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January 7, 2000

## The INS Public Charge Guidance: What Does it Mean For Immigrants Who Need Public Assistance?

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Many legal immigrants fear that if they receive various public benefits, 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 legal 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. Recent research suggests that public charge concerns, along with other “chilling effects” related to welfare reform and confusion about eligibility rules for benefits, have kept many legal immigrants from accessing benefits for which they are eligible.<sup>1</sup>

In May 1999, the Immigration and Naturalization Service issued important new guidance that should greatly ease the public charge concerns of immigrants eligible for public benefits.<sup>2</sup> The guidance narrowly limits the situations in which receipt of public benefits is relevant to a “public charge” finding. Under the guidance, the receipt of any non-cash benefit, with the sole exception of institutionalization for long-term care at government expense, is *never* a factor in a public charge determination. Thus, immigrants can accept Medicaid, food stamps, WIC, housing benefits, child care subsidies or other non-cash benefits without endangering their immigration status. In addition, although receipt of certain types of cash assistance remains relevant to a public charge determination

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<sup>1</sup> The Urban Institute has found that use of means-tested cash assistance (AFDC, TANF, SSI, or GA) by noncitizens fell 35 percent between 1994 and 1997. Welfare use by U.S. citizens fell 14 percent during the same period. Michael Fix and Jeffrey S. Passel, *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994-1997*, The Urban Institute, March 1999.

<sup>2</sup> *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999). At the same time, the INS published a proposed rule on public charge determinations for notice and comment. 64 Fed. Reg. 28675 (May 26, 1999). 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 INS rule in a cable sent to U.S. consulates abroad. INS 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, INS 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*, Answer 37, May 25, 1999. 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.

under the guidance, 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, 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 freely accept that assistance without endangering their immigration status.

This paper discusses the new guidance and the public charge implications of receiving cash assistance.<sup>3</sup> A chart at the end of this paper summarizes the public charge implications of receiving cash assistance for different types of immigrants.

## **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 legal 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 an INS 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

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<sup>3</sup> Under the INS guidance, institutionalization for long-term care at government expense may also give rise to a public charge finding. Although this paper focuses on the public charge implications of cash assistance receipt, it includes a brief discussion of the public charge implications of long-term care assistance.

<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. Income from cash assistance does not count toward meeting this income test, but neither does it otherwise adversely affect a potential sponsor’s ability to win a relative’s admission to the United States.

<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. Legal permanent residents 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.

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>

- refugees and asylees;<sup>8</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; and
- applicants for adjustment of status under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA).

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.<sup>9</sup> Although not specifically mentioned in the guidance, “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.

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

<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> The guidance also notes that receipt of public benefits is not an adverse factor in meeting the “good moral character” requirement for registry, unless there is evidence that an applicant obtained or attempted to obtain public benefits through fraud. 64 Fed. Reg. 28689, 28691.

<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.

## INS Guidance Narrowly Limits the Types of Public Benefits that Are Relevant to a Public Charge Determination

Traditionally, “public charge” determinations have been highly discretionary judgments by INS or consular officers. These determinations take into account an immigrant’s age, health, education and job skills, income, assets, and any money available to the immigrant from family members. Because of the broad discretion INS and consular officials have to decide whether to admit or adjust the status of immigrants, few standards have constrained what they could ask or what benefit programs they could consider in making a determination. Following passage of the 1996 welfare law, some INS and consular officers took an aggressive interpretation, which sometimes went beyond what the law permits, of what could count towards this determination. Widespread confusion about the relationship between public benefit receipt and the public charge test caused numerous immigrants and their families to avoid using benefits for which they were eligible.

The new INS guidance and corresponding State Department cable respond to this problem and strictly limit the kinds of public benefits that are relevant to a “public charge” finding. Under the new 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 INS officers to place no weight on the receipt of non-cash public benefits (other than institutionalization for long-term care).<sup>12</sup>

Although the INS is careful to note that providing an exhaustive list of non-cash benefits is not possible, the proposed rule does list several types of benefits that may not be considered for public charge purposes, including:<sup>13</sup>

- 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;<sup>14</sup>
- housing benefits;
- child care services;
- energy assistance;
- job training;
- educational assistance; and,

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

<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, 28693.

<sup>14</sup> Food stamps are excluded from consideration even when they are provided in the form of cash. Immigration and Naturalization Service, *Questions and Answers: Public Charge*, Answer 9.

- similar state and local programs.

Nor are all cash benefits 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>15</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>16</sup>

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

Except for infrequent cases where immigrants seek re-entry 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. Legal permanent residents have already adjusted their status and can naturalize without being subject to the public charge test.<sup>17</sup> Refugees, asylees, and most Cuban/Haitian entrants are exempt from the public charge test.<sup>18</sup> Hence, these groups generally can safely receive SSI or TANF cash assistance without having to worry about the public charge test.

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<sup>15</sup> 64 Fed. Reg. 28689, 28692-28693. Although not specifically mentioned in the 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.” The proposed INS rule also states that supplemental cash benefits excluded from the term “assistance” under TANF program rules are not relevant to a public charge determination. 64 Fed. Reg. 28676, 28682; proposed 8 C.F.R. § 212.103. The TANF program rules define “assistance” to include “cash, payments, vouchers, and other forms of benefits designed to meet a family’s ongoing basic needs . . . .” 45 C.F.R. § 260.31. Various types of benefits are excluded from the TANF definition of assistance, including work subsidies paid to employers or third parties and non-recurrent, short-term benefits that are designed to address a specific crisis situation or episode of need.

<sup>16</sup> 64 Fed. Reg. 28689, 28693.

<sup>17</sup> In very rare circumstances, an LPR may be subject to deportation if he or she has become a public charge within five years after entering the United States. As explained in a separate section of this paper, the public charge test for deportation purposes is quite different than the public charge test for admission/adjustment purposes. Several additional restrictions apply to the use of the public charge test for deportation purposes and so constrain its use that it is seldom invoked.

<sup>18</sup> In very rare circumstances, an LPR may be subject to deportation if he or she has become a public charge within five years after entering the United States. As explained in a separate section of this paper, the public charge test for deportation purposes is quite different than the public charge test for admission/adjustment purposes. Several additional restrictions apply to the use of the public charge test for deportation purposes and so constrain its use that it is seldom invoked.

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.

The only category of qualified aliens that may be subject to the public charge test consists of battered spouses or children who are eligible to self-petition for adjustment of status under the Violence Against Women Act (VAWA). Under VAWA, a battered immigrant who does not have LPR status and who is married to or the child of a U.S. citizen or LPR may self-petition for an immigrant visa without the consent of the abusive spouse or parent. Although VAWA petitioners are not LPRs, they are treated as "qualified aliens" for federal public benefits purposes if there is a substantial connection between the abuse and their need for benefits and their VAWA petition has been approved or they have a petition pending that sets forth a prima facie case for relief under VAWA.<sup>19</sup> This means that VAWA petitioners who arrived in the United States prior to August 22, 1996, remain eligible for TANF and SSI benefits. Immigrants who self-petition under VAWA are not required to submit an affidavit of support to adjust their status. It is not clear whether they are subject to the public charge test. The INS recently said that it would address this issue in future guidance.<sup>20</sup>

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 INS 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**

The INS 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 decision-maker 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 factors.<sup>21</sup> The

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<sup>19</sup> 8 U.S.C. § 1641(c).

<sup>20</sup> Immigration and Naturalization Service, *Questions and Answers: Public Charge*, Answer 32.

<sup>21</sup> 64 Fed. Reg. 28689, 28690. The "totality-of-the-circumstances" factors are codified at 8 U.S.C. § 1182(a)(4)(B).

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.<sup>22</sup> 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 cash assistance, 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.<sup>23</sup> The 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>24</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>25</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>26</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.

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<sup>22</sup> 64 Fed. Reg. 28689.

<sup>23</sup> 64 Fed. Reg. 28689, 28690.

<sup>24</sup> 64 Fed. Reg. 28689, 28690, quoting *Matter of Martinez-Lopez*, 10 I&N 409, 421-422 (AG, Jan. 6, 1964).

<sup>25</sup> 64 Fed. Reg. 28689, 28690

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

## Receipt of Benefits by Children and Other Family Members

More than eight of every ten families with at least one non-citizen parent are “mixed-status” households, meaning that they contain both citizen and non-citizen members.<sup>27</sup> In mixed-status households, some members may be eligible for benefits (typically citizen children) while 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 INS 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>28</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 must have come to the attention of the INS and the INS must have decided 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 INS and the INS 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;

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<sup>27</sup> Michael Fix and Wendy Zimmerman, *All Under One Roof: Mixed-Status Families in an Era of Reform*, The Urban Institute, June 1999, <http://www.urban.org/research/publication/all-under-one-roof-mixed-status-families-era-reform>.

<sup>28</sup> 64 Fed. Reg. 28689, 28691-28692.

- the immigrant or his or her sponsor must fail to repay the debt after the demand has been made; and
- 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>29</sup>

As a practical matter, this combination of circumstances can virtually never occur. Most immigrants who entered 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 INS 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>30</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.

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<sup>29</sup> 64 Fed. Reg. 28689, 28691.

<sup>30</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.

## 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>a</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 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 legal permanent residents 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 their first five years in the country. 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 INS 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 released at the same time as the guidance, INS 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>b</sup> After the release of the INS guidance, the Health Care Financing Administration reiterated that confidentiality protections prohibit the release of information about Medicaid applicants and recipients to the INS, even in cases where institutionalization for long-term care is considered in making a public charge determination.<sup>c</sup>

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

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

<sup>c</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.

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 INS 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>31</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 benefits

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<sup>31</sup> 64 Fed. Reg. 28689, 28691.

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.<sup>32</sup> 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>33</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.

## Conclusion

The new INS public charge guidance should greatly ease concerns that many legal immigrants may have about being classified as a public charge. The guidance clarifies that a “public charge” is an immigrant who is likely to become “primarily dependent on the government for subsistence” and very narrowly limits the situations in which receipt of public benefits is relevant to a “public charge” finding. The guidance makes clear that receipt of non-cash benefits (except for institutionalization for long-term care at government expense) cannot 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 freely accept that assistance without endangering their immigration status.

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<sup>32</sup> See Wendy Zimmerman and Karen C. Tumlin, “Patchwork Policies: State Assistance for Immigrants Under Welfare Reform,” The Urban Institute, May 1999, <http://www.urban.org/research/publication/patchwork-policies-state-assistance-immigrants-under-welfare-reform>. Under PRWORA, sponsor deeming is optional for state-funded benefits. 8 U.S.C. § 1632.

<sup>33</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.

TABLE 1

**When Is Receipt of Cash Assistance a Factor in a Public Charge Determination?**

<b>Type of Immigrant</b>	<b>Individual Receives Cash Assistance for Income Maintenance</b>	<b>Family Member Receives Cash Assistance for Income Maintenance</b>
<b>Legal permanent resident (LPR) seeking to become a citizen</b>	No public charge test for citizenship.	Legal permanent resident (LPR) seeking to become a citizen
<b>Citizen or LPR seeking to sponsor a relative</b>	No public charge test for sponsorship.	Citizen or LPR seeking to sponsor a relative
<b>LPR or other immigrant with a green card returning to the U.S. after traveling abroad for six months or longer</b>	Receipt of cash assistance for income maintenance purposes is a factor in public charge determination. Decision-maker 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.	Not a factor in public charge determination unless cash assistance is the sole source of income for the family. Decision-maker must consider the “totality of the circumstances” before finding that immigrant is likely to become primarily dependent on the government for subsistence.
<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>	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	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.

TABLE 1

**When Is Receipt of Cash Assistance a Factor in a Public Charge Determination?**

<b>Type of Immigrant</b>	<b>Individual Receives Cash Assistance for Income Maintenance</b>	<b>Family Member Receives Cash Assistance for Income Maintenance</b>
	ineligible for federally funded cash assistance during their first five years here.	
<b>Battered spouse or child seeking to adjust status or applying for a visa under VAWA</b>	Unclear. INS has said it will clarify in future guidance.	Unclear. INS has said it will clarify in future guidance. At a minimum, receipt of cash assistance by a family member should not be a factor in public charge determination unless cash assistance is the family’s sole source of income.
<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>Decision-maker 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. Decision-maker must consider the “totality of the circumstances” before finding that immigrant is likely to become primarily dependent on the government for subsistence.</p>