AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

Biden Administration Announces Limited Immediate Change to Public Charge Rules

By AILA's USCIS HQ (Benefits Policy) Committee[1]

The Trump administration expanded the application of the public charge ground of inadmissibility, INA §212(a)(4)(A), to unprecedented levels never seen in the administration of U.S. immigration laws.[2] On Tuesday, February 2, 2021, President Biden issued an Executive Order (EO) entitled, "Restoring Faith in our Legal Immigration System and Strengthening Integration and Inclusion Efforts for New Americans," which only makes one immediate change related to the public charge ground of inadmissibility. That change is the revocation of the Trump Presidential Memorandum dated May 23, 2019 entitled, "Enforcing the Legal Responsibilities of Sponsors of Aliens" regarding the enforcement of legal responsibilities of the sponsors of foreign nationals under INA §213A [hereinafter PM 213A] as to the financial support provided to a sponsored foreign national, if the sponsored foreign national applies for or received means-tested public benefits. This change is noted in Section 6 of President Biden's EO. It is not one of the provisions that has caused the inadmissibility denials under INA §212(a)(4)(A), which greatly increased under the Trump Administration.

Immediate Change – May 23, 2019 Presidential Memorandum (PM 213A) Revocation

PM 213A was issued by President Trump on May 23, 2019 to address the perceived failure of agencies not to enforce the requirements of INA §213A to require sponsors to reimburse the government when triggered. The provisions of INA §213A include exceptions for foreign nationals, who have been battered or subjected to extreme cruelty (8 USC. §1631(f)) or who would be unable to obtain food and shelter without the public benefits (8 USC §1631(e)), for children and pregnant women who are lawfully residing in the U.S. and receiving medical assistance from a State under the Children's Health Insurance Program or Medicaid (42 USC §1396b(v)(4)), and for individuals receiving SNAP benefits who are members of the sponsor's household or are under 18 years old (7 USC §2014(i)(2)(E)).

President Biden's February 2 EO requires the heads of relevant agencies to suspend, as appropriate, any investigations or compliance actions under PM 213A that are inconsistent with section 1 of the EO requiring federal agencies to: " develop welcoming strategies that promote integration, inclusion, and citizenship, and it should embrace the full participation of the newest Americans in our democracy." In addition, the heads of the relevant agencies are required to issue revised guidance as to the enforcement of INA §213A in light of section 1 of the EO.

[1] Special thanks to Committee members Kathleen Campbell Walker and Rob Cohen for their contributions to this practice pointer.

[2] *See* AILA Featured Issue: Public Charge Changes at USCIS, DOJ, and DOS, AILA Doc. No. 19050634 (Posted 1/4/2021).

AILA Doc. No. 21020433. (Posted 2/10/21)

Immediate Review – Public Charge

By April 3, 2021, the EO requires the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the heads of other relevant agencies, as appropriate, to review all agency actions related to the implementation of the public charge ground of inadmissibility under INA §212(a)(4) and the related ground of deportability in INA §237(a)(5).

Filing Requirements Unchanged

A. Form I-944, Declaration of Self-Sufficiency

The EO **does not** change the current requirements to file a Form I-944, Declaration of Self-Sufficiency, with Form I-485 Adjustment of Status applications. Form I-944 is currently required in all jurisdictions. Although the Ninth Circuit upheld on December 2, 2020, preliminary injunctions against DHS's public charge rule issued by the Northern District of California and the Eastern District of Washington, the preliminary injunctions have **not** taken effect against the DHS public charge rule because the Ninth Circuit has **not** issued a mandate. Instead, on January 21, 2021, the Ninth Circuit granted the government's motion to stay the issuance of the mandate pending resolution of a petition for *writ of certiorari* subsequently filed on January 22, 2021 by the government, and resolution of petitions for writ of certiorari filed in *Wolf v. Cook County* (Seventh Circuit) and *Department of Homeland Security v. New York* (Second Circuit).

This means that as of today, February 4, 2021, the DHS public charge rule remains in effect and that the Form I-944 is currently required in all jurisdictions. Note, however, that if the government moves to withdraw its *certiorari* petitions or the Supreme Court declines to hear the cases, **the mandates will likely issue** and the injunctions against the implementation of the public charge rule would once again become effective. AILA will continue to monitor the litigation and update members as soon as more information becomes available.

At present, members report the receipt of Requests for Evidence (RFE) when the Form I-944 was not submitted in the past due to court injunctions, but until the Biden Administration announces any further changes, members must submit the I-944 with their adjustment applications as of February 24, 2020.[3] As to the issue of what level of documentation is necessary to be submitted with the I-944, we are not currently receiving reports of Notices of Intent to Deny issued for I-485 applications based on limited support documents submitted. We hope this current experience remains the same while the "review" of public charge rules and policies is ongoing.

B. DS-5541, Immigrant Healthcare Questionnaire

The EO does not impact the Health Insurance Proclamation (Presidential Proclamation 9945), a Trump era proclamation, which requires immigrant visa applicants to demonstrate they can acquire health insurance within 30 days of entry or have the ability to pay for their foreseeable healthcare costs. The Department of State (DOS) proposed Form DS-5541 to verify IV applicants complied with this insurance requirement. However, Presidential Proclamation 9945 **remains enjoined** at this time based upon two separate challenges to the Proclamation. In *Doe v. Trump*, the District

[3] https://www.uscis.gov/i-944.

Court enjoined the enforcement of the Proclamation. Although the Ninth Circuit issued a decision to stay this injunction (and permit the enforcement of the Proclamation), the Court has not issued a mandate to implement its decision. This leaves in place the lower court's injunction, pending the plaintiffs' motion for *rehearing en banc* which will delay the mandate until the court decides whether to rehear the case.[4] Proclamation 9945 also remains enjoined because the Federal District Court in New York, in *Make the Road NY et al. v. Pompeo*, issued a separate injunction against the Proclamation as well as DOS' version of the public charge rule.[5] That injunction remains in place.

C. DS-5540, Public Charge Questionnaire

DOS announced on August 7, 2020, that it **would adhere to** the injunction issued by the U.S. District Court for the Southern District of New York and therefore, would not require Form DS-5540. DOS noted that the Court order enjoined the Department from "enforcing, applying, implementing, or treating as effective" the Department's October 2019 interim final rule and accompanying Foreign Affairs Manual (FAM) guidance related to the public charge ground of visa ineligibility.[6] Since the government did not appeal this decision, the injunction remains in place and the DS-5540 is not required.

In addition, DOS rescinded its prior Foreign Affairs Manual (FAM) guidance as to the application of the public charge ground of inadmissibility contained in 9 FAM 302.8 and is applying the prior version of that provision. It posted the following notice, as of October 1, 2020, at the top of 9 FAM 302.8:

> *Note: The U.S. District Court for the Southern District of New York, in Make the Road New York et al v. Pompeo et al, has issued a preliminary injunction on July 29, 2020, enjoining the Department of State's October 2019 interim final rule and January 2018 FAM guidance on public charge. As a result of this ruling, the Department has rescinded the FAM guidance previously in 9 FAM 302.8 and replaced it with the revised version below. You should not rely on or refer to prior FAM guidance in evaluating the public charge ground of visa ineligibility, but instead apply the relevant provisions of the INA (see 9 FAM 302.8-1(A) below) and the text of 22 CFR 40.41 that was in place prior to October 11, 2019 (see 9 FAM 302.8-1(B) below). If during the course of a visa adjudication you believe that an applicant may be ineligible under INA 212(a)(4), or want to ensure that you are not relying on enjoined guidance, you must refuse the case under INA 221(g) rather than INA 212(a)(4) and request an advisory opinion from L/CA.*

Background Summary - *PP 9945*

PP 9945 was issued by former President Trump on October 4, 2019. It suspended the entry of immigrants, "who will financially burden the U.S. healthcare system," and was effective originally

[4] *See Doe v. Trump*, AILA Doc. No. 21010436. (Posted 1/4/21).
[5] *Make the Road NY et al. v. Pompeo*, 475 F. Supp. 3d 232 (S.D.N.Y. 2020).
[6] *See* Department of State Update on Public Charge on August 7, 2020 at: https://travel.state.gov/content/travel/en/News/visas-news/update-on-public-charge.html

as 12:01 ET on November 3, 2019.[7] PP 9945 has a complicated history in the courts, though it is important to note that Presidential Proclamation 9945 **remains enjoined**. As mentioned above, the Proclamation remains enjoined because the Ninth Circuit has not issued its mandate in *Doe v. Trump* and the plaintiffs have moved for *rehearing en banc* which will delay the mandate until the court decides whether to rehear the case.[8] Proclamation 9945 also remains enjoined because in *Make the Road NY et al. v. Pompeo,* the Court issued a separate injunction against the Proclamation as well as DOS' version of the public charge rule.[9] That injunction also remains in place.

Notwithstanding the tortured litigation history, the requirement is based upon a Presidential Proclamation. President Biden therefore has the authority to revoke the Proclamation and eliminate the requirement. Of course, the same standards to overcome the grounds of inadmissibility based on public charge that have existed since the 1952 INA remain.

Background Summary - *DHS Public Charge Final Rule*

The second main element as to former President Trump's expansion of the public charge statutory inadmissibility ground was the DHS public charge final regulation published on August 14, 2019 with an effective date of October 15, 2019 as 12:00 am ET.[10] This regulation also has a complex litigation history.

One of the most recent federal court decisions on this regulation came from the Ninth Circuit on December 2, 2020, upholding the preliminary injunctions issued against DHS's public charge rule issued by the Northern District of California and the Eastern District of Washington.[11] In its order, however, the panel majority vacated the Eastern District of Washington's entry of a nationwide injunction. To date, the preliminary injunctions have **not** taken effect against the DHS public charge rule, because the Ninth Circuit has **not** issued a mandate. Instead, on January 21, 2021, the Ninth Circuit granted the government's motion to stay the issuance of the mandate pending resolution of a petition for *writ of certiorari*, subsequently filed on January 22, 2021, and resolution of petitions for writ of certiorari in *Wolf v. Cook County* (Seventh Circuit) and *Department of Homeland Security v. New York* (Second Circuit). This means that as of today the DHS public charge rule remains in effect and that the Form I-944 is currently required in all jurisdictions. For more information on the litigation history surrounding the DHS public charge final rule, see AILA's Featured Issue: Public Charge Changes at USCIS, DOJ, and DOS, AILA Doc. No. 19050634.

The recession of this regulation cannot be accomplished by Presidential Order, but must go through the Administrative Procedure Act (APA) requirements for notice and comment of proposed rulemaking. Thus, it is possible that there will be a final court order declaring the regulation invalid before the administration can publish a proposed rule to rescind the regulation, review and respond

[7] *See* AILA Doc. No. 19100700 (Oct. 9, 2019) and 84 *Fed. Reg.* 196 (Oct. 9, 2019).
[8] *See Doe v. Trump*, AILA Doc. No. 21010436. (Posted 1/4/21).
[9] *Make the Road NY et al. v. Pompeo*, 475 F. Supp. 3d 232 (S.D.N.Y. 2020).
[10] 84 *Fed. Reg.*41292 (August 14, 2019).
[11] *See* AILA Practice Alert: Ninth Circuit Court of Appeals Upholds Preliminary Injunctions of DHS Public Charge Rule, AILA Doc. No. 20120236 (Posted 12/10/2020). (*City and County of San Francisco, et. al. v. USCIS* 12/2/20)

to public comments, and then publish a final rule. In the absence of a final court order, this process will take at least several months.

Until there is either a final court order, or an effective date for a final rule revoking the regulation, applicants must continue to file petitions and applications that facially comply with the requirements of the regulation. As a strategic decision, attorneys may wish to consider providing skeletal support documents with Form I-944, which are sufficient to pass muster with the USCIS Lockbox, but not a complete set of financial documents, which can often be overwhelming. If necessary, Form I-944 can later be supplemented and, of course, when the rule has been rescinded (hopefully), the documentation will no longer be required and the former standards will apply. This suggestion is based on the belief that due to the content of Section 1 of the EO as well as the review of the public charge provisions noted in Section 6 of the EO, that USCIS is unlikely to issue a Notice of Intent to Deny or a denial of an adjustment application in the interim on the sole basis of skeletal I-944 documentation.