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USCIS proposes new public charge rules: the Form I-864 will become table stakes as scrutiny shifts to the applicant

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On September 21, 2018 the Department of Homeland Security announced the most sweeping changes to "public charge" inadmissibility in almost two decades.[2] If implemented in their current form, the proposed rules will increase the number of adjustment applicants who will face a serious likelihood of being found inadmissible on public charge grounds.

This article first briefly reviews the status quo rules for public charge determinations in adjustment of status cases (Section I). It then analyzes the new definition of what it means to be "likely to become a public charge" and the expanded list of programs that can trigger inadmissibility (Section II). The article then summarizes the new "totality of the circumstances" factors proposed by USCIS, along with the "heavily weighted" circumstances that will be nearly outcome determinative in public charge assessments (Section III). Next, it summaries the standards and procedures for "public charge bonds," in which the Department appears to have a new interest (Section IV). Finally, the article concludes with recommendations for how lawyers should contend with the proposed rules in their current practices (Section V).

Note that although the proposed rules discussed in this article have been signed by the DHS secretary, they have not yet been published in the Federal Register. It is anticipated that they will be published while this article is in press.

I. Shifting the focus to the applicant.

U.S. law has long required that immigrants demonstrate financial self-reliance.[3] Under the current Immigration and Nationality Act (INA), an applicant is

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[2] Proposed Rule - Inadmissibility on Public Charge Grounds (Sep. 21, 2018), *available at* https://www.dhs.gov/publication/proposed-rule-inadmissibility-public-charge-grounds (last visited Sep. 24, 2018) (hereinafter *Announcement*). For ease of reference, specific provisions in the proposed rules are referenced herein with their C.F.R. citation and the designation "Proposed."

[3] Immigration Act of 1882, 22 Stat. 214 (Aug. 3, 1882). "Professional beggars" were later barred under Immigration Act of 1903, 32 Stat. 1213 (March 3, 1903).

inadmissible if he is determined "*likely at any time to become a public charge*."[4] The INA itself does not articulate a test for determining whether an immigrant is likely to become a public charge.[5] Rather, it lists five factors to be "taken into account:" (1) age; (2) health); (3) "family status;" (4) assets, resources and financial status; and (5) education and skills.[6]

The last major changes to public charge determinations were made in 1996 when Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).[7] It was then that Congress created the legally-enforceable Affidavit of Support that was later promulgated as the Form I-864. Prior to 1996, applicants submitted affidavits of support to help overcome public charge inadmissibility, showing that a sponsor had committed to ensuring the applicant's financial wellbeing. But the support promises made in these pre-1996 affidavits could be enforced by neither the government nor the immigrant beneficiary.[8]

Congress believed that non-binding support affidavits failed to prevent immigrants from becoming public charges precisely because they were legally unenforceable.[9] A legally-binding affidavit of support was seen as a mechanism to ensure that a family-based petitioner, "rather than taxpayers," would serve as the financial safety net for the sponsored immigrant.[10] Early bills would have made affidavits enforceable by only the government,[11] but a private right of action allowing enforcement by immigrant beneficiaries was later added.[12]

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[4] INA § 212(a)(4)(A) (emphasis added).

[5] *Cf.* INA § 212(a)(4); 8 C.F.R. § 213a.1.

[6] INA § 212(a)(4)(B).

[7] Pub.L. 104-208; Pub.L. 104-193.

[8] *See*, *e.g.*, *Rojas-Martinez v. Acevedo-Rivera*, 2010 U.S. Dist. LEXIS 56187 (D. P.R. June 8, 2010) (granting defendant's motion to dismiss; holding that I-134, predecessor to I-864, was not an enforceable contract, even though executed after the effective date of IIRAIRA legislation).

[9] Report of the House Committee on the Judiciary on H.R. 2202, Rept. 104-469 (Mar. 4, 1996), at 144 ("...various State court decisions and decisions by immigration courts have held that the affidavits of support, as currently constituted, do not impose a binding obligation on sponsors to reimburse welfare agencies that provide public benefits to sponsored aliens. As a result, these provisions have been wholly incapable of assuring that individual aliens not burden the public benefits system and, consequently, the taxpayer").

[10] Report of the Committee on Economic and Educational Opportunities, Rept. 104-75 (Mar. 10, 1995), at 46 ("This change in law is intended to ensure both that the affidavits of support are legally binding and that sponsors—rather than taxpayers—are responsible for providing emergency financial assistance during the entire period between an alien's entry into the United States and the date upon which the alien becomes a U.S. citizen.").

[11] House Conference Report to Accompany H.R. 4, Rept. 104-430 (Dec. 20, 1995), at 475 ("…affidavits of support are not to be construed to provide any right to sponsored aliens.").

[12] Conference Report to Accompany H.R. 2491, Rept. 104-350 (Nov. 16, 1995), at 1831-32; Report of the House Committee on the Budget to Accompany H.R. 3734, Rept. 104-651 (June 27, 1996), at 1451 ("Affidavits of support must be enforceable against the sponsor by the sponsored alien").

The resulting statute is familiar to immigration practitioners: the legally binding Form I-864 is required in all family-based immigration cases with only extremely limited exceptions.[13] The Form I-864 is notoriously complex, especially in the case of sponsors with limited means or irregular income. Practitioners rightly worry about documenting sponsors' irregular income, about changes of employment, about what "assets" can be used, and about how to deal with joint sponsors.[14]

In practical impact, the Form I-864 has become the focus of practitioner's concerns about public charge matters to the virtual exclusion of all else. It is uncommon for practitioners to delve deeply into the employment prospects of an applicant in a family-sponsored case, because a valid Form I-864 is virtually always sufficient to avoid inadmissibility on public charge grounds. The most common exception, under the status quo, is serious medical conditions. Even with a valid Form I-864 in hand, applicants must be prepared to show how they will cover the cost of intensive medical care. Currently, it is fair to say that Form I-864 sponsors, rather than beneficiaries, are most likely to be on the receiving end of intense financial scrutiny.

In 1999, the legacy Immigration and Naturalization Service (INS) published field guidance on public charge determinations that remains in effect.[15] The INS defined an applicant "likely to become a public charge" as one who is "'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."[16] Only four specific programs were categorized as the type of cash benefit programs that would be considered for public charge purposes: (1) Supplemental Security Income (SSI); (2) Temporary Assistance for Needy Families (TANF); (3) state general assistance programs; and (4) programs, including Medicaid, when used for long-term institutionalization for healthcare.[17] The field guidance reiterated the "totality of circumstances" standard that exists in the INA, but added no additional interpretive gloss.[18]

The main thrust of the proposed rules is to shift the focus away from the U.S. petitioner and to the applicant. In addition to the Form I-864, the applicant will have to file a new form, the Form I-944, Declaration of Self-Sufficiency, designed to assess her ability to become financially self-sufficient.[19] The balance of this article deals mainly with the rules for how self-sufficiency will be assessed under the proposed rules.

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[13] 8 U.S.C. § 1182(a)(4)(C).

[14] *Cf.* Greg McLawsen and Gustavo Cueva, *The Rules Have Changed: Stop Drafting I-864s for Joint Sponsors*, 20 Bender's Immigr. Bull. 1287 (Nov. 15, 2015).

[15] 64 Fed. Reg. 28689 (May 26, 1999) (hereinafter Field Guidance).

[16] *Id.* at 28689.

[17] *Id.* at 28692.

[18] *Id.* at 28690.

[19] *Announcement*, p. 333 *et seq.*

The proposed USCIS rules follow directly on the heels of similar efforts by the Department of State (DOS) with respect to immigrant and nonimmigrant visa applications. Under revisions to the Foreign Affairs Manual earlier this year - most recently in July 2018 - DOS has adopted an approach similar to the totality of circumstances rule described in this article.[20]

Many classes of adjustment applicants are statutorily exempt from or eligible for a waiver of public charge determinations. The proposed rules list those classes but they are not discussed in this article.[21] Notably, the proposed rules would apply not only to adjustment applicants but also to those seeking a change or extension of nonimmigrant status.[22]

A preliminary draft of the proposed rules was leaked to the press in April 2018.[23]

II. New definition and test for "public charge."

Under the proposed rules, the definition of "public charge" is now expressly tied to the receipt of "public benefits."[24] Public charge now means one who receives public benefits. In turn, USCIS creates a new and broad list of programs that qualify as "public benefits" for this purpose.[25] All programs on the list are not treated equally. Rather, classes of programs have different thresholds that trigger public charge inadmissibility. The resulting standards are head-spinning for lawyers and will be utterly Byzantine to the layperson.

Remember that public charge determinations are prospective in nature. The question is whether a person, in the future, is "likely" to receive public benefits.[26] If an applicant has received public benefits as categorized below that, by definition, makes the individual a public charge.[27] But even if he has not received such

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[20] *See* 9 FAM 302.8.

[21] 8 C.F.R. § 212.23 (proposed).

[22] 8 C.F.R. § 212.20 (proposed).

[23] A copy of the leaked draft is available at https://bit.ly/2ImBzJ4 (last visited Sep. 27, 2018) (hereinafter April 2018 Draft Rules).

[24] 8 C.F.R. § 212.21(a) (proposed).

[25] 8 C.F.R. § 212.21(b) (proposed).

[26] *See Announcement*, p. 157 ("DHS's review is predictive: an assessment of an alien's likelihood at any time in the future to become a public charge").

[27] 8 C.F.R. §§ 212.21(a) (proposed) (public charge means "an alien who receives one or more public benefit, as defined in paragraph (B) of this section"; 212.21(b) (proposed) (listing programs). The regulations on this point are maddeningly complex. Receipt of "public benefits" at more than the *de minimis* levels defined in the new regulations makes an applicant by definition a *current* public charge. 8 C.F.R. § 212.21(a) (proposed). But the statute, of course, asks for the prospective determination of whether an applicant is "likely… to *become*" a public charge. INA § 212(a)(4)(A). DHS says that it "does not propose to establish a per se policy whereby an alien is likely at any time to become a public charge if the alien is receiving public benefits." *Announcement*, p. 144. Presumably this means even if the *de minimis* threshold is exceeded, as that is how "public benefits" are defined in the new regulations, that is, with the *de minimis* thresholds baked in. Put differently, use of the enumerated programs beneath the *de minimis* thresholds does not strictly qualify as use of

benefits, he may still be inadmissible on public charge grounds. That is because the DHS will now deploy a new totality of circumstances test to determine if the person is "likely at any time in the future to receive one or more public benefit."[28] The totality of circumstances test is described and analyzed in the following section.

The proposed rules divide public benefits into two main buckets: monetizable and non-monetizable. The monetizable programs are those where the cash value imparted to the non-citizen can be calculated based on arithmetic set forth in the proposed rules. For monetizable programs, receiving an amount of benefits over the *de minimis* threshold will trigger inadmissibility. For non-monetizable programs, inadmissibility is triggered by enrollment per se, rather than a particular dollar value of benefits received. Enrollment in non-monetized programs for a *period of time* that exceeds a de minimis threshold triggers a public charge determination. Receipt of benefits does not count against an applicant for periods of time in which he is serving in the active duty armed forces or Ready Reserve.[29]

The list of programs is indeed quite broad. Note, however, that DHS initially considered an even *more* expansive list. At least as of April 2018, DHS considered including participation in subsidized healthcare under the Affordable Care Act (Obamacare) and even use of the earned income tax credit.[30] The proposed rules do not currently list the Children's Health Insurance Program (CHIP), but DHS does include a request for comments as to whether CHIP should be added to the list of prohibited programs.[31]

Is it "safe" for a non-citizen to enroll in benefit programs that are not listed below? That is far from clear. DHS takes the position only that such use would not meet the *definition* of a public charge. In other words, use of such programs will not by itself support an inadmissibility finding. But it is far from clear that DHS would lack the ability to consider the use of such programs as a factor in assessing the totality of circumstances.

Finally, the consequences of receiving non-cash public benefits will not be retroactive.[32] Receipt of benefits other than cash assistance will have a public charge consequence only if received after the 60-day period following publication of the rules.[33] Receipt of SSI, TANF, general assistance, and long-term

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"public benefits" at all under the proposed rules. 8 C.F.R. §§ 212.21(b)(1) & (b)(2) (proposed). Despite the bizarre heading in the announcement, there seems no question that an applicant will be found inadmissible on public charge grounds if he has received public benefits in excess of the *de minimis* thresholds, since such use by itself makes him a current public charge. 8 C.F.R. § 212.21(a) (proposed).

[28] 8 C.F.R. § 212.21(c) (proposed).

[29] C.F.R. § 212.21(b)(4) (proposed).

[30] 8 C.F.R. § 212.23 (proposed).

[31] *Announcement*, p. 140.

[32] 8 C.F.R. § 212.22(d) (proposed).

[33] *Id.*

institutionalization while the proposed rules are pending will continue to carry the consequences set forth in existing field guidance as described above.[34]

A. "Monetizable" benefit programs.

Inadmissibility is triggered if the cumulative value of a "monetized benefit" received by the applicant was at or about 15 percent of the Federal Poverty Guidelines (FPG) for a household of one within any 12-month period.[35] Based on 2018 FPG, a cumulative value of $1,821 or greater in the past year would trigger public charge inadmissibility.[36] An individual who receives more than $1,821 in assistance, the Department opines, "is neither self-sufficient nor on the road to achieving self-sufficiency."[37] That is a somewhat surprising statement, as Congress has already limited the ability of non-citizens to access public benefits based on its understanding of what would serve the goal of gaining self-sufficiency.[38]

This is a substantial departure from existing guidelines. Under the status quo, only a person who is "primarily dependent" on public benefits is considered a public charge.[39] Primarily dependent means a "person for whom public benefits represent more than half of their income and support."[40]

Monetizable public benefits are themselves divided into two classes: (1) cash assistance programs; and (2) non-cash benefits capable of being "monetized." Cash assistance programs include the familiar list from the 1999 Field Guidance:

- Supplemental Security Income (SSI);
- Temporary Assistance for Needy Families (TANF); and
- Any "Federal, State local, or tribal case assistance for income maintenance," including state-administered "General Assistance" programs.[41]

"Non-cash benefit" programs include:

- Supplemental Nutrition Assistance Program (SNAP or "food stamps");
- Section 8 Housing Assistance under the Housing Choice Voucher Program; and
- Section 8 Project-Based Rental Assistance, including Moderate Rehabilitation.[42]

For non-cash benefit programs, the applicant is imputed with a pro rata share of the value received by his household. For these programs, DHS takes the total value

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[34] *Id.* (citing Field Guidance).

[35] 8 C.F.R. § 212.21(b)(1) (proposed).

[36] *Cf. Announcement*, p. 108.

[37] *Announcement*, p. 108.

[38] 8 U.S.C. § 1601 (Congressional findings from PRWORA concerning self-sufficiency and qualified aliens' access to public benefits).

[39] Field Guidance.

[40] *Announcement*, p. 106.

[41] 8 C.F.R. § 212.21(b)(1)(i) (proposed).

[42] 8 C.F.R. § 212.21(b)(1)(ii) (proposed).

conveyed to the household members covered by the program and assigns a pro rata portion to the applicant.[43] Hence, an applicant in a household of four, receiving a monthly $1,000 housing voucher, would be imputed with receiving $250/month in monetized non-cash benefits.

Note that DHS leaves open the possibility that even *de minimis* use of monetizable benefits by an applicant could be considered via the totality of circumstances factors.[44] Though such use would not automatically trigger inadmissibility, it could serve as one element to undergird an inadmissibility finding.

Although the proposed regulations are tied to the Federal Poverty Guidelines, they do not address how applicants will be addressed at field offices in Hawaii and Alaska. Both states have marginally higher FPG than the contiguous U.S. and presumably benefit use would trigger public charge inadmissibility only if it exceeded 15% of that higher state-specific threshold.

B. "Non-monetizable" benefits.

The second bucket of public benefits are "non-monetizable" programs, where the dollar value imparted to an applicant cannot be readily calculated.[45] For these programs, inadmissibility is triggered by enrollment for 12 months within any 36-month period. *However* – program enrollment is aggregated. If an applicant is enrolled in two programs for a given month, that is counted as two months of enrollment towards the 12-month maximum.

The list of non-monetizable programs includes:

- Medicaid (except for specific programs);[46]
- Institutionalization for long-term care at government expense;[47]
- Premium and cost-sharing subsidies for Medicare Part D (prescription drug coverage;[48] and
- Subsidized housing under the Housing Act of 1937.[49]

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[43] 8 C.F.R. § 212.24 (proposed).

[44] *Announcement*, p. 111 ("DHS also seeks public comments on whether DHS should consider the receipt of designated monetizable public benefits at or below the 15 percent threshold as evidence in the totality of the circumstances.").

[45] *Cf. Announcement*, p. 112 ("...DHS lacks an easily administrable standard for assessing the monetary value of an alien's receipt of some non-cash benefits").

[46] 8 C.F.R. § 212.21(b)(2)(i) (proposed). The proposed regulations expressly exempt: (1) emergency Medicaid; (2) services under the Individuals with Disabilities Education Act (IDEA); (3) school-based benefits for children up to the maximum age for secondary education under state law; and (4) Medicaid received by children who will gain U.S. citizenship via the Child Citizenship Act of 2000. 8 C.F.R. § 212.21(b)(2)(i)(A)-(E) (proposed).

[47] 8 C.F.R. § 212.21(b)(2)(ii) (proposed).

[48] 8 C.F.R. § 212.21(b)(2)(iii) (proposed).

[49] 8 C.F.R. § 212.21(b)(2)(iv) (proposed).

As with the standard applicable to monetizable benefits, DHS believes that the receipt of 12 months of non-monetized benefits shows that an individual is "neither self-sufficient nor on the road to achieving self-sufficiency."[50]

What if an applicant has received some monetizable and some non-monetizable public benefits? In this case, inadmissibility is triggered if the applicant receives *any* monetizable benefits *and* receives non-monetizable benefits for at least nine months in a 36-month period.[51]

C. Receipt of public benefits by U.S. citizen children.

Under the proposed rules, an applicant will not be directly penalized if his U.S. citizen children receive public benefits.[52] This is true even if the programs that they are enrolled in would be problematic if received by the applicant himself. Nonetheless, there is every reason to anticipate that many families may disenroll their eligible U.S. citizen children from programs out of misguided concerns.

III. New totality of circumstance test and "heavily-weighted" factors.

As discussed above, the crux of the proposed rules is to place scrutiny on the applicant,[53] far beyond whether he has submitted a valid and sufficient Form I-864. USCIS will require a new Form I-944 Declaration of Self-Sufficiency to gather the information it will use to examine the applicant's ability to be financially independent.[54] This section walks through the factors that CIS will now consider in support of its totality of circumstances test. It then turns to the "heavily-weighted factors" that will per se trigger public charge inadmissibility.

Practitioners should anticipate that the Form I-944 - if implemented - will add substantial complexity to adjustment cases. DHS estimates that the form will take 4.5 hours in comparison to the 6.25 hours that it believes the average person uses to complete the 18-page Form I-485.[55]

A. The totality of circumstances factors.

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[50] *Announcement*, p. 112.

[51] C.F.R. § 212.21(b)(3) (proposed).

[52] *Announcement*, p. 144 ("DHS notes that while the number of children, including U.S. citizen children, may count towards an alien's household size for purposes of determining inadmissibility on the public charge ground, *the direct receipt of public benefits by those children would not factor into the public charge inadmissibility determination*.") (emphasis added).

[53] This article uses the term "applicant" to refer to the individual about whom the public charge determination is made, as the proposed regulations would apply both to those seeking adjustment of status (intending immigrants) and also to applicants for change of nonimmigrant status.

[54] *Proposed rules*, p. 167 *et seq*.

[55] *Announcement*, pp. 333, 335.

The proposed rules add a thick interpretive gloss to the five statutory public charge factors. Scrutiny of these factors, which are outlined in Table 1, add a massive level of complexity to public charge determinations.[56]

Table 1
New Public Charge Factors per 8 C.F.R. § 212.22(b) (proposed)

Factor	Standard	Evidence
Age	Whether the applicant is of employable age and whether age makes her less likely to be employable.	[Not specified]
Health	Whether the applicant has a medical condition that impacts her ability to work.	● I-693 medical exam. ● Evidence that the condition is likely to require extensive medical treatment or will interfere with ability to care for self, attend school or work.
"Family status"	Whether the applicant *is* a dependent or *has* dependents that make her more likely to receive public benefits.	[Not specified]
Assets, resources and financial status	(1) Whether the applicant's income is at/above 125% FPG; (2) Whether the applicant has sufficient resources to cover reasonably foreseeable medical costs; and (3)Whether the applicant has financial liabilities *or* has received public benefits.	● Gross household income excluding income from public benefits. ● Income from non-household members and/or household members. ● Household's "cash assets and resources." ● Household's "non-cash assets and resources that can be converted into cash within 12 months." ● Applications for or receipt of public benefits. ● Receipt of a fee waiver for an immigration benefit. ● Credit history and credit score. ● Private health insurance.

[56] 8 C.F.R. § 212.22(b) (proposed).

Education and skills	Whether the applicant has "sufficient education and skills" to maintain full-time employment.	• Employment history. • High school degree or higher education. • Occupational skills, certificates or licenses. • English language proficiency.
Prospective immigration status and anticipated period of admission	The immigration status that the applicant seeks and the period of planned admission.	[Not specified]
Affidavit of Support	Whether a valid and sufficient Form I-864 has been filed.	• Sponsor's income, assets and resources. • Sponsor's relationship to the applicant. • "Likelihood that the sponsor would actually provide the statutorily-required amount of financial support."

Age. The proposed regulations unambiguously discriminate in favor of applicants who are of traditional working age, that is, between ages 18 and 65 to 67.[57] The consideration of age is primarily "in relation to employment or employability."[58] Some older applicants may be able to rebut the negative impact of their age by demonstrating that they do not need to be employed because they are financially independent. But the proposed regulations could be disastrous for older applicants who are not financially independent. Again, a valid Affidavit of Support for older applicants may not by itself be sufficient.

Health. Serious medical conditions are perhaps the issue that practitioners are already most keenly aware of with current public charge determinations, beyond the Form I-864. Most attorneys are aware that a medical condition requiring ongoing treatment, such as cancer, can lead to public charge concerns. In practice, these situations are somewhat rare. The proposed regulations suggest a heightened scrutiny of medical conditions. DHS reserves the ability to consider medical evidence beyond the required Form I-693 medical examination.[59] It seems possible that DHS could issue RFEs when an examination identifies a Class B condition and the Service wants to know the details of how it is being managed.

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[57] 8 C.F.R. § 212.22(b)(1)(i) (proposed). *See* 42 U.S.C. § 416(l)(2) (defining early retirement age).

[58] *Announcement*, p. 163.

[59] *Announcement*, p. 172.

Household size. Note that DHS has construed "family status" as a factor exclusively concerned with the applicant's household size.[60] Put bluntly, DHS views larger households as more likely to receive public benefits, so larger households will create risk in public charge determinations. The new regulations define household members broadly to include, *inter alia,* the applicant's:

- Spouse;
- All children[61] residing with the applicant or for whom he is providing at least 50% of their financial support, or are listed as dependents on his federal income tax filings; and
- Anyone who provides at least 50% of the applicant's financial support.[62]

Assets, resources and financial status. DHS puts such a strident interpretive spin on this factor that it seems to swallow up the concept of financial sponsorship via the Form I-864. The Department articulates three separate tests, failing any one of which is problematic under this factor.

First, DHS announces a test that mirrors the standard applied to Form I-864 sponsors, although it is even more severe. The test asks whether the applicant's household income:

> …is at least 125 percent of the most recent Federal Poverty Guidelines based on the alien's household size… or if the alien's household's annual gross income is under 125 percent of the recent Federal Poverty Guidelines, whether the total value of the alien's household assets and resources is at least 5 times the difference between the alien's household's gross annual income and the Federal Poverty Guideline for the alien's household size...

The 125% FPG income standard is, of course, the standard that applies to a sponsor executing the Form I-864. Unlike a Form I-864 sponsor, however, the proposed regulations do not offer a lower standard (100% FPG) for active duty personnel.[63] Likewise, just as with a Form I-864 sponsor, the applicant can make up for a shortfall in income with assets "or resources." As with the standard applied for Form I-864 sponsors, the assets or resources must be five times the income

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[60] Although the rule announcement says that DHS will "consider the alien's household size as part of the family status factor," the proposed rules themselves are exclusively concerned with household size with respect to the family status factor. *Announcement*, p. 144.

[61] As defined by INA Section 101(b)(1).

[62] 8 C.F.R. § 212.21(d) (proposed).

[63] Foreign-born active duty personnel will normally already be lawful permanent residents, though there are exceptions such as the ill-fated Military Accessions Vital to National Interest (MAVNI) program.

shortfall. But unlike a Form I-864 sponsor, there is no lower standard (three versus five times) that applies in the case of a U.S. citizen sponsoring a spouse or child.[64]

Under the status quo, most applicants in family-based petitions already meet the above standard. Except in limited circumstances, the U.S. petitioner must meet the 125% FPG income standard by his/her self to serve as the mandatory Form I-864 sponsor. Since the proposed regulations look at household income, an applicant who lives with a sponsor who meets the Form I-864 income requirements will pass the new test. Those requiring a joint sponsor, however are a different story altogether. Essentially, any applicant who requires a joint sponsor not living in his "household" would likely run afoul of the proposed standard per se.

The proposed regulations permit the use of both "assets" and "resources" to make up income shortfall, but it is unclear what would qualify as a resource but not an asset and vice versa.[65] In any event, this new test presents a heightened emphasis on the applicant's earning capacity, above and apart from the income earned by other household members and Form I-864 sponsors.

Second, DHS adds a test that dovetails with the expanded emphasis on the applicant's health. Now, DHS examines whether the applicant has:

> [S]ufficient household assets and resources to cover any reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work…[66]

This rule opens the door to in-depth scrutiny of how applicants will pay for the treatment of any condition in their Medical Examination (whether Class B or otherwise) or otherwise identified. For any serious medical condition, the new standard of practice may require a professional evaluation to identify the likely treatment course along with documentation of how the family will be able to afford that care. The rules provide no clear standard for what will constitute a "serious" medical condition.

Finally, DHS adds a test to examine whether the applicant "has any financial liabilities or past receipt of public benefits… that make the alien more or less likely

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[64] Form I-864 Instructions (rev'd March 6, 2018), p. 10 ("In order to qualify based on the value of your assets, the total value of your assets must equal at least five times the difference between your total household income and the current Federal Poverty Guidelines for your household size. However, if you are a U.S. citizen and you are sponsoring your spouse or child age 18 years of age or older, the total value of your assets must only be equal to at least three times the difference.").

[65] The separate use of "assets" and "resources" comes from the definition of public charge at INA § 212(a)(4)(B)(IV). To date, use of the term "assets" in the public charge arena stem from its use at INA § 213a in conjunction with the rules on Affidavits of Support.

[66] 8 C.F.R. § 212.22(b)(4)(B) (proposed).

to become a public charge."[67] Intending immigrants who have received monetizable or non-monetizable benefits above the proscribed levels are public charges per se.[68] Hence "receipt of public benefits" here refers to *de minimis* receipt of the programs listed at proposed 8 C.F.R. § 212.21(b). More halting than the mere text to this new standard is the expansive evidence that DHS will consider. The proposed rule will consider the following evidence, which presumably will either be required for the new Form I-944 or will be requested via RFE on a case-by-case basis:

- 12 months of documentation pertaining to "cash assets" such as deposit accounts;
- Documentation of non-cash assets, such as real estate, that may be converted to cash within 12 months;
- Prior applications for public benefits;
- Documentation of approval for public benefits;
- Credit report; and
- Documentation of private healthcare.[69]

It appears that a credit report will be mandatory initial evidence for the Form I-944.[70] Whether all undocumented applicants will be able to obtain a credit report is unclear.[71] Even in the strongest case, this documentation imposes a significant burden on applicants and their counsel. In weaker cases, the extensive documentation provides DHS with a vast array of material in which to identify a toehold that would support a negative public charge determination.

The preliminary draft of the proposed rules leaked in April 2018 took specific aim at those who received subsidized healthcare under the ACA.[72] Those express references to the ACA have been stripped from the proposed rules signed by the DHS Secretary. It is noteworthy, however, that applicants may be asked for proof of "private" health insurance in connection with the Form I-944.[73] This wording leves open the possibility that USCIS might consider insurance under the ACA to be other than "private" and thus problematic.

Education and skills. DHS will now examine whether an applicant has "adequate education and skills to either obtain or maintain employment sufficient to avoid becoming a public charge, if authorized for employment."[74] At first blush one might read this standard as applying only to applicants who *already* hold work authorization in the U.S "if authorized for employment"). But since the rule speaks

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[67] 8 C.F.R. § 212.22(b)(4)(C) (proposed).

[68] 8 C.F.R. § 212.21(a) (proposed). For a discussion, see Section II above.

[69] 8 C.F.R. § 212.22(b)(4)(ii)(I) (proposed).

[70] *Announcement*, p. 342 (identifying the cost of obtaining a credit report as one of the intrinsic costs of the proposed Form I-944).

[71] The author owes this observation to attorney Vicente Omar Barraza.

[72] *See*, *e.g.*, April 2018 Draft Rules, *supra*, p. 53.

[73] 8 C.F.R. § 212.22(b)(4)(ii) (proposed).

[74] 8 C.F.R. § 212.22(b)(5) (proposed) (emphasis added).

of the ability to *obtain* employment if authorized, it should be read as addressing the ability of the applicant to gain or maintain employment once granted adjustment.[75]

To evaluate this test, DHS will look to facts more familiar in employment-sponsored cases. The four evidentiary factors that DHS will consider are:

- The applicant's employment history;
- Whether the applicant has a high school degree or higher;
- Whether the applicant has any certifications or licenses, or can demonstrate occupational skills; and
- Whether the alien is "proficient" in English "or proficient in other languages *in addition to* English."[76]

The infusion of English language proficiency into public charge inadmissibility is a development of potentially enormous consequences. Will proficiency be gauged along the lines of the formal test used at naturalization interviews? Will an interviewing officer have latitude, based on an interview, to make a negative determination on an applicant's proficiency? This is another single factor that could be leveraged for enormous power in the determination of individual cases.

Prospective immigration status and expected period of admission. This standard stems from the fact that DHS now plans to examine public charge inadmissibility for those seeking a change of nonimmigrant status.[77] The proposed suggest that a less onerous standard will be applied to an applicant seeking change of a nonimmigrant status.

Affidavit of Support. The proposed rules identify the Form I-864 Affidavit of Support as one of the "minimum factors to consider" in relation to public charge inadmissibility.[78] In addition to the evidence already considered in connection to the Form I-864, DHS will now consider the sponsor's relationship to the applicant and the "likelihood that the sponsor would actually provide the statutorily-required amount of financial support."[79] The Department of State already considers how the executor of a Form *I-134* Affidavit of Support is related to an applicant.[80] The proposed rule casts the most doubt on adjustment cases requiring a joint sponsor, especially one with an attenuated relationship to the applicant. Considering that a joint sponsor already attests under penalty of perjury that she will provide the required financial support to the applicant, and the joint sponsor will not be present

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[75] That is, the applicant will be "authorized for employment" if granted status as an LPR, in which event DHS examines whether the person will then be able to obtain or maintain employment.

[76] 8 C.F.R. § 212.22(b)(5)(ii) (proposed) (emphasis added).

[77] 8 C.F.R. § 212.22(b)(6) (proposed).

[78] 8 C.F.R. § 212.22(b)(7) (proposed).

[79] 8 C.F.R. § 212.22(b)(7)(i)(C) (proposed).

[80] 9 FAM 302.8-2(B)(2)(f)(3)(c)(ii) (office may consider the "sponsor's relationship to the applicant (e.g., relative by blood or marriage, former employer or employee, schoolmates, or business associate)").

at the adjustment interview, it is unclear what else an adjudicating officer would rely upon to determine whether the joint sponsor will live up to her promise.

B. Heavily weighted negative and positive factors.

Under the proposed rules, a USCIS adjudicator will be charged with examining the blizzard of new public charge standards and related evidence described above. In addition, the proposed rules identify specific circumstances that would weigh "heavily" in a public charge determination. None of these factors, by itself, is supposed to be dispositive.[81]

The proposed rules identify four circumstances as heavily weighted *negative* factors:[82]

- "The alien is not a full-time student and is authorized to work, but is unable to demonstrate current employment, and has no employment history or no reasonable prospect of future employment;"
- The applicant is currently receiving public benefits or is currently "certified or approved" to receive a public benefit;
- The applicant has received one or more public benefit "within the 36 months immediately preceding the alien's application for a visa, admission, or adjustment of status;"
- "The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for him- or herself, attend school, or work; and… The alien is uninsured and has neither the prospect of obtaining private health insurance, or the financial resources to pay for reasonably foreseeable medical costs related to a the [sic.] medical condition;" or
- The applicant has previously been found inadmissible or deportable on public charge grounds.[83]

Conversely, two circumstances would be heavily-weighted *positive* factors;

- The applicant has household assets, resources, "and support" of at least 250% FPG; or
- The applicant is work-authorized and currently employed at or above 250% FPG for her household size.[84]

The first of these heavily-weighted positive factors allows the applicant to benefit from the financial clout of her primary Form I-864 sponsor or another household

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[81] 8 C.F.R. § 212.22(c) (proposed). It is difficult not be skeptical about the disclaimer. The wide net cast by the totality of circumstances factors – in most cases – should provide at least some additional negative material. One might imagine that most cases with a heavily-weighted negative factor will turn out unfavorably in the absence of a strong countervailing consideration.

[82] 8 C.F.R. § 212.22(c) (proposed). No single circumstance is supposed to be dispositive to a public charge determination. *Id.*

[83] 8 C.F.R. § 212.22(c)(1) (proposed).

[84] 8 C.F.R. § 212.22(c)(2) (proposed).

member. To date, practitioners have correctly advised most clients that they will pass scrutiny with respect to financial sponsorship if the sponsor (or joint sponsor) meets the 125% FPG requirement of the Form I-864. That is now no longer the case in view of the totality of circumstances factors discussed above. Nonetheless, it would appear to be the case that sponsors with income at or above *250% FPG* will – absent strong negative factors – get an applicant past public charge scrutiny. A work-authorized applicant making at or above 250% FPG will normally pass muster in her own right under the proposed rules.

IV. $10,000 public charge bonds - the new Affidavit of Support?

The INA itself already gives immigration agencies the authority to require an applicant to post a bond to overcome public charge inadmissibility.[85] Yet in actual practice these bonds are all but unheard of. USCIS does not even currently have a specified process for accepting public charge bonds.[86] The proposed regulations devote substantial space to outlining new processes and standards for these bonds.

DHS intends to use these bonds as a tool to allow the admission of an applicant who is inadmissible on public charge grounds - but just barely so. The bond will be offered to applicants who have no heavily weighted negative factors and have other factors showing self-reliance.[87] The regulations leave open the possibility that posting these bonds will become the new normal in cases with borderline public charge inadmissibility. Note that this gives adjudicators extraordinary leverage over families with modest financial means. Once an adjudicator has located considerations

The possibility of posting a bond may be made available to an adjustment applicant who is determined to be inadmissible on *exclusively* public charge grounds.[88] The applicant may initiate the bond-posting process only once invited to by USCIS.[89] Bond amounts will be a *minimum* of $10,000 and the amount set by USCIS will, under the text of the regulations, be unreviewable.[90]

The bond remains in effect until the applicant formally requests and obtains cancellation of the bond on the basis that she has:

- Become a U.S. citizen;
- Permanently departed the U.S.;
- Died;

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[85] INA § 213. *See* AFM § 61.1; 9 FAM 302.8-2(B)(2)(g).

[86] *Announcement*, pp. 31, 245.

[87] *Announcement*, p. 251. The Department also reserves the ability to look at factors beyond the public charge arena, such as exceptional humanitarian reasons. *id.* at 252.

[88] 8 C.F.R. § 213.1(a) (proposed). *See* INA § 213 (bond is available only if non-citizen is otherwise admissible).

[89] *Id.* ("...DHS may allow the alien to submit a public charge bond…"); 8 C.F.R. § 213.1(b) (proposed) (reserving discretion to invite applicant to submit bond).

[90] 8 C.F.R. § 213.1(b)(2) (proposed).

- Been an LPR for five years; or
- Changed to a non-immigrant status not subject to public charge inadmissibility.[91]

Notably, cancellation of the bond does not simply happen automatically. The non-citizen will be required to file a request and pay an associated filing fee.[92] The non-citizen and bond obligor will have to show both that one of the conditions for termination has been met and also that the non-citizen did not breach the bond by receiving public benefits.[93]

Alternatively, the non-citizen may *substitute* a new bond for the one already submitted to USCIS.[94] Although it does not happen automatically, USCIS may then take action to cancel the original bond.[95]

If public charge bonds become commonplace it would be remarkable against historical context. As discussed above, the legally binding Form I-864 was specifically created by Congress as an enforceable means of holding sponsors financially accountable for the immigrants they sponsor.[96] Sponsors must already shoulder a substantial financial burden that can far outlast a marriage, and the beneficiary may enforce her right to support in state or federal court at the sponsor's expense.[97] USCIS now adds to that - effectively for the first time - the prospect that the same sponsor may be required to post a cash bond of *at least* $10,000.

V. Conclusion: A brave new world for public charge rules.

The proposed rules described in this article have not yet taken effect; indeed, as of the time of writing they have not even been formally published. Nonetheless, practitioners should start now to prepare for their potential impact.

Do not focus on public benefit use to the exclusion of other factors. The proposed rules have received significant attention in the news media because of the expended list of programs that will lead to public charge inadmissibility, including SNAP (food stamps). Yet it would be a mistake for practitioners to focus on their clients' use of public benefits to the exclusion of the much broader "totality of circumstances" factors. First, many of the prohibited public benefits will normally be unavailable to applicants, who will not 'qualified aliens' under PRWORA. Means-tested benefits are generally available only to those who have been lawful permanent residents for five years. Second, the totality of circumstances test simply cast a far, far broader net than merely those receiving public benefits. The new

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91 8 C.F.R. § 213.1(g) (proposed).

92 8 C.F.R. § 213.1(g)(3) (proposed).

93 8 C.F.R. §§ 213.1(g)(4) (proposed), 213.1(h)(2).

94 8 C.F.R. § 213.1(f) (proposed).

95 8 C.F.R. § 213.1(f)(2) (proposed).

96 Section I, *supra.*

97 INA §§ 213A(a)(2), (3).

Form I-944 will serve as a launching point into a deep analysis of an applicant's financial circumstances and income-earning ability. Practitioners will most certainly want to examine public benefit use as a threshold matter, but the heavy-lifting at the case assessment stage will be to make a wholistic appraisal of the factors set forth in the rule.

Any case requiring a joint sponsor will be seriously problematic. At the time of case-initiation, most practitioners screen for whether an adjustment application will need a joint sponsor due to the petitioner's financial circumstances. As a rule of thumb, practitioners should assume that any case that requiring a joint sponsor will be highly problematic under the proposed rules. For starters, DHS is openly skeptical about whether a Form I-864 signed by a joint sponsor should be given much weight. This despite the fact that joint sponsors share joint and several liability with primary sponsors.[98]

Identify clients who could benefit from better financial planning and English language ability. Under the proposed rules, the details of a family's financial situation takes on great new significance in the adjustment process. This includes the applicant's credit score. Practitioners should consider adopting measures in their intake process to assess clients' financial status including credit scores. For some clients, it may be appropriate to direct them to educational material and resources to help them improve their credit score and financial standing. Similarly, applicants now face a ground of inadmissibility predicated in part on English language ability. Practitioners will now want to treat adjustment and change of status applicants' English ability as they would naturalization applicants. Applicants will limited English may need to be referred to community resources. Indeed, as with naturalization applications, limited English ability may become a reason to delay applications until it can be remedied.

Help clients understand what are and are not problematic programs. In the wake of the Department's announcement there will likely be a ripple of fear in immigrant communities about the use of public benefits.[99] This fear is indeed well-founded, but only with respect to programs that count towards the public charge determination as set forth above. For example, early drafts of the proposed rule changes would have considered subsidized healthcare under the ACA a public benefit. The author has already been asked on numerous occasions whether children should be disenrolled from this and other healthcare programs. Practitioners should help their clients and community members clearly identify which programs are and are not considered towards public charge determinations.

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[98] 8 C.F.R. § 213a.2(c)(iii)(C).

[99] Legacy INS promulgated its 1999 guidance in part specifically to prevent misguided avoidance of programs. Field Guidance at 28689 ("The Department decided to publish a proposed rule defining "public charge" in order to reduce the negative public health consequences generated by the existence of 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').

Misunderstandings on this front could lead to life-threatening situations for vulnerable families.

Remember naturalization and beyond. Many applicants may be fearful of candidly disclosing their use of public benefits, even when that fear is built on a misunderstanding of what programs are problematic. Practitioners should push hard on their clients at the consultation stage and beyond to ensure that they are getting a full and accurate understanding of their clients' public benefit use. Especially after the Form I-944 is implemented, applicants will be creating a sworn record of these matters. Any misrepresentation will jeopardize the person's residency status and subsequent ability to naturalize. Indeed, it would seem to be precisely the type of conduct that is currently the target of heightened efforts to pursue denaturalization.