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## THE APPLICABILITY OF “PUBLIC CHARGE” RULES TO LEGAL IMMIGRANTS WHO ARE ELIGIBLE FOR PUBLIC BENEFITS<sup>1</sup>

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Some legal immigrants fear that if they receive public assistance, the U.S. Citizenship and Immigration Services (USCIS) — formerly the Immigration and Naturalization Service (INS) — or State Department will decide they are likely to become a “public charge.” A public charge finding may result in denial of permission to adjust to lawful permanent resident status, denial of a visa to enter the United States, denial of re-admission to the United States after a trip abroad for more than six months, or, in very rare circumstances, deportation. Research suggests that public charge concerns, along with other “chilling effects” related to welfare reform and confusion about eligibility rules for benefits, may prevent many legal immigrants from accessing benefits for which they are eligible.<sup>2</sup>

The applicability of the public charge rule, however, is much more limited than is commonly understood. According to USCIS guidance, the receipt of public benefits is only relevant to a “public charge” finding in very limited circumstances.<sup>3</sup> Under the guidance, the receipt of any non-cash benefit — including health care benefits, food stamps, WIC, housing assistance, and other non-cash benefits — with the sole exception of institutionalization for long-term care at government expense, is *never* a factor in a public charge determination. In addition, although receipt of certain types of cash assistance remains relevant to a public charge determination, the vast majority of immigrants have no reason to avoid cash assistance because of concerns about adverse immigration consequences related to public charge. With a few rare,

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<sup>1</sup> This analysis is an updated version of a Center report on public charge rules, *The INS Public Charge Guidance: What Does it Mean for Immigrants who Need Public Assistance?*, issued in 2000.

<sup>2</sup> For example, a California survey found that nearly 20 percent of Spanish-speaking Latinos who requested Medicaid applications decided to not complete them because they were concerned that receiving benefits would have an adverse effect on their immigration status. See “Barriers to Enrollment in Healthy Families and Medi-Cal.” Institute for Health Policy Studies, University of California, February 2001.

<sup>3</sup> *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999), available on the internet at: <http://uscis.gov/lpbin/lpext.dll/inserts/fr/fr-55301/fr-55472/fr-57116?f=templates&fn=document-frame.htm#fr-64fr28689>. The U.S. Department of State, which handles visa applications outside of the United States, issued similar guidance based upon the content of the proposed rule in a cable sent to U.S. consulates abroad. At the same time as it published the guidance, USCIS published a proposed rule on public charge determinations for notice and comment. 64 Fed. Reg. 28675 (May 26, 1999). USCIS has stated that immigrants may rely on the field guidance in determining which benefits they may safely accept before a final rule is published. If the final rule is different from the proposed rule, USCIS stated that it plans to issue additional guidance to ensure that immigrants who relied on the original guidance will not suffer adverse immigration consequences. Immigration and Naturalization Service, *Questions and Answers: Public Charge*, A37 (May 25, 1999), available on the internet at [http://uscis.gov/graphics/publicaffairs/questsans/public\\_cqa.pdf](http://uscis.gov/graphics/publicaffairs/questsans/public_cqa.pdf). Except where otherwise noted, Federal Register citations in this document are to the field guidance, although the provisions of the proposed rule are substantially the same.

albeit important, exceptions, immigrants who remain eligible for cash assistance under either the Temporary Assistance for Needy Families (TANF) program or the Supplemental Security Income (SSI) program can accept that assistance without endangering their immigration status.

## **What is “Public Charge” and When Do Immigrants Need to be Concerned About a “Public Charge” Determination?**

A “public charge” is an immigrant who is likely to become “primarily dependent on the government for subsistence.”<sup>4</sup> Although a determination that an immigrant is likely to become a public charge can have serious immigration consequences (such as denial of admission to the United States or denial of permission to adjust status), the vast majority of immigrants who have already entered the United States — especially immigrants who are lawful permanent residents (LPRs) — will never be subject to a public charge determination.

In general, immigrants who are LPRs are *not* subject to the public charge test. It is aliens who are *seeking to become* LPRs (through a visa application or an application for admission or adjustment of status) who have to convince a USCIS or consular officer that they are not likely to become a public charge. LPRs do not have to meet a public charge test to become citizens, and there is no public charge test for immigrants or U.S. citizens seeking to sponsor an immigrant.<sup>5</sup>

There are two limited exceptions to the general rule that LPRs do not need to be concerned about public charge consequences: 1) LPRs may be subject to a public charge test if they leave the country for more than 180 consecutive days,<sup>6</sup> and 2) in *very* rare circumstances, an immigrant, even an immigrant who is an LPR, may be subject to deportation if she or he has become a public charge within five years after entering the United States. Additional restrictions apply, however, to the use of the public charge test for deportation purposes; these restrictions, which are explained later in this paper, so constrain the use of the test for deportation purposes that it rarely applies and is seldom invoked.

Immigrants who are not LPRs are more likely to face public charge scrutiny. An immigrant who is not an LPR may suffer two types of consequences if he or she is judged to be a public charge: 1) denial of permission to enter the United States, and 2) denial of permission to adjust immigration status to become an LPR. Several important categories of immigrants who do not enter the United States as LPRs, however, are exempt from the public charge test when seeking admission or adjustment of status, including:<sup>7</sup>

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<sup>4</sup> 64 Fed. Reg. 28689.

<sup>5</sup> 64 Fed. Reg. 28689, 28693. Instead, sponsors must demonstrate the means to maintain their own family and that of the immigrant whom they are sponsoring at an annual income of at least 125 percent of the poverty line.

<sup>6</sup> LPRs who leave the country for more than six months can be subject to a public charge test because they are treated as “applicants for admission” and therefore are subject to the immigration law’s grounds of inadmissibility, including public charge. LPRs who are returning to the United States after a trip of *less* than six months are not considered “applicants for admission” and are not subject to the public charge test unless they: 1) engaged in illegal activity after leaving the United States; 2) committed certain criminal offenses in the United States; 3) left the United States while in removal proceedings; or 4) attempted to enter somewhere other than at an official port of entry.

<sup>7</sup> 64 Fed. Reg. 28689, 28691.

- refugees and asylees;<sup>8</sup>
- battered immigrants applying for lawful immigration status under the Violence Against Women Act (VAWA);<sup>9</sup>
- Cuban and Nicaraguan applicants for adjustment of status under section 202 of the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA);
- applicants for adjustment of status under the Cuban Adjustment Act or the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA); and
- certain victims of trafficking in persons applying for lawful immigration status under the Trafficking Victims Protection Act.

Like an LPR, an immigrant who is *not* an LPR may be subject to deportation in very rare circumstances.

There are a few other immigrant categories that are at least partially exempt from public charge determinations. Immigrants who have been in the United States continuously since January 1, 1972 are not subject to a public charge test when they “register” to become legal permanent residents. “Lautenberg parolees” and “special immigrant juveniles” also are exempt from the public charge test.<sup>10</sup> Finally, Amerasian immigrants who enter the United States as LPRs are not subject to a public charge test when they initially seek to be admitted to the United States. After their initial admission to the United States, Amerasian immigrants who travel abroad for more than six months may be subject to the public charge test when they seek to re-enter the United States.

## **Types of Public Benefits that are Relevant to a Public Charge Determination**

According to USCIS guidance, the only types of public benefits relevant to a public charge determination are “public cash assistance for income maintenance” and “institutionalization for long-term care at government expense.”<sup>11</sup> No other public benefits are relevant to a public charge determination. The guidance explicitly directs USCIS officers to

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<sup>8</sup> Refugees and asylees remain exempt from the public charge test even if they travel outside the country for more than six months after adjusting to LPR status. Public charge also is not a factor in determining whether an immigrant is eligible for withholding of removal (formerly known as “withholding of deportation”) under § 241(b)(3) of the Immigration and Nationality Act (INA).

<sup>9</sup> 8 U.S.C. §1182(p).

<sup>10</sup> See Linton Joaquin and Braden Cancilla, *Protecting Immigrants and the Community: A New Approach to Public Charge Determinations*, 76 Interpreter Releases 885, 892 (June 7, 1999). “Lautenberg parolees” include certain former Soviet and Indochinese nationals who were denied refugee status and paroled into the United States. “Special immigrant juveniles” include aliens who are under age 21 and eligible for long-term foster care because family reunification is not a viable option. They can apply for a visa or adjustment of status if a return to their home country is not in their best interests.

<sup>11</sup> 64 Fed. Reg. 28689.

place no weight on the receipt of non-cash public benefits (other than institutionalization for long-term care).<sup>12</sup>

USCIS guidance list several types of benefits that may not be considered for public charge purposes, including:

- Medicaid, Children’s Health Insurance Program, and other health insurance and health services, other than support for long-term care;
- food stamps, WIC, and other nutrition programs;
- housing benefits;
- child care services;
- energy assistance;
- job training;
- educational assistance; and,
- similar state and local programs.

Cash benefits are not always relevant to a public charge determination. The guidance draws a careful distinction between “cash assistance for income maintenance” and other benefits that happen to be provided in the form of cash. Programs that provide “cash assistance for income maintenance” include SSI, TANF-funded cash assistance, and state and local cash assistance programs for income maintenance. Cash benefit programs that provide “special purpose” or “supplemental” benefits *not* intended for income maintenance — such as energy assistance or child care — are not “cash assistance for income maintenance” and are not relevant to a public charge determination.<sup>13</sup> The guidance also notes that non-recurrent cash payments for specific crisis situations are not “cash assistance for income maintenance.” Finally, cash payments that have been “earned” through employment or service in the military, including Social Security, government pensions, and veterans’ benefits are not “cash assistance for income maintenance.”<sup>14</sup>

### **Immigrants Who Remain Eligible for Cash Benefits Also are Unlikely to be Subject to Public Charge Test**

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<sup>12</sup> *Id.* This does not mean that an alien who receives only non-cash benefits will never be denied admission or adjustment of status for public charge reasons; it only eliminates consideration of these benefits when the INS or a consular officer makes a public charge determination. An immigrant who is likely to become primarily dependent on the government for subsistence for reasons other than non-cash benefit use (e.g., because he or she is of advanced age and has no friends or relatives willing to assist him or her) may still be denied admission or adjustment of status under the public charge test.

<sup>13</sup> 64 Fed. Reg. 28689, 28692-28693. Although not specifically mentioned in USCIS guidance, receipt of an earned income tax credit also is not relevant to a public charge determination since the EITC is a supplemental benefit that is earned and is not “cash assistance for income maintenance.”

<sup>14</sup> 64 Fed. Reg. 28689, 28693.

Except for cases where immigrants seek reentry after six months out of the country, “public charge” determinations are irrelevant to the overwhelming majority of immigrants who remain eligible for SSI and TANF cash assistance. Under the 1996 welfare law, immigrants cannot receive SSI or TANF unless they are “qualified aliens,” a category that was created in the 1996 welfare law and includes legal permanent residents, refugees, asylees, Cuban/Haitian entrants, certain battered spouses and children, and aliens who are paroled into the United States for at least one year.<sup>15</sup> LPRs have already adjusted their status and can naturalize without being subject to the public charge test. Refugees, asylees, and most Cuban/Haitian entrants are exempt from the public charge test.<sup>16</sup> Hence, these groups generally can safely receive SSI or TANF cash assistance without having to worry about the public charge test.

Public charge considerations may remain a factor for immigrants in the limited number of states that provide cash assistance to “unqualified” or “PRUCOL” immigrants who have yet to adjust to LPR status. Even for these immigrants, however, receipt of cash assistance is only one factor in a public charge determination. The USCIS or State Department can make a public charge finding only after considering all of the other factors under what is known as the “totality-of-the-circumstances” test, which is discussed below. Moreover, many PRUCOL immigrants are asylum applicants who will be exempt from the public charge test if their applications for asylum are approved. (Public charge issues are not a consideration in determining eligibility for asylum.)

### **Receipt of Cash Benefits is Only One Factor Among Many in a Public Charge Determination**

USCIS guidance provides that receipt of cash assistance for income maintenance purposes is only one factor among many that must be considered in making a public charge determination. In addition to cash benefit receipt, the decisionmaker must consider the “totality of the circumstances,” including the immigrant’s age, health, family status, assets, resources, financial status, education, skills, and whether an affidavit of support exists, among other

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<sup>15</sup> There is one very limited exception to the federal welfare law’s bar on cash assistance for unqualified aliens. Unqualified aliens who were receiving SSI benefits on August 22, 1996 remain eligible for SSI. Many of the supposedly “unqualified” immigrants who continue to receive SSI under this exemption were miscoded in SSA computers and are actually citizens or LPRs. According to a Social Security Administration estimate, there are fewer than 4,000 immigrants nationwide who were receiving SSI on August 22, 1996 who actually fall into the category of unqualified immigrants. These immigrants could conceivably be subject to a public charge test if they attempt to adjust status or if they leave the country for more than 180 days. Most of these immigrants are unlikely ever to adjust status or leave the country, however, since they are elderly or have serious disabilities that may already have prevented them from adjusting status.

<sup>16</sup> A related, but much smaller category of immigrants, parolees who are qualified immigrants, could be subject to a public charge test in limited cases if they apply to adjust status. Parole is a procedure that allows aliens who are not eligible for a visa or for refugee status to enter the United States and is granted “only on a case by case basis for urgent humanitarian reasons or significant public interest.” INA § 212(d)(5). Cubans who escape to the United States are often granted indefinite parole status, as were persons from Vietnam and repressive regions of the former Soviet Union. In many cases, humanitarian parolees ultimately qualify for refugee status or some other special status that allows them to adjust their status without being subject to a public charge test. Cubans who adjust under the Cuban Adjustment Act and former Soviet and Indochinese nationals who qualify as “Lautenberg parolees” under the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990 are examples.

factors.<sup>17</sup> The guidance also mandates that every order denying admission or adjustment of status must reflect consideration of each of the factors that are part of the totality-of-the-circumstances standard and specifically articulate the reasons for the denial. This requirement is especially important because it should prevent immigration officers from issuing summary denials based only on an immigrant’s receipt of cash assistance.

Where an immigrant has received benefits, the amount of benefits received, the duration of benefit receipt, and the length of time that has passed since the immigrant relied upon cash assistance all are factors that may diminish the significance of benefit receipt for public charge purposes. USCIS guidance includes a number of examples where, under the totality-of-the-circumstances test, other factors weigh against a public charge finding in spite of past or current receipt of cash assistance:

- The guidance approvingly cites an earlier Attorney General ruling that “[s]ome 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. 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>18</sup>
- “The negative implication of past receipt of . . . benefits . . . may be overcome by positive factors in the alien’s case demonstrating an ability to become self-supporting. For instance, a work-authorized alien who has current full-time employment or an affidavit of support should be found admissible despite past receipt of cash public benefits, unless there are other adverse factors in the case.”<sup>19</sup>

In general, past receipt of cash assistance is less likely to result in a public charge finding than current receipt of assistance. Current receipt of cash assistance does not automatically result in a public charge finding. The guidance notes that “an alien receiving a small amount of cash for income maintenance purposes could be determined not likely to become a public charge due to other positive factors under the totality-of-the-circumstances test.”<sup>20</sup> Both current and past receipt of cash assistance are only one factor among many that must be considered under the totality-of-the-circumstances test in determining whether an immigrant is likely to become primarily dependent on the government for subsistence.

### **Receipt of Benefits by Children and Other Family Members**

More than eight of every ten families with at least one noncitizen parent are “mixed-status” households, meaning that they contain both citizen and noncitizen members.<sup>21</sup> In mixed-status households, some members may be eligible for benefits (typically citizen children) while

<sup>17</sup> 64 Fed. Reg. 28689, 28690. The “totality-of-the-circumstances” factors are codified at 8 U.S.C. § 1182(a)(4)(B).

<sup>18</sup> 64 Fed. Reg. 28689, 28690, quoting *Matter of Martinez-Lopez*, 10 I&N 409, 421-422 (AG, Jan. 6, 1964).

<sup>19</sup> 64 Fed. Reg. 28689, 28690

<sup>20</sup> *Id.*

<sup>21</sup> Michael Fix and Wendy Zimmerman, *All Under One Roof: Mixed-Status Families in an Era of Reform*, The Urban Institute, June 1999.

others may be ineligible because of their immigration status. For example, a citizen child in a mixed-status household may receive a “child-only” TANF grant or a grandparent may receive SSI benefits, while other immigrants in the household are ineligible for benefits.

The USCIS guidance provides that the receipt of cash benefits by an immigrant’s family member is *not* attributable to the immigrant for public charge purposes unless the family — not merely the individual recipient — is reliant on the benefits as its *sole* financial means of support.<sup>22</sup> Even where cash benefits are attributable to an immigrant because they are the family’s sole means of support, a public charge finding can be made only after considering the other factors under the totality-of-the-circumstances test.

## The Public Charge Test for Deportation

The public charge test for deportation purposes is significantly different and even less threatening to immigrants than the public charge test for admission and adjustment-of-status purposes. As an initial matter, for an immigrant to be subject to the public charge test for deportation, the immigrant’s use of cash assistance or institutionalization for long-term care has to come to the attention of the USCIS and the USCIS has to decide to commence a deportation proceeding against the immigrant. This is quite different from the application of the test for admission/adjustment purposes where all immigrants seeking admission to the United States or adjustment of status have to pass public charge scrutiny.

In those rare cases where an immigrant’s benefit use comes to the attention of the USCIS and the USCIS decides to commence a deportation proceeding, additional restrictions apply to the use of the public charge test. For an immigrant to be deported as a public charge, *all* of the following additional conditions must be met:

- the immigrant must have become a public charge within his or her first five years after entering the United States;
- the circumstances that caused the immigrant to become a public charge must not have arisen *after* the date the immigrant entered the United States (e.g., if the immigrant became a public charge because of an accident or illness that occurred *after* entry into the United States, the public charge test for deportation is not met);
- the immigrant or the immigrant’s sponsor must be legally obligated to repay the government agency that provided the cash assistance or long-term care benefits;
- the government agency that provided the benefits must make a demand for repayment within five years after the immigrant entered the United States;
- the immigrant or his or her sponsor must fail to repay the debt after the demand has been made; and

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<sup>22</sup> 64 Fed. Reg. 28689, 28691-28692.

- the government agency that provided the benefits must obtain a final judgment in an appropriate court against the sponsor or other obligated party and must take all actions available under the law to enforce a final judgment against the sponsor.<sup>23</sup>

As a practical matter, this combination of circumstances can virtually never occur. Most immigrants who enter the United States on or after August 22, 1996 are barred from receiving TANF during their first five years in the United States and are barred altogether from receiving SSI. (The two most significant categories of immigrants entering the United States on or after August 22, 1996 that remain eligible for federal cash assistance benefits during their first five years here, refugees and asylees, are exempt from the public charge test.) Even if an immigrant receives these benefits during his or her first five years in the United States and becomes a public charge for reasons that did not arise after entry into the country, the immigrant or immigrant's sponsor must be legally obligated to repay the benefits provided and fail to repay the benefits, and the government agency that provided the benefits must obtain a final judgment and take all actions available to enforce the judgment.

These final requirements relating to liability for the benefits provided are unlikely to be met in most cases. Under federal cash assistance or long-term care programs, an immigrant who receives benefits, like any benefit recipient, does not have a legal obligation to repay the government for the benefits it provided. The deportation test could conceivably be met where an *immigrant's sponsor* is legally obligated to repay benefits provided to a sponsored immigrant. This is because the USCIS guidance applies the public charge deportation doctrine to cases where an immigrant's sponsor is legally obligated to repay the government for benefits provided to the sponsored immigrant but fails to do so.<sup>24</sup> Liability is only possible where a sponsor signs the "new" enforceable Affidavit of Support (Form I-864) required for applications for immigrant visas or adjustment of status filed on or after December 19, 1997. For the deportation test to be met, the government agency that provided the means-tested benefits to the immigrant would have to request reimbursement from the immigrant's sponsor, sue the sponsor to obtain a judgment, and take all actions available under the law to enforce the judgment.

Again, because only benefits received during an immigrant's first five years in the United States can possibly lead to deportation for being a public charge, even immigrants with enforceable affidavits are unlikely to be subject to a public charge determination because they generally will not have been eligible for cash benefits during this period. For all of these reasons, the USCIS guidance notes that "[d]eportations based on public charge have been rare, and the immigration and welfare laws are not likely to change this."<sup>25</sup>

A minority of states provide state-funded cash assistance to immigrants who entered the United States after August 22, 1996 and are barred from receiving federal means-tested public

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<sup>23</sup> 64 Fed. Reg. 28689, 28691.

<sup>24</sup> There is a sound argument that the INS misconstrues the public charge test for deportation by allowing deportation on public charge grounds where an immigrant's sponsor (rather than the immigrant) has failed to repay a benefit that he or she is legally obligated to repay. Existing public charge case law suggests it is the immigrant who must be legally obligated to repay the benefit and that the government cannot deport an immigrant because individuals who are legally obligated to support the immigrant fail to do so. See National Immigration Law Center, *Comments on INS No. 1989-99 Inadmissibility and Deportability on Public Charge Grounds*, July 26, 1999 (<http://www.nilc.org/immlawpolicy/pubchg/longcmts.htm>).

<sup>25</sup> 64 Fed. Reg. 28689, 28691.



benefits during their first five years in the United States. Even in these states, public charge-related deportations should remain rare. Most states that provide state-funded TANF, SSI-substitute or General Assistance cash assistance programs during the five-year period also impose sponsor-deeming requirements that count the income and resources of sponsors and their spouses as if they were available to the immigrant when the immigrant's financial eligibility is determined. In states with sponsor deeming, the actual number of immigrants who receive cash assistance is likely to be limited. For most immigrants with sponsors, deeming rules are a substantial barrier to receipt of benefits. Even if a sponsor is destitute, the reporting and paperwork requirements associated with deeming make receipt of benefits unlikely in most cases.

Where immigrants are able to receive state-funded cash assistance in spite of sponsor deeming rules (or in states that have no sponsor deeming rules), receipt of cash assistance may create a debt that the sponsor is legally obligated to repay depending on state policy regarding sponsor liability for state benefits.<sup>26</sup> Even in these cases, however, the public charge test would not be met unless all the other necessary conditions for public charge deportation were satisfied. If the immigrant was able to prove that the cause of dependence arose after entry to the United States (e.g., the immigrant became disabled after entry), the state failed to make a demand for repayment, the state did not obtain a final judgment against the sponsor, or the sponsor made repayment, the public charge test for deportation would not be met.

## **The Public Charge Implications of Institutionalization for Long-term Care at Government Expense**

Institutionalization for long-term care at government expense may be considered for public charge purposes. Short-term stays for rehabilitation purposes at long-term care facilities, however, are not a factor in a public charge determination.<sup>27</sup> Although institutionalization for long-term care at government expense may be considered in a public charge determination, few immigrants who are institutionalized at government expense should be adversely affected by the new guidance.

Immigrants in long-term care facilities could conceivably be subject to a public charge test if they attempt to adjust status or leave the country for more than 180 days. Since immigrants in long-term care facilities are either elderly or have serious disabilities, they are unlikely to leave the country for more than 180 days. The consequences resulting from denial of a petition to adjust status may be less significant for an immigrant who is already institutionalized and unable to work (as long as he or she remains eligible for long-term care assistance) than for an immigrant who needs to adjust status to obtain work authorization or other benefits.

As with public charge deportations based on cash assistance receipt, public charge deportation based on institutionalization should remain a very rare occurrence. The public charge test for deportation can be met only where a legal obligation to repay the government for

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<sup>26</sup> Whether or not the provision of state-funded cash assistance to a sponsored immigrant creates a legal obligation for the sponsor to reimburse the state for the assistance provided is a matter of state discretion. A state is not required to commence a legal action to compel repayment of unreimbursed assistance. 8 U.S.C. § 1183a.

<sup>27</sup> 64 Fed. Reg. 28693.

long-term care assistance arises during an immigrant's first five years in the United States. Participation in Medicaid does not create a debt that an immigrant is legally obligated to repay. Sponsors of immigrants who became LPRs after December 1997 and who signed enforceable affidavits of support may be required to repay government benefits related to health care, but few sponsors will be liable for benefits provided during an immigrant's first five years in the United States since most immigrants who entered the country after December 1997 are not eligible for federally-funded long-term care assistance (i.e., Medicaid) during this period. Even if an immigrant is institutionalized during his or her first five years here, he or she would not be deportable if the causes of institutionalization arose after entry into the United States.

The USCIS has stated that it is not taking any proactive steps to deport immigrants who reside in long-term care facilities. As part of a Questions and Answers fact sheet on public charge issues, USCIS stated that “[it] will not send investigators into nursing homes or other long-term care facilities to look for aliens who might be deportable as public charges.”<sup>28</sup> After the release of the USCIS guidance, the Health Care Financing Administration reiterated that confidentiality protections prohibit the release of information about Medicaid applicants and recipients to the USCIS, even in cases where institutionalization for long-term care is considered in making a public charge determination.<sup>29</sup>

## Conclusion

A “public charge” is an immigrant who is likely to become “primarily dependent on the government for subsistence.” Federal guidance makes clear that receipt of non-cash benefits (except for institutionalization for long-term care at government expense) can not be considered and is not relevant to a public charge determination. In addition, although receipt of certain types of cash assistance remains relevant to a public charge determination, the vast majority of legal immigrants who qualify for cash assistance have no reason to avoid it because of concerns about adverse immigration consequences related to public charge. With a few significant exceptions, legal immigrants who remain eligible for cash assistance under either the federal TANF program or the SSI program can accept that assistance without endangering their immigration status.

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<sup>28</sup> Immigration and Naturalization Service, *Questions and Answers: Public Charge*, Answer 31.

<sup>29</sup> Letter from Sally K. Richardson, Health Care Financing Administration, United States Department of Health and Human Services to State Health Officials, May 26, 1999 and Letter from Sally K. Richardson to State Health Directors, December 17, 1997.

## Appendix: When Is Receipt of Cash Assistance a Factor in a Public Charge Determination?

Type of Immigrant	Individual Receives Cash Assistance for Income Maintenance	Family Member Receives Cash Assistance for Income Maintenance
<b>Legal permanent resident (LPR) seeking to become a citizen</b>	No public charge test for citizenship.	
<b>Citizen or LPR seeking to sponsor a relative</b>	No public charge test for sponsorship.	
<b>LPR or other immigrant with a green card returning to the U.S. after traveling abroad for six months or longer</b>	<p>Receipt of cash assistance for income maintenance purposes is a factor in public charge determination.</p> <p>Decisionmaker must consider the “totality of the circumstances” before finding that immigrant is likely to become primarily dependent on the government for subsistence. Past use is less likely to result in a public charge finding than current use.</p>	<p>Not a factor in public charge determination unless cash assistance is the sole source of income for the family.</p> <p>Decisionmaker must consider the “totality of the circumstances” before finding that immigrant is likely to become primarily dependent on the government for subsistence.</p>
<b>LPR who became an LPR before December 1997 (i.e., does not have a Form I-864 Affidavit of Support) and fears that receipt of cash assistance will result in deportation</b>	LPRs who do not have Form I-864 Affidavits of Support cannot be deported for use of TANF-funded cash assistance or SSI unless they committed fraud to obtain benefits.	
<b>Sponsored LPR who became an LPR after December 1997 (i.e., has a Form I-864 Affidavit of Support) and fears that receipt of cash assistance will result in deportation</b>	<p>Receipt of cash assistance under the new affidavit of support can create a legal debt for purposes of the public charge deportation test. Even then, however, the additional conditions that must be met before a public charge determination can be rendered make deportation extremely unlikely. For example, to be subject to deportation, the immigrant must have received cash assistance during his or her first five years in the United States; yet virtually all immigrants in this category are ineligible for federally-funded cash assistance during their first five years here.</p>	Public charge finding extremely unlikely. Receipt of cash assistance by a family member is only a factor in public charge determination if cash assistance is the sole source of income for the family. Even if cash assistance is sole source of income, all of the additional public charge deportation test criteria must be met.
<b>Battered spouse or child seeking to adjust status or applying for a visa under VAWA and certain victims of trafficking in persons seeking a lawful immigration status</b>	No public charge test.	
<b>“Unqualified” (PRUCOL) immigrant seeking to become an LPR or prospective immigrant seeking admission</b>	<p>Receipt of cash assistance is a factor in public charge determination.</p> <p>Decisionmaker must consider the “totality of the circumstances” before finding that immigrant is likely to become primarily dependent on the government for subsistence. Past use is less likely to result in a public charge finding than current use.</p>	<p>Not a factor in public charge determination unless cash assistance received by the family member is the sole source of income for the family.</p> <p>Decisionmaker must consider the “totality of the circumstances” before finding that immigrant is likely to become primarily dependent on the government for subsistence.</p>