

IMPACT OF PROPOSED PUBLIC CHARGE REGULATION ON CITIZENS OF FREELY ASSOCIATED STATES UNDER COMPACTS OF FREE ASSOCIATION

Background

The U.S. has international treaty agreements with the Freely Associated States of the Republic of Palau, the Republic of the Marshall Islands, and the Federated States of Micronesia, commonly known as the Compacts of Free Association (COFA).¹ Citizens of Palau, the Marshall Islands, and Micronesia are eligible to freely enter and exit, and reside indefinitely, in the U.S. (and U.S. Pacific jurisdictions, including Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands). Under the COFA, such Freely Associated States (FAS) citizens do not require visas to enter the U.S., and are given a unique “non-immigrant” immigration status that does not have any expiration date.² FAS citizens residing in the U.S. are authorized to work in the U.S.³ There are over 61,000 FAS citizens currently residing in the U.S. and its associated Pacific jurisdictions.⁴



Once in the U.S., FAS citizens are generally NOT eligible for most federal, state, and local government benefits. For example, FAS citizens are NOT eligible for Medicaid, Medicare, or the Supplemental Nutrition Assistance Program (SNAP).⁵ One of the few benefits they are eligible for is federal housing assistance.⁶

¹ 48 U.S. Code Section 1901, <https://www.gpo.gov/fdsys/pkg/USCODE-2017-title48/pdf/USCODE-2017-title48-chap18-subchapl-partA-sec1901.pdf> and 48 U.S. Code Section 1931, <https://www.gpo.gov/fdsys/pkg/USCODE-2009-title48/pdf/USCODE-2009-title48-chap18-subchapl-partA-sec1931.pdf>.

² The passports for FAS citizens entering the U.S. are stamped “CFA/PAL”, “CFA/MIS” (or “CFA/RMI”), or “CFA/FSM” and they are provided a Form I-94 (Arrival/Departure Record), with an 11-digit number that serves as their “alien registration number”. This “non-immigrant” status is unique because all other non-immigrant statuses have expiration dates and must be renewed periodically. The I-94’s are stamped “D/S”, meaning for an (indefinite) “duration of status”. Because they have the right to remain in the U.S. indefinitely, FAS citizens also are not required to meet the usual requirement for non-immigrant status of only having an intention to reside temporarily (rather than permanently) in the U.S.

³ U.S. Citizenship and Immigration Services, Fact Sheets on Status of Citizens of Palau, Federated States of Micronesia and the Republic of the Marshall Islands, <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/complete-section-1-employee-information-and-attestation/federated-states-micronesia-republic-marshall-islands-and-palau>

⁴ U.S. Department of Interior, Interior Assistant Secretary Discusses Health Care Coverage Options with Representatives from the Freely Associated States of Micronesia, Marshall Islands, and Palau Living in Hawaii and U.S. Mainland, November 10, 2016, <https://www.doi.gov/oia/interior-assistant-secretary-discusses-health-care-coverage-options-representatives-freely-0>

⁵ The 1996 Personal Responsibility and Work Opportunity Reconciliation Act created two categories of immigrants: those who are qualified and those who are not qualified. In general, only “qualified” immigrants are eligible for federal means-tested public benefits. Because COFA/FAS citizens were not included on the “qualified” list, they are considered not-qualified. Note that COFA/FAS citizens living in the U.S. may be in mixed-households in which a parent may be a COFA/FAS citizen, but the child may be a U.S. citizen. Those U.S. citizen children would be eligible for public benefits. Some states provide benefits for COFA, such as premium assistance in Oregon and Hawaii or health coverage for lawfully present children through their CHIP programs (Immigrant Children’s Health Improve Act state option) or to all immigrant children and pregnant women using state funds.

⁶ National Housing Law Project and National Law Center on Homelessness & Poverty, Trump Administration’s Proposed “Public Charge” Rule: What Housing and Homelessness Advocates Should Know, October 2018. COFA/FAS citizens living in the U.S. are listed as a category of aliens eligible for HUD assistance in Title 42 §1436(a). Note that HUD programs are not considered “federal means-tested public benefits,” <https://fas.org/sgp/crs/homesecc/RL31753.pdf>.

Application of Public Charge to COFA

Under the the proposed public charge regulation released by the U.S. Department of Homeland Security (DHS) on October 10, 2018,⁷ FAS citizens seeking to enter (or re-enter) the U.S. would have to meet the new proposed public charge test. However, since FAS citizens do not need visas to enter the U.S. and there are no other pre-arrival screening processes, *it is not clear how, when, and where an inquiry about this new public charge test would take place*. It would be chaotic and unfair for FAS citizens to be stopped and questioned about the public charge factors at airports by the U.S. Customs and Border Patrol, or to be required to submit either the Form I-944 or documentation upon arrival at the airport.

FAS citizens also can apply for lawful permanent residence (“green cards”) in the U.S., e.g. through a U.S. citizen or lawful permanent resident family member.⁸ If they choose to do so, then the new proposed public charge test also would apply to them at the time of their application for the green card.



Like other individuals subject to the new public charge test, FAS citizens would be required to complete the new DHS Form I-944 (Declaration of Self-Sufficiency), which DHS estimates would take four and a half hours to complete. The draft I-944⁹ asks questions and requires documentation about the individual’s education, employment, income, assets, health insurance, health, medical history, and English proficiency, in addition to questions about the past and current receipt of federal, state, and local government benefits.

Note that there could be substantial confusion when answering the proposed question “Have you ever applied for or received any public benefits as listed in the Instructions?” or “Do you anticipate applying for or receiving the public benefits, as listed in the Instructions, in the future in the United States?” in which FAS citizens may incorrectly note use of state or local programs that are not subject to public charge, such as state premium assistance programs for health insurance.

New Proposed Public Charge Test

Under the proposed new public charge test, in weighing positive and negative factors, the following “negative factors” would be used against FAS citizens, as well as all applicants for green cards:¹⁰

- Being under 18 years old, or 62 years and older
- Not having a college education
- Not having a professional license or credential
- Having limited English proficiency

⁷ Inadmissibility on Public Charge Grounds, <https://www.regulations.gov/document?D=USCIS-2010-0012-0001>.

⁸ Since FAS citizens have the right to enter and exit, reside indefinitely, and work in the U.S., few apply for green cards each year: Department of Homeland Security, Yearbook of Immigration Statistics 2017, <https://www.dhs.gov/immigration-statistics/yearbook/2017> (<40 in FY 2017).

⁹ <https://www.regulations.gov/document?D=USCIS-2010-0012-0047>.

¹⁰ Under the draft of the proposed regulation released by DHS, receipt of the listed public benefits by the applicant’s children, including any U.S. citizen children, would NOT be considered as a factor in the new public charge test.

- Having any medical condition that might require extensive medical treatment without private health insurance or financial resources to pay for reasonably foreseeable medical costs
- Not having a household income of at least 125% of the Federal Poverty Guidelines (\$31,375 for a family of four)
- Having received any of the following public benefits within the past 36 months: Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), General Assistance (GA), Supplemental Nutrition Assistance Program (SNAP, formerly known as food stamps), and federal housing assistance (Section 8)¹¹
- Having received 12 months of any of the following public benefits: Medicaid (except emergency Medicaid and some other limited exceptions for disabled children), Medicare Part D Low Income Subsidies (assistance with premium and cost-sharing payments), residing in public housing¹²
- Having a lower/poor credit score or negative credit history
- Having used a fee waiver for a prior immigration benefit

On the other hand, the only positive factors under the new proposed public charge test are:

- Having a “sponsor” file an affidavit of support (a legally binding contract agreeing to provide financial support to the applicant)
- Having a household income over 250% of the Federal Poverty Guidelines (in 2018, \$62,750 for a family of four)
- Having a college or advanced degree, and/or professional licenses and credentials
- Being proficient in English (or in another language used in employment)

Given that the list of negative factors is much longer than the list of positive factors, many FAS citizens will have challenges in meeting this new proposed public charge test, and are at risk of being denied entry, or being denied lawful permanent residence.¹³ Note that state and local benefits, other than those explicitly listed in the regulation/cash assistance, will not subject an individual to public charge.



If this proposed public charge regulation is finalized and implemented,¹⁴ FAS citizens who have characteristics that would be considered as negative factors - i.e., have less education, being less proficient in English, not having a high enough household income, as well as those that might have received federal housing assistance -- might be blocked from entering or re-entering the U.S.¹⁵

¹¹ The only public benefits that FAS citizens are likely to have received are GA or federal housing assistance.

¹² Receipt of non-emergency Medicaid, Medicare Part D subsidies, or living in public housing for only 9 months would be a negative factor if the individual also received any of the cash or cash-like benefits listed above.

¹³ DHS also proposes applying the public charge test to all non-immigrants, including visitors, foreign students, and temporary workers; like FAS citizens, most of these individuals are not eligible for any of the listed public benefits but may have trouble overcoming the long list of negative factors.

¹⁴ In the draft of the proposed regulation released by DHS, the new public charge test would not be retroactive, i.e., would only apply to the listed public benefits received after the effective date of any final regulation.

¹⁵ While the draft of the proposed regulation only applies to individuals entering the U.S. or applying for lawful permanent residence in the U.S., DHS noted that the Department of Justice is developing a parallel proposed regulation regarding the potential deportation of individuals – including lawful permanent residents and FAS citizens – already residing in the U.S. At this time, we do not have any additional information about the details or timeline for such a parallel proposed regulation.