PUBLIC CHARGE:
New Rules to Enforce an Old Immigration Hurdle

BY JOCELYN CORTEZ, ESQ.

While much attention has been given to the prospect of stemming illegal immigration along the U.S. border with Mexico via a physical barrier, family immigration practitioners today are navigating a legal landscape where an invisible barrier is going up.

The barrier in question is the new and novel use of the "public charge" ground of inadmissibility by immigration policy makers and officials. The public charge ground has brought some facets of what would traditionally have been considered ***legal*** immigration to a grinding halt.

Section 212 of the Immigration and Nationality Act (INA) contains numerous statutory grounds to deny admission to a foreign national applying for an immigrant or non-immigrant visa. The public charge ground of inadmissibility, which resides in INA 212(a)(4), originally found its way into law in 1882 and has gone largely undefined since then. However, it has found new life in President Donald Trump's administration's immigration policies.

Legal Framework for the Public Charge Ground of Inadmissibility

INA 212(a)(4) gives wide latitude to adjudicating officers to deny a visa if they believe the applicant "is likely at any time to become a public charge […]". (Unless the intending immigrant qualifies for an exemption of this requirement, such as an applicant for a visa under the Violence Against Women Act (VAWA); see the related article on page 8 for more information on this type of visa.) Section (B)(i) of this statute directs officers, when considering whether an immigrant is likely to become a public charge, to "at a minimum" consider the applicant's age, health, family status, assets, resources and financial status, and education and skills. For decades, an applicant for admission has been able to overcome a finding of inadmissibility for public charge by simply filing an Affidavit of Support as required in INA 212(a)(4)(B)(ii). This affidavit commits the signor, or "sponsor," to a contract with the government, promising to provide economic support to the applicant, if necessary, during the time the affidavit is enforceable. The period of enforceability varies and could end upon the applicant's death, naturalization as a U.S. citizen, or after working 40 qualifying quarters of coverage under Title II of the Social Security Act.[1]

The INA and federal regulations require the petitioner in family immigration cases to be the sponsor and, among other things, demonstrate that they are at least 18 years old, are a U.S. citizen or legal permanent resident and have an annual income equal to at least 125 percent of the federal poverty line."[2] If the petitioner/sponsor's income level does not meet this last requirement, the applicant may have a joint sponsor file an Affidavit of Support under INA 213A(f) and 8 CFR 213a.2(c)(2)(iv)(B). This joint sponsor likewise enters into a contract with the government under INA 213A(a).

The Public Charge Ground Gets a New Look

Via a change in policy and regulation, the State Department has declared that Affidavits of Support, while still required, are no longer on their own enough to overcome a public charge finding. This change affects family immigration in both consular cases (processed in the applicant's country of citizenship) and adjustment of status applications (processed at U.S Citizenship and Immigration Services (USCIS) offices in the U.S.).

Consular Processing Cases

According to a story published in *Reuters* in April, immigrant visa applications denied on public charge grounds at consular posts have quadrupled as of the end of the 2018 fiscal year.[3] The turning of the tide began more than a year and a half ago when the State Department revised its Foreign Affairs Manual (FAM), a collection of instructions for consular posts, in January 2018.[4] The revised FAM directed its consular officers to consider factors beyond those in INA 212(a)(4)(B)(i), including a wider array of public benefits usage.

Whereas before, public cash benefits and government-funded institutionalization for long-term care were the only types of public benefits consular officers considered, now, "past or current receipt of public assistance of ***any type*** by the

visa applicant ***or a family member in the visa applicant's household*** is relevant to determining whether the applicant is likely to become a public charge in the future […]."[5] Pursuant to this change in policy, it would arguably be possible, for example, for an immigration officer to deny entry to an applicant if an applicant had family members who relied on public benefits such as Medicaid (even if the family members in question were U.S. citizens).

Adjustment of Status Cases

On August 12, 2019, USCIS published its final rule amending regulations pertaining to public charge. The changes are many and complex. Taking effect on October 15, 2019, the rule will require the filing of (new) Form I-944. The changes will not apply to applications filed before October 15 or to many humanitarian-based visas like VAWA, U visa and T visa applicants.

Pursuant to this final rule, to determine whether a person is a public charge, USCIS is to weigh various enumerated factors in a "totality of circumstances" context including, for example, whether the person has opted to buy private health insurance that has ***not*** led to a tax credit under the Affordable Care Act (which is considered a positive; conversely, utilizing a tax credit to purchase health insurance under the Affordable Care Act is not to be considered, according to the final rule), the contents of a person's tax transcripts and copies of credit reports.[6] An applicant making below 125 percent of the federal poverty line will have a "negative factor" in their case; those earning between 125 percent and 250 percent above the federal poverty line will have a positive factor weighing in their favor. If found to be a public charge, the person may post an $8,100 bond, exonerated upon the applicant's death, naturalization, exit from the U.S., or five years after adjustment. As in the revised FAM, the number of people in the applicant's household, as well as *their* legal status and nature of *their* use of public benefits, will influence whether the applicant is found to be a public charge. Thus, while more mildly worded than the change in FAM policy, the effect of the final rule will be just as devastating for some.

Helping Your Client Through This Minefield

The effects of a public charge denial can be far-reaching for clients, causing years of delay and family separation. To illustrate, recall that a joint sponsor can file an Affidavit of Support where the petitioner's earnings are insufficient under the poverty guidelines; however, in cases where a joint sponsor has already made that filing, you cannot "stack" more joint sponsors *ad infinitum*. Moreover, where the applicant in a consular processing case was relying on an approved provisional I-601A waiver for unlawful presence, this waiver gets revoked at the time of a denial for any other basis of inadmissibility, including public charge. Thus, the case can come to a dead end with the client abroad. Crucially, there is no waiver available for a public charge finding and appeals are difficult to navigate in a bureaucracy far away.

All is not lost, however. Careful consideration and counseling can still yield a successful visa application for your client. To get there, practitioners should begin with consulting listservs and colleagues to search out reported results on these issues in consular cases as results vary by posts. The practices at the Ciudad Juarez/El Paso, Texas post may differ from the practices at the Nogales-Mariposa post in Arizona.

Next, meeting with the client to vet facts that could lead to a public charge finding is key. Although the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 prohibited undocumented individuals from most forms of public benefits, it is still crucial to review what public benefits, if any, the applicant or a household member has received in the previous three years. This information should be compared against the public benefits listed in the applicable Foreign Affairs Manual and regulations, depending on the type of case, to determine if the client could be labeled a public charge under these new policies. Determining what public benefits may weigh against your client's case is not easy. For example, the Foreign Affairs Manual that applies to consular interviews, FAM 302.8-2(B)(1)(d)(3), provides a list of certain benefits that the State Department "should not be considered to be benefits when examining the applicant under INA 212(a)(4)" (i.e. when determining whether the applicant is likely to become a public charge). Such benefits include, *inter alia*, Supplemental Assistance Program (SNAP) (formerly called food stamps); Emergency Medical Services; Medicaid; and Women, Infants and Children (WIC). However, the provision goes on to indicate that such benefits "may only be considered as part of the totality of the applicants circumstances in determining whether an applicant is likely to be a public charge." And indeed, 9 FAM 302.8-2(B)(2)(f)(1)(c)(ii) asks the consular officer to consider the receipt of means-tested benefits by the *sponsor* or any member of his or her household within the past three years.

Further, all factors listed in INA 212(a)(4)(B)(i) should be evaluated through the lens of your client. For example, a gainfully employed DACA recipient with no reliance on public benefits will likely avoid a public charge finding, despite having several dependents. On the other hand, an older client with past health issues who has depended solely on family may not.

There will be cases where waiting until the applicant's financial situation improves may be the best bet. In all cases, the practitioner should clearly explain these evolving policies to the client so that they can make an informed decision about whether to move forward with a case that could result in prolonged family separation. Looking ahead, all signs point to a more wide-spread use of this ground of inadmissibility. In a landscape where the only thing that seems certain is constant flux, helping the client understand where their case stands is paramount. NL

1. INA 213A(a)(1)-(3); 8 CFR 213a.2(d).
2. INA 213A(f); 8 CFR 213a.2(c)(1).
3. https://mobile.reuters.com/article/amp/idUSKCN1RR0UX. Last accessed April 29, 2019.
4. Foreign Affairs Manual 9 FAM 302.8, et al.
5. 9 FAM 302.8-2(B)(1) and 9 FAM 302.8-2(2)(f)(1)(b)(emphasis added).
6. DHS Press Release dated September 22, 2018, "DHS Announces New Proposed Immigration Rule to Enforce Long-Standing Law that Promotes Self-Sufficiency and Protects American Taxpayers."

JOCELYN CORTEZ is an attorney with Pereira Immigration Law Group. She has represented hundreds of clients in a wide variety of immigration matters including family immigration petitions, humanitarian visas, removal defense in tribunals in the Executive Office for Immigration Review and the Board of Immigration Appeals, naturalization and other U.S. citizenship issues, Deferred Action for Childhood Arrivals, cases brought under the Cuban Adjustment Act and Temporary Protected Status. She serves on the board of directors for Dream Big Nevada, a local immigrant rights' non-profit organization, and she is a member of the local chapter of the American Immigration Lawyers Association, as well as the Southern Nevada Association of Women Attorneys and the Las Vegas Latino Bar Association.