

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

Note: As of publication, implementation of the new rule is blocked by federal court orders issued on October 11, 2019.

Background

The United States has international treaty agreements, known as the Compacts of Free Association (COFA), with three Pacific Island nations - the Republic of Palau, the Republic of the Marshall Islands, and the Federated States of Micronesia. Citizens of these nations, which are known as the Freely Associated States (FAS), are eligible to freely enter and exit, and reside and work indefinitely, in the U.S. and its jurisdictions. FAS citizens do not require visas to enter the U.S. and are given a “non-immigrant” immigration status that does not have any expiration date.¹ There are over 61,000 FAS citizens currently residing in the U.S. and its Pacific territories.

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 Supplemental Security Income (SSI), Medicaid (with exceptions for state-options for certain populations), Temporary Assistance for Needy Families (TANF), or the Supplemental Nutrition Assistance Program (SNAP). However, they are eligible for federal housing assistance.²

New Public Charge Rule

“Public charge” or the “public charge rule” has been part of U.S. immigration law for over a hundred years and is used to identify people who, in the government’s opinion, are likely to depend on government support for subsistence. If government officials determine a person is likely to be a public charge, they could be denied entry into the U.S., adjustment of status, or lawful permanent residence (a green card).

On August 14, 2019, the Department of Homeland Security (DHS) published a new public charge rule that would significantly change how immigrant officials make public charge determinations. The regulation was intended to be effective beginning October 15, 2019. However, several states and public interest groups filed lawsuits seeking to block or delay implementation of this regulation, and on October 11, 2019, federal judges in California, New York, and Washington issued injunctions blocking the rule from being implemented. If those blocks are ended by higher level courts, the new public charge rule will be implemented.

¹ The passports for FAS citizens entering the U.S. are stamped “CFA/PAL”, “CFA/MIS” (or “CFA/RMI”), or “CFA/FSM”. FAS citizens are also provided a Form I-94 (Arrival/ Departure Record), with an 11-digit number that serves as their “alien registration number” and are marked with a “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.

² COFA/FAS citizens living in the U.S. are listed as a category of aliens eligible for HUD assistance in Title 42 §1436(a). See <https://www.nhlp.org/webinars/trump-administrations-proposed-public-charge-rule-what-housing-and-homelessness-advocates-should-know/>.

New Definition

Under the new rule, DHS would define a public charge as a noncitizen who receives one or more specified benefits for more than a combined 12 months within a 36-month period. (For example, the receipt of two benefits in one month counts as two months.) These benefits are:

- Any federal, state, local, or tribal cash assistance including TANF, SSI, and general assistance programs;
- Medicaid (with exceptions including coverage for emergency services, children under 21 years old, Medicaid without federal funding, pregnant women and 60 days of post-partum services), received after the rule's effective date;
- Supplemental Nutrition Assistance Program (SNAP), received after the rule's effective date; and
- Federal Public Housing, Section 8 housing vouchers, and Section 8 project-based rental assistance, received after the rule's effective date.

DHS will **not** consider benefits used by individuals (or a spouse) while serving as a member of the U.S. armed services. Use of benefits by family or household members is also not considered. Certain groups, such as refugees; asylees; and survivors of trafficking, domestic violence, or other serious crimes (T or U visa applicants/holders) would not be subject to the new public charge rule.

Totality of Circumstances Test

Under the new public charge rule, immigration officers must weigh positive and negative factors in applying what is known as the "Totality of Circumstances Test".

Negative factors include (which make an individual more likely to be deemed a public charge):

- Receipt of the specified benefits;
- Having an income of less than 125% of the federal poverty level (\$32,187 for a family of four);
- Being under 18 years old, or 62 years and older;
- Not having a high school education;
- Having limited English proficiency; and/or
- Having any medical condition that might require extensive medical treatment while lacking private health insurance or the financial resources to pay for reasonably foreseeable medical costs.

Positive factors include (which make an individual less likely to be deemed a public charge):

- 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 level (\$64,375 for a family of four);
- Having a college or advanced degree, and/or professional licenses and credentials; and/or
- Having private health insurance, without federal government subsidies for premiums or cost-sharing.

For a detailed discussion of the new public charge rule, the Protecting Immigrant Families campaign has developed an FAQ.³

³The FAQ is available at <https://bit.ly/2mmm6Sd>.

Application of Public Charge to FAS Citizens

If the new public charge rule is implemented, FAS citizens will be subject to the new rule when entering the U.S. and/or when applying for a green card.

At Entry into the U.S.

FAS citizens seeking to enter or re-enter the U.S. may be assessed under this new public charge rule.⁴ DHS has stated that “COFA migrants may be affected by this rulemaking when applying for admission at a port of entry” which also includes airports. However, it is not clear how immigration officers would apply the new rule to FAS citizens. Since FAS citizens do not need visas to enter the U.S. and there are no other pre-arrival screening processes, their experience will be unique among nonimmigrant arrivals. Immigration officers would be empowered to require FAS citizens to demonstrate their ability to pass the public charge assessment when arriving in the U.S. The only clarification offered by DHS is that anyone seeking admission at ports of entry will not be required to fill out the new Form I-944, Declaration of Self-Sufficiency.

One potential new scenario when FAS citizens might face denial of entry to the U.S. would be if they receive 12 months of federal housing benefits after the final rule is implemented, leave the U.S., attempt to re-enter, and are asked about those federal housing benefits by the immigration officer at the airport.

Green Card Application

FAS citizens can apply for lawful permanent residence (“green cards”) in the U.S. through various pathways. If they choose to do so using a pathway subject to public charge, such as through a U.S. citizen or lawful permanent resident family member or employment, then the new public charge rule would apply to them at the time of their application for the green card. Those applying for citizenship are not subject to public charge.

New USCIS Form I-944 Declaration of Self-Sufficiency

Like other individuals subject to the new public charge rule, FAS citizens would be required to complete the new USCIS Form I-944 when applying for a green card.⁵ The form asks questions and requires documentation about the individual’s education, employment, income, assets, health insurance, and English proficiency. The form also asks questions about past and current receipt of federal, state, and local government benefits.

FAS citizens may face confusion when answering the I-944 question:

Have you ever received, or are currently certified to receive in the future any of the following public benefits?

Medicaid is among the public benefits applicants are required to list, as use of Medicaid is a negatively weighted factor. Under federal law, FAS citizens are considered “non-qualified” immigrants, ineligible for most forms of Medicaid. However, some states, such as California and New York, use their own state funds to provide Medicaid benefits to all lawfully present populations, including FAS citizens.⁶ This patchwork funding of health insurance

⁴For information from USCIS, see <https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility>.

⁵See USCIS Form I-944, as published in the final rule, is available at <https://www.regulations.gov/document?D=USCIS-2010-0012-0047>.

⁶Some states have acted to grant FAS citizens access to health care through state funds. See more at: <https://www.apiahf.org/resource/health-care-for-cofa-citizens/>.

programs will mean that both FAS citizens and immigration officers will face uncertainty in public charge determinations despite the fact that only federally funded Medicaid for non-pregnant adults is supposed to be negatively weighted in the public charge rule.

It is important for FAS citizens to understand which programs are subject to public charge. ONLY use of Medicaid, SNAP, federal housing, and cash assistance are considered. All other programs are not. This means that **Affordable Care Act Premium Tax Credits and Cost Sharing Reductions, WIC, health centers, HIV/AIDS programs, state and local non-cash programs**, and other assistance that FAS citizens may use will **not** impact a public charge determination.

The following table shows which programs will be reviewed in making a public charge determination for FAS citizens and examples of programs that will not be considered in a public charge determination. Only benefits used by the individual FAS citizen entering the U.S. or adjusting status will be considered - not benefits used by family or household members.

PROGRAMS SUBJECT TO PUBLIC CHARGE	EXAMPLES OF PROGRAMS <u>NOT</u> SUBJECT TO PUBLIC CHARGE
Medicaid, except for Medicaid provided to pregnant women, children and through emergency state-only funding	Affordable Care Act Premium Tax Credits & Cost-Sharing Reductions
Supplemental Nutrition Assistance Program (SNAP)	Special Supplemental Nutrition Program from Women, Infants, and Children (WIC)
Federal Housing Assistance	Services Received at Community Health Centers
Federal, State, Local and Tribal Cash Assistance	HIV/AIDS Program Services
	State and Local Non-Cash Programs