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Immigration - Public Charge

Immig - public charge

April 26, 1999

NOTE TO: Bruce Reed
Elena Kagan
Chris Jennings
Cynthia Rice
Jeanne Lambrew
Devorah Adler

FROM: Irene Bueno

Re: **DRAFT INS FIELD GUIDANCE ON PUBLIC CHARGE**

Please review the attached INS Field Guidance on Public Charge that will be published and distributed to the INS Field offices along with the proposed regulation. Note that a section on refugees is pending DOJ approval and is forthcoming. I will forward that section to you when I receive it.

Please give me your comments by the end the week, April 30 or let me know if you have any questions.

Thanks.

DRAFT
4/22/99

96 Act ***
HQ *******

MEMORANDUM FOR ALL REGIONAL DIRECTORS
ALL SERVICE CENTER DIRECTORS

FROM: MICHAEL A. PEARSON
EXECUTIVE ASSOCIATE COMMISSIONER,
FIELD OPERATIONS

SUBJECT: Public Charge: INA Sections 212(a)(4) and 237(a)(5)

This memorandum provides guidance concerning the public charge ground of inadmissibility, section 212(a)(4) of the Immigration and Nationality Act (INA), and the related deportation charge under section 237(a)(5) of the INA. It also discusses the impact of these subsections on the new enforceable Affidavit of Support prescribed by the section 213A of the INA, established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

IIRIRA and the recent welfare reform laws[1] have sparked public confusion about the relationship between the receipt of federal, state, and local public benefits and the meaning of "public charge" under the immigration laws. Accordingly, the Service is taking 2 steps to ensure the accurate and uniform application of law and policy in this area. First, the Service is issuing this memorandum which both summarizes longstanding law with respect to public charge and provides new guidance on public charge determinations in light of the recent changes in law. In addition, the Service is publishing a proposed rule for notice and comment that will for the first time define "public charge" and discuss evidence relevant to public charge determinations.

Although the definition of public charge is the same for both admission/adjustment and deportation, the standards applied to public charge adjudications in each context are significantly different and are addressed separately in this memorandum. After discussing the definition and standards for public charge determinations, the memorandum goes on to discuss exemptions from public charge determinations and particular types of benefits that may and may not be considered for public charge purposes, in addition to other issues.

1. Definition of "Public Charge"

The Service is publishing a rule for notice and comment that defines "public charge" for purposes of both admission/adjustment and deportation. That rule proposes that "public charge" means an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) **"primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."**

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[1] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, as amended by the Balanced Budget Act of 1997, Pub. L. 105-33; the Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. 105-185; and the Noncitizen Technical Amendments Act of 1998, Pub. L. 105-306.

Until the public has had an opportunity to comment on this proposed definition and a final rule is published, Service officers shall adopt this definition on an interim basis. Accordingly, officers should not initiate or pursue public charge deportation cases against aliens who receive only non-cash public assistance (other than institutionalization) during the period before a final rule is published. Similarly, officers should not place any weight on the receipt of non-cash public assistance (other than institutionaliization) with respect to determinations of inadmissibility on public charge grounds.

See section 6, below, for a more detailed discussion of particular types of benefits that may and may not be considered for public charge purposes before a final rule is published.

2. Admission and adjustment of status

Under INA section 212(a)(4), an alien seeking admission to the United States or seeking to adjust status to that of an alien lawfully admitted for permanent residence is inadmissible if the alien, "at the time of application for admission or adjustment of status, is likely at any time to become a public charge."[2] IIRIRA amended section 212(a)(4) of the INA to codify the factors relevant to a public charge determination. **Officers must consider, at a minimum, the alien's age, health, family status, assets, resources, and financial status, and education and skills when making a public charge inadmissibility determination.** Every denial order based on public charge must reflect consideration of each of these factors and specifically articulate the reasons for the officer's determination.

The most significant change to section 212(a)(4) under IIRIRA is the creation of a new affidavit of support (AOS), which, coupled with new section 213A, imposes on the sponsor a legally enforceable support obligation. The law requires that sponsors demonstrate that they are able to maintain the sponsored alien at an annual income of not less than 125 percent of the federal poverty level. The AOS requirement applies to all immediate relatives (including orphans), family-based immigrants, and those employment-based immigrants who will work for a relative or for a firm in which a U.S. citizen or lawful permanent resident (LPR) relative holds a 5 percent or more ownership interest. Immigrants seeking admission or adjustment of status in these categories are inadmissible under subparagraphs (C) and (D) of the modified section 212(a)(4), respectively, unless the appropriate sponsor has completed and filed a new AOS if the application for an immigrant visa or adjustment of status on or after December 19, 1997. Note that this requirement applies to these aliens even if, under the factors codified in section 212(a)(4)(B), the adjudicator would ordinarily find that the alien is not likely to become a public charge. The only exceptions from this requirement are for qualified battered spouses and children and for qualified widow(er)s of citizens, *if* these aliens have filed visa petitions on their own behalf. Where such an AOS has been filed on an alien's behalf, it should be considered along with the statutory factors in the public charge determination.

The standard for adjudicating inadmissibility under section 212(a)(4) has been developed in several Service, BIA, and Attorney General decisions and has been codified in the Service regulations implementing the legalization provisions of the Immigration Reform and Control Act of 1986. **These decisions and regulations, and section 212(a)(4) itself, create a "totality of the circumstances"**

[2] See Section 4 below on categories of aliens who are exempt from public charge determinations.

test.

In determining whether an alien is likely to become a public charge, Service officers should assess the financial responsibility of the alien by examining the "totality of the alien's circumstances *at the time of his or her application*. . . . The existence or absence of a particular factor *should never be the sole criterion* for determining if an alien is likely to become a public charge. The determination of financial responsibility *should be a prospective evaluation*" based on the alien's age, health, family status, assets, resources and financial status, education, and skills, among other factors.[3]

In addition, the Attorney General has ruled 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."[4] Under the new AOS rules, all family-based immigrants (and some employment-based immigrants) will have a sponsor who has indicated an ability and willingness to come to the immigrant's assistance. An alien may be considered likely to become a public charge even if there is no legal obligation to reimburse the benefit-granting agency for the benefits or services received, in contrast to the standards for deportation, discussed below.[5]

Current receipt of cash benefits for income maintenance and current institutionalization

If at the time of application for admission or adjustment an alien is receiving a cash public benefit for income maintenance or is institutionalized for long-term care (as discussed in Section 6, below), that benefit should be taken into account under the totality of the circumstances test as one of the alien's "resources," along with the other statutory factors under section 212(a)(4)(B)(i) and any AOS. The alien should not be requested to repay the cost of any benefits received. Current receipt of non-cash benefits should not be taken into account under the totality of the circumstances test.

Past receipt of cash benefits for income maintenance and past institutionalization

Past receipt of cash income-maintenance benefits does not automatically make an alien inadmissible as likely to become a public charge, nor does past institutionalization for long-term care at government expense. Rather this history would be one of many factors to be considered in applying the totality of the circumstances test. In the case of an alien who has received cash income-maintenance benefits in the past or who has been institutionalized for long-term care at government expense, a Service officer determining admissibility should **assess the totality of the alien's circumstances at the time of the application** for admission or adjustment and **make a forward-looking determination** regarding the likelihood that the alien will become a public charge after admission or adjustment. The more time that has passed since an alien received cash benefits or was institutionalized, the less weight these factors will have as a predictor of future receipt. Also, the "length of time an applicant has received public

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[3] 8 C.F.R. § 245a.4(b)(11)(iv)(B), and see INA § 212(a)(4)(B). The federal courts have also endorsed this "totality of the circumstances" test. See, e.g., Zambrano v. INS, 972 F.2d 1122 (9th Cir. 1992), *judgment vacated on other grounds, 509 U.S. 918 (1993).*

[4] Matter of Martinez-Lopez, 10 I&N 409, 421-422 (AG, Jan. 6, 1964).

[5] Matter of Harutunian, 14 I. & N. Dec. 583 (BIA 1974) (interpretating § 212(a)(15), recodified as § 212(a)(4)).

cash assistance is a significant factor."[6] The longer an alien has received cash benefits in the past, the stronger the implication that the alien is likely to become a public charge. The negative implication of past receipt of such benefits or past institutionalization, however, may be overcome by positive factors in the alien's case demonstrating an ability to be self-supporting. For instance, a work-authorized alien who has current full-time employment or an AOS should be found admissible despite past receipt of cash public benefits, unless there are other adverse factors in the case.

Past receipt of non-cash benefits should not be taken into account under the totality of the circumstances test.

Repayment of public benefits

IIRIRA did not create any requirement that aliens repay benefits received in the past in order to avoid being found inadmissible on public charge grounds, nor has such a requirement existed in the past. Accordingly, officers should not instruct or suggest that aliens must repay benefits previously received as a condition of admission or adjustment, and they should not request proof of repayment as a condition for finding the alien admissible to the United States. (See INS Memorandum, "Public Charge: INA Sections 212(a)(4) and 237(a)(5) – Duration of Departure for LPRs and Repayment of Public Benefits," dated December 16, 1997, for further discussion.)

Repayment is relevant to the public charge inadmissibility determination only in very limited circumstances. If at the time of application for admission or adjustment of status the alien has an outstanding public debt for a cash benefit or the costs of institutionalization that would render the alien deportable on public charge grounds under section 237(a)(5) of the INA, then the alien is inadmissible. **Only a debt that satisfies the three-part test under section 237(a)(5), described below, will render an alien a public charge upon admission.** If the debt is paid, then the alien will no longer be inadmissible based on the debt, and the usual totality of the circumstances test would apply. While the Service may not demand that an alien repay a public debt which meets the three-part test, it may inform an alien that if the alien does not repay the debt, he or she will continue to be inadmissible to the United States. Adjudicators should make sure also to inform aliens that even if they pay the debt, they may still be determined to be inadmissible as an alien likely to become a public charge under the totality of the circumstances test.

If an INS officer finds evidence of possible benefit fraud in the course of performing his or her immigration duties, that information should be forwarded through official channels to the appropriate benefit-granting agency for possible investigation and enforcement action. In such cases, absent a determination of fraud by the benefit-granting agency, immigration benefits to which the alien is otherwise entitled should not be withheld or denied.

3. Public charge determinations - deportation

The determination of whether an alien is deportable as a public charge is quite different from the determination of whether an alien is likely to become a public charge under section 212(a)(4). Section 237(a)(5) of the INA states that "[a]ny alien who, within 5 years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable." This

[6] 8 CFR § 245a.2(k)(4).

section requires a two-step determination. First, the Service must determine whether the alien has become a public charge within five years after the date of entry. Second, if the alien has become a public charge, then the Service must determine whether the alien has demonstrated that the circumstances that caused the alien to become a public charge arose after the alien's entry into the United States.[7] An alien who can make such a showing is not deportable as a public charge.

With respect to whether an alien has become a public charge, the Attorney General has determined that the mere receipt of a public benefit by an alien does not make an alien a public charge for purposes of deportation under section 237(a)(5). Rather, in Matter of B, 3 I. & N. Dec. 323 (BIA and AG 1948),[8] the Attorney General established a strict three-part test to determine if an alien has become a public charge. In order for an alien to become a public charge under section 237(a)(5), the following 3 requirements must be met:

1) The state or other government entity that provides the benefit must, by law, impose a charge or fee for the services rendered to the alien. In other words, the alien or designated relatives or friends must be legally obligated to repay the benefit-granting agency for the benefits or services provided. **If there is no reimbursement requirement, and if the government does not have the legal authority to sue in court to recover payment, the alien cannot be said to be a public charge.**

2) **The responsible benefit agency officials must make a demand for payment for the benefit or services** from the alien or other persons legally responsible for the debt under federal or state law (e.g., the alien's sponsor).

3) **The alien and other persons legally responsible for the debt fail to repay after a demand has been made.**

The demand for repayment must be made within 5 years of an alien's entry in order to render the alien deportable as a public charge.[9] In addition, the Service has determined that, in order for an alien to become deportable as a public charge as a result of the failure of the sponsor to repay the agency, the benefit-granting agency must take all available actions to collect from the sponsor. This includes filing an action in the appropriate court and taking all steps available under law to enforce any judgment against the sponsor.

Deportations based on public charge grounds have been rare, and the new immigration and welfare laws are not likely to change this. First, for aliens who are not sponsored under the new AOS, it is unlikely that there will be a legal obligation to repay public benefits or that the benefit-granting agency will make a demand for repayment. Thus, just as in the past, the first 2 prongs of the Matter of B test will generally not be satisfied. Only aliens who apply for immigrant visas or adjustment of status on or after December 19, 1997, may be sponsored under the new, enforceable AOS, which could satisfy the

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[7] Under the re-entry doctrine, the 5-year period starts again if, within the alien's first 5 years after entry, he or she has a "meaningful departure" from the United States and then returns.

[8] While this decision concerned the public charge provision of the 1917 Act, the test established continues to be valid under current law, which is substantially the same as the 1917 law. See Matter of L, 6 I. & N. Dec. 349 (BIA 1954), and Matter of Harutunian, 14 I. & N. Dec. 583 (BIA 1974).

[9] Matter of L, 6 I. & N. Dec. 349 (BIA 1954).

standards for deportation under Matter of B. However, under the new welfare reform laws, these same aliens will generally be barred from receiving federal means-tested public benefits for the first 5 years after admission or adjustment – the critical period for purposes of deportability. In addition, under the "deeming" rules, the sponsor's income will be attributed to the alien in assessing his or her eligibility to receive a means-tested benefit, which would normally raise the alien's income over the benefit eligibility threshold. Only if an immigrant receives a cash benefit for income-maintenance within 5 years of entry or is institutionalized for long-term care (despite the eligibility limitations), there is a demand for repayment by the benefit-granting agency, and the sponsor or other responsible party fails to repay, can the immigrant become deportable as a public charge. However, even in this case, the alien must be given an opportunity to prove that he or she became a public charge for causes that arose after entry. If the alien can make such a showing, he or she will not be deportable as a public charge. Thus, the Service is unlikely to see a significant increase in cases of deportability on public charge grounds.

4. Exemptions from public charge determinations

Under the new laws, refugees and asylees remain exempt from public charge determinations for purposes of admission and adjustment of status pursuant to sections 207, 208, and 209 of the INA. Similarly, Amerasian immigrants are exempt from the public charge ground of inadmissibility for their initial admission.[10] In addition, various statutes contain exceptions to the public charge ground of inadmissibility for aliens eligible for benefits under their provisions, including the Cuban Adjustment Act (CAA), the Nicaraguan Adjustment and Central American Relief Act (NACARA), and the Haitian Refugee Immigration Fairness Act (HRIFA).[11] These laws provide avenues of adjustment for certain aliens – including Cuban/Haitian entrants,[12] who remain eligible for many public benefits under welfare reform – without subjecting them to screening as potential public charges.

Most LPRs who have been outside the United States for 180 days or less are not applicants for admission and therefore are not subject to the grounds of inadmissibility, pursuant to section 101(a)(13)(C) of the INA.[13] Accordingly, absent an indication that they may be applicants for admission, such LPRs should not routinely be questioned on issues related to the likelihood that they will become a public charge.

[Add discussion of refugees who adjust to LPR status, Cuban/Haitian entrants, and Amerasians who are applicants for admission pursuant to section 101(a)(13)(C).]

Under section 249 of the INA, which allows aliens who have been in the United States since January 1, 1972, to "register" as LPRs, public charge is not a factor in determining eligibility. Receipt of public

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[10] Amerasian immigrants are defined in section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988.

[11] See Matter of Mesa, 12 I. & N. Dec. (Dep. Assoc. Comm. 1967) (public charge exception under the CAA); NACARA, Pub. L. 105-100, [section 202]; HRIFA, Pub. L. 105-277, Division A, Title IX, [section 902].

[12] Cuban/Haitian entrants are defined in section 501(c)(e) of the Refugee Education Assistance Act of 1980.

[13] Section 101(a)(13)(C) provides that an LPR seeking admission to the U.S. is not an applicant for admission unless the alien: (i) has abandoned or relinquished that status; (ii) has been absent for more than 180 days; (iii) has engaged in illegal activity after leaving the U.S.; (iv) left the U.S. while in removal proceedings; (v) has committed certain offenses in the U.S.; or (vi) is attempting to enter other than at a port of entry or has not been admitted to the U.S. after inspection and authorization.

benefits is not an adverse factor in meeting the "good moral character" requirement for registry, absent evidence that an applicant procured or attempted to procure such benefits through fraud or misrepresentation.

5. Receipt of benefits by children and other family members

The Service has addressed the issue of receipt of benefits by children and other family members in a number of memoranda on the issue of public charge for aliens applying for legalization under section 245A of the INA. The Service's approach to the receipt of benefits by family members in the legalization context has been upheld in federal court and should govern the question for general public charge determinations as well.[14] The rule is well summarized in an April 21, 1988, memorandum from the Associate Commissioner for Examinations to the Regional Commissioners:

> As a general rule, the receipt of . . . benefits by a member of the . . . applicant's family is not attributed to the applicant for purposes of determining the likelihood that the applicant will become a public charge. . . . If, however, the family is reliant on the . . . benefits as its sole means of support, the . . . applicant may be considered to have received public cash assistance. This determination is to be made on a case-by-case basis and upon consideration of the totality of the applicant's circumstances.

Although this memorandum specifically addressed the receipt of cash assistance under the former Aid to Families with Dependent Children (AFDC) program, the rule is applicable generally to benefit programs that may give rise to public charge determinations. **Accordingly, Service officers should not attribute benefits received by U.S. citizen or alien children or other family members to alien applicants for purposes of determining whether the applicant is likely to become a public charge, absent evidence that the family is reliant on the benefits as its sole means of support.**

6. Benefits that may and may not be considered for public charge purposes

The term "public charge" is not defined in law or regulation and, in the past, the Service has not provided comprehensive guidance on the kinds of benefits that could cause an alien to be considered a public charge. In light of the new laws and the complexity of the federal, state, and local public benefits system, this issue now requires that the Service adopt uniform standards. Accordingly, the Service is publishing a proposed rule for notice and comment, as noted above. The proposed standards take into account the law and public policy decisions concerning alien eligibility for public benefits and public health considerations, as well as past practice by the Service and the Department of State.

It has never been Service policy that any receipt of services or benefits paid for in whole or in part from public funds renders an alien a public charge, or indicates that the alien is likely to become a public charge. The nature of the public program must be considered. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, receiving emergency medical care, or collecting earned social security payments would not make an alien inadmissible as a public charge, despite the use of public funds. While the Service has not previously issued guidance on a program-by-program basis, the Department of State did codify its policy in the Foreign Affairs Manual (FAM), excluding Food Stamps from consideration for public charge purposes because of its

[14] See Perales v. Reno, 48 F.3d 1305 (2d Cir. 1995).

"supplemental" nature.[15] The Service is now taking a similar approach by adopting a definition of public charge that focuses on whether the alien is or is likely to become **primarily dependent on the government for subsistence**. After extensive consultation with benefit-granting agencies, the Service has determined that **the best evidence of whether an alien is primarily dependent on the government for subsistence is either (i) the receipt of public cash assistance for income maintenance, or (ii) institutionalization for long-term care at government expense.**

The Service is proposing this definition by regulation and adopting it on an interim basis for several reasons. First, confusion about the relationship between the receipt of public benefits and the concept of "public charge" has deterred eligible aliens and their families, including U.S. citizen children, from seeking important health and nutrition benefits that they are legally entitled to receive. This reluctance to access benefits has an adverse impact not just on the potential recipients, but on public health and the general welfare. Second, non-cash benefits (other than institutionalization for long-term care) are by their nature supplemental and do not, alone or in combination, provide sufficient resources to support an individual or family. In addition to receiving non-cash benefits, an alien would have to have either additional income – such as wages, savings, or earned retirement benefits – or public cash assistance. Thus, by focusing on cash assistance for income maintenance, the Service can identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests. Finally, certain federal, state, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general public health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus, participation in such programs is not evidence of poverty or dependence.

In adopting this new definition, the Service does not expect to substantially change the number of aliens who will be found deportable or inadmissible as public charges. First, under the stricter eligibility rules of the welfare reform laws, many legal aliens are no longer eligible to receive certain types of public benefits, so they run no risk of becoming public charges by virtue of such benefits. Many of those who remain eligible for federal, state, and local public benefits are LPRs, refugees, and asylees, who are unlikely to face public charge screening in any case in light of the section 101(a)(13)(C) and the statutory exemptions.[16] Further, in light of the Matter of B test, deportations on public charge grounds have been rare and are expected to remain so. With respect to admissibility, the new AOS has already raised the threshold for many families to demonstrate that a sponsored alien is not likely to become a public charge. In addition, the statutory factors under section 212(a)(4)(B) continue to apply. **Thus, while the Service will not take an alien's past or current receipt of non-cash benefits such as medical assistance into account for public charge purposes, the alien's age, health, and resources must be considered (along with the other statutory factors) in determining whether he or she is likely to become primarily dependent on the government for subsistence in the future.**

The rules governing alien eligibility for federal, state, and local public benefits are complex and subject to change, including significant state-by-state variations. INS officers are not expected to know the substantive eligibility rules for different public benefit programs. Rather, in the face of complexity and variation in the availability of public benefits, this guidance and the proposed rule are intended to make

[15] 9 FAM § 40.41, n.9.1.

[16] See Section 4, above, for a discussion of public charge exemptions.

public charge determinations simpler and more uniform, while simultaneously providing greater predictability to the public.

A. Benefits that may be considered for public charge purposes

Cash benefits for income maintenance and institutionalization for long-term care at government expense may be considered for public charge purposes. The most common examples of such benefits are:

1. Supplemental Security Income (SSI) under Title XVI of Social Security Act;
2. Temporary Assistance for Needy Families (TANF) cash assistance (part A of Title IV of the Social Security Act) (successor to the AFDC program);[17]
3. State and local cash assistance programs (often called "General Assistance" programs); and
4. Programs (including Medicaid) supporting aliens who reside in an institution for long-term care (i.e., a nursing home or mental health institution).

Past or current receipt of such cash benefits does not lead to a per se determination that an alien is either inadmissible or deportable as a public charge. Rather, such benefits should be taken into account under the totality of the circumstances test for purposes of admission/adjustment and should be considered for deportation purposes under the standards of section 237(a)(5) and Matter of B.

Note that not all cash assistance is provided for purposes of income maintenance, and thus not all cash assistance is relevant for public charge purposes. For example, some energy assistance programs provide supplemental benefits through cash payments, in addition to vouchers or in-kind benefits, depending on the locality and the type of fuel needed. Such supplemental, special purpose cash benefits should not be considered in public charge determinations because they are not evidence of primary dependence on the government for subsistence.

B. Benefits that may not be considered for public charge purposes

Non-cash benefits (other than institutionalization for long-term care) should not be taken into account in making public charge determinations, nor should special-purpose cash assistance that is not intended for income maintenance. Therefore, past, current, or future receipt of these benefits should not be considered in determining whether an alien is or is likely to become a public charge. Further, an alien need not repay benefits already received or withdraw from a benefit program in order to be eligible for admission or adjustment of status.

It is not possible to list all the supplemental, non-cash benefits an alien may receive that should not be considered for public charge purposes, but common examples include:

1. Medicaid and other health insurance and medical services (including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases; use of health

[17] States have flexibility in administering the TANF program and may choose to provide non-cash assistance such as subsidized child care or transportation vouchers in addition to cash assistance. Such non-cash benefits should not be considered for public charge purposes.

clinics, etc.) other than support for institutionalization for long-term care[18]
2. Children's Health Insurance Program (CHIP)
3. Nutritional programs, including Food Stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), and benefits under the National School Lunch Act
4. Housing assistance
5. Child care services
6. Energy assistance, such as the Low Income Home Energy Assistance Program (LIHEAP)
7. Emergency disaster relief
8. Foster care and adoption assistance
9. Educational assistance, including benefits under the Head Start Act and aid for elementary, secondary, or higher education
10. Job training programs
11. In-kind, community-based programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter).

State and local programs that are similar to the federal programs listed above should also be excluded from consideration for public charge purposes. Note that states may adopt different names for the same or similar publicly funded programs. In California, for example, Medicaid is called "Medi-Cal" and CHIP is called "Healthy Families." It is the underlying nature of the program, not the name adopted in a particular state, that determines whether it should be considered under this exemption.

7. Affidavit of Support

The new AOS form, Form I-864, asks whether the sponsor or a member of the sponsor's household has received means-tested benefits within the past 3 years. The purpose of this question is not to determine whether the sponsor is or is likely to become a public charge, but to ensure that the adjudicating officer has access to all facts that may be relevant in determining whether the 125-percent annual income test is met. Any cash benefits received by the sponsor cannot be counted toward meeting the 125-percent income threshold, but receipt of other means-tested benefits, such as Medicaid, is not disqualifying for sponsorship purposes. As noted above, public benefit programs are increasingly available to families with incomes above 125 percent of the poverty line.

The regulations implementing the new AOS requirement are found at 8 CFR part 213a. Separate guidance has been issued on adjudicating applications including an AOS.

Continued Use of Form I-134

The use of the new AOS is mandatory for those categories of immigrants listed in section 212(a)(4)(C) and (D), and a Service officer may not accept a Form I-134 in place of the new AOS for these immigrants if the application was filed on or after December 19, 1997. In those cases not governed by sections 212(a)(4)(C) and (D) and 213A (e.g., parolees or nonimmigrants) in which the Service has traditionally accepted Form I-134, Service officers may continue to do so on a discretionary basis. Use of Form I-361 will continue in cases involving Amerasians under Public Law

[18] The Service's decision not to consider Medicaid, CHIP, and Food Stamps for public charge purposes does not affect the authority of benefit granting agencies to seek repayment for benefits received by an alien from the alien's sponsor under the new AOS.

97-361.

8. Naturalization

In the overwhelming majority of cases, public charge is not a factor at the time of naturalization. The Service has no authority to make the repayment of public assistance a condition for granting naturalization, and officers should not request proof of repayment from applicants in connection with a naturalization adjudication.

There are two narrow circumstances under which the public charge issue can arise in a naturalization case. First, the alien's admission for permanent residence may not have been "lawful" pursuant to section 318 because, *at the time of entry or adjustment*, the alien was subject to exclusion as an alien likely to become a public charge. This would generally occur only if the alien withheld or misrepresented material facts relating to the public charge issue at the time of entry or adjustment. Secondly, the alien's initial admission may have been lawful, but later the alien may have become deportable as a public charge. As a practical matter, neither of these situations is likely to occur.

9. Public Charge Bonds

Section 213 of the INA, Admission of Certain Aliens on Giving Bond, was amended by IIRIRA only by including a parenthetical reference to the new AOS prescribed in section 213A. Where appropriate, officers may use the public charge bond option pursuant to section 213 as has been done in the past.

If there are any additional questions, contact _____, Headquarters Office of_____, at (202) xxx-xxxx.

Immigration - public charge

OMB

EXECUTIVE ORDER 12866 SUBMISSION

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1. Agency/Subagency originating request
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Immigration and Naturalization Service

2. Regulation Identifier Number (RIN)
1115-AF45
1115-A509

3. Title
Deportability and Inadmissibility on public charge grounds

4. Stage of Development
- ____ Prerule
- __X__ Proposed Rule
- ____ Interim Final Rule
- ____ Final Rule
- ____ Final Rule - No material change
- ____ Notice
- ____ Other

Description of Other

5. Legal Deadline for this submission
a) ☐ Yes ☒ No
b) Date ____/____/____ (DD / MM / YYYY)
c) ☐ Statutory ☐ Judicial

6. Designations
a) Economically Significant (E.O. 12866)
☐ Yes ☒ No
b) Unfunded Mandate (2 U.S.C. 1532)
☐ Yes ☒ No
If either of the above is "Yes," submit four (4) complete packages to OIRA

7. Agency Contact (person who can best answer questions regarding the content of this submission)
Alice Smith
Phone (202) 305-9353

Certification for Executive Order 12866 Submissions

The authorized regulatory contact and the program official certify that the agency has complied with the requirements of E. O. 12866 and any applicable policy directives.

Signature of Program Official	Date
Alice A. Smith	
Signature of Authorized Regulatory Contact: Richard A. Sloan, Director Policy Directives & Instructions	Date: 4/15/99

CLOSE HOLD - FOR INTERAGENCY REVIEW ONLY

DOJ/INS DRAFT 1 to OMB, 4/14/99

BILLING CODE 4410-10

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 212 and 237

INS No. ; AG Order No.

RIN 1115-AF45

Deportability and Inadmissibility on Public Charge Grounds

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service (Service) regulations to establish clear standards governing a determination that an alien is inadmissible or ineligible to adjust status, or has become deportable, on public charge grounds. This proposed rule is necessary to alleviate growing public confusion over the meaning of the currently undefined term "public charge" in immigration law and its relationship to the receipt of Federal, State or local public benefits. By defining "public charge," the Service seeks to reduce the negative public health consequences generated by the existing confusion and to provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.

CLOSE HOLD - FOR INTERAGENCY REVIEW ONLY

DATES: Written comments must be submitted on or before [Insert date 60 days from date of publication in the FEDERAL REGISTER].

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. ****-99 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange an appointment.

FOR FURTHER INFORMATION CONTACT: [To Be Determined], Immigration and Naturalization Service, 425 I Street NW., Room _____, Washington, DC 20536; telephone (202)_____.

SUPPLEMENTARY INFORMATION:

Background and Necessity for Definition of "Public Charge"

Recent immigration and welfare reform laws have generated considerable public confusion about whether the receipt of Federal, State, or local public benefits for which an alien may be eligible renders him or her a "public charge" under the immigration statutes governing admissibility, adjustment of status, and deportation. See 8 U.S.C. 1182(a)(4); 8 U.S.C. 1227(a)(5). See also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Title V, section 501 et seq., 110 Stat. 3009-3668 (codified as

amended in different sections of 8 U.S.C.) (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104-193, sections 400-451, 110 Stat. 2260 (codified as amended generally at 8 U.S.C. 1601, et seq.) (1996).

Under section 212(a)(4) of the Immigration and Nationality Act (the Act), the determination of whether an individual alien "is likely to become a public charge at any time" is made by a Department of State consular officer at the time his or her visa application is adjudicated overseas, by a Service officer at the time an alien seeks admission into the United States, and by the Service at the time an alien applies for adjustment of status if he or she is already in the U.S. 8 U.S.C. 1182(a)(4). The statute further states that the decision shall be "in the opinion of" the consular officer or the Attorney General, who has delegated this authority to the Service. Id.; 8 CFR 2.1. Under section 237(a)(5) of the Act, an alien also may be deported if he or she "has become a public charge" within five years after his or her "date of entry" (i.e. admission) into the United States for causes not shown to have arisen since entry. 8 U.S.C. 1227(a)(5). An immigration judge will make the determination if any of these issues arise during removal proceedings for an alien.

On August 22, 1996, the President signed the Welfare Reform Act. The Welfare Reform Act and its amendments imposed new restrictions on the eligibility of aliens -- whether present in the United States legally or illegally -- for many Federal, State, and local public benefits. 8 U.S.C. 1601-1646 (as amended). Despite these new restrictions, many legal aliens remain eligible for at least some forms of public assistance, such as Medicaid, Food Stamps, Supplemental Security Income (SSI), Temporary Aid to Needy Families (TANF), and the Children's Health Insurance Program (CHIP), among other benefits. Congress also chose not to apply the alien eligibility restrictions in the Welfare Reform Act to emergency medical assistance; short-term, in-kind, non-cash emergency disaster relief; public health assistance related to immunizations and to treatment of the symptoms of a communicable disease; certain in-kind services (e.g. soup kitchens, etc.) designated by the Attorney General as necessary to the protection of life and safety; and assistance under certain Department of Housing and Urban Development (HUD) programs. 8 U.S.C. 1611(b)(1).

Numerous States and localities also have funded public benefits, particularly medical and nutrition benefits, for aliens who are now ineligible for certain Federal public benefits. Congress further authorized States to enact laws after August 22,

1996 that affirmatively provide illegal aliens with certain State and local public benefits. 8 U.S.C. 1621(d). A complete overview of all the public benefits and programs that remain available to various categories of aliens under the welfare reform laws is beyond the scope of this discussion.

Although Congress has determined that certain aliens remain eligible for some forms of medical, nutrition, child support services, and other public assistance, numerous legal immigrants and other aliens are choosing not to apply for these benefits because they fear the negative immigration consequences of potentially being deemed a "public charge." This tension between the immigration and welfare laws is exacerbated by the fact that "public charge" has never been defined in statute or regulation. Without a clear definition of the term, aliens have no way of knowing which benefits they may safely access without risking deportation or inadmissibility.

Additionally, the Service has been contacted by many State and local officials, Members of Congress, immigrant assistance organizations, and health care providers who are unable to give reliable guidance to their constituents and clients on this issue. According to Federal and State benefit-granting agencies, this growing confusion is creating significant, negative public health consequences across the country. This situation is

becoming particularly acute with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fear of obtaining these necessary medical and other benefits is not only causing them considerable harm, but also jeopardizing the general public. Concern over the public charge issue is further preventing aliens from applying for available supplemental benefits, such as child care and transportation vouchers, that are designed to aid individuals in gaining and maintaining employment. In short, the absence of a clear public charge definition is undermining the Government's policies of increasing access to health care and helping people to become self-sufficient. The Service seeks to remedy this problem with this proposed rule.

Overview of the Proposed Rule

First, the proposed rule provides a definition for the ambiguous statutory term "public charge" that will be used for purposes of both admissibility and adjustment of status under section 212(a)(4) of the Act and for deportation under section 237(a)(5) of the Act. Second, the proposed rule describes the kinds of public benefits that, if received, could make a person a "public charge." The proposed rule also provides examples of the types of public benefits that will not be considered in public

charge determinations. Third, the proposed rule adopts long-standing principles developed by the case law. As discussed below, the cases have established prerequisites and factors to be considered in making public charge determinations.

The Meaning of "Public Charge" and Public Benefits That Demonstrate Primary Dependence on the Government for Subsistence

Following extensive consultation with benefit-granting agencies, the Department is proposing to define "public charge" to mean an alien who has become (for deportation purposes) or who is likely to become (for admission or adjustment purposes) "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." This interpretation of "public charge" is reasonable because it is based on the plain meaning of the word "charge," the historical context of public dependency when the "public charge" immigration provisions were first enacted more than a century ago, and the expertise of the benefit-granting agencies that deal with subsistence issues. It is also consistent with factual situations presented in the public charge case law.

When a word is not defined by statute and legislative history does not provide clear guidance, courts often construe it

in accordance with its ordinary or natural meaning as contained in the dictionary. See, e.g., Sutton v. United Air Lines, Inc., 130 F.3d 893, 898 (10th Cir. 1997), cert. granted 119 S.Ct. 790 (1999)(citations omitted). The word "charge" has many meanings in the dictionary, but the one that can be applied unambiguously to a person and best clarifies the phrase "become a public charge" is "a person or thing committed or entrusted to the care, custody, management, or support of another." Webster's Third New International Dictionary of the English Language 377 (1976). The dictionary gives the following apt sentence as an example of usage: "He entered the poorhouse, becoming a county charge." Id. See also 1 Oxford English Dictionary 381 (Compact ed. 1981) (definition # 13 for "charge" - "the duty or responsibility of taking care of (a person or thing); care, custody, superintendence").

This language indicates that a person becomes a public charge when he or she is committed to the care, custody, management or support of the public. The dictionary definition suggests a complete, or nearly complete, dependence on the government rather than the mere receipt of some lesser level of financial support. Historically, individuals who became dependent on the government were institutionalized in asylums or placed in "almshouses" for the poor long before the array of

limited-purpose public benefits now available existed. This primary dependence model of public assistance was the backdrop against which the "public charge" concept in immigration law developed in the late 1800s.

Although no case has specifically identified the types of public benefits that can give rise to a public charge finding, a definition based on primary dependence on the government is consistent with the facts found in the deportation and admissibility cases. See, e.g., Matter of L.R., 7 I. & N. Dec. 124 (BIA 1956)(deportation based on public mental hospital institutionalization); Matter of Harutunian, 14 I. & N. Dec. 583 (R.C., Int. Dec. 1974)(receipt of old age assistance for principal financial support was important factor in denying admission).

The Service has also sought the advice and relied on the expertise of various Federal agencies that administer a wide variety of public benefits. The Department of Health and Human Services (HHS), which administers TANF, Medicaid, CHIP, and many other benefits, has advised that the best evidence of whether an individual is relying primarily on the government for subsistence is either the receipt of public cash assistance for income maintenance purposes or institutionalization for long-term care at government expense. (See Letter to INS Commissioner Doris

Meissner from HHS Deputy Secretary Kevin Thurm, dated March 25, 1999, reprinted below)(hereinafter "HHS Letter" and reprinted at the end of this Supplementary Section **or at end of reg.?**). The Department of Agriculture (USDA), which administers Food Stamps, the Social Security Administration (SSA), which administers SSI, and other benefit-granting agencies have concurred with the HHS advice to the Service that receipt of cash benefits is the best evidence of primary dependence on the government. **[Add references to USDA, SSA letters and others once obtained; we plan to reproduce letters either at end of the reg. itself or the Supp. Section, according to appropriate placement instructions from OMB/Federal Register.]** Cash benefits for income maintenance include SSI, TANF, and State or local cash assistance programs (often called "General Assistance" programs). Acceptance of these forms of public assistance could make a person a public charge, provided the additional requirements for deportation or inadmissibility discussed later in this Supplementary Section and in the regulation are also met.

According to the HHS and other benefit agencies consulted by the Service, non-cash benefits generally provide supplementary support in the form of vouchers or direct services to support diet, health, and living condition needs. (See HHS Letter). These benefits are often provided to low-income working families

to sustain and improve their ability to remain self-sufficient. A few examples of these non-cash benefits that do not directly provide subsistence are Medicaid, Food Stamps, CHIP, and their related State analogues, housing assistance, transportation vouchers, and certain kinds of limited non-cash assistance provided under the TANF program. These forms of assistance, and others discussed below and in the proposed regulation, will not be considered for public charge purposes. The HHS has further stated that "...it is extremely unlikely that an individual or family could subsist on a combination of non-cash support benefits or services alone. . . . HHS is unable to conceive of a situation where an individual, other than someone who permanently resides in a long-term care institution, could support himself or his family solely on non-cash benefits so as to be primarily dependent on the government." (See HHS Letter).

The one exception identified by the HHS to the principle that non-cash benefits do not demonstrate primary dependence is the instance where Medicaid or related programs pay for the costs of a person's institutionalization for long-term care (other than imprisonment for conviction of a crime). Such institutionalization costs, therefore, may be considered in public charge determinations.

This distinction between cash benefits that can lead to primary dependence on the government and non-cash benefits that do not create such dependence is already applied by the State Department with regard to Food Stamps, a non-cash benefit program. The Foreign Affairs Manual (FAM) for consular officers excludes Food Stamps from public charge admissibility consideration because it is an essentially supplementary benefit that does not make recipients dependent on the government for subsistence. See 9 FAM section 40.41, N.9.1. The proposed definition of "public charge" is consistent with this existing State Department policy and that agency's recognition that certain supplemental forms of public assistance should not be considered in a public charge determination.

Receipt of Non-cash Public Benefits That Do Not Demonstrate Primary Dependence on the Government for Subsistence

It has never been Service policy that the receipt of any public service or benefit must be considered for public charge purposes. The nature of the program is important. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, obtaining immunizations, and receiving public emergency medical care typically do not make a person inadmissible or deportable. Non-cash benefits, such as these and others, are by their nature supplemental and frequently

support the general welfare. By focusing on cash assistance for income maintenance, the Service can identify those individuals who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests. Certain Federal, State, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. Thus, participation in such programs is not evidence of poverty or dependence.

The proposed rule identifies the major forms of cash benefits that may be considered for public charge purposes and several examples of non-cash benefits that will not be considered. Due to the complexity and ever-changing character of the Federal, State and local public benefits still available to aliens, it is not possible to name every benefit that will or will not be considered for public charge purposes. Aliens and their advisors should carefully consider the nature of the specific public benefits involved. If they could be construed as cash benefits for income maintenance, as distinguished from in-kind services, medical or food assistance, vouchers or other forms of non-cash benefits, then a Service officer may consider

their receipt in making a public charge decision, even if the benefit is not specifically addressed by name in the proposed rule. Again, receipt of SSI, cash TANF, and State or local cash assistance programs for income maintenance (e.g., "General Assistance") will be considered as part of the public charge analysis. The Service will also consider public assistance (including Medicaid) for supporting aliens who reside in an institution for long-term care (i.e., a nursing home or mental health institution).

Other non-cash public benefits that will not be considered and that are listed in the proposed rule include, but are not limited to: Medicaid; CHIP; emergency medical assistance; other health insurance and medical services for the testing and treatment of symptoms of communicable diseases; emergency disaster relief; nutrition programs, including Food Stamps and the Special Supplemental Nutrition Program for Women, Infants and Children (WIN); housing assistance; energy assistance; job training programs, and non-cash benefits funded under the TANF program. State and local non-cash benefits of a similar nature to the identified benefits also will not be considered. It is the underlying nature of the program, not the name adopted in a particular State, that will determine whether it is relevant for public charge consideration.

Additional Requirements for Public Charge Determinations

After defining "public charge," the separate deportation and inadmissibility sections of the proposed rule incorporate principles established by case law and statute for each of those public charge determinations.

A. Admission and Adjustment of Status

The provisions that relate to admission and adjustment of status incorporate the "totality of the circumstances" analysis that officers must employ in making a prospective public charge decision. See, e.g, Matter of Perez, 15 I. & N. Dec. 136, 137 (BIA 1974). Under section 212(a)(4)(B) of the Act, officers are required to consider specific minimum factors in determining whether the alien's circumstances indicate that he or she is likely to become a public charge. These factors include the alien's age, health, family status, assets, resources, financial status, education, and skills. No single factor will determine whether an alien is a public charge, including past or current receipt of public benefits.

In addition, most aliens intending to immigrate or adjust status in family-based and certain employment-based categories after December 19, 1997, are required to file the new Form I-864, Affidavit of Support signed by their sponsor(s). 8 U.S.C. 1182(a)(4)(C-D); 8 U.S.C. 1183(a); 8 CFR 213a. The new Affidavit

of Support is legally binding and requires sponsors to maintain the sponsored alien at an annual income of not less than 125 percent of the Federal poverty line for the relevant family size. 8 U.S.C. 1183(a); 8 CFR 213a. If an Affidavit of Support is not filed, the intending immigrant will be denied admission or adjustment on public charge grounds, unless he or she is exempt from the Affidavit of Support requirement under section 212(a)(4)(C-D) of the Act. As one of the circumstances considered in determining whether a person is likely to become a public charge, officers may also consider any Affidavit of Support filed by a sponsor on behalf of an alien under section 213A of the Act and are encouraged to do so. See 8 U.S.C. 1182(a)(4)(B)(ii). Certain categories of aliens seeking to become lawful permanent residents are exempt from the Affidavit of Support requirement -- including those who qualify as widow(ers) of citizens or as battered spouses, and their children. Id.

In one significant respect, a public charge determination for purposes of inadmissibility differs from the context of deportability. As the next section describes in detail, deportation on public charge grounds requires the Service to prove that the alien or another obligated party has failed to repay a legal demand for the public benefits at issue. The

proposed rule adopts the case-developed doctrine that this failure-to-reimburse requirement does not apply to inadmissibility on public charge grounds. See Matter of Harutunian, 14 I. & N. Dec. 583 (BIA 1974). Applicants for admission or adjustment of status, therefore, could be found inadmissible or ineligible to adjust status on public charge grounds even if there is no duty to reimburse the agency that provides assistance. Again, this receipt of public benefits will result in such a finding only if the totality of the alien's circumstances, including the minimum factors in section 212(a)(4)(B) of the Act, indicate that he is likely to become a public charge.

B. Deportation

The provisions on deportation in the proposed rule incorporate the Attorney General's decision in the leading case, Matter of B-, 3 I. & N. Dec. 323 (AG and BIA 1948), that the Service can prove public charge deportability only if there has been a failure to comply with a legally enforceable duty to reimburse the assistance agency for the costs of care. In addition, the demand for repayment of the specific public benefit must have been made within the alien's initial five-year period after admission, unless it is shown that demand was unnecessary because there was no one against whom payment could be enforced.

Matter of L, 6 I. & N. Dec. (BIA 1954). Under the proposed definition for public charge previously discussed, only the failure to meet an agency's demand for repayment of a cash benefit for income maintenance or for the costs of institutionalization for long-term care will be considered for deportation. If the alien can show that the causes for which he or she received one of these types of public benefits during his initial five years after admission arose after admission, he or she will not be deportable on public charge grounds. See 8 U.S.C. 1227(a)(5).

The proposed rule also provides that the Affidavit of Support is relevant to the public charge inquiry for deportation purposes. Under the new Affidavit of Support rules, if a sponsored alien obtains Federal, State, or local means-tested public benefits, the sponsor is obligated to repay those benefits if the benefit-granting agency makes a demand for repayment. Various Federal agencies have designated certain assistance programs that they administer to be "means-tested public benefits." For example, SSI, TANF, Medicaid, Food Stamps, and CHIP have been designated as Federal means-tested public benefits and could give rise to a repayment obligation under the Affidavit of Support. If States designate means-tested public benefits in the future, such benefits also could give rise to such an

obligation. Although an Affidavit of Support may cover other matters, only demands for repayment of cash benefits, such as SSI, TANF and State General Assistance, or other cash benefits for income maintenance purposes will be relevant for deportation determinations under the proposed definition of "public charge."

The Department of Justice has determined that the existing three-part Matter of B test for public charge deportations also applies to demands for repayment of means-tested benefits under the new Affidavit of Support. The government entity providing the benefit must have a legal right to seek repayment under the Affidavit of Support; the agency must have made a demand for repayment; and the obligated party or parties must have failed to meet this demand. The rule also requires that, before a deportation action may be initiated, the agency seeking repayment must have taken all steps necessary to obtain a final judgment requiring the sponsor or other person responsible for the debt to pay. Without such a requirement, an alien could be wrongly deported as a public charge based on a debt that a court might later determine was not legally enforceable. Although the demand for repayment must be made within five years of the alien's admission, there is no time limit on obtaining a final judgment as long as it is obtained prior to the public charge proceedings.

Welfare Reform and Other Significant Factors that Limit Potential for Aliens to Become "Public Charges"

The proposed rule is not expected to alter substantially the number of aliens who will be found deportable or inadmissible as public charges. Deportations on public charge grounds have always been rare due to the strict Matter of B requirements that agencies first must demand repayment, assuming they have a legal right to do so, and the obligated party or parties must have failed to pay. This is unlikely to change.

Several recently enacted welfare and immigration reform measures have also contributed to reducing the possibility that aliens will be found likely to become public charges under section 212(a)(4) of the Act. Due to the increased restrictions of the welfare reform laws, many aliens are no longer eligible to receive public benefits formerly available to them. Under new "deeming" rules, some aliens who might otherwise have been able to obtain certain Federal, State or local means-tested public benefits can no longer do so because their sponsors' resources now count as resources available to the aliens (i.e. the sponsors' resources are "deemed" available to the alien). In addition, the requirement of a legally binding Affidavit of Support obligating sponsors to support their immigrating family members above the poverty level before they will be granted

admission or adjustment has significantly raised the bar for people who might, in the past, have entered and become public charges. These new laws work together to limit the potential for immigrants to become dependent on the government. The proposed rule defining "public charge" will not change or negatively affect the operation of these provisions.

Conclusion

The Department believes that this rule, if adopted, will provide for better overall administration of the public charge provisions of the Act. It will also help alleviate the increasing, negative public health and nutrition consequences caused by the confusion over the meaning of "public charge." The rule, if adopted, will provide rules of decision that will apply in proceedings before the Executive Office for Immigration Review (EOIR), as well as proceedings before the Service.

At a later date, the Department plans to propose additional revised sections for part 212 concerning the other grounds of inadmissibility under section 212 of the Act. Sections 212.100 - 212.111 of this proposed rule are being issued in advance as subpart G. The Department will amend the labeling of this subpart or section numbers, if necessary, at the time of final publication of any revised sections to this part.

Regulatory Flexibility Act

The Attorney General has determined, in accordance with 5 U.S.C. 605(b), that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this proposed rule, if adopted, will apply to individual aliens, who are not within the definition of small entities established by 5 U.S.C. 601(6).

Unfunded Mandates Reform Act

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the Unfunded Mandates Reform Act of 1995. 2 U.S.C. 658(7)(A)(ii).

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined in 5 U.S.C. section 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a "significant regulatory action" under Executive Order 12866, section 3(f)(4) Regulatory Planning and Review. Accordingly, this proposed rule has been submitted to the Office of Management and Budget for review.

Executive Order 12612

This proposed rule, if adopted, would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposed rule, if adopted, would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This proposed rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

Plain Language in Government Writing

The President's June 1, 1998, Memorandum published at 63 FR 31885, concerning Plain Language in Government Writing, applies to this proposed rule.

List of Subjects:

8 CFR Part 212, Subpart G

Administrative practice and procedure; Aliens; Admission; Adjustment of Status; Public charge determinations.

8 CFR Part 237, Subpart A

Administrative practice and procedure; Aliens; Deportation; Public charge determinations.

Accordingly, chapter I of title 8 of the Code of Federal Regulations, is proposed to be amended by adding new part 212, subpart G to read as follows:

1. Part 212 is amended by inserting a new subpart G and list of section contents, to read as follows:

PART 212, Subpart G--PUBLIC CHARGE INADMISSIBILITY

§ 212.100 What issues does this subpart G address?

§ 212.101 What law governs a determination of whether I am inadmissible on public charge grounds?

§ 212.102 What is the meaning of "public charge" for admissibility and adjustment of status purposes?

§ 212.103 What specific benefits are considered to be "public cash assistance for income maintenance purposes?"

§ 212.104 What factors will make me inadmissible or ineligible to adjust status on public charge grounds?

§ 212.105 Are there any forms of public assistance that I can receive without becoming inadmissible as a public charge, if I should later apply for a visa, admission, or adjustment of status?

§ 212.106 If I have received public cash assistance for income maintenance, have been institutionalized at government expense, or have been deemed a public charge in the past, will I be inadmissible or ineligible to adjust status on public charge grounds now or in the future?

§ 212.107 Will I be required to pay back any public benefits that I have received before an immigration officer or immigration judge will find me admissible or eligible to adjust status?

§ 212.108 Are there any special requirements for aliens who are seeking to immigrate based on a family relationship or on employment?

§ 212.109 Will I be considered likely to become a public charge because my spouse, parent, child, or other relative has become, or is likely to become, a public charge or has received public assistance?

§ 212.110 Are there any individuals who are exempt from the public charge ground of inadmissibility?

§ 212.111 Are there any waivers for the public charge ground of inadmissibility?

Authority: 8 U.S.C. 1182(a)(4).

2. Subpart G, sections 212.100 - 212.111 are added to read as follows:

Subpart G -- Inadmissibility as a Public Charge

§ 212.100 What issues does this subpart G address?

(a) Subpart G addresses the public charge grounds of inadmissibility under Section 212(a)(4) of the Immigration and Nationality Act ("the Act"). It applies to all aliens seeking admission to the United States or adjustment of status to lawful permanent residency, except for the categories of aliens described in section 212.110 of this subpart or other categories of aliens who may be exempted by law.

(b) In this subpart, the terms "I," "me" and "my" in the section headings and "you" and "your" in the text of each section refer to an alien who may be inadmissible or ineligible to adjust status on public charge grounds.

§ 212.101 What law governs a determination of whether I am inadmissible on public charge grounds?

The public charge grounds of inadmissibility are found under section 212(a)(4) of the Act. A Department of State consular officer makes the public charge determination if you are applying

for a visa overseas. An Immigration and Naturalization Service (Service) officer makes the public charge determination if you are applying for admission at a port-of-entry to the United States, or for adjustment of status to that of a lawful permanent resident. Under section 212(a)(4), you will be found inadmissible or ineligible to adjust status if, "in the opinion of" the consular officer or Service officer making the decision, you are considered "likely at any time to become a public charge." If you have been placed in removal proceedings where issues of your admissibility or eligibility to adjust status arise, an immigration judge will decide whether you are likely to become a public charge.

§ 212.102 What is the meaning of "public charge" for admissibility and adjustment of status purposes?

(a) "Public charge" for purposes of admissibility and adjustment of status means an alien who is likely to become primarily dependent on the government for subsistence as demonstrated by either

(1) the receipt of public cash assistance for income maintenance purposes, or

(2) institutionalization for long-term care at government expense (other than imprisonment for conviction of a crime).

(b) For purposes of this subpart, the term "government" refers to any Federal, State or local government entity or entities. The term "cash" includes not only funds you receive in the form of cash from a government agency, but also funds received from a government agency by check, money order, wire transfer, direct deposit to your bank account, or any other means provided that the funds are for purposes of maintaining your income.

(c) As described in sections 212.103 and 212.105 of this subpart, not all forms of public assistance will be considered for public charge purposes because they do not result in primary dependence on the government. Immigration officers and immigration judges must also consider many other factors, as described in this subpart, before making a final public charge determination.

§ 212.103 What specific benefits are considered to be "public cash assistance for income maintenance purposes?"

(a) For purposes of determining inadmissibility on public charge grounds, the public benefits considered to be "public cash assistance for income maintenance" include, but may not be limited to:

1) Supplemental Security Income (SSI), 42 U.S.C. § 1381, et seq.;

2) Temporary Aid for Needy Families (TANF), 42 U.S.C. § 601, et seq., other than non-cash assistance or services provided through the TANF program; and

3) State and local cash assistance programs that provide for income maintenance (often called State "General Assistance," but may exist under other names).

(b) Due to the complexity and constantly changing nature of the numerous Federal, State and local benefits for which you may be eligible, it is not possible to give a complete listing of such benefits that could be considered for public charge purposes. If you are receiving, or contemplating receiving, any public cash assistance (as "cash" is described in section 212.102(b) of this subpart) for purposes of maintaining your income, an immigration officer or immigration judge may consider it as a factor in making a decision as to whether you are likely to become primarily dependent on the government.

§ 212.104 What factors will make me inadmissible or ineligible to adjust status on public charge grounds?

(a) Under Section 212(a)(4)(B) of the Act, the immigration officer or consular official must consider, "at a minimum," your age, health, family status, assets, resources, financial status, education, and skills in making a decision on whether you are likely to become a public charge. The decision-maker may also

consider any Affidavit of Support filed by your sponsor(s) on your behalf under section 213A of the Act and 8 CFR 213a. The decision-maker will consider the "totality of circumstances" before determining whether you are likely to become a public charge. No single factor, including past or current receipt of public benefits, will control this decision.

(b) You are inadmissible or ineligible to adjust status on public charge grounds if, after consideration of your case in light of all of the minimum factors in section 212(a)(4)(B) of the Act, any Affidavit of Support (Form I-864) filed on your behalf under part 213a of this Chapter, and any other facts that may be relevant, the immigration officer, consular officer, or immigration judge determines that it is likely that you will become primarily dependent for your subsistence on the government, at any time, as demonstrated by

(1) receipt of public cash assistance for income maintenance (e.g., SSI, cash TANF, or State, or local cash assistance programs for income maintenance, such as General Assistance); or

(2) institutionalization for long-term care (other than imprisonment for conviction of a crime) at government expense.

§ 212.105 Are there any forms of public assistance that I can receive without becoming inadmissible as a public charge, if I should later apply for a visa, admission, or adjustment of status?

(a) The only benefits that are relevant to the public charge decision are public cash assistance for income maintenance and institutionalization for long-term care at government expense. Non-cash public benefits will not be considered because they are of a supplemental nature and do not demonstrate primary dependence on the government.

(b) Although it is not possible to list all of the non-cash public benefits that will not be considered, you will not risk being found inadmissible as an alien likely to become a public charge by receiving the following non-cash public benefits:

(1) The Food Stamp program, 7 U.S.C. § 2011, et seq.;

(2) The Medicaid program, 42 U.S.C. 1396, et seq. (other than payments under the Medicaid program for long-term institutional care);

(3) The Child Health Insurance Program (CHIP), 42 U.S.C. § 1397aa, et seq.;

(4) Emergency medical services;

(5) Other health insurance and medical services, including public assistance for immunizations and for testing and

treatment of symptoms of communicable diseases, and use of health clinics; but not including public assistance for costs of institutionalization for long-term care;

(6) The Women, Infants and Children (WIC) program, 42 U.S.C. § 1786;

(7) Other nutrition programs, including, but not limited to, the National School Lunch Act, 42 U.S.C. 1751 et seq.;

(8) Emergency disaster relief;

(9) Housing assistance;

(10) Child care services;

(11) Energy assistance, such as the Low Income Home Energy Assistance Program (LIHEAP);

(12) Foster care and adoption assistance;

(13) Transportation vouchers or other non-cash transportation services;

(14) Educational assistance, including benefits under the Head Start Act and aid for elementary, secondary, or higher education;

(15) Non-cash assistance funded by the TANF program;

(16) Job training programs;

(17) In-kind, community-based programs, services, or assistance designated by the Attorney General as

necessary for the protection of life or safety, including soup kitchens, crisis counseling and intervention, and short-term shelter; See "Specification of Community Programs Necessary for Protection of Life or Safety under Welfare Reform Legislation," 61 FR 45985 (August 30, 1996);

(18) State and local supplemental, non-cash benefits that serve purposes similar to those of the Federal programs listed above;

(19) Any other Federal, State or local public assistance program, under which benefits are provided in-kind, through vouchers, or any other medium of exchange other than payment of cash benefits for income maintenance to the eligible person.

(c) Although the non-cash public benefits described in subsection (b) will not be considered for admissibility purposes, you may still be inadmissible or ineligible to adjust status if, in the opinion of the officer making the decision, you are likely to become a public charge following his or her analysis of the totality of the circumstances, as described in section 212.04 of this subpart. This includes consideration of all the

minimum statutory factors described in section 212(a)(4)(B) of the Act.

§ 212.106 If I have received public cash assistance for income maintenance, have been institutionalized at government expense, or have been deemed a public charge in the past, will I be inadmissible or ineligible to adjust status on public charge grounds now or in the future?

Such past circumstances do not necessarily mean that you will be found inadmissible or ineligible to adjust status on public charge grounds based on a present application for admission or adjustment. The immigration officer, consular officer, or immigration judge who makes the decision must consider all of the relevant facts of your case. Past receipt of public cash assistance or institutionalization under circumstances that made you a public charge would support a finding that you are inadmissible only if, in light of all the factors listed in section 212.104 of this subpart, it is likely that you will continue to be, or become again, a public charge in the future.

§ 212.107 Will I be required to pay back any public benefits that I have received before an immigration officer or immigration judge will find me admissible or eligible to adjust status?

Immigration officers and immigration judges do not have the authority to require that you reimburse public benefit-granting agencies for assistance that you have received. However, they may consider your receipt of public cash assistance for income maintenance purposes or your institutionalization for long-term care at government expense as factors in deciding whether you are likely to become a public charge in the future, regardless of whether the agency granting the benefit has sought reimbursement from you or any another party obligated to pay back the benefit on your behalf. If there is a final judgment against you for failure to repay the costs of public cash assistance or institutionalization that has not been satisfied, immigration officers or judges may also consider this failure to repay as one of the relevant factors in deciding whether you are likely to become a public charge.

§ 212.108 Are there any special requirements for aliens who are seeking to immigrate based on a family relationship or on employment?

Under section 212(a)(4)(C) and (D) of the Act, you must file an Affidavit of Support (Form I-864) from your sponsor(s) in accordance with section 213A of the Act and part 213a of this chapter if you are seeking to immigrate in certain family-based visa categories or as an employment-based immigrant who will work

for a relative or a relative's firm. If you do not file the Affidavit of Support as required, you will be inadmissible or ineligible to adjust status on public charge grounds. Certain battered spouses and children of U.S. citizens and lawful permanent residents are currently exempt under section 212(a)(4)(C) of the Act from filing an Affidavit of Support.

§ 212.109 Will I be considered likely to become a public charge because my spouse, parent, child, or other relative has become, or is likely to become, a public charge or has received public assistance?

(a) The fact that one, or all, of your close relatives has become, or is likely to become, a public charge will not make you inadmissible as a public charge, unless the evidence shows that you, individually, are likely to become a public charge.

(b) Public cash assistance benefits received by your relatives will not be attributed to you, unless they also represent your sole support.

§ 212.110 Are there any individuals who are exempt from the public charge ground of inadmissibility?

(a) The Act and various other statutes contain exceptions to the public charge ground of inadmissibility for the following categories of aliens:

(1) refugees and asylees at the time of admission and adjustment of status to legal permanent residency according to sections 207, 208 and 209 of the Act;

(2) Certain Amerasian immigrants at admission as described in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, section 584, contained in section 101(e), Pub. L. No. 100-202, 101 Stat. 1329-183 (1987) (as amended); 8 U.S.C. 1101 note;

(3) Cuban and Haitian entrants at adjustment as described in the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. 99-603, Title II, section 202, 100 Stat. 3359 (as amended);

(4) Nicaraguans and other Central Americans who are adjusting status as described in the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, section 202(a), 111 Stat. 2193 (1997)(as amended);

(5) Haitians who are adjusting status as described in the Haitian Refugee Immigration Fairness Act of 1998, section 902, Title IX, Pub. L. No. 105-277 (1998), 112 Stat. 2681 (Oct. 21, 1998).

(b) Other categories of aliens may also be excepted from the public charge provisions in section 212(a)(4) of the Act, now or by subsequent legislation. The list of such aliens in subsection (a) may not include every excepted category.

(c) In addition, aliens who have been previously admitted for lawful permanent residence ("LPRs") and who re-enter the U.S. are not applicants for admission and, therefore, are not subject to the grounds of inadmissibility, unless they are covered by one of the six categories described in section 101(a)(13)(C) of the Act, including being absent from the U.S. for over 180 days.

§ 212.111 Are there any waivers for the public charge grounds of inadmissibility?

There are no waivers available for the public charge grounds of inadmissibility, except for the waiver for certain aged, blind, or disabled applicants for adjustment of status under section 245A of the Act. See 8 U.S.C. 1255(d)(2)(B)(ii)(IV). However, various laws have exempted certain categories of aliens from the requirements of section 212(a)(4) of the Act. Several of these categories are described in section 212.110 of this part.

****

3. Part 237 is added to read as follows:

PART 237--DEPORTABLE ALIENS

(Additional subparts continue to be reserved)

Subpart A -- Public Charge Ground of Deportation

§ 237.10 What issues does this subpart A address?

§ 237.11 What law governs whether I am deportable on public charge grounds?

§ 237.12 What does it mean to be a public charge, for purposes of removal as a deportable alien?

§ 237.13 What specific benefits qualify as "public cash assistance for the purpose of income maintenance?"

§ 237.14 Are there any forms of public assistance that I can receive, without becoming deportable as a public charge?

§ 237.15 What other conditions must be met for me to be deportable as a public charge?

§ 237.16 Is the Affidavit of Support (Form I-864) under section 213A of the Act relevant to public charge deportation?

§ 237.17 Does the five year period in section 237(a)(5) of the Act run only from my first admission to the United States?

§ 237.18 Will I be considered a public charge because my spouse, parent, child, or other relative has accepted public benefits or has become a public charge?

Authority: 8 U.S.C. 1227(c)(5).

§ 237.10 What issues does this subpart A address?

(a) This subpart addresses the public charge ground of deportation under section 237(a)(5) of the Act.

(b) In this subpart, the terms "I," "me" and "my" in the section headings and "you" and "your" in the text of each section refer to an alien who may be deportable on public charge grounds.

§ 237.11 What law governs whether I am deportable on public charge grounds?

(a) Section 237(a)(5) of the Act describes which aliens are deportable on public charge grounds. If the Service brings a removal proceeding against you charging that you are subject to deportation on public charge grounds, the Service must prove that you became a public charge within five years of your entry (i.e. admission) to the U.S.

(b) If you can prove that the causes that led to your becoming a public charge arose after your admission to the U.S., you will not be deported.

§ 237.12 What does it mean to be a "public charge" for purposes of removal as a deportable alien?

(a) "Public charge" for purposes of deportation means "an alien who has become primarily dependent on the government for subsistence as demonstrated by either

(1) the receipt of public cash assistance for income maintenance purposes, or

(2) institutionalization for long-term care at government expense (other than the costs for imprisonment for conviction of a crime)."

(b) For purposes of this subpart, the "government" refers to any Federal, State or local governmental entity or entities. "Cash" includes not only funds you receive in the form of cash from a government agency, but also funds received from a government agency by check, money order, wire transfer, direct deposit to your bank account, or any other means, provided that the funds are for purposes of maintaining your income.

(c) As described sections 237.13 and 237.14 of this subpart, not all forms of public assistance will be considered for public charge purposes because they do not result in primary dependence

on the government. In addition, you will not be found deportable on public charge grounds unless the other conditions described in section 237.15 of this subpart have been met.

§ 237.13 What specific benefits qualify as "public cash assistance for the purpose of income maintenance?"

(a) Public benefits considered to be "public cash assistance for income maintenance" include, but may not be limited to:

(1) Supplemental Security Income (SSI), 42 U.S.C. § 1381, et seq.;

(2) Temporary Aid for Needy Families (TANF), 42 U.S.C. § 601, et seq., other than non-cash assistance and services provided by the TANF program, and

(3) State and local cash assistance programs that provide for income maintenance (often called State "General Assistance", but may be called other names).

(b) Due to the complexity and constantly changing nature of the numerous Federal, State and local benefits for which you may be eligible, it is not possible to give a complete listing of such benefits that could be relevant for public charge purposes. If, within five years of your admission into the U.S., you have received any public benefit that is provided in the form of cash (as that term is described in § 237.12(b) of this subpart) for

purposes of maintaining your income, it may serve as a basis for your deportation on public charge grounds, provided that all of the requirements of Section 237(a)(5) of the Act and the other conditions for deportation described in this subpart have been satisfied.

§ 237.14 Are there any forms of public assistance that I can receive, without becoming deportable as a public charge?

(a) The only benefits that are relevant to the public charge decision are public cash assistance for income maintenance and institutionalization for long-term care at government expense. Non-cash public benefits will not be considered because they are of a supplemental nature and do not lead to primary dependence on the government for subsistence.

(b) Although it is not possible to list all of the non-cash public benefits that are irrelevant for public charge purposes, you will not risk being found deportable by receiving the following non-cash public benefits:

(1) The Food Stamp program, 7 U.S.C. § 2011, et seq.;

(2) The Medicaid program, 42 U.S.C. 1396, et seq. (other than payments under the Medicaid program for long-term institutional care);

(3) The Child Health Insurance Program (CHIP), 42 U.S.C. § 1397aa, et seq.;

(4) Emergency medical services;

(5) Other health insurance and medical services, including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases, and use of health clinics; but not including public assistance for costs of institutionalization for long-term care;

(6) The Women, Infants and Children (WIC) program, 42 U.S.C. § 1786;

(7) Other nutrition programs, including, but not limited to, the National School Lunch Act, 42 U.S.C. 1751 et seq.;

(8) Emergency disaster relief;

(9) Housing assistance;

(10) Child care services;

(11) Energy assistance, such as the Low Income Home Energy Assistance Program (LIHEAP)

(12) Foster care and adoption assistance;

(13) Transportation vouchers or other non-cash transportation services;

(14) Educational assistance, including benefits under the Head Start Act and aid for elementary, secondary, or higher education;

(15) Non-cash assistance or services provided by the TANF program;

(16) Job training programs;

(17) In-kind, community-based programs, services, or assistance designated by the Attorney General as necessary for life and safety, including soup kitchens, crisis counseling and intervention, and short-term shelter; See Specification of Community Programs Necessary for Protection of Life or Safety under Welfare Reform Legislation," 61 FR 45985 (August 30, 1996);

(18) State and local supplemental, non-cash benefits that serve purposes similar to those of the Federal programs listed above;

(19) Any other Federal, State or local public assistance program, under which benefits are provided through vouchers or any other medium of exchange other than payment of cash benefits to the eligible person.

§ 237.15 What other conditions must be met for me to be deportable as a public charge?

(a) In addition to the requirements of section 237(a)(5) of the Act, and except as provided in paragraph (b), you are not deportable as a public charge unless the Service shows that

(1) the government entity that provided, or is providing, either the public cash assistance for your income maintenance as described in sections 237.12 and 237.13 of this subpart or the costs of institutionalization for your long-term care as described in section 237.12 of this subpart, has a legal right to seek repayment of those benefits against either you or another obligated party, such as a family member or a sponsor; and

(2) within five years of your admission to the U.S., the public entity providing the benefit demanded that you or another obligated party repay the benefit; and

(3) you or another obligated party failed to repay the benefit demanded; and

(4) there is a final administrative or court judgment obligating you or another party to repay the benefit. (As long as the demand for repayment under paragraph (a)(2) occurred within five years of your admission, the final judgment may be rendered against you or another obligated party at any time thereafter).

(b) If a legal right to seek repayment of the public benefits described in sections 237.12 and 237.13 of this subpart is

established, but the Service proves that there was no one against whom repayment could be enforced, thereby making a demand for repayment unnecessary, then the Service need not show that a demand was made and a final judgment for repayment of the public benefits rendered.

§ 237.16 Is the Affidavit of Support (Form I-864) under section 213A of the Act relevant to public charge deportation?

(a) The Affidavit of Support required under section 213A of the Act (Form I-864)and 8 CFR 213a is relevant to the public charge grounds for deportation in certain circumstances. Section 213A of the Act provides that the Affidavit of Support may support a legally enforceable claim against your sponsor(s)for repayment of certain Federal, State or local means-tested public benefits provided to you. You may be found deportable on public charge grounds if the Service proves that

(1) an Affidavit of Support under Section 213A was filed on your behalf and is currently in effect; and

(2) within five years after your admission to the U.S., you (i) obtained SSI, cash TANF benefits, or other Federal, State, or local means-tested public benefits that were cash assistance benefits for income maintenance purposes and that, at the time the Affidavit of Support was signed, had been designated as "means-tested" by

the government entity responsible for administering the benefit; or

(ii) were institutionalized for long-term care at government expense (other than imprisonment for conviction of a crime); and

(3) such benefits have not been repaid as provided in section 235.15.

§ 237.17 Does the 5-year period in section 237(a)(5) of the Act run only from my first admission to the United States?

(a) The 5-year period begins again each time you are admitted to the United States.

(b) If you have been lawfully admitted for permanent residence (LPR status), you are not considered an applicant for admission upon return to the U.S. after a trip abroad unless you are covered by one of the categories specified in Section 101(a)(13)(C) of the Act, including an absence of 180 days or more from the U.S. If you do not fall into one of the categories listed in section 101(a)(13)(C) of the Act, the 5-year period for deportation purposes would still be counted from your last admission to the U.S.

§ 237.19 Will I be considered a public charge because my spouse, parent, child, or other relative has accepted public benefits or has become a public charge?

(a) The fact that one, or all, of your close relatives has received public benefits, or has become a public charge, will not make you deportable as a public charge, unless the evidence shows that you, individually, have become a public charge.

(b) Public cash assistance benefits received by your relatives will not be attributed to you, unless they also represent your sole support.

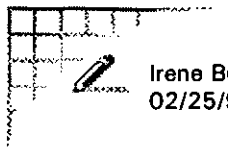
Dated:

Janet Reno

Attorney General

[Reproduce HHS, SSA, USDA, etc. letters that support cash/non-cash benefits analysis as evidence of primary dependence on the government. See Supplementary Section for discussion. Appropriate placement of these letters to be determined with OMB.]

Immig - public charge



Irene Bueno
02/25/99 09:04:39 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP, J. Eric Gould/OPD/EOP, Christopher C. Jennings/OPD/EOP, Devorah R. Adler/OPD/EOP

Subject: Public Charge update

According to James Costello (DOJ), they are preparing a memo for the AG's review. They expect to give the AG the memo at the end of this week and that she would want about 10 days to review the memo and the options. I stressed the importance of resolving this issue in light of the Urban Institute study that will be released next week. I expect that James will give us another update at the immigration meeting this morning at 11 am.

Immig-public charge

MEMORANDUM FOR ELENA KAGAN

FROM: Julie Fernandes

CC: Cynthia Rice

RE: Public Charge -- remaining legal issues

DATE: January 11, 1999

Recent changes in the welfare and immigration laws, along with changes in the Medicaid program, have created some confusion about how Medicaid and Food Stamps should be considered in the determination of whether an alien is or is likely to become a "public charge." Determination as a "public charge" has significant consequences for an alien -- it can cause them to be denied admission to the United States, deported, or denied permanent residency. By statute, the INS and State Department are required to consider the alien's age, health, family status, assets, resources, financial status, education and skills when considering whether he or she is or is likely to become a public charge.

There have been documented instances in which aliens have been denied re-entry to the U.S. because they had received Medicaid or Food Stamps. Moreover, aliens have been told that receipt of Medicaid and/or Food Stamps will have a negative effect on their immigration status. These cases have translated into widespread concern in immigrant communities about legal receipt of these benefits, even where the beneficiary is a U.S. citizen child. The concern about negative immigration consequences associated with the legal use of Medicaid and Food Stamps interferes with the President's goals of increasing insurance coverage and improving public health.

After much discussion and debate, the INS and the State Department have agreed to issue guidance that past or current use of Medicaid, the Children's Health Insurance Program (CHIP), or Food Stamps (or their state analogs) is not to be considered in determining whether a person is likely to become a public charge for purposes of admission to the U.S. or adjustment of status, except where an alien has received long-term institutionalized care funded by Medicaid.

However, we have not reached resolution on how these programs should be treated for purposes of deportation based on having become a public charge. Section 237(a)(5) of the INA states that "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable." Under the INS's current policy -- informed by a 1948 decision of the Board of Immigration Appeals (BIA), *Matter of B.* -- if an alien is subject to the new binding affidavit of support (post-December 1997 aliens only) and (1) receives a public benefit (like Medicaid or TANF) within five years after entry, (2) there is a demand for repayment of the value of that benefit from the benefit-granting agency, and (3) the sponsor refuses to pay, the *alien* can be subject to deportation for being a public charge. The theory is that since the new affidavit of support creates a binding obligation on the part of the

sponsor to support the alien, a failure on the sponsor's part to meet that obligation creates an unpaid debt for which the alien is responsible, and thus the alien is deportable as a public charge.

With regard to the receipt of federal welfare benefits, this rule has almost no application -- most aliens entering the U.S. are not eligible for Medicaid and/or Food Stamps for the first five years (unless, of course, we manage to restore some benefits to post-Welfare Act aliens in FY 2000). However, states are free to provide welfare-like benefits (including state-only food and health benefits) to post-Welfare Act aliens. Thus, aliens in jurisdictions where state-only benefits are available may be deterred from taking advantage of these programs if they believe there may be deportation consequences down the road. In addition, some states do not make clear whether benefits offered are state-only or federally financed, and thus some aliens may be deterred from taking advantage of any medical and/or food benefits for fear of the possible deportation consequences.

Issue #1

We would like to be able to assure legal immigrants that legal use of Medicaid, CHIP, and Food Stamps -- or their state analogs -- would never lead to deportation. The legal question that we have posed to the Department of Justice is how we can get to this result in light of the aforementioned BIA case (*Matter of B.)* that sets out this multi-part test for when a finding of public charge is triggered. According to DOJ, the binding affidavit of support creates just the kind of debt that *Matter of B.* contemplated.

The Department has indicated that in order for the Attorney General to take certain programs (like Medicaid or Food Stamps) off the table for purposes of triggering the *Matter of B.* test, she must issue a regulation. However, they have suggested that it may be possible to issue interim guidance that directs INS officers not to consider Medicaid or Food Stamp use as a basis for a debt that could trigger deportation, pending the issuance of a regulation that effects this change. OLC is looking into whether this option is legally permissible.

Issue #2

We would like the INS's guidance to lay out a clear analytical distinction between those programs that should be considered for purposes of the public charge analysis, and those that should not.

The current version of the guidance lists examples of those programs that should be considered in the public charge analysis (TANF, SSI) and those that should not be considered (Food Stamps, Medicaid, WIC, etc.), but does not articulate the basis for distinguishing one group from the other. Thus, if an immigration or consular officer is presented with an alien who is receiving benefits from a program not listed, there is no guidance to that officer about whether to consider this program for public charge purposes.

HHS has made the argument to the INS that the distinction should be between cash and non-cash

benefits (with an exception for those who reside in a long-term care institution; though the benefit they receive is non-cash, they are wholly dependent on it for food and shelter). The State Department, while not endorsing any particular framework for the overall distinction, has long relied on the conclusion that Food Stamps are "supplemental" for determining that receipt of Food Stamp benefits should not be considered for purposes of public charge.

According to DOJ and INS, they have not yet concluded whether they can -- in light of their past administrative decisions re: public charge -- separate programs based on a cash/non-cash or a supplemental/non-supplemental distinction.

Immig - public charge

Julie A. Fernandes
10/29/98 07:17:23 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Bruce N. Reed/OPD/EOP

cc: Laura Emmett/WHO/EOP, Cathy R. Mays/OPD/EOP
Subject: Daily report on public charge--

---------- Forwarded by Julie A. Fernandes/OPD/EOP on 10/29/98 07:40 PM ----------

Cynthia A. Rice 10/29/98 06:46:32 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc: Julie A. Fernandes/OPD/EOP, Jeanne Lambrew/OPD/EOP, Christopher C. Jennings/OPD/EOP
Subject: Daily report on public charge--

Public Charge: Yesterday, the National Council of La Raza advised us against issuing a general statement on our decision that use of Medicaid, Children's Health Insurance Program (CHIP), and/or Food Stamps will not be considered in determining whether a legal immigrant is a "public charge" except where an individual has received institutionalized care funded by Medicaid. We had considered issuing such a statement, so that immigrants newly eligible for Food Stamps starting November 1st would have this information, even though the detailed INS guidance about the entire public charge issue is being held up as the OLC considers one more legal issue. However, La Raza argued that this general statement -- without backup detail on a host of related issues -- would create more confusion in the immigrant community and would not be welcomed.

A 3:30 call we intended to be about "can we issue this statement and how" thus became an opportunity for us to 1) remind DOJ we need an answer to the legal question ASAP and 2) once OLC makes its ruling, we will need to move forward as quickly as possible.

The La Raza board is coming to the White House Friday for a long scheduled meeting. Maria had said we might use the opportunity have a quiet side conversation about the issue and that she would involve us in this discussion.

Immig-public charge

Immigration/Welfare -- Public Charge: DOJ and the State Department have agreed to issue guidance instructing INS inspectors and State Department consular officers to disregard prior or current receipt of Medicaid, CHIP, and/or Food Stamps when determining whether an immigrant is likely to become a public charge (unless an alien has received institutionalized care funded by Medicaid). Determination as a "public charge" has significant consequences for an alien -- it can cause them to be denied entry or re-entry to the U.S., refused a request to adjust their immigration status, or deported. By statute, the INS and the State Department are required to consider the alien's age, health, family status, assets, resources, financial status, education, and skills when considering whether he or she is likely to become a public charge. Under this revised policy, these factors would continue to be considered in the public charge determination; however, the fact that the alien receives Medicaid or Food Stamps would not.

In recent months, there have been documented instances of aliens being denied re-entry to the U.S. because they had received Medicaid and of aliens being told by immigration officials that receipt of Medicaid or Food Stamps could negatively impact their immigration status. These cases have translated into widespread concern in immigrant communities and may be discouraging immigrants who are legally eligible for Medicaid and Food Stamps from obtaining needed benefits, even for their children who may be U.S. citizens. As you know, many working Americans receive Food Stamps and recent changes to the Medicaid program -- particularly the new CHIP program -- mean more and more working families will receive health care insurance through Medicaid. Our goal is to have the new guidance issued by November 1st -- the effective date of the Agriculture Research Act provisions which restore Food Stamp benefits to 250,000 elderly, disabled, and other needy legal immigrants, including 75,000 children, who lawfully resided in the U.S. as of August 22, 1996.

Immig - public charge

DRAFT PUBLIC STATEMENT ON PUBLIC CHARGE

Today, the [Department of Health and Human Services and the Department of Agriculture] made public an Administration decision that past or current use of Medicaid, the Children's Health Insurance Program (CHIP), and/or Food Stamps will not be considered in determining whether a legal immigrant is a "public charge," except where an individual has received institutionalized care funded by Medicaid. Guidance will be issued by the Department of Justice and the State Department clarifying that health insurance and nutritional benefits are cost effective, important to public health, and do not provide any unique, additional information that would lead to a public charge determination.

Determination as a "public charge" has significant consequences for an immigrant -- it can cause them to be denied admission to or permanent residency in the United States. Concern about public charge determinations has prevented legal immigrants from enrolling themselves or their children in the Medicaid. Law-abiding immigrants who are eligible for Medicaid often worry that receiving these benefits could result in INS action against them or their families. This fear has not only interfered with the goal of signing up eligible children for health insurance, but in some cases has caused sick or injured people to unnecessarily forego health care. This has created uncompensated health care costs for hospitals, other providers, and states. It also poses a risk to the public health since the lack of treatment of uninsured legal immigrants for communicable diseases could endanger citizens at large.

Concern over the public charge rules has also discouraged legal immigrants who are working at low-wage jobs from applying for Food Stamps for themselves and their children. Food Stamps provides a nutritional safety net for both the working and non-working poor. This Spring, Congress enacted the Administration proposal to restore Food Stamp benefits to 240,000 legal immigrants beginning November 1, 1998. The policy being announced today will remove any concerns that the use of Food Stamps and other nutrition assistance programs, such as nutrition assistance to Women, Infants, and Children (WIC), by these immigrants would result in a public charge determination.

The detailed DOJ and State Department guidance containing this clarification, which will be issued shortly, will comprehensively address policies on public charge determinations. We look forward to working with immigration officials, state health officials, and others to ensure that misunderstanding and fear do not stand in the way of legal immigrants receiving important benefits.

Immig - Public charge

Diana Fortuna 05/21/98 10:50:12 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Christopher C. Jennings/OPD/EOP

cc: Julie A. Fernandes/OPD/EOP, Jeanne Lambrew/OPD/EOP, Laura Emmett/WHO/EOP
Subject: Public charge

Julie, OMB, and I are opposing INS and the State Department actions that are endangering our efforts to sign up as many children for Medicaid as possible and to restore food stamps and other benefits to legal immigrants. A formerly obscure feature of immigration law requires the INS or State to bar people from the U.S. who are likely to be a "public charge." Because of crackdowns by INS/State since welfare reform passed, word has spread in immigrant communities that signing up yourself or your children for Medicaid or other benefits puts you at risk with the INS -- and while these fears are exaggerated, they are not crazy. For example, legal immigrants with green cards who leave the country for more than 6 months are not permitted to re-enter the country if they are currently on Medicaid.

The INS wants to issue guidance that current receipt on SSI, TANF, Medicaid, or sometimes food stamps automatically makes you a public charge -- even though you're legitimately eligible for benefits -- preventing you from adjusting your immigration status or leaving the U.S. for more than 6 months. (They say this is current policy, but that's quite murky.) The advocates are starting to jump on this issue. We have enlisted Rob Weiner of WH counsel and James Castello at DOJ to help us figure out whether the law will allow us to rescue just Medicaid or whether we can go even further to say the INS shouldn't consider receipt of benefits in determining public charge, but simply look at income, assets, etc. The further we go, the more we will enrage Lamar Smith. The INS is fearful of provoking him, and feels that some of the options we're considering fly in the face of the common sense meaning of the term "public charge." The State Department appears baffled that we are concerned about this issue and dug-in to their position.

Just wanted to make sure you're aware and on board. Chris, Bruce Bullen of Massachusetts has written you on this issue.

Immig - Public charge

Irene Bueno

05/25/99 07:53:32 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Elena Kagan/OPD/EOP@EOP, Christopher C. Jennings/OPD/EOP@EOP, Cynthia A. Rice/OPD/EOP@EOP

cc: Laura Emmett/WHO/EOP@EOP, Eugenia Chough/OPD/EOP@EOP, Devorah R. Adler/OPD/EOP@EOP

Subject: LA Times Article on Public Charge

U.S. Seeks to Spur Use of Aid by Immigrants

By PATRICK J. MCDONNELL, Times Staff Writer

The Clinton administration plans to unveil long-awaited but controversial rules today that officials say should help tens of thousands of legal immigrants seek publicly financed health, nutrition and other aid without fear of deportation or other consequences.

"This new regulation will improve the health of our families by addressing widespread confusion that prevents legal immigrants from signing up for health insurance, school lunch, child care and other essential programs," said Vice President Al Gore, who is scheduled to announce the guidelines during a stop in Texas.

The changes, effective immediately, are designed to quell a persistent fear in the immigrant community from California to Florida to New York that applying for public benefits can put applicants--even legal immigrants--on the road to deportation.

Stoking the fears are incidents in which federal and state authorities have cited immigrants' past use of aid in attempts to deport them or bar them from bringing relatives from abroad. The new rules would explicitly ban use of such noncash aid against immigrants.

The widespread fear in the immigrant community, health professionals say, has resulted in broad underutilization of many initiatives, including Medicaid (Medi-Cal in California, the federal-state health insurance plan for the poor) and the Children's Health Insurance Program (Healthy Families in California, for uninsured youth).

Some people even avoid immunizations and treatment of communicable diseases, officials say, which threatens to undermine the nation's public health regimen and spread contagious illnesses.

The changes, to be announced after months of intense debate within the White House, come after several studies documented a steep decline in receipt of benefits among immigrants.

A report released in March by the Urban Institute, a Washington research organization, found that welfare use by noncitizen households plummeted 35% between 1994 and 1997. That was more than double the 15% drop among citizens. The decline was even sharper in Los Angeles County, one of the nation's principal

immigrant magnets.

The Urban Institute found the drop was largely linked to the "chilling effects" of efforts to link benefit eligibility to immigration status. Community health care workers have seen the fear first-hand.

"Even women with very high-risk pregnancies are scared to death to ask for aid that they are entitled to," said Lynn Kersey of Maternal and Child Health Access, a nonprofit group in Los Angeles.

Officials of California and other states have pressed the Clinton administration to clarify the matter, as have activists with Latino groups and other immigrant lobbies.

The change--and the fact that the new rules are being announced by Gore, a presidential aspirant--once again underscores how the atmosphere in Washington has become considerably more pro-immigrant since 1996, when Congress severely cut noncitizen access to public benefits as part of its landmark welfare overhaul.

"The administration has learned, and in many ways politicians in general have learned, that they do well politically when they do the right things for immigrants," said Cecilia Munoz, vice president for policy for the National Council of La Raza.

Although Latino organizations and allied groups praised the changes, activists seeking reductions of immigration levels were expected to be harshly critical.

"These rules will increase the number of immigrants on welfare who will be able to bring in more immigrants to go on welfare and are an insult to all Americans--native born and immigrant," said U.S. Rep. Lamar Smith (R-Texas), who heads the House immigration subcommittee.

The regulations do not make anyone newly eligible for benefits.

Rather, the move provides specific direction to federal agencies, including the Immigration and Naturalization Service and the State Department, that have the responsibility of determining whether immigrants and potential immigrants are a likely "public charge," or a drain on public resources. Officials regularly interview immigrants seeking permanent resident status and citizenship.

For more than 100 years, a person's likelihood to become a public charge has been a ground for inadmissibility and deportation. But, until now, there has been no precise definition of the term.

Immigration - public charge

Irene Bueno

05/04/99 07:55:14 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP
cc: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP
bcc:
Subject: Re: Public Charge- Feinstein call

In follow up to your call with Feinstein, I will work with INS to draft something or present options for discussion at Thursday's public charge roll-out meeting.

Also, I understand that you want an INS representative at the Thursday public charge roll-out meeting. I will check with INS who the most appropriate person to attend the meeting. Since Paul Virtue has left, I think it would either be Bob Bach, Alan Erenbaum, or Cathy St. Denis who is the Commissioner's office but I will let you know.

Thank you.

Maria Echaveste

Maria Echaveste 05/04/99 06:46:00 PM

Record Type: Record

To: Irene Bueno/OPD/EOP
cc: Elena Kagan/OPD/EOP
bcc:
Subject: Re: Public Charge- Feinstein call

I just wanted you to know that I did speak with Diane Feinstein early this afternoon; she is so frustrated with public charge that she wants to drop her bill asap--she will not drop the bill if she could get a letter from INS to permit children to get immunized and folks to get necessary serious health care by end of the week. I've talked to Elena about it and we'll discuss it on thurs, but I wanted you to know that I did what you asked to do.
Irene Bueno

Irene Bueno

05/04/99 11:18:30 AM

Record Type: Record

To: Irene Bueno/OPD/EOP
cc: Maria Echaveste/WHO/EOP, Marjorie Tarmey/WHO/EOP, Clara J. Shin/WHO/EOP, Janet Murguia/WHO/EOP
bcc:
Subject: Re: Public Charge- Feinstein call

I just spoke to Feinstein's immigration staff person, Lavida Strickland, and she indicated that Feinstein plans to introduce this bill this afternoon, Tuesday. Lavida believes to have any impact on Feinstein, a call earlier today would be helpful since Feinstein will probably attend the Democratic Party luncheon meeting today from 12:30-2 and introduce the bill after the lunch.

Let me know if you need more info.

Thanks

Irene Bueno

Irene Bueno

05/04/99 11:00:16 AM

Record Type: Record

To: Maria Echaveste/WHO/EOP, Marjorie Tarmey/WHO/EOP
cc: Clara J. Shin/WHO/EOP, Janet Murguia/WHO/EOP
Subject: Public Charge- Feinstein call

Here are some quick talking points. Let me know if you need more info. Thanks.

I understand that you are planning to introduce legislation today that would clarify that receipt of health services such as Medicaid and CHIP should not be considered as a basis of a finding that an immigrant is a public charge.

Thank you for your leadership on this issue and other important immigration issues.

The Administration shares your concern that legal immigrants and even U.S. citizen children who are eligible to receive Medicaid and CHIP have not applied for these benefits for fear that they will be penalized under immigration laws. We are aware that the California CHIP outreach efforts have been significantly undermined because this issue.

The clarification of this issue is a top Administration priority.

We are currently in the process of clearing proposed regulation and field guidance that will clarify this issue to ensure that children are accessing important health services.

We expect the proposed regulation and guidance will be published in the next few weeks (last week of May is the target).

We believe that introduction of your legislation at this time could undermine efforts to assure immigrants that they are safe to access important health services. First, your legislation could draw attention to an issue that has not been on the radar screen of the anti-immigrant organizations. Furthermore, your legislation may call to question whether the INS has authority to issue the type of public charge regulations that they are plan to issue.

While I understand your frustration with this process, you have our assurances that this regulations will be published as soon as possible.