benefits.<sup>30</sup> Rather, the adjudicator needs to consider all of the factors in conjunction and must weigh both the positive and negative factors to determine whether the applicant is likely to become a public charge.<sup>31</sup>

Based on the current definition of public charge in policy guidance by USCIS, the only programs considered in the public charge determination are:

- Cash assistance for income maintenance, including:
  - Supplemental Security Income (SSI)
  - Temporary Assistance for Needy Families (TANF) (may have other names at the state level)
  - State and local cash assistance programs (often called “General Assistance” programs)
- Institutionalization for long-term care at government expense:
  - In a nursing home or mental health institution, *and*
  - Covered by Medicaid

If an individual receives public cash assistance, the length of time during which the individual received this assistance is significant in determining public charge.<sup>32</sup> The government has stated that the more time that has passed since an individual received cash benefits or was institutionalized, the less weight these factors will have as a predictor of future receipt of benefits.<sup>33</sup>

**Example:** Maya will be eligible soon to adjust status through a petition filed by her U.S. citizen mother. Ten years ago, Maya was severely injured by a car accident and could not work. To make ends meet, she received cash payments for six months from the Cash Assistance Program for Immigrants (CAPI) in California. However, she has since recovered, received a degree online, and started working as an independent consultant. Although Maya received cash assistance ten years ago, her prior receipt of this public benefit will not be the only factor considered in determining whether she is likely to be a public charge in the future. The government will consider the fact that Maya has not received this assistance for many years, along with her degree and ability to earn an income when she receives employment authorization.

Any past use of cash aid or long-term institutionalization is just one factor weighed in the totality of the circumstances. An officer will weigh how long the person used the benefit or service, how long ago in the past this use occurred, and consider all relevant factors at time of application. Supplying the officer with positive factors at the time of filing can certainly overcome past reliance on cash aid.

Even use of cash aid at the time of applying for status does not necessarily indicate the person is likely to become primarily dependent on the government in the future. It is important to consider arguments that a small amount of support does not indicate primary dependence on the government for income maintenance.

**Example:** Max came to the United States to escape violence that he experienced in his home country based on his HIV-positive status. He relies on a variety of programs provided by the City and State of New York that help him live with HIV, including cash assistance. Max is also working. Max’s receipt of cash assistance would count against him as one negative factor in the totality of the circumstances test. However, if he applies to adjust through a family member, he will have an affidavit of support

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299 F. 592, 593 (2d Cir. 1924) (upholding public charge finding where applicant “was supported by public moneys of the state of New York and nothing was paid for his maintenance by him or his relatives”); *see also Coykendall v. Skrmetta*, 22 F.2d 120, 121 (5th Cir. 1927) (“[I]t cannot well be supposed that the words in question were intended to refer to anything other than a condition of dependence on the public for support.”)

<sup>30</sup> *See, e.g., Matter of Perez*, 15 I. & N. Dec. at 137.

<sup>31</sup> *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).

<sup>32</sup> *See id.* at 28690.

<sup>33</sup> *See id.*

from his petitioner and a joint sponsor, if necessary. Max can show that he is not primarily dependent on the small amount of cash aid he receives because he also works, and that he has the assistance of family with the affidavit of support. Therefore, under the totality of the circumstances test, Max can still show he is not likely to become primarily dependent on government-supplied cash aid in the future.

#### 4. Public Benefits Not Considered in the Totality of the Circumstances Test

Under current USCIS guidance, use of any services beyond cash aid for income maintenance and long-term care is not considered by USCIS.<sup>34</sup> The USCIS Fact Sheet on public charge confirms that past, current, or future receipt of non-cash benefits and special-purpose cash benefits that are not intended for income maintenance are not considered in the public charge determination. These benefits include:<sup>35</sup>

- Non-cash benefits (other than institutionalization for long-term care)
- Non-cash TANF benefits such as subsidized child care, transit subsidies
- Medicaid and other health insurance and health services (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases;<sup>36</sup> use of health clinics, short-term rehabilitation services, and emergency medical services) other than support for long-term institutional care
- Children's Health Insurance Program (CHIP)
- Nutrition programs, including Food Stamps (SNAP), the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the National School Lunch and School Breakfast Program, and other supplementary and emergency food assistance programs
- Housing benefits
- Child care services
- Energy assistance, such as the Low-Income Home Energy Assistance Program (LIHEAP)
- Emergency disaster relief
- Foster care and adoption assistance
- Educational assistance (such as attending public school), including benefits under the Head Start Act and financial aid and grants for elementary, secondary, or higher education
- Job training programs
- In-kind, community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter)
- Prison, jail, incarceration costs

State and local programs that are similar to federal programs listed above are also generally not considered for public charge purposes. Any programs that are entirely funded by private entities are also not considered for public charge. It is important to note that, while an adjudicator may consider institutionalization for long-

<sup>34</sup> U.S. Citizenship and Immigration Services, *Public Charge Fact Sheet*, <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet> (last updated October 16, 2018).

<sup>35</sup> These benefits may have alternative names when administered on the state and local levels. Please seek advice from a local public benefits expert for further information about local and state programs.

<sup>36</sup> For example, the federal government provides a variety of HIV-related medical care through the Ryan White HIV/AIDS Program, including AIDS Drug Assistance Program (ADAP-Medication Assistance) and Continuation of Health Insurance Coverage (CHIC-Premium Assistance). These services do not count against an applicant in a public charge determination.

term care at government expense, short-term institutionalization for rehabilitation at government expense is not considered under existing field guidance.<sup>37</sup>

Finally, adjudicators also should not consider cash benefits or long-term care that are received by the applicant's U.S.-citizen family members or family members who are not applying for admission.<sup>38</sup>

**Example:** D.J. is a DACA recipient with two U.S.-citizen children. D.J.'s younger daughter has a severe developmental disability and receives SSI as a form of financial support. Although the SSI payments are paid to D.J. as the parent, their daughter officially receives this cash assistance. Therefore, this SSI assistance would not count against D.J. if they were to apply for adjustment of status in the future.<sup>39</sup>

## B. The “Totality of the Circumstances” Test at the U.S. Consulates

The “totality of the circumstances” test is set out in the statute, but policies dictate how this test is applied. Current guidance for implementation of the public charge law was set out in 1999 by the Department of Justice, which then housed the legacy Immigration and Naturalization Service (INS). Current U.S. Citizenship and Immigration Services (USCIS) must follow this guidance. However, the consulates are under the direction of the Department of State and have their own guidance to follow. This guidance is set out in the Foreign Affairs Manual (FAM). This guidance tracked the policy followed by USCIS, until 2018, when the Department of State updated the FAM guidance on public charge.<sup>40</sup> For this reason, we will separately discuss policies in place at the consulates under the Department of State.

**IMPORTANT NOTE:** Consular officials and USCIS officials currently use different policies to make a public charge determination. Thus, a person's risk for being found inadmissible as likely to become a public charge depends on whether the applicant is applying for adjustment of status within the United States or whether they are applying for admission through consular processing.

### 1. Consular Processing vs. Adjustment of Status

#### *Consular processing*

Certain applicants for admission must go through **consular processing**, which requires them to attend an interview at a U.S. consulate abroad in order to receive an immigrant visa (permanent residency) to enter and live in the United States or a nonimmigrant (temporary) visa to enter and visit the United States. Specifically, individuals who must consular process include applicants for admission who are currently outside of the United States and seek to enter the country on a visa.

**Example:** U.S.-citizen Alan wants his mother to come live with him in the United States. Alan files a Form I-130 petition for his mother, Ellen, who lives in the United Kingdom. His mother, Ellen, will go to the U.S. consulate to process her immigrant visa to enter the United States. The consulate will decide whether she is admissible. Once she is admitted, Ellen will be a lawful permanent resident.

Consular processing is also required for individuals who are currently in the United States and are not eligible to apply for adjustment of status under any of the avenues available in INA § 245, but otherwise are eligible to immigrate through a family or employment petition.<sup>41</sup>

<sup>37</sup> See *id.* at 28689.

<sup>38</sup> See *id.* at 28692.

<sup>39</sup> The only exception to this applies when there is no other evidence of income or support for the applicant and the officer determines that the applicant relies on the benefit received by the family member as the sole source of income.

<sup>40</sup> See generally, 9 FAM 302.8.

<sup>41</sup> Individuals within the United States might also be eligible for other immigration benefits that do not require leaving the United States. There are many forms of relief that might be available to a person without status living within the U.S.

**Example:** Irma entered the United States ten years ago by walking through the desert on foot. She did not go through a checkpoint. She is now married to Kris, a U.S. citizen. Kris petitions for Irma to become a permanent resident so that they can be together in the United States. However, because Irma was not inspected and admitted to the United States when she entered, she must complete her application process by attending an interview with a U.S. consular official in her home country.

### *Adjustment of status*

Adjustment of status is a term used to describe the process of applying for lawful permanent residency within the United States. Individuals who are eligible for **adjustment of status** may apply to become a lawful permanent resident without being required to leave the United States.<sup>42</sup> These applications are adjudicated by U.S. Citizenship and Immigration Services (USCIS).

## **2. Totality of the Circumstances in Consular Processing Cases and Recent Changes to the Foreign Affairs Manual**

In January 2018, the Department of State revised the sections of the Foreign Affairs Manual (FAM) governing public charge determinations in consular processing cases. The FAM public charge revisions allow consular officials to consider additional factors to find an applicant likely to become a public charge, in the totality of the circumstances. The changes encourage officers to look beyond the affidavit of support and consider all other factors present in the case. In addition, the changes encourage officers to question and investigate the sponsor's ability to pay. These changes have already gone into effect, and practitioners report more visa denials based on public charge inadmissibility after consular interviews.

Below is a summary of the Department of State's revisions to the totality of the circumstance factors in the FAM:

- Applicant's **age**: According to the FAM, age is a negative factor if the applicant is under eighteen and unaccompanied; advanced age may also be a negative factor if viewed as reducing the applicant's employability and increasing the applicant's possible healthcare costs.
- Applicant's **health**: This includes health issues that might affect the applicant's prospects for employment, future medical expenses, and/or the applicant's ability to provide for themselves or their dependents.
- Applicant's **family status**: This factor considers the number of dependents for whom the applicant would have financial responsibility. The fact of having many dependents may be a negative factor in an applicant's case.
- Applicant's *and sponsor's* **assets, other financial resources, and financial status**: Current or prior receipt of public assistance by an applicant, sponsor, or their family members may be a negative factor and is "relevant" to determining whether the applicant is likely to become a public charge. "[B]ut the determination must be made on the *present* circumstances,"<sup>43</sup> and if the applicant's financial circumstances are much improved since past receipt of public benefits, that is a positive factor (whereas being in similar financial straits would be a negative factor). The FAM also states that income above 125 percent of Federal Poverty Guidelines "generally constitutes sufficient resources."<sup>44</sup>

Additionally, travel outside the U.S. for a benefit entails risk and uncertainty. Thus, many individuals choose not to begin the process to consular process through a family member, even if they might be eligible.

<sup>42</sup> Determining eligibility for adjustment of status is complex. For additional information on who qualifies for adjustment of status, see ILRC, *Family-Based Adjustment of Status Options* (December 2018), [https://www.ilrc.org/sites/default/files/resources/fam\\_based\\_adjst\\_stat\\_options-20181221.pdf](https://www.ilrc.org/sites/default/files/resources/fam_based_adjst_stat_options-20181221.pdf).

<sup>43</sup> 9 FAM 302.8-2(B)(2)(f)(1)(b) (emphasis added).

<sup>44</sup> 9 FAM 302.8-2(B)(2)(f)(2)(a).

- Applicant’s **education, work experience, and skills**: This includes length of employment, frequency of job changes, employment plans, and job offers.
- “[A]ny other reasonable factors considered relevant by an officer in a specific case.”<sup>45</sup>

Due to these changes, consular processing applicants and petitioners need increased screening of red flags and must undergo additional interview preparation in order to avoid being inadmissible as a public charge. In evaluating these factors for a client’s case, advocates should take the perspective of a consular officer who may be less forgiving or generous. If any red flags or factors of particular concern apply to a client, the advocate should be cautious about sending the client to their consular interview, especially if they have an approved I-601A provisional waiver. Additional documentation might be essential to overcoming concerns at the consular interview.<sup>46</sup>

#### a. Applicant’s use of public benefits

The FAM still defines public charge as a person who is likely to become primarily dependent on cash aid for income maintenance or long-term institutionalized care. The consular officer should not consider use of other benefits and services used by the applicant for admission.<sup>47</sup>

#### b. Petitioner or Sponsor’s use of public benefits

The current FAM guidance directs officers to consider the sponsor’s use of means-tested benefits as a factor in determining the sponsor’s ability to support the applicant for admission.<sup>48</sup> This change is consistent with the new guidance encouraging officers to investigate the sponsor’s ability and willingness to pay, despite a signed Form I-864, Affidavit of Support. Unlike the type of benefits that are central to the public charge analysis, this directive suggests that any use of a means-tested benefit by the sponsor might impact their ability to support an applicant for admission. Officers could consider prior use of a fee waiver, Medicaid or other services as part of their assessment of the sponsor’s ability to support the applicant. Advocates should be mindful of this shift and prepare accordingly. Applicants should be armed with information reflecting the sponsor’s current ability to pay, despite past use of a means-tested benefit or fee waiver. This might include evidence such as proof of private health insurance, change in financial circumstances of the sponsor, or evidence that the means-tested benefit received had a high income threshold.

### C. The Affidavit of Support Requirement in the Totality of the Circumstances Test

In addition to overcoming a “totality of the circumstances” test, some applicants for admission and adjustment of status must submit a sufficient affidavit of support.<sup>49</sup> This requirement applies *only* to persons immigrating through a family visa petition and, in some cases, employment-based petitions.<sup>50</sup> Under this test, most people immigrating through a family visa petition *must* have an affidavit of support on Form I-864 submitted on their behalf, or they will be found inadmissible as a public charge.

For cases processing at USCIS field offices in the United States, a sufficient Form I-864 generally means that the person will overcome any negative factors in a totality of the circumstances test analysis, barring any new facts that dramatically change the situation of the applicant or sponsor. However, the latest FAM guidance states that an affidavit of support is no longer sufficient, on its own, to establish that someone will not be inadmissible under the public charge ground at INA § 212(a)(4).<sup>51</sup> Therefore, consular officials are likely to

<sup>45</sup> 9 FAM 302.8-2(B)(2).

<sup>46</sup> For more information about how to avoid a public charge finding in consular processing cases, see ILRC, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues* (July 2018), [https://www.ilrc.org/sites/default/files/resources/consul\\_process\\_pract\\_alert\\_pub\\_charge\\_affid-20180702.pdf](https://www.ilrc.org/sites/default/files/resources/consul_process_pract_alert_pub_charge_affid-20180702.pdf).

<sup>47</sup> See 9 FAM 302.8-2(B)(1).

<sup>48</sup> 9 FAM 302.8-2(B)(2)(f)(1)(c).

<sup>49</sup> INA § 212(a)(C)-(D).

<sup>50</sup> *Id.*

<sup>51</sup> 9 FAM 302.8-2(B)(2)(a)(3).

give less weight to the Form I-864 contract. Instead, the Form I-864 is a “positive factor,” to be taken into account as part of the “totality of circumstances” test at U.S. consulates.<sup>52</sup> For this reason, advocates should provide additional evidence to show an applicant is not likely to be a public charge in the totality of the circumstances, as explained above. In addition, applicants at the consulate should be prepared to explain the relationship to the person signing the affidavit of support and their ability and willingness to sponsor the applicant should it become necessary.

### III. Conclusion

Until a new regulation becomes final, the definition of a “public charge” continues to be a person “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.”<sup>53</sup> However, the Trump Administration appears committed to altering this definition to exclude individuals who use important government services to care for themselves and their families. Advocates should prepare cases to show that their clients are not a public charge in the totality of the circumstances to ensure that their clients can obtain the immigration status they merit while also getting the services that they deserve.



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#### About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the fundamental rights of immigrant families and communities.

<sup>52</sup> See 9 FAM 302.8-2.

<sup>53</sup> Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).