



# PUBLIC CHARGE AND NATURALIZATION

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## I. Introduction

On August 14, 2019, the Department of Homeland Security (DHS) published a new public charge rule, governing public charge inadmissibility determinations by U.S. Citizenship & Immigration Services (USCIS). The new rule is set to take effect on October 15, 2019. Applications postmarked or submitted electronically to USCIS before October 15, 2019 will be adjudicated under prior public charge guidance. Lawsuits have been filed to challenge this new public charge rule, so implementation of the new rule or parts of it may be delayed beyond October 15, 2019.

Public charge and this newly published rule do not apply in the naturalization process, through which lawful permanent residents apply to become U.S. citizens. The rule interprets a provision of the Immigration and Nationality Act (INA) pertaining to inadmissibility. The inadmissibility ground says a person is inadmissible if they are likely to become a public charge, which is a concept having to do with the likelihood that an immigrant will be financially self-reliant or need publicly funded support. (INA § 212(a)(4)). This law only applies to individuals seeking admission into the United States or applying for adjustment of status. This is not a provision of the law that applies to all immigrants.<sup>1</sup>

Indeed, the eligibility requirements for naturalization do not include a public charge test. The legal use of government benefits and programs does not disqualify a permanent resident from naturalization. However, the publicity around the new rule has confused many immigrants and their representatives about the range of its impact, and this practice advisory provides information that can answer many of those question.

This practice advisory provides an update on public charge for advocates providing naturalization legal assistance. This advisory briefly discusses the legal standard for assessing public charge and then discusses how to advise lawful permanent residents looking to naturalize.

## II. What is the Legal Effect of the New Rule on Public Charge?

The rule was published on August 14, 2019 with an effective date of October 15, 2019, at which point the new public charge will become law, unless litigation stops the rule from going into effect. As of the date of this practice advisory, half of dozen lawsuits have been filed challenging the new public charge rule, all of which seek injunctive relief. It is possible

<sup>1</sup> For more information about public charge, including status of the litigation, practice advisories and community resources for talking to immigrants about using important government programs and services, please visit the Immigrant Legal Resource Center's website at <https://www.ilrc.org/public-charge>. Under the new rule, those extending non-immigrant statuses in the U.S. would also be required to disclose public benefit use.

that the litigation will succeed in halting the implementation of the rule and possibly delay the effective date. Until October 15, 2019, or a later date depending on the outcome of litigation, current guidance dating back to 1999 controls.<sup>2</sup> The rule has no retroactive effect. This means that even though the rule adds new negative factors that count against an immigrant for purposes of public charge (discussed below), the United States Citizenship and Immigration Services (USCIS) will only consider these new factors and newly-added benefits if they were used *after* the new rule goes into effect on October 15, 2019.<sup>3</sup>

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**Practice Tip:** As of the date of this practice advisory and until October 15, 2019, USCIS is continuing to assess public charge as it has since 1999.<sup>4</sup> Attorneys and legal advocates who are helping lawful permanent residents (LPRs) complete a naturalization application can continue to help applicants with their N-400 applications, and fee waiver applications if applicable, without concern that a new set of rules has gone into effect. Litigation that has already been filed may further delay the effective date of the new rule. The ILRC will update information on our website to note any shifts in the effective date at <https://www.ilrc.org/public-charge>. **Even if the new rule goes into effect on October 15, 2019, public charge does not apply in the naturalization process and the impact of this rule in the naturalization context is negligible.**

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### III. What is Public Charge?

#### Meaning of Public Charge and Rule Change

Since 1999 and until the new rule goes into effect, public charge refers to the likelihood that an immigrant who is applying to enter the U.S. on a visa, or applying to become a Lawful Permanent Resident (LPR), will become “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.”<sup>5</sup> Under both the 1999 guidance and the new rule, the legal standard for determining whether or not an immigrant is likely to become a public charge is a forward looking totality of the circumstances test, that takes into account the immigrant’s age; health; family status; assets, resources, and financial status; and education and skills. However, the new rule makes several changes:

- It expands the list of government benefits that count against the immigrant to include not only cash-based benefits but also federal Medicaid (with some exceptions for emergency care, children and pregnant women), the federal SNAP program (formerly known as Food Stamps), and housing subsidies including Section 8. See 8 C.F.R. § 212.21(b).
- It also considers the use of a fee waiver for immigration benefits by the applicant to be a negative factor in the totality of the circumstances test. See 8 C.F.R. § 212.22(b)(4)(ii)(F). However, as discussed below, the impact of this change is negligible for naturalization applicants, including for naturalization applicants who plan to sponsor a relative when they become U.S. citizens.
- It implements harsh standards for personal circumstances, including negative weight for children, seniors, and individuals who have limited English proficiency, limited education, medical conditions, or large families. Income below 125 percent of the federal poverty guidelines is a negative factor. At the same time, the rule strongly

<sup>2</sup> The 1999 guidance specifies that the United States Citizenship and Immigration Services (USCIS) may not consider an immigrant’s past or current use of a government-funded program as a factor when conducting a public charge determination, except if the immigrant used a *cash-based program* such as Temporary Assistance for Needy Families (TANF) or Supplemental Security Income (SSI), or was in *institutional long-term care at government expense*. See U.S. Dep’t of Justice, Immigration and Naturalization Service, *Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations: Public Charge: INA Sections 212(a)(4) and 237(a)(5)* (May 20, 1999), available at 64 Fed. Reg. 28689, <https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf> (last visited Sept. 2019). See also USCIS Public Charge Fact Sheet (April 29, 2011), available at <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet> (last visited Sept. 2019).

<sup>3</sup> The October 15, 2019 effective date only applies to the newly added government benefits that will be considered negative factors, as well as the use of immigration fee waivers. Benefits that have been considered negative factors since 1999 such as cash aid and long-term institutionalization continue to be negative factors now and after October 15, 2019.

<sup>4</sup> For immigrants applying for lawful permanent resident status through consular processing, the Foreign Affairs Manual (FAM) has implemented changes to the public charge analysis. Please see the ILRC’s *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*, available at <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.

<sup>5</sup> See 1999 INS Field Guidance and USCIS Fact Sheet, referenced at footnote 3 of this practice advisory.

favors immigrants with high incomes and includes a single positive factor, namely, a household income equal to or above 250 percent of the federal poverty guidelines. See 8 C.F.R. §§ 212.22(b), 212.22(c).

- When looking at public benefit use, the new rule shifts the legal standard from one that considers a likelihood that the immigrant will become “primarily dependent” on the government as demonstrated by the use of cash assistance or long-term care, to one that defines public charge as a person who is likely to need, in aggregate, more than 12 months of certain defined public benefits in any 36-month period in the future.. See 8 C.F.R. §§ 212.21(a), 212.21(c). Theoretically, a person who used benefits in the past could still overcome the public charge ground of inadmissibility under a totality of the circumstances analysis. But the legal standard in the new rule will make that much more challenging.
- In a drastic shift to USCIS adjudication practice, although the determination also takes into account an affidavit of support, when required from the immigrant’s sponsor, the affidavit of support will no longer, on its own, suffice to override other negative factors. Rather, the affidavit of support will be just one factor considered in the totality of the circumstances analysis. See 8 C.F.R. § 212.22(b)(7).

The public charge test continues to be future looking and continues to use a totality of the circumstances analysis. See 8 C.F.R. § 212.22(a). Please see the ILRC’s practice advisory, *An Overview of Public Charge*, for a comprehensive overview of public charge.<sup>6</sup>

### Public Charge is a Ground of Inadmissibility and Does Not Apply in Naturalization

Public charge is a ground of **inadmissibility** under the Immigration and Nationality Act (INA § 212). The new rule interprets this ground of inadmissibility, found at INA § 212(a)(4). A very limited public charge ground of deportability, found at INA § 237(a)(5), also exists. It is discussed below. The new rule does not pertain to the deportability ground.

Grounds of inadmissibility apply only at the time of admission: When an immigrant applies to enter the U.S. (entry) or applies to become a Lawful Permanent Resident (LPR) (adjustment of status); or when an LPR leaves the U.S. for more than 180 consecutive days and re-enters. Grounds of inadmissibility do not apply at the time of naturalization. However, if a naturalization applicant traveled *for more than 180 consecutive days* and was admitted back into the U.S., but was in fact inadmissible at the time they returned due to *any* ground of inadmissibility including public charge, the fact of entering when inadmissible could make the immigrant subject to removal. This could come up during the naturalization process. Note that this has been true under existing law, and the new rule does not change this consideration. This practice advisory addresses best practices in screening naturalization applicants for travel-related issues, below.

This practice advisory focuses on the public charge ground of inadmissibility. The public charge ground of deportability, not at issue in the new rule, impacts permanent residents and others who have already been admitted to the United States. The grounds of deportability are the list of reasons an LPR could be charged in immigration court with being deportable. The deportation ground related to public charge is very different from the law discussed in this practice advisory because it is limited at a minimum by several factors. The limiting factors for public charge deportability include: the immigrant must become a public charge within five years of becoming an LPR, based on a condition that pre-dated their admission; there must be a debt for the public benefit; the institution that provided the benefit or service must demand payment; and the immigrant must refuse to pay. See INA § 237(a)(5). The public charge ground of deportability uses this different legal standard and has, to date, been applied narrowly and infrequently. LPRs subject to a ground of deportability go before an immigration judge who determines whether the permanent resident can remain in the U.S. Advocates who need help with a question related to the public charge ground of deportability may contact the ILRC’s Attorney of the Day service or consult an ILRC manual.<sup>7</sup>

<sup>6</sup> The practice advisory is available at <https://www.ilrc.org/overview-public-charge>.

<sup>7</sup> Please see <https://www.ilrc.org/technical-assistance> for more information about the ILRC’s Attorney of the Day service. Please also see the ILRC’s practice advisory on public charge as a group of deportability, available at <https://www.ilrc.org/public-charge-ground-deportability>. The ILRC publishes

## Only Some Immigrants are Subject to Public Charge

The public charge ground of inadmissibility applies to immigrants seeking to enter the U.S. or to adjust status to lawful permanent residence: it primarily applies to family-based immigration. The new inadmissibility rule will also be applied to certain nonimmigrants who are not exempt from public charge.<sup>8</sup> The public charge test does not apply to LPRs applying for citizenship (except if they were previously inadmissible, as discussed below). This is clearly stated in the preamble to the new rule, “This rule addresses how DHS determines inadmissibility of aliens on account of public charge; and it does not apply to individuals seeking to be naturalized ... because the public charge ground of inadmissibility does not apply in naturalization proceedings.”<sup>9</sup> There is no public charge test for many groups of non-citizens, including refugees, asylees, survivors of trafficking or domestic violence, and others.<sup>10</sup>

## IV. There Is No Public Charge Test for Naturalization

### The Eligibility Criteria for Naturalization Do Not Include Public Charge

General requirements for naturalization include:<sup>11</sup>

- Being at least 18 years old at the time of filing [Form N-400, Application for Naturalization](#).
- Being a permanent resident (having a “Green Card”) for at least 5 years, or 3 years if the applicant meets the criteria for marriage to a U.S. citizen.
- Living for at least 3 months in the state or USCIS district where the LPR applies.
- Demonstrating continuous residence in the United States for at least 5 years immediately preceding the date of filing Form N-400, or 3 if the applicant meets the criteria for marriage to a U.S. citizen.
- Showing physical presence in the United States for at least 30 months out of the 5 years (or 18 months out of the 3 years) immediately preceding the date of filing Form N-400.
- Being able to read, write, and speak basic English.
- Having a basic understanding of U.S. history and government (civics).
- Being a person of good moral character for at least 5 years, or 3 if the applicant meets the criteria for marriage to a U.S. citizen.
- Demonstrating an attachment to the principles and ideals of the U.S. Constitution, including taking the naturalization oath.

### Advocates Helping Naturalization Applicants Must Still Screen for Issues Related to Public Benefits

Even though public charge is not part of the eligibility determination for naturalization, attorneys and legal advocates should carefully screen applicants for any red flag issues, especially when helping applicants who receive public benefits and are applying for a fee waiver for their naturalization application. While the fee waiver does not raise any separate concern, it might flag the use of benefits to the adjudicator and thus prompt more questions about receipt of benefits at the interview.

a guide to removal defense law and practice, *Inadmissibility and Deportability*, available at <https://www.ilrc.org/publications/inadmissibility-deportability>.

<sup>8</sup> 8 C.F.R. § 214.1(a)(3)(iv).

<sup>9</sup> 84 Fed. Reg. 41425 (Aug. 14, 2019).

<sup>10</sup> Please see the ILRC’s practice advisory, *An Overview of Public Charge*, for a comprehensive overview of public charge including the groups to whom it does and does not apply. The practice advisory is available at <https://www.ilrc.org/overview-public-charge>.

<sup>11</sup> For an overview of the requirements for naturalization, see USCIS Policy Manual Vol. 12, available at <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12.html> (last visited Sept. 2019); see also information on the USCIS Citizenship Resource Center, available at <https://www.uscis.gov/citizenship> (last visited Sept. 2019). The ILRC publishes a comprehensive guide to naturalization law and practice, *Naturalization and U.S. Citizenship: The Essential Legal Guide*, available at <https://www.ilrc.org/naturalization-and-us-citizenship>.

Advocates are screening to ensure the applicant did not trigger a ground of deportability, and to double check that the applicant has not fraudulently used benefits, which might also affect the good moral character determination. Generally, legal use of government-funded programs and the use of a fee waiver will not cause problems for the applicant, provided they have not left the U.S. for a trip a longer than 180 days.

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**Practice Tip:** A red flag is any issue that may impact an LPR's naturalization application, such as an issue that triggers a good moral character bar, or an issue that raises a concern that the naturalization applicant may be deportable. Inadmissibility due to public charge is only an issue for a naturalization applicant if it also raises an underlying concern about deportability. Technically, a person who is deportable may still naturalize, but under current guidance, USCIS is likely to refer such a person to immigration court to face charges of deportability. (In defense, the applicant can apply for relief before the immigration judge.)

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## V. How Inadmissibility Can Affect an LPR

The public charge test discussed above is a ground of inadmissibility. A permanent resident who lives in the U.S. and never leaves is not subject to the grounds of inadmissibility. Instead, permanent residents within the United States are subject to a different set of rules, the grounds of deportability (INA § 237(a)). Although lawful permanent residents in the U.S. are only subject to the grounds of deportability, the public charge ground of inadmissibility can impact an LPR in one of three ways:

1. They traveled outside the U.S. for more than 180 days;<sup>12</sup>
2. They were actually inadmissible due to public charge at time of adjustment to LPR status (when they got their green card) and lied about it;
3. They are deportable for some other reason, and now want to apply to adjust status again in front of the immigration judge as a relief to removal.

### Red Flag: Travel Outside the U.S. for more than 180 Days

An LPR can travel freely outside the U.S. without needing to be re-assessed for admissibility. An LPR is only subject to the grounds of inadmissibility upon return to the U.S. if they travel outside the U.S. and trigger one of the factors in INA § 101(a)(13)(C). This list includes committing certain crimes or having abandoned LPR status. In addition, **spending more than 180 consecutive days outside the U.S. triggers a full screen for admissibility when the LPR returns**, regardless of any other negative factors. For this reason, any LPR who stayed outside the U.S. for more than 180 days could have triggered a public charge inadmissibility issue, even if no other legal concern is present.

It is important for attorneys and legal advocates to understand that an LPR who traveled outside the U.S. for more than 180 days, and was inadmissible at the time of entry, could now be deportable for having been inadmissible at entry even if immigration authorities allowed them to enter. See INA § 237(a)(1)(A).

**Example 1:** LPR Vu takes a trip to Vietnam to visit his family. He stays for two weeks and returns. Even if the officers learn that Vu uses several public benefits and relies on support from the U.S. government, he can freely re-enter the United States. This is because Vu is an LPR and not subject to the public charge ground of inadmissibility.

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<sup>12</sup> By statute, an LPR is considered to be seeking a new admission if they trigger any of the conditions listed in INA § 101(a)(13)(C), including committing certain crimes. In practice, if a separate issue such as crime, triggers the admissibility screen upon re-entry, public charge is not the main concern. However, merely being absent for more than 180 days triggers an admissibility screen, regardless of other behavior.

Example 2: LPR Vu takes another trip to Vietnam, and this time stays to take care of his mother after surgery. He stays for 187 days and then returns to the United States. Because Vu was absent more than 180 days, he is now subject to the grounds of inadmissibility. Immigration officers could determine that he is inadmissible for being likely to become a public charge and place him in removal proceedings, charging him as inadmissible under INA 212(a)(4). Vu will have a chance to argue his case before the immigration judge.

Example 3: LPR Vu, who was absent from the U.S. for 187 days and then returns to the United States, is admitted into the U.S. even though he may have been inadmissible due to public charge. When he applies to naturalize, he faces the risk that the adjudicating officer will claim he is now deportable for having been inadmissible at the time of entry. Advocates will argue that the agency should not be able to look back to time of entry to make such a discretionary determination, but the client should understand the risk of applying.

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**Practice Tip:** In practice, attorneys and advocates are screening to see whether a naturalization applicant had an absence of more than 180 days, and would have been likely to have been barred on public charge grounds at the time they reentered the U.S.

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### **Red Flag: The LPR Was Inadmissible for Public Charge and Lied About It When They Became a Permanent Resident**

If an applicant for naturalization was inadmissible at the time they were granted permanent resident status, and that ground of inadmissibility was not waived, USCIS will argue that they are not a lawful permanent resident. A person must have been properly granted lawful permanent resident status to meet the first requirement of being and maintaining LPR status for 5 or 3 years. Even if the LPR who now wants to naturalize could have been denied a green card on public charge grounds at the time they applied for permanent residence, it is unlikely to be a problem now if all pertinent information was disclosed at the time. If an immigrant disclosed all information to USCIS when they applied to become a Lawful Permanent Resident, including any information related to public charge, it would be very difficult for an officer, at time of a naturalization adjudication, to argue that the immigrant was inadmissible at time of adjustment for having been a public charge. The LPR's file would show documentation related to public charge, such as the affidavit of support, documentation of income, family ties, use of benefits, and other factors. The decision to grant LPR status is discretionary and advocates may presume that USCIS considered all factors, unless the immigrant lied. If the immigrant lied about one or more of these critical factors when they became an LPR, the factors related to public charge could come up as problematic at naturalization.

Example 1: When he was 19 years old and before he became an LPR, Raul was in an inpatient psychiatric hospital, and his institutionalization was paid for by Medicaid. Since then, he has been receiving effective treatment and has a job and a family. When he applied for his green card, he shared most of his medical history but did not disclose the institutionalization, because he was ashamed of it. Since becoming an LPR, he has had one more incident, which required six months of inpatient treatment. Raul now wants to apply to naturalize. Because Raul might have been found to be inadmissible on public charge grounds at the time he got his green card, and lied about an important factor, applying for naturalization now is risky. Raul's advocate should discuss the risks with him, and his options to readjust status if he moves forward with his naturalization application and is placed in removal proceedings.

Example 2: LPR Khalida received cash assistance from a government program a year before she applied for and was granted her green card. At the time she applied for permanent residence, she was no longer receiving cash assistance, and she also disclosed her past use of the benefit. USCIS granted Khalida's green card. Khalida faces little risk in applying for naturalization. Even if she uses benefits now, she will be able to show that all

factors were disclosed at the time of her green card application—she will argue that the officer made a proper discretionary determination.

### Relief in Immigration Court: Readjusting Status

If an LPR becomes deportable for any reason, one possible defense from deportation is an application to readjust status to become a lawful permanent resident again. This is a possible relief where the issue of deportability is either not a ground of inadmissibility, or when a waiver of the inadmissibility ground is possible, such as with certain crimes. It might also be possible relief where there was a legal error in the initial adjustment. If readjusting status is the relief sought from removal, the applicant will have to show admissibility, including that they are not likely to become a public charge.

Example: Marc becomes deportable for having been inadmissible at time of entry. It turns out USCIS thought they had jurisdiction over his adjustment of status application whereas in fact jurisdiction was with the court. Marc did not seek legal assistance when he applied to naturalize and was placed in removal proceedings. Now, Marc is back in front of an immigration judge and needs to adjust status. Luckily, he is married to a United States citizen who can file a new visa petition for him. Any grounds of inadmissibility, including public charge, could bar Marc from readjusting status even though he was previously an LPR.

## VI. Effect of the New Rule on the Inadmissibility Analysis for a Naturalization Applicant

The new rule only applies to applications for adjustment of status postmarked or submitted electronically on or after October 15, 2019. See 8 C.F.R. § 212.20. Although the rule is silent on this point, it is logical that LPRs who travel for more than 180 days and are seeking a new admission will not be subject to the new rule unless they return to the U.S. on or after October 15, 2019.<sup>13</sup> After that date, the main effect on naturalization applicants is related to new factors in the heightened inadmissibility screening that all LPRs face upon returning to the U.S. after traveling outside the U.S. for more than 180 days. Advocates assisting with naturalization applications will need to screen LPRs who traveled outside the country and returned to the U.S. after the rule went into effect, and who have long absences (more than 180 days), to ensure they were not inadmissible on public charge grounds at the time of entry using the factors of the new public charge rule. Newly-added benefits (such as Medicaid or SNAP) used before October 15, 2019 will not be considered.

In the event that an LPR left the U.S. before the new rule went into effect, but returned to the U.S. after October 15, 2019 (or a later date if litigation succeeds in delaying the effective date of the new rule), the LPR would be subject to the new rule at the time of their reentry to the U.S. This would only apply if the LPR was absent for more than 180 days and is therefore seeking a new admission. Advocates should consider this scenario when screening for long absences.

## VII. Good Moral Character and Public Benefits

Good moral character is an eligibility factor for naturalization. It has nothing to do with public charge or the new rule defining public charge. However, naturalization applicants who are applying for a fee waiver based on receipt of a public benefit should receive a legal screening to ensure their use of public benefits does not trigger a good moral character bar, or even a crime bar, specifically related to fraudulent receipt of public benefits. It is a best practice to screen naturalization applicants who are applying for fee waivers for any good moral character issues arising from the improper use of the benefit.

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<sup>13</sup> Heightened questioning from officers may occur sooner, but advocates will maintain that the effective date for all purposes is October 15, 2019.

## Heightened Scrutiny for LPRs Who Traveled

A naturalization applicant who receives a government benefit and traveled out of the country for more than one calendar month should be screened for potential public benefits problems such as an SSI overpayment, a SNAP (Food Stamps) overpayment, or failure to report the travel to the human services agency when that is required by the particular benefit program. These situations could trigger a good moral character concern for fraudulent or improper use of the benefit. Any conviction for violating laws relating to public benefits, such as “welfare fraud,” requires a separate analysis to determine whether the applicant might also be deportable on a crime ground.

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**Practice Tip:** Good moral character issues involving public benefits could arise even for short absences lasting more than one calendar month. These issues concern improper receipt of a benefit. Screening for good moral character is different from screening for inadmissibility after to a long absence. Advocates who identify a potential good moral character issue involving public benefits can partner with a public benefits attorney from a local legal aid office to resolve the issue.

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## VIII. Best Practices for Naturalization Workshops

At a naturalization workshop, it is essential to screen naturalization applicants to see whether their past use of public benefits could be an issue for their naturalization application. Best practices include:

1. Screen all applicants for absences of more than 180 days, which trigger the grounds of inadmissibility including public charge. This is true for all applicants, and especially naturalization applicants who are also applying for a fee waiver on the basis of public benefit receipt, which could open a line of questioning about public benefit use and absences at their naturalization interview. **This is not a new recommendation.** Careful screening for long absences has been a best practice and essential legal screening under the law that predates the new public charge rule. Applicants with long absences should all be getting an in-depth legal consultation to explore not only public charge but also other potential issues.
2. Note that the new public charge rule expands the categories of benefits that could trigger a finding of public charge (as compared to the 1999 guidance, which focuses on cash aid and long-term institutional care). For individuals with absences of more than 180 days, advocates should keep in mind the expanded set of public benefits that could have triggered inadmissibility upon return if those benefits were used on or after October 15, 2019.
3. Screen all applicants who use public benefits, in particular applicants who are applying for a fee waiver on the basis of receipt of a public benefit, for any good moral character issues related to misuse of a benefit. Even short absences could be a red flag for improper receipt of a public benefit while out of the country.
4. Advise naturalization applicants that using a fee waiver could trigger inquiry into their public benefit and travel history, and screen for any travel related issues. Because the fee waiver is such an important and essential tool to allow many LPRs to access all the benefits of U.S. citizenship, advocates should ensure they can continue to help LPRs with fee waivers by implementing rigorous red flag screenings, and paying particular attention to training fee waiver station staff and volunteers. See the discussion on fee waivers, below.
5. To avoid having an absence of more than 180 days trigger a public charge problem, is it also a best practice to advise naturalization applicants to avoid absences of over 180 days between the time they apply and the time they naturalize. This is a good practice not only to avoid public charge problems but also to avoid triggering other potential grounds of inadmissibility.



**Practice Tip:** There are many issues in a naturalization application—such as crimes, good moral character, how the LPR obtained their green card, absences, and more—that could lead to a negative outcome for the applicant, ranging from a denial of the application to deportation. Public charge is not unique in that respect. Some New Americans Campaign partners require all applicants at workshops to sign a limited scope agreement, examples of which are available from the New Americans Campaign at <http://naturalization.ning.com/page/group-processing-resources#5>. For example, CUNY Citizenship Now!'s limited scope agreement states, "We assume no responsibility for the outcome of your case and we cannot guarantee results." Nothing about public charge suggests the need to treat the issue differently from the myriad issues that may arise in a naturalization case.

## IX. Fee Waivers for Naturalization as a Negative Public Charge Factor

The new rule on public charge considers the use of an immigration fee waiver to be a negative factor in the totality of the circumstances analysis—in other words, one among many factors that would suggest the immigrant is likely to become a public charge.<sup>14</sup> In response to comments that the public submitted opposing the use of a fee waiver as one of the negative factors for public charge because it might discourage naturalization, DHS stated, "This rule addresses how DHS determines inadmissibility of aliens on account of public charge; and it does not apply to individuals seeking to be naturalized who would apply for a fee waiver request because the public charge ground of inadmissibility does not apply to naturalization proceedings."<sup>15</sup>

However, and most importantly for purposes of this practice advisory, **an LPR who is applying to naturalize is not subject to a public charge bar for using a naturalization fee waiver.** This is because there is no public charge test at naturalization. Additionally, if the fee waiver was for an immigration benefit that is not subject to a public charge inadmissibility decision, such as naturalization or other immigration benefits exempt from public charge, then prior use of a fee waiver may not be counted as a factor.<sup>16</sup> Nor will USCIS consider the request for or receipt of a reduced fee for the naturalization application as a negative factor in a public charge inadmissibility determination. Moreover, the fact that one family member used a fee waiver does not count against another family member who may be applying for a green card in the future, as the new rule only considers an applicant's own prior use of an immigration fee waiver. Therefore, using a fee waiver to apply for naturalization is irrelevant to concerns about public charge.<sup>17</sup>

Even if the naturalization applicant was denied naturalization on some *other* ground (unrelated to public charge) and put into removal proceedings, their use of a fee waiver for their naturalization application would be irrelevant.<sup>18</sup> If they are eligible to apply to readjust as a defense to removal, their prior use of a naturalization fee waiver would not be a negative factor because only fee waivers for immigration benefits that are subject to a public charge inadmissibility determination may be considered. See 8 C.F.R. § 212.22(b)(4)(ii)(F). (See also section above § Relief in Immigration Court: Readjusting

<sup>14</sup> The new rule considers both application for and receipt of an immigration fee waiver to be negative factors. See 8 C.F.R. § 212.22(b)(4)(ii)(F). For immigrants subject to the public charge ground of inadmissibility, only fee waivers submitted on or after October 15, 2019 will be considered negative factors. The Department of Homeland Security's response to comments in the Federal Register specify that "fee waivers applied for or received before the effective date will not be considered." 84 Fed. Reg. 41424 (Aug. 14, 2019).

<sup>15</sup> 84 Fed. Reg. 41425 (Aug. 14, 2019).

<sup>16</sup> The list of categories of immigrants exempt from the public charge ground of inadmissibility, i.e., who may use a fee waiver to apply for their status without it counting in the public charge analysis, can be found at 8 C.F.R. § 212.23. Please also see the ILRC's practice advisory, *An Overview of Public Charge*, for a comprehensive overview of public charge including the groups to whom it does and does not apply. The practice advisory is available at <https://www.ilrc.org/overview-public-charge>.

<sup>17</sup> Even if a naturalization applicant is denied naturalization and is either put into removal proceedings and seeks to readjust, or remains an LPR, then travels and is subject to admissibility screening after long absence, that individual's prior use of a fee waiver for their naturalization application would not be a negative factor. This is because naturalization is not subject to a public charge inadmissibility test. See 8 C.F.R. § 212.22(b)(4)(ii)(F).

<sup>18</sup> The same analysis holds true if a naturalization applicant uses a fee waiver for their naturalization application, is denied naturalization, remains an LPR, then travels and is subject to admissibility screening after long absence. Their prior use of a fee waiver for their naturalization application would not be a negative factor in that screening.

Status.) More importantly, a rigorous red flag screening should have identified any risks of deportability and the attorney or legal advocate should have advised the LPR about the risk of getting referred to immigration court.

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**Practice Tip:** Even though using a fee waiver with a naturalization application does not raise public charge concerns, using a fee waiver based on receipt of public benefits could open a line of questioning related to travel and use of benefits. See Best Practices for Naturalization Workshops, above.

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## X. Effect of Public Charge on a Naturalization Applicant’s Ability to Sponsor a Family Member After Becoming a U.S. Citizen

A naturalization applicant who uses fee waiver in their naturalization application and then as a citizen wants to petition for and sponsor, a family member can do so. There is no public charge test for the sponsor of a family-based immigration petition. The public charge test applies to the beneficiary of the petition. Therefore, **the fact that the sponsor, who is now a citizen, may have used a fee waiver to apply for naturalization, does not hinder their ability to sponsor a relative.**

The underlying question is whether the sponsor has sufficient resources (income and assets) to file an affidavit of support on behalf of the family member for whom they are petitioning. Quite simply, if the sponsor’s income is low enough that they are eligible for public benefits, or low enough that they would require a fee waiver if they were applying for naturalization today, then the sponsor’s affidavit of support is unlikely to be deemed sufficient and they will probably need a joint sponsor. Conversely, if the sponsor’s current income and assets are sufficient to support a strong affidavit of support, then the fact that the sponsor may have required a fee waiver to apply for an immigration benefit in the past is not a relevant consideration. The most important legal analysis for sponsors pertains to the overall strength of their affidavit of support.

Use of a public benefit by the sponsor, or use of a fee waiver by the sponsor, is not an enumerated negative factor under the new public charge rule. Use of a public benefit by a sponsor is currently only a factor in the context of consular processing, and even in that context does not include use by the sponsor of an immigration fee waiver.<sup>19</sup> The new public charge rule does not consider public benefit use or fee waiver use by the sponsor as part of the affidavit of support. The affidavit of support does not ask about whether the sponsor ever applied for or received a fee waiver. Nonetheless, as noted above, a sponsor who qualifies for a fee waiver or a public benefit may also have trouble meeting the requirements of sponsorship because they may also lack the required income and resources for the affidavit of support. This should not deter a prospective sponsor from using a fee waiver to naturalize—the sponsor person may still petition for a family member and a joint sponsor can help the family meet the public charge requirements.

Example: LPR Priya is applying to naturalize and qualifies for a naturalization fee waiver. She applies for naturalization with the fee waiver and becomes a U.S. citizen. She later petitions for her mother to immigrate to the United States and submits an affidavit of support as her sponsor. The fact that Priya used a fee waiver to apply for naturalization does not count against her mother’s green card application or bar her from immigrating. The fact that Priya recently needed a fee waiver, however, suggests she may not have sufficient financial means to meet the requirements for being a sponsor. The petition may require a joint sponsor or other evidence to counter the possibility that Priya’s mother will become a public charge.

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<sup>19</sup> For more information about public charge changes to consular processing, please see the ILRC’s *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*, available at <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.

## Notes and Additional Resources

The state of the law on public charge remains in flux due to litigation challenging the new rule. ILRC will be continuing to track new developments related to public charge, as well as specific issues relating to naturalization.

- Please check the ILRC website at <https://www.ilrc.org/public-charge> for updates to this practice advisory and other materials.
- Outreach and Community Resources
  - ILRC [Public Charge Outreach Toolkit](#) (includes FAQ and community flyers)
  - ILRC Community Resource: [Public Charge: Community Messages](#) (English, Spanish, Chinese)
  - ILRC Community Resource (Infographic) on [Public Charge: Your Questions Answered](#) (pertains to public charge under the 1999 guidance and before implementation of the new rule)
- Legal Practice Advisories
  - ILRC [An Overview of Public Charge](#)
  - ILRC [Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues](#)
  - ILRC [Totality of the Circumstances: Assessing the Public Charge Ground of Inadmissibility](#)
  - ILRC [Public Charge as a Ground of Deportability](#)
- [Protecting Immigrant Families](#) website
  - Protecting Immigrant Families resources on how to talk to families about public charge, available at <https://protectingimmigrantfamilies.org/know-your-rights/>. Resources include NILC's <https://www.nilc.org/issues/economic-support/lets-talk-about-public-charge-pif/>.
  - Protecting Immigrant Families specialized resources for advocates and service providers, available at <https://protectingimmigrantfamilies.org/special-resources/>.



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## About the Immigrant Legal Resource Center

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