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'Public Charge' Rule Will Create New Hurdles For Work Visas

By **Shannon Donnelly and Jamie Cheung** (January 30, 2020, 4:42 PM EST)

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The U.S. Supreme Court ruled on Jan. 27 that the Trump administration can begin to implement the public charge rule while litigation continues in the federal court system, lifting an October 2019 injunction issued by the U.S. District Court for the Southern District of New York.

The public charge rule increases the scrutiny on applicants for immigration benefits and presumes that even temporary reliance on public assistance may render an applicant inadmissible to the United States, while also broadening the categories of public assistance that could lead to a finding of inadmissibility.

Late in the evening of Jan. 30, United States Citizenship and Immigration Services published rushed guidance to implement the new regulation on Feb. 24, 2020 (except in Illinois where the rule remains enjoined by a federal court as of Jan. 30). We now anticipate there will be a rush to file ripe cases in advance of Feb. 24 to circumvent the new public charge requirements.

USCIS has indicated that further implementation guidance will be released the week of February 3.

The public charge rule, originally due to take effect on Oct. 15, 2019, redefines the list of applicable public benefits and the threshold level of receipt of a public benefit that would result in an applicant being deemed a public charge.

A public charge is now defined as a foreign national[1] who receives one or more public benefits for more than 12 months in the aggregate within any 36-month period (the receipt of two benefits in one month counts as two months).

The rule also states that an application or certification for public benefits alone may be viewed as evidence of a foreign national's likelihood of receiving public benefits in the future, but does not in and of itself constitute receipt. Furthermore, benefits received by a dependent, such as the spouse or child of the principal applicant, will not be considered unless the principal applicant is listed as also receiving the benefit.

Moreover, if a foreign national is the person receiving benefits on behalf of another (for instance as a

parent or legal guardian), that foreign national will not be considered to have received, been certified for or applied for such public benefits.

U.S. immigration law and regulations have historically established that immigration adjudicators have the ability to determine that a foreign national is inadmissible to the United States if they believe the foreign national is likely to become a so-called public charge.

The longstanding interpretation of this ground of inadmissibility has been that applicants for temporary or permanent immigration to the United States may be refused admission if it appears likely that they will become wholly dependent on public assistance.

The new rule also introduces a new USCIS form, Form I-944, Declaration of Self Sufficiency. When the rule was originally due to take effect last year, USCIS had published revised versions of several forms on their website, including the new Form I-944, for a brief period before taking them down as a result of the nationwide injunction. With the October 2019 injunction lifted, the administration may now implement the public charge rule as originally intended.

The impact of the public charge rule on employer-based sponsorship has yet to be determined, but could indeed provide logistical, timing and regulatory hurdles that have not previously been of issue. Foreign nationals should review the list of applicable benefits as well as the list of excluded public benefits when weighing whether to either apply for or unsubscribe from a public benefit program as not all public benefits are subject to the new rule.

Employers sponsoring foreign national employees for nonimmigrant visas or U.S. permanent residence may want to ensure that these employees are familiar with the new list of public benefits that may result in a finding of “public charge” inadmissibility. In addition, it is important to consider that the new Form I-944, Declaration of Self Sufficiency, will require significant preparation time to ensure that it is properly completed and has the appropriate supporting documentation.

The Form I-944, Declaration of Self Sufficiency, is a 19-page document that requires extensive background information about the applicant’s household income, assets, tax filings, credit scores, health insurance, and other financial information. A U.S. Citizenship and Immigration Services officer will review the application under the totality of the circumstances, wherein age, health, family status, financial status, assets, education and skills, and receipt or application for public benefits will be considered as a whole.

Applicants will also need to be wary of any particular circumstances that may be seen as a heavily weighted negative factor that is detrimental to their application and should take additional steps to remedy this before submission. Immigration attorneys should also implement a more robust review of a foreign national’s case at the consultation stage in order to recommend steps to remedy any issues that could affect their adjustment of status to lawful permanent residence application, or for a change or extension of temporary nonimmigrant status.

Employers who sponsor foreign national employees, and in some instances their immediate family members, for nonimmigrant visas or U.S. permanent residence may find it more difficult and time consuming to obtain approvals. Such cases will require more intensive legal counsel and privacy will be of the utmost concern. There will be information required in the Form I-944 that should not be shared with employers.

Maneuvering through the minefield created by the public charge rule, will be a headache for employers and employees alike. Timely guidance from USCIS is crucial to clarify how the new public charge rule will be implemented in light of the Supreme Court's ruling.

Update: This article has been updated with information on guidance issued by USCIS on Jan. 30.

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[1] Certain foreign nationals are exempt from public charge determinations. Exempt categories include applicants for adjustment who are persons seeking or who have been granted asylum, refugees, certain "special immigrant juveniles," and certain applicants who were victims of certain crimes or human trafficking, as well as self-petitioners under the Violence Against Women Act.