

Memo

To: Cynthia Carey-Grant, Monica Gandhi, Anton Pozniak, Kevin Osborne
From: American Friends of AIDS2020
Date: February 7, 2019
Re: Public Charge and Implications for Traveling to the United States for AIDS2020

Recent policy changes and proposals regarding the definition of “public charge” have raised concerns about their potential impact on AIDS2020 conference attendees. A “public charge” is an individual who is likely to become “primarily dependent on the government for subsistence.” This memo provides an overview of these changes, focusing specifically on their implications for nonimmigrant visa (NIV) applicants,¹ the category of individuals who will be applying for temporary admission to the U.S. to attend AIDS2020. It further focuses on B-1 (business) and B-2 (tourist) visas, which are the most likely types of visas to be sought by conference attendees.^{2,3}

SUMMARY

1. Public charge, one of the grounds for inadmissibility to the U.S. for non-citizens, has long been part of immigration law. Other major grounds for inadmissibility include: health, criminal, fraud and misrepresentation, and unlawful presence.
2. Recent and proposed changes to public charge, including a revision to the Department of State (DOS) Foreign Affairs Manual (FAM) last year and proposed rules issued by the Department of Homeland Security (DHS), will likely have significant impacts on immigrants and those seeking to extend their stay or change their visa status. Importantly for any foreign national intending to participate in the AIDS2020 conference, the impact of these changes on nonimmigrants (e.g. those on tourist or business visas) is expected to be, in the opinion of legal experts, inconsequential. More broadly, to date, there have been no policy changes to the NIV process for short term visitors under the current Administration (other than for countries subject to Presidential Proclamation 96453).
3. People with HIV seeking to visit or immigrate to the U.S. are no longer barred from entry based on being HIV positive (health-related ground of inadmissibility), due to the lifting of the HIV immigration ban in 2008 and subsequent removal of HIV as a communicable disease of public health significance in 2010. There is no indication that the Administration intends to reimpose the HIV ban.

Three important caveats:

First, while this memo describes current law and policy, the U.S. policy environment continues to evolve and we will endeavor to keep you apprised of any changes that could affect conference attendance.

Second, it is important to underscore that officials who make visa determinations –DOS consular officers (at the time of visa application abroad) and Customs and Border Protection (CBP) inspectors (at U.S. ports of entry) – continue to have discretion in determining the applicability of law and policy in individual cases, as has always been the case. The policy guidance that DOS and CBP officers receive from their superiors can be significant in how that discretion is exercised.

Lastly, nothing in this memo should be construed as legal advice; rather, this memo is provided for informational purposes only. You should feel free to share it with groups and individuals who are keen to better understand these matters.

BACKGROUND

Public charge, one of the grounds for inadmissibility to the U.S. for non-citizens, has long been part of immigration law, dating back to the late 19th century.⁴ Other major grounds for inadmissibility include: health, criminal, fraud and misrepresentation, and unlawful presence. The Immigration and Nationality Act (INA), the main statutory body of U.S. immigration law, states that: “Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”⁵

While public charge is not defined in the statute, agency guidance, which has served as the basis for such determinations for the past 20 years, defines a public charge as an individual who is likely to become “primarily dependent on the

government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.”⁶ Public cash assistance programs are limited to Supplemental Security Income (SSI); Temporary Assistance for Needy Families (TANF); and state or local general assistance programs. Past or current receipt of one of the public benefits listed is not in and of itself a basis for a public charge finding; rather it is one of the factors considered as part of the “totality of the circumstances.”

Public charge determinations are rarely applied to NIV applicants. In FY 2017, for example, of the 2.7 million NIV applications that were refused, only 47 (.002%) were based on public charge grounds. In contrast, a total of 9,681,913 NIVs were issued in that year. The most common reason for an NIV refusal is an applicant’s inability to establish that he or she will actually depart at the expiration of her authorized stay and is not intending to remain in the U.S.⁷

In addition, and importantly, due to an amendment to the INA through the 2008 PEPFAR Reauthorization bill,⁸ the statutory ban on HIV positive visitors and immigrants was removed, returning the decision about whether HIV should be considered a “communicable disease of public health significance” (for purposes of health-related inadmissibility) to the Department of Health and Human Services, which subsequently removed HIV from this list in 2010.⁹ There is no indication that the Administration intends to reimpose the HIV ban. It is still important to note that public charge determinations have always taken health into account as one factor among many; in that context, it is possible that HIV would be considered as a factor in such determinations.

CHANGES TO PUBLIC CHARGE

In early 2018, the DOS revised the FAM to provide new guidance to consular officers regarding public charge determinations. In addition, in October 2018, DHS published a notice of proposed rulemaking (NPRM) on public charge.

FAM Changes:¹⁰ Revisions made to the FAM in 2018 do not change the definition of public charge, but do make the following changes regarding immigrant admissibility:

- Renders the affidavit of support, required for immigrant applicants, as no longer sufficient on its own (consular officials are to also consider age, health, family status, assets, resources, financial status, education, and skills in every case);
- Adds consideration of the applicant’s past or current use of public benefits of any type, including non-cash benefits, to the assessment;
- Adds consideration of public benefits used by sponsors or family members (e.g., of a child living in the United States receiving CHIP health benefits); and
- States that health issues “which might affect employment, increase likelihood of future medical expenses, or otherwise affect the applicant’s ability to adequately provide for himself or herself or dependents should increase the burden on the applicant to provide evidence that they will not become a public charge.” This could include the need to provide proof of medical insurance or the ability to pay medical expenses in the United States.

Proposed Rule on Public Charge:¹¹ In addition to the FAM changes, on October 10, 2018, the DHS published a notice of proposed rulemaking (NPRM) seeking to change the definition of public charge. The NPRM included a 60-day public comment period that closed on December 10, 2018; more than 200,000 comments were received. If finalized as proposed, it would, among other things:

- Redefine public charge as an “alien who receives one or more public benefits”;
- Expand the range of public benefits considered to include cash assistance for income maintenance, government-funded institutionalized long-term care, and certain health, nutrition, and housing programs that were previously excluded from public charge determinations; and
- Establish thresholds for use of public benefits to determine an individual to be a public charge.
- Consider current or recent receipt of public benefits as a heavily weighted negative factor in an individual’s public charge determination; this includes having a medical condition that is likely to require extensive treatment or institutionalization and being uninsured and lacking the financial resources to pay for the medical costs associated with the condition.

While the rule primarily applies to immigrant visa applicants, it would require nonimmigrants applying for an extension of stay or change of status to demonstrate that they have not received and are not likely to receive public benefits as described in the rule.

IMPLICATIONS FOR NONIMMIGRANTS

As mentioned above, changes to the FAM and the proposed rule on public charge are not expected to impact nonimmigrants seeking to visit the United States, although the proposed rule would affect NIV applicants seeking to extend their stay or change their visa status. The main barrier to entry facing NIV applicants remains the same—they must establish that they will return after their visit and that they will not violate the terms of their visa (e.g., by working without authorization) while in the United States. All NIV applicants continue to be presumed to have “immigrant intent” and must convince a consular officer that, based on documentary evidence—proof of employment, a residence and other property, family, savings and other resources—they have no intention to reside in the United States. In borderline cases, the applicant could be required to submit additional evidence to verify the provision of support while they are in the United States.

CONCLUSION

While there are ongoing changes to current law and policy regarding immigration to the U.S., these do not affect nonimmigrant visa applicants in any significant way, if at all, in the opinion of legal experts. As of this writing, they do not, in and of themselves, increase the level of scrutiny or raise the burden of proof for NIV applicants seeking temporary admission on a B-1 or B-2 visa. More broadly, to date, there have been no policy changes to the NIV process for short term visitors under the current Administration, with the exception of countries subject to Presidential Proclamation 9645. We will continue to monitor the situation going forward and would welcome your feedback and ongoing advice.

ADDITIONAL RESOURCES

Congressional Research Service, Immigration: Frequently Asked Questions about “Public Charge”, September 19, 2018

Congressional Research Service, Nonimmigrant (Temporary) Admissions to the United States: Policy and Trends, R45040, December 8, 2017.

Kaiser Family Foundation, Proposed Changes to “Public Charge” Policies for Immigrants: Implications for Health Coverage, September 24, 2018, <https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage/>

Catholic Legal Immigration Network resources: <https://cliniclegal.org/public-charge>

National Immigration Law Center resources: <https://www.nilc.org/issues/economic-support/pubcharge/>

ENDNOTES

- 1 A nonimmigrant is “An alien who seeks temporary entry to the United States for a specific purpose. The alien must have a permanent residence abroad (for most classes of admission) and qualify for the nonimmigrant classification sought. The nonimmigrant classifications include: foreign government officials, visitors for business and for pleasure, aliens in transit through the United States, treaty traders and investors, students, international representatives, temporary workers and trainees, representatives of foreign information media, exchange visitors, fiance(e)s of U.S. citizens, intracompany transferees, NATO officials, religious workers, and some others. Most nonimmigrants can be accompanied or joined by spouses and unmarried minor (or dependent) children.”
Source: <https://www.uscis.gov/tools/glossary/nonimmigrant>.
- 2 Note that there are 24 major nonimmigrant visa categories. In addition, there are 38 countries in the Visa Waiver Program (VWP), which enables most citizens or nationals of participating countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. Countries included are: Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, United Kingdom.
- 3 Per Presidential Proclamation 9645, foreign nationals from 7 countries - Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen – are restricted from entry into the United States. See, *Presidential Proclamation 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, September 24, 2017, <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>. Chad was on the original list but removed in April 2018 (<https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-presidential-proclamation-lift-entry-restrictions-nations-republic-chad/>). Waivers are available under some circumstances.
- 4 It was included in the Immigration Act of 1882, the first general immigration act in the U.S.
- 5 8 U.S.C. § 1182(a)(4).
- 6 USCIS, <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet>.
- 7 CRS, Immigration: Frequently Asked Questions about “Public Charge”, September 19, 2018.; DOS, Visa Statistics, <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics.html>.
- 8 The Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, P.L. 110-293.
- 9 CDC, <https://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule.html>.
- 10 FAM, <https://fam.state.gov/fam/09fam/09fam030208.html>.
- 11 Federal Register / Vol. 83, No. 196 / Wednesday, October 10, 2018.