

# Public Charge: DHS, DOS, FAM and Related Issues

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Presented by The Protecting Immigrant Families Campaign  
in collaboration with AILA, MLRI, and ILRC



AILA Doc. No. 19050634. (Posted 11/7/19)



Disclaimer: This PowerPoint, presented for a training with PIF on 11/1/19, is intended for educational use only.

# Disclaimer

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- This presentation does **not** constitute legal advice
- Analysis presented in this slide deck is subject to change, especially depending on any changes that happen as a result of the litigation
- If you have questions about public charge generally, check out the PIF webinar “Public Charge 101” or PIF’s basic update “What Advocates Need to Know”

# Goals for Today

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Attendees will learn:

- Latest developments in public charge litigation
- Strategies for screening clients vis-a-vis public benefits eligibility and public charge exemptions
- Techniques for assessing “totality of circumstances” factors
- Key messages to share with clients.

# Layout of Materials

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- Litigation Tracker
- Cash, Food Stamp/SNAP Eligibility Chart
- Potential Implications Chart
- Totality of Circumstances Worksheet
- Benefits Determination Sheet
- Self-Sufficiency Worksheets

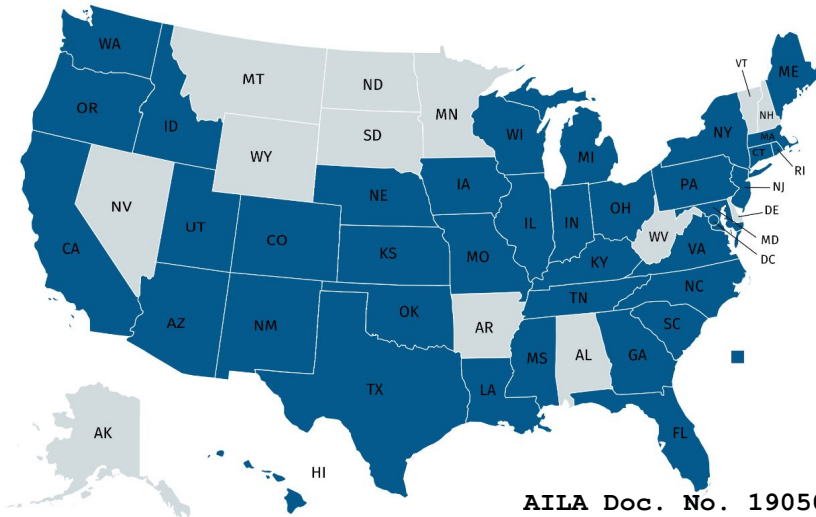
# Roadmap

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1. State of play
2. Overview of DHS and DOS public charge rules
3. Public benefit eligibility and public charge exemptions under each rule
4. DOS rules: Adjustment & Consular Processing now
5. DHS and DOS: Weighing the totality of circumstances factors
6. Filling out new forms
7. Hypotheticals
8. Recap and key takeaways
9. Q&A Session

# What is the PIF Campaign?

To unite to protect and defend access to health care, nutrition programs, public services and economic supports for immigrants and their families at the local, state and federal level.



- Created in 2017 and co-chaired by NILC and CLASP
- More than **400 Active Member Organizations** in **40 states!**
- We're happy to connect you with partners in your state that are working on these issues.

# [www.protectingimmigrantfamilies.org](http://www.protectingimmigrantfamilies.org)



## "Public Charge" Regulation **BLOCKED** by the courts

**Update (10/11/19):** Multiple federal courts have blocked President Trump's Public Charge regulation from going into effect on October 15. This racially-motivated "wealth test" rigs the rules against immigrants and their families who are on the pathway to a green card.

Families should continue to use the services for which you are eligible without fear. [See how "public charge" will impact you based on your immigration status, and what you should do.](#)

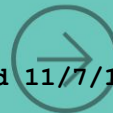
### KNOW YOUR RIGHTS

Learn more about what these immigration policies mean for you and your community



### RESEARCH & ANALYSIS

Explore more detailed information and data



### TAKE ACTION

Help us fight the Trump administration's public charge regulation



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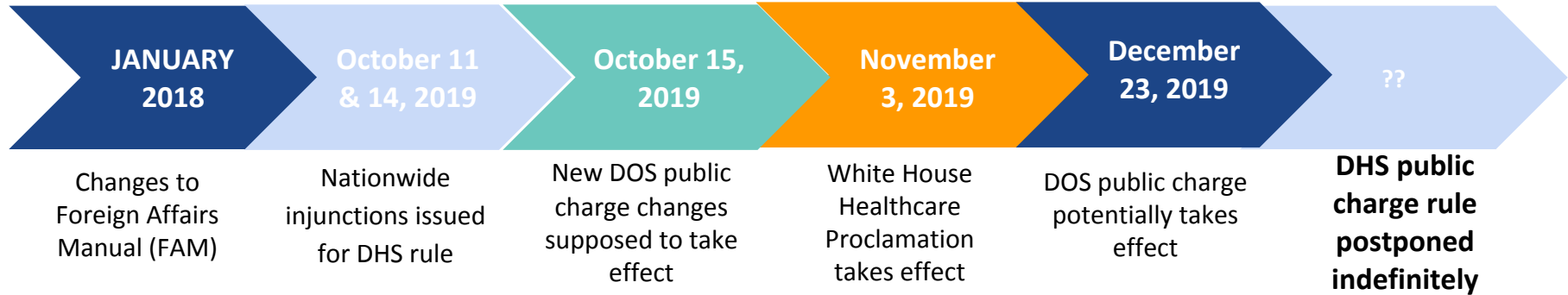
# **PART 1**

## **PUBLIC CHARGE STATE OF PLAY**

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# Public Charge: Timeline



- The DHS rule was scheduled to take effect on **October 15**.
  - Postpones the October 15 effective date **indefinitely**
  - Prohibits DHS from using new DHS forms related to public charge (I-944)
  - Prohibits DHS from considering **any** of the factors in the new rule
    - DHS prohibited from implementing or enforcing the rule “in any manner or in any respect and shall preserve the status quo”

# State of Play

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## **DHS Final Rule:** inadmissibility as applied to adjustments

- [Lit Tracker](#)
  - 9 lawsuits (in CA, WA, NY, MD, IL)
  - Nationwide Preliminary Injunctions issued in NY, WA, and MD
  - Limited Injunctions issued in CA, IL
  - One additional lawsuit on the forms, filed in DC by AILA
- The government moved to stay the injunctions (10/25/2019)
- Government filed notice of Interlocutory Appeal (10/30/2019)

# State of Play

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**DOS Interim Final Rule:** inadmissibility relating to visas and consular processing

- *Was supposed* to become effective on October 15
- 2 public comment periods:
  - Interim final rule: 30 days, ending **November 12**
  - DS-5540: 60 days, ending **December 23**

# State of Play

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## White House Healthcare Proclamation:

- For people seeking immigrant visas abroad: denies admission if one is unable to show that he/she will be covered by certain insurance products within 30 days after entering the U.S. or have the financial resources to pay out-of-pocket for “reasonably foreseeable medical expenses.”
- Issued on October 4; Effective date: **November 3**
- Lawsuit filed on 10/30 challenging this Proclamation

## DOJ NPRM: governing deportability

- OMB meetings concluded on **October 18**
- Awaiting a potential rulemaking and possible 60-day public comment period

# Which Public Charge Standard Applies

## Consular Processing

- Consular processing immigrant visa cases pending by December 23, 2019 - *Jan 2018 revised FAM on public charge*
- Consular processing immigrant visa cases pending after December 23, 2019, unless DOS regulation or form are further delayed - *DOS Interim Rule*

## USCIS

- Nonexempt AOS cases currently pending before USCIS - *1999 Legacy INS Public Charge Guidelines still apply*
- Future nonexempt AOS cases to be filed with USCIS, *if* injunctions are lifted or amended & DHS Final Rule goes into effect - *DHS Final Rule unless modified by any court decrees*

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## AOS Applications Before EOIR

- *BIA case law, unless new DOJ rule is promulgated (INS 1999 Guidelines & DOS Final Rule not binding but may be persuasive authority)*

# Direct & Indirect Effects

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- **Directly affected individuals (DHS + DOS)**
  - Certain working class non-citizens who are applying for admission to the country or adjustment to LPR status
  - Certain non-immigrant visa holders who seek an extension of their visa or another non-immigrant status
- **Broader population of people subject to “chilling effect”**
  - Fear extends to people who are not subject to public charge
  - Fear extends to benefits not considered in public charge test
  - Fear and uncertainty may prevent immigrants from using the programs their tax dollars help support, preventing access to health care, nutritious food and secure housing

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# **PART 2**

## **PUBLIC CHARGE RULES OVERVIEW**

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# Public Charge Rules: Overview

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- DHS Public charge rule is about “**admissibility**”
  - Distinct from a “deportability” rule which DOJ intends to propose
    - See ILRC’s practice guide on public charge as a ground of deportability at: <https://www.ilrc.org/public-charge-ground-deportability>
- DOS is also about “**admissibility**”
  - applies to individuals applying for admission from outside of the US
- Currently, there is no DOJ public charge regulation about inadmissibility for EOIR/immigration judges
  - BIA case law interprets public charge statute



# “Public Charge” Definitions

## Current DHS and DOS Definition

A “public charge” is someone “likely to become primarily dependent on the government for subsistence.”

## Future DHS and DOS Definition

A “public charge” is person who “receives *one or more* public benefits... for more than 12 months in the aggregate within any 36-month period”... such that receipt of two benefits in one month counts as two months.

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# **PART 3**

## **PUBLIC BENEFIT ELIGIBILITY & PUBLIC CHARGE EXEMPTIONS**

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# Correlating Status & Public Benefits:

## Who is Subject to Public Charge & Who is Eligible For Benefits?

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### LPRs:

- Eligible for most benefits, federal or state, cash or noncash
- DHS current Guidance or Final Rule applies, *upon triggering readmission*
  - unless **exempt** from public charge

### Applicants for Adjustment of Status (AOS):

- generally ineligible for federal cash benefits unless applying via certain AOS pathways but may be eligible for state cash benefits, depending on state
- DHS current Guidance or Final Rule applies (& BIA case law for AOS before EOIR)
  - unless **exempt** from public charge

**Others seeking status *in U.S.*: eligibility and applicable rules/exemptions vary**

# Statuses: Who is Affected by DHS Rule?

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- Returning LPRs who trigger an admission & AOS applicants who are subject to INA 212(a)(4)
- The benefits aspect of the enjoined DHS Final Rule also affects nonimmigrant visa holders who seek change/extension of status here after having receiving covered benefits, if not exempt from public charge
  - See 8 CFR § 212.20 (scope), § 212.23 (exemptions), § 214.1/248.1 (nonimmigrants)
- But: most non-immigrants are ineligible for federal or state cash benefits (& the federal benefits to be added by DHS & DOS rules)

# Status & Exemptions

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- Numerous statutory provisions expressly exempt categories of noncitizens from INA § 212(a)(4) - see *Potential Implications Chart*
- The enjoined DHS Final Rule lists only 27 exemptions [8 CFR § 212.23] as well as a “catch-all” if “exempt under any other law from the public charge ground of inadmissibility”:
  - Non-AOS statuses listed include: asylum/refugee, TPS, Registry, T and U nonimmigrants, & a few special nonimmigrants (A, C, G, NATO)
  - Multiple categories of AOS are listed, but effect of exemption varies depending on whether or not adjusting directly via an expressly exempt pathway
- DOS 10/15/19 Rule incorporates exemptions provisions of the enjoined DHS Final Rule - *guidance to follow??*

# “Super exemptions” under DHS Final Rule

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8 CFR § 212.23(a)(18), (19), (20), (21):

These are exemptions for **T & U** nonimmigrants, **T applicants with prima facie case, “VAWA self-petitioners,”** & subset of “**Qualified Aliens**”

- They are exempt from Final Rule regardless of “immigration benefit” sought for which admissibility is required (& regardless of AOS pathway taken, if AOS is the immigration benefit sought)
- Also: “VAWA self-petitioners” is a term of art defined at INA § 101(a)(51) that includes CAA, HRIFA, NACARA, & special rule cancellation beneficiaries as well as actual self-petitioners & DV victim beneficiaries of I-130s

# Other AOS exemptions Under INA & DHS Final Rule

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- Exempt when adjusting via the following pathways (but arguments exist that exemption should be broader):
  - AOS as an asylum/refugee
  - SIJ
  - Special country-specific adjustments (e.g., Afghani/Iraqi, Lautenberg Vietnam /Cambodia/Laos, Polish/Hungarian)
  - AOS under Nat'l Defense Authorization Act 2003 (posthumous benefits)

# Others Not Subject to Public Charge Inadmissibility Ground

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Not listed as exempt under DHS Final Rule, but public charge also does not apply to these statuses under INA (could fall under catch-all):

- Parole
- Withholding of Removal
- Cancellation of Removal



# Public Charge Inadmissibility does NOT apply to:

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- Naturalization
- DACA & Medical Deferred Action
- Old “212(c)” waivers

# What Benefits Matter & Who's Eligible?

*See Benefits Determination Sheet & NILC Eligibility Chart!*



- Cash benefits for income support:
  - **Federal cash**: SSI & TAFDC/TANF (“welfare”) - “Qualified Aliens” under 8 U.S.C. § 1641 (“Q.A.s”) *[See Implications Chart]*
  - **State cash**: varies by state but often “lawfully present” or “PRUCOL” standard applies - which may include many statuses and/or applicants for status
- Noncash benefits under enjoined DHS Rule & DOS\* Rule are: federal non-emergency Medicaid, federal SNAP (food stamps), & federal public & Section 8 housing. Eligible: Q.A.s, plus 2 more categories for housing *[See Implications Chart]*

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*\*But potentially different treatment under FAM*

# Correlating Exemptions & Benefits Eligibility

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[See Implications Chart!]

- The benefits aspects of DHS Final Rule *directly* affect non-citizens eligible for such benefits but “likelihood” of receiving such benefits in future under TOC test may affect many more
- Most Q.A.s who are eligible for federal cash benefits & federal noncash benefits to be added by DHS Final Rule & DOS Rule are exempt, but some Q.A.s are not expressly recognized as exempt by these 2 rules:
  - **Parole**
  - **Withholding of Removal grantees**
  - **Certain Cuban-Haitian Entrants** (“CHE”s) not exempt via other provisions (e.g. CHEs in removal)
- Since eligibility for state cash benefits may be broader than Q.A.s, depending on state law, more eligible noncitizens who are not exempt are potentially affected - regardless of which public charge standard applies

# Understanding a client's benefits

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- How can you tell what kind of benefits your client is receiving?
- Varies by benefits program - e.g., what is “Medicaid” in your state?

***But:*** if client is receiving a benefit that isn't covered by any public charge standard (**see *Determining Benefits Chart***), then that benefit will not be considered adversely.



# Federal “Medicaid” vs. Emergency, State or Other Healthcare not Covered by DHS Final Rule/DOS Rule

**Generally:** non-Q.A.s are generally eligible only for emergency Medicaid or state funded or other health care not covered by DHS/DOS Rules.

See Implications Chart regarding who’s eligible for federal Medicaid

**To find out what kind of health care it is:**

- This is state-specific, so work with health advocates in your state to determine easiest way to clarify this
- E.g., in MA, call “Healthcare for All” hotline 800-272-4232

# Housing

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- **Primary source:** Review the lease
- **Contact:** Your client's landlord, the lease, the local housing authority in order to determine whether this is state or federal housing or an excluded federal housing program.



*See Determining Benefits Chart*

## Some benefits covered by DHS Final Rule (& DOS Rule, if the noncitizen lived in U.S. in past & received them) won't count:

- 1) Noncash benefits received before the effective date
- 2) Medicaid benefits received by a pregnant woman or child under 21
- 3) Cash or noncash benefits received while in one of the 27 listed exempt groups
- 4) Cash or noncash benefits received as a member of the military or spouse/child of one (see correction to DHS Final Rule)
- 5) Benefits received/to be received by certain children of U.S. citizens acquiring citizenship or adopted

(*See Implications Chart* for arguments that exception #3 extends more broadly than to the mere receipt of benefits while in an exempt status.)

## Also: many federal & state benefits available to immigrants are NOT COVERED by DHS Final Rule or DOS Rule\*

For example:

- Social Security retirement benefits
- Family Medical Leave Act (FMLA)
- OASDI (old age survivors disability insurance)
- Unemployment
- State Medicaid
- Ryan White Program benefits
- HOPWA
- McKinney Homeless
- WIC
- Shelters & Food banks

See ***Benefits Determination Chart***  
for more

\*For DOS treatment of noncash benefits under FAM as “just one data point” in whether person is “likely to resort to public cash assistance,” see AILA-DOS liaison minutes 4/12/18. For helpful BIA case distinguishing public support to needy from essentially supplementary benefits, see *Matter of Harutunian*, 14 I&N Dec. 583 (1974).  
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# Benefits Message:

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- Most immigrants should KEEP their benefits
- Benefits generally *improve* immigrants' future self-sufficiency - *see Self-Sufficiency Checklists* regarding questions to ask clients



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# **PART 4**

## **ADJUSTMENT & CONSULAR PROCESSING NOW DOS RULES**

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# Who Needs to Consular Process?

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1. People already outside the U.S. who apply for a visa to come to the United States
2. People in the U.S., applying to become permanent residents, but who do not qualify to go through the process in the U.S. Some people have to leave the U.S. to finish the process to become a permanent resident.

# Who Does NOT Need to Consular Process?

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People already in the U.S. who:

1. Are eligible to adjust status in the U.S. via a family petition, and who were inspected and admitted or paroled into the U.S., and who are not barred under INA 245(c), OR who are eligible to adjust status under INA 245(i)
2. Are applying for or adjusting under a specific statute:
  - a. Asylum
  - b. U visa
  - c. T visa
  - d. Self-petitioners under the Violence Against Women Act (VAWA)
  - e. Special Immigrant Juvenile Status
  - f. Many others!

# Who Needs to Consular Process?

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Nico entered the United States 10 years ago without papers. Nico crossed through the desert and did not go through a checkpoint. Nico is now married to Kris, a USC. Kris petitions for Nico to become a permanent resident so that they can live together in the United States.

**Can Nico adjust status in the U.S.?**

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# Who Needs to Consular Process?

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Can Nico adjust status in the U.S.?

**No.** Nico must leave the United States to complete the immigrant visa process at the consulate because Nico entered “without inspection.”

# Rules: FAM and DOS IFR

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Foreign Affairs Manual	Interim Final Rule (IFR)
Last revised in January 2018	Published in Federal Register on October 11, 2019
Will be <u>implemented by DOS until December 23, 2019</u> (when DS-5540 is approved for new IFR) or possibly later	Effective date is October 15, 2019, but <u>DOS has delayed implementation</u> until DS-5540 is approved by OMB

# About the Foreign Affairs Manual (FAM)

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- FAM rules for public charge apply to family members who are immigrating to the U.S. by applying for their residency (“green card”) from **outside** the US.
- The FAM maintains the current definition of public charge as “a person who is likely in the future to rely on cash assistance for monthly income or government funded long-term care”.
- However, it changes how officers evaluate an affidavit of support from sponsors and joint sponsors, and considers use of non-cash benefits by applicants, sponsors, and family members.



# About the DOS Rule

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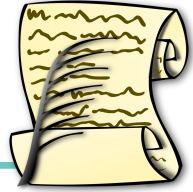
- The Department of State issued an interim final rule (IFR) on public charge, intended to take effect on October 15, 2019. DOS issued the rule to align with the DHS rule that has been blocked by the courts.
  - DOS has delayed implementation of the IFR because it has no forms yet to implement this rule.
- This new IFR will override the changes to the FAM

# About the DOS Rule

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- According to the DOS website, this IFR will take effect December 23, 2019.
- Comment period on the DOS rule ends on NOVEMBER 12, 2019. We will need your organizations to help submit comments against this rule.
- Anyone who will apply for status from **outside** the US, or needs to leave the US in order to get their visa should obtain a detailed screening from an attorney.

# Healthcare Proclamation



- Effective **November 3, 2019**
- Applies to all immigrants applying for visas at consulates abroad with the intention of living in the US permanently, including parents and spouses of US citizens and the immediate family members of lawful permanent residents.
  - **Limited exceptions:** immigrants who already have a valid visa, children of US citizens, unaccompanied children, permanent residents who are seeking reentry, and recipients of “special immigrant visas” for Afghans and Iraqis.
  - The administration can make additional exceptions on a case-by-case basis.
- An immigrant must prove that they will obtain health insurance within 30 days of their arrival in the US.
  - Otherwise, must demonstrate that they have the financial resources to pay for medical expenses.
- No clear procedures for **individual consular officers** to determine whether immigrants meet the proclamation’s requirements
- There was a lawsuit filed on 10/30/19 against this proclamation

# Healthcare Proclamation Effect

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- According to the Migration Policy Institute, **31 percent of green card holders have health care benefits that don't count as insurance under the proclamation**, including Medicaid or insurance purchased with subsidies on an Affordable Care Act exchange.
- Families don't stop qualifying for individual insurance subsidies until they have a household income that is [at least four times the federal poverty line](#), or over \$103,000 for a family of four and nearly \$50,000 for an individual. That's a threshold that is hard to clear for all but the wealthiest immigrants: The median income for a US immigrant household was \$56,000, according to the [Pew Research Center](#).
- Immigrants with job offers will have an easier time, as they will likely have health insurance through their employer.
- Proclamation will push immigrants to buy short-term or visitor insurance policies, which generally don't cover pre-existing conditions, and often have caps or limits on benefits

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# **PART 5**

## **DHS & DOS**

### **WEIGHING TOC FACTORS**

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# Public Charge Test is Future Looking

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- Immigration officials look at a person's circumstances to determine if a person is likely at any time in the ***future*** to become a public charge



# Totality of Circumstances (TOC) Test

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- The test for public charge does not **only** consider benefits, but includes a weighing of the total circumstances
- No one factor alone should make someone a public charge
- Determine which factors should be considered determined by whether you are processing through:
  - The consulate applying DOS rules
  - Adjusting status in the U.S. with DHS rules
  - Before the Immigration Judge in EOIR (no regulations but BIA case law applies, and persuasive authority can be found in INS 1999 Guidelines and DOS Final rule)

# TOC factors: DHS

(enjoined)

## Age 8 C.F.R. § 212.22(b)(1)(i)

- Age is a negative factor if the applicant is under 18 or over 61

## Health 8 C.F.R. § 212.22(b)(2)

- Health issues that might affect employment, school, or the applicant's ability to provide for themselves or dependents
- A health issue that needs extensive medical treatment
- Future medical expenses
- Private health insurance that would cover needed medical treatment

## Household Status 8 C.F.R. § 212.22(b)(3)(i)

- Number of dependents for whom the applicant would have financial responsibility.
- **Note:** assumption is many dependents may be a negative factor.

## Income and Assets 8 C.F.R. § 212.22(b)(4)(i)

- Applicant's income (is it above 125% of the FPG?)
- Whether the applicant has sufficient income / assets to cover any "reasonably foreseeable" medical costs
- Receipt of listed benefits
- Credit score
- Liabilities, such as mortgages, credit card debt, or unpaid child support

## Education and Skills 8 C.F.R. § 212.22(b)(5)(i)

- Length of employment
- Frequency of job changes
- Employment plans and job offers
- English proficiency
- Level of education, certificates, and degrees
- Caregivers are exempt

## Prospective Status 8 C.F.R. § 212.22(b)(6)

- Focus on the duration of intended stay

## Affidavit of Support 8 C.F.R. § 212.22(b)(7)

- Adding in a "determination" of whether a sponsor is likely to support the client, based on:
- Close relationship or no familial relationship to the client
- Whether they live in the same house
- Whether the sponsor has sponsored others in the past



# TOC factors: DOS Differences

## **Age** 22 CFR § 40.41(a)(1)

- Clearer that an applicant's age under 18 or above 61 is a negative factor

## **Health** 22 CFR § 40.41(a)(2)

- Same as DHS reg

## **Household Status** 22 CFR § 40.41(a)(3)

- Same as DHS reg

## **Income and Assets** 22 CFR § 40.41(a)(4)

- Income thresholds the same as in the DHS regulation
- Receipt of listed benefits is the same as DHS regulation but in the DOS regulation, receipt of benefits after October 15 could *possibly* be counted
- Also, 22 CFR § 40.41(c)(3) excludes benefits received while exempt under the enjoined DHS regulation 8 CFR § 212.23(a) - it is unclear how this will be impacted by the injunction against DHS.
- No consideration of credit score
- Liabilities not defined

## **Education and Skills** 22 CFR § 40.41(a)(5)

- Same as DHS

## **Prospective Visa Classification** 22 CFR § 40.41(a)(6)

- Same focus on duration as in DHS

## **Affidavit of Support** 22 CFR § 40.41(a)(7)

- Guidelines to establish credibility of the affidavit of support not addressed as in the DHS regulation



# Heavily Weighted Factors in the TOC test

DHS 8 C.F.R. § 212.22(b)-(c) & DOS 22 CFR § 40.41(a)(8)

- The regulations differentiate between minimum factors to consider in the totality of the individuals circumstances *versus* heavily weighted factors

- **Positive Factors** (8 C.F.R. § 212.22(c)(2) & 22 CFR § 40.41(a)(8)(ii)):

1. Household income/assets at least 250% Federal Poverty Guidelines ("FPG")
2. Client's income is over 250% FPG
3. Enrolled in private health insurance (w/o ACA tax credits)

- **Negative Factors** (8 C.F.R. § 212.22(c)(1) & 22 CFR § 40.41(a)(8)(i)):

1. Authorized to work but unemployed (exception: if they are a student)
2. Received public benefits for more than 12 months in 36 month period (as defined)
3. Diagnosed with medical condition and low income/assets and/or no private insurance
4. Previously found inadmissible as public charge



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# **PART 6**

## **FILLING OUT NEW FORMS**

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# New USCIS forms are enjoined

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USCIS announcement on the injunction:

<https://www.uscis.gov/greencard/public-charge>

- Applicants should **continue using current versions** of:

<b>I-485</b> , Application for Adjustment of Status	<b>I-129</b> , Petition for Nonimmigrant Worker
<b>I-539</b> , Application to Extend/Change Nonimmigrant Status	<b>I-864</b> , and I-864EZ, Affidavit of Support (and EZ)

- Applicants are **NOT required to submit a Form I-944**, Declaration of Self-Sufficiency while DHS rule is enjoined!

Att. Doc. No. 19050634 (Posted 11/7/19)

FORM ENJOINED  
BY FEDERAL  
COURT -  
DO NOT USE!!



## Declaration of Self-Sufficiency

Department of Homeland Security  
U.S. Citizenship and Immigration Services

USCIS  
Form I-944  
OMB No. 1615-0142  
Expires xx/xx/xxxx

To be completed by an attorney or accredited representative (if any).

<input type="checkbox"/> Select this box if Form G-28 is attached.	Volag Number (if any) <input type="text"/>	Attorney State Bar Number (if applicable) <input type="text"/>	Attorney or Accredited Representative USCIS Online Account Number (if any) <input type="text"/>
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► **START HERE** - Type or print in black ink.

### Part 1. Information About You

1. Your Current Legal Name (do not provide a nickname)

Family Name (Last Name)

Given Name (First Name)

Middle Name

2. U.S. Mailing Address

In Care Of Name (if any)

# I-485

## Application to Register Permanent Residence or Adjust Status

Department of Homeland Security  
U.S. Citizenship and Immigration Services

USCIS  
Form I-485  
OMB No. 1615-0023  
Expires 07/31/2021

### For USCIS Use Only

Receipt

Action Block

#### Section of Law

- |                                     |  |
|-------------------------------------|--|
| <input type="checkbox"/> INA 209(a) | <input type="checkbox"/> INA 249                 |
| <input type="checkbox"/> INA 209(b) | <input type="checkbox"/> Sec. 13, Act of 9/11/57 |
| <input type="checkbox"/> INA 245(a) | <input type="checkbox"/> Cuban Adjustment Act    |
| <input type="checkbox"/> INA 245(i) | <input type="checkbox"/> Other _____             |
| <input type="checkbox"/> INA 245(m) |  |

to be completed by an attorney or accredited representative (if any).

### Public Assistance

61. Have you received public assistance in the United States from any source, including the U.S. Government or any state, county, city, or municipality (other than emergency medical treatment)? ☐ Yes ☐ No
62. Are you likely to receive public assistance in the future in the United States from any source, including the U.S. Government or any state, county, city, or municipality (other than emergency medical treatment)? ☐ Yes ☐ No

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### Illegal Entries and Other Immigration Violations

# New DOS forms

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1. DS-5540, Public Charge Questionnaire
  - ➡ Not required yet - needs approval by OMB
  - ➡ Public comment period until **December 23, 2019**
2. DS-5541, Immigrant Healthcare Questionnaire
  - ➡ Required for immigrant visa applicants on and after **November 3, 2019**

# New Healthcare Questionnaire: DS-5541



U.S. Department of State

OMB APPROVAL NO. 1405-XXXX  
EXPIRATION Date: XX/XX/20XX  
ESTIMATED BURDEN: 10 MINUTES

## IMMIGRANT HEALTHCARE QUESTIONNAIRE

### PART 1 - INFORMATION ABOUT YOU

1. Your Current Legal Name (Do not provide a nickname)  
Family Name (Last Name) Given Name (First Name) Middle Name

### PART 2 - YOUR HEALTH

2. Will you be covered by health insurance in the United States within 30 days of your entry into the United States?

☐ Yes ☐ No

3. If you answered "yes" to Question 2, identify the specific health insurance plan and date coverage will begin.

4. If you answered "no" to Question 2, how do you plan to pay for healthcare for your existing medical conditions in the United States?

### Federal Agency Disclosure and Authorizations

#### PAPERWORK REDUCTION ACT STATEMENT

Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time required for searching existing data sources, gathering the necessary documentation, providing the information and/or documents required, and reviewing the final collection. You do not have to supply this information unless this collection displays a currently valid OMB control number. If you have comments on the accuracy of this burden estimate and/or recommendations for reducing it, please send them to: PRA\_BurdenComments@state.gov.

#### CONFIDENTIALITY STATEMENT

INA Section 222(f) provides that visa issuance and refusal records shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States. Visa records may be disclosed in certain situations, as described in INA Section 222(f), including disclosure to a court as needed in a case pending before the court.

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# **PART 7**

## **HYPOTHETICALS**

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# Public Charge: 3 Steps for Analysis

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## Step 1. Determine If Public Charge Applies:

- **WHO**: Category of Immigration Status?
- **WHAT**: Type of Application?

**\*\*If no public charge test, you're done! Otherwise, move on to Step 2**

## Step 2. Determine Which Rule Applies:

- **WHERE**: USCIS or Consulate Abroad?

## Step 3. Determine How It Will Apply to This Case:

- **HOW**: Positive and Negative Factors, such as receipt of benefits

# Roberto

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Roberto is a 68-year-old man from El Salvador with Temporary Protected Status (TPS). He has been living in the United States for more than 30 years, working in a chicken processing factory and never receiving any benefits. Roberto has several chronic medical conditions including sleep apnea, COPD, diabetes, high blood pressure and lower back pain. Roberto had to reduce his work hours due to his health and only earns \$14,000 per year, enough to pay his rent and utilities. Roberto's daughter recently became a U.S. Citizen and would like to help her father get permanent residence.



# Roberto - Analysis (1/3)

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## Step 1. Determine If Public Charge Applies:

- **WHO**: Category of Immigration Status?

Roberto currently has TPS, which does not make him exempt from public charge necessarily. TPS holders are exempt from public charge when they apply for TPS, but when they are applying to change their status from TPS to permanent residence, public charge applies.

- **WHAT**: Type of Application?

Adjustment of Status or Immigrant Visa through a family-based petition

= public charge inadmissibility applies

# Roberto - Analysis (2/3)

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## Step 2. Determine Which Rule Applies:

- **WHERE**: USCIS or Consulate Abroad?
- Roberto can apply for adjustment of status with **USCIS if he:**
  - lives in the **Sixth or Ninth Circuits**, because TPS is considered to be an “admission” - which allows you to adjust in the U.S.; or
  - traveled and reentered on **advance parole**
- If Roberto lives in another circuit, he does not automatically qualify for adjustment of status, but he could apply for adjustment of status with USCIS and argue that TPS is an admission
- **If not**, he will have to **consular process** abroad

# Roberto - Analysis (3/3)

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## Step 3. Determine How It Will Apply to This Case:

- **HOW**: Positive and Negative Factors

If Roberto applies with **USCIS** while the DHS rule is enjoined, *he will only have to worry about using cash assistance or long-term care.*

- He worked his whole time here and never accessed the 2 items so no public charge finding.
- **Note**: Because his income is so low, he will need a strong affidavit of support from his daughter (I-864) in addition to his Form I864A, and may need a *joint sponsor.*

# Eddie

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Eddie is a 29-year-old graduate student. He works as a student instructor and research assistant to pay for tuition and other expenses, as he's not eligible for federal loans. Eddie was born in Mexico and his mother brought him across the border when he was a small child. He has had DACA since 2012. Eddie married a U.S. citizen (Irma) last year and they have an 8 year old U.S. born daughter with minor learning disabilities and mild anxiety. Irma works as a teaching assistant, earning \$30,000 per year. Eddie's daughter receives Medicaid and his wife has ACA Marketplace Coverage. Irma receives treatment for severe asthma and, last year, went to the emergency room for an asthma attack. Eddie's wife wants to help him obtain lawful permanent residence.



# Eddie - Analysis (1/5)

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## Step 1. Determine If Public Charge Applies:

- **WHO**: Category of Immigration Status?

Eddie currently has DACA, and DACA applicants do not have a public charge test applied when they apply or renew DACA, but public charge will apply if he seeks lawful permanent residence through a family-based petition through his spouse.

- **WHAT**: Type of Application?

Adjustment of Status or Immigrant Visa through a family-based petition

= public charge inadmissibility applies



# Eddie - Analysis (2/5)

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## Step 2. Determine Which Rule Applies:

- **WHERE**: USCIS or Consulate Abroad?
  - Because Eddie was brought across the border and has not been admitted or paroled into the US, he will have to **consular process** (unless he qualifies to adjust status under 245 (i))
  - Eddie will either be subject to the FAM or the DOS interim final rule (IFR), if his interview is after the IFR goes into effect (anticipated 2020)
  - Remember! Under the new proclamation, he will also need proof of health insurance!

# Eddie - Analysis (3/5)

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## Step 3. Determine How It Will Apply to This Case:

- **HOW**: Positive and Negative Factors **if FAM is in effect**
  - **Use of public benefits/assistance** by Eddie and his family
    - Whether Eddie used cash aid or long-term institutionalized care paid for by Medicaid
    - **Whether Eddie's family uses any "public assistance" is "relevant"**
  - **Being a low-income family**, whether or not Eddie or Irma receive benefits, will make a case more challenging, but not impossible.
  - DOS might use **Irma's asthma** to find that she will not be likely to provide financial support to Eddie and find affidavit of support insufficient
    - **May need a joint sponsor**
  - Explore **age, health, income, insurance, other factors** and document them

# Eddie - Analysis (4/5)

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## Step 4. Determine How It Will Apply to This Case:

- **HOW**: Positive and Negative Factors **if IFR is in effect**
  - Whether Eddie uses any **public benefits** that are listed in **22 CFR § 40.41(c)**
    - But! DACA recipients and most undocumented immigrants do not qualify for most of the public benefits listed in the rule
    - Are those benefits in the Eddie's name? If a relative receives a listed benefit, it won't count.
  - **Being a low-income family**, whether or not Eddie receives benefits, will make a case more challenging, but not impossible.
  - What about **age, health, income, insurance, and other factors**? Explore all relevant factors and how to document them.

# Eddie - Analysis (5/5)

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NOTE: Eddie would be eligible to apply for **cancellation of removal** under **INA § 240A(b)** if he ends up in removal proceedings:

- ✓ Not subject to public charge
- ✓ Has been here 10 years with good moral character
- ✓ Has a U.S. citizen spouse or child who would suffer “extreme and exceptionally unusual hardship” if Eddie is removed (i.e. severe asthma, anxiety and learning challenges)
- ✓ Can continue renewing DACA without worrying about public charge
- ✓ Could try consular processing later if he loses before the immigration judge but will have to face the removal bar

# Kareena

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Kareena has been living in the United States as a green card holder (LPR) for the past 12 years. She is 72 years old and recently retired from her job as a cashier. Kareena receives Medicare and Medicaid. Kareena's sister recently became ill and she wants to travel back to India for a few months. Kareena is worried that if she leaves, she won't be able to come back to the United States to be with her son and grandchildren.



# Kareena - Analysis (1/3)

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## Step 1. Determine If Public Charge Applies:

- **WHO**: Category of Immigration Status?

Kareena currently is a permanent resident and is not subject to public charge inadmissibility unless she spends more than 180 consecutive days outside of the U.S. and seeks to reenter.

- **WHAT**: Type of Application?

If Kareena spends **180 days or less outside of the U.S.**, she will not be asking for any type of immigration benefit, and

**will NOT be subject to public charge!!**

# Kareena - Analysis (2/3)

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## ALTERNATIVE Step 1. Determine If Public Charge Applies:

- **WHAT**: Type of Application?

If Kareena spends more than **180 days outside of the U.S.**, she will be seeking to be readmitted as a permanent resident, and

**will be subject to public charge**

# Kareena - Analysis (3/3)

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## Step 2. Determine Which Rule Applies:

- **WHERE**: USCIS or Consulate Abroad?

The CBP officer will apply the **USCIS** current definition of public charge if Kareena spends more than 180 days outside of the U.S.

## Step 3. Determine How It Will Apply to This Case:

- **HOW**: Positive and Negative Factors

Because the current **USCIS** definition applies, Kareena **will only have to worry about using cash assistance or long-term care - neither of which she used, so she would not be found to be a public charge**



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# **PART 8**

## **RECAP AND KEY TAKEAWAYS**

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# Public Charge: Takeaways

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- *Differences in DHS, DOS, and FAM standards*
- *Very few affected people* qualify for the defined “public benefits”
  - Public benefits that **most** affected people qualify for are NOT “public benefits” under the rule, OR
  - They belong to exempt categories of status, OR
  - The public charge rule just doesn’t apply to them (e.g.: green card holders, family members)
- *Non-cash Benefits* received prior to now may **not** be considered under the DHS final rule and arguably not under the DOS rule either - but FAM does consider them.
- *Prospective* determination
- *Focus on income/assets* may be more significant than public benefits

# Key Messages

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- DHS rule currently enjoined and DOS rule delayed
- Most immigrants should keep their benefits!
- Avoiding benefits does NOT mean you will pass the public charge test
- We will continue to fight against the many attacks on immigrants and their families.

# Questions?

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