



PUBLIC CHARGE EXEMPTIONS AND CONSIDERATIONS

By Em Puhl and Sarah Lakhani

Individuals applying for admission to the United States or adjustment of status are subject to the public charge ground of inadmissibility unless they fall into categories that are exempt from public charge or not subject to this ground of inadmissibility within the Immigration and Nationality Act (INA) or corresponding regulations. Primarily, people subject to a public charge test are applicants for an immigrant visa or permanent resident status through a family- or employer-based petition, and people applying for most nonimmigrant visas. It is important to remember that the INA exempts some categories of immigrants from public charge inadmissibility. Others may avoid public charge concerns when they apply for a type of immigration status that is not subject to the public charge ground of inadmissibility or, sometimes, not subject to any grounds of inadmissibility.

This advisory provides an overview of the exemptions to public charge inadmissibility and the forms of relief a client may seek without being subject to a public charge test. It also discusses public charge issues to keep in mind when advising immigrants who may be considering adjustment of status or consular processing through a family or employer petition after having a status that is not subject to public charge inadmissibility. Understanding these considerations will help advocates best counsel their clients and prepare applications in the current climate of uncertainty surrounding public charge policy.

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I. Who Is Subject to Public Charge Inadmissibility?

As a ground of inadmissibility, public charge generally applies when an applicant seeks admission to the United States as a nonimmigrant or as an immigrant based on a family or employer petition. It also applies when an individual applies for adjustment of status through a relative or employer while within the United States.

A. Relief Subject to Public Charge Inadmissibility

An applicant is subject to the public charge ground of inadmissibility when they apply for most nonimmigrant visas to enter the United States.¹ Additionally, public charge inadmissibility applies when an individual seeks to:

- adjust status or consular process based on an approved family-based petition (Form I-130)
- adjust status or consular process based on an approved employer petition (Form I-140)

The primary avenues for adjusting status based on a family or employer petition are sections 245(a) and 245(i) of the INA. Applicants who are applying based on these provisions are subject to all grounds of inadmissibility and so must provide evidence showing they are not likely to become a public charge in the future. While the INA provides waivers for some grounds of inadmissibility, there is no waiver available if an applicant is found to be a public charge.

Note that public charge applies to the above applications even if the applicant currently has or previously held a status that was not subject to public charge. See Section III below for an explanation of immigration relief not subject to public charge.

Example: Maya has Temporary Protected Status (TPS). When she applied for TPS, she did not have to address public charge concerns, as the inadmissibility ground of public charge does not apply to TPS applicants. Now she is married to a U.S. citizen and is ready to adjust status. Even though she has TPS, she *will* be subject to a public charge determination when she applies to adjust status because there is no special exemption for TPS holders at the time of adjustment through a family member.

Additionally, although a lawful permanent resident (LPR) has been admitted and is not generally subject to the public charge ground of inadmissibility,² an LPR who has been outside of the country for more than 180 consecutive days is subject to all grounds of inadmissibility, including public charge.³ Additionally, if an LPR loses that status and applies to re-adjust status through a family-based petition—typically as a defense to a deportability charge—they will be subject to the public charge inadmissibility ground when the new application for adjustment of status is adjudicated.⁴

1. Public Charge Inadmissibility – Adjustment of Status with U.S. Citizenship and Immigration Services (USCIS)

An applicant for adjustment of status under INA § 245(a) or (i) will be subject to the public charge inadmissibility test laid out in the 1999 Field Guidance issued by the legacy Immigration and Naturalization Service (INS) and used today by USCIS, a component of the Department of Homeland Security (DHS). The 1999 Field Guidance adopted the definition of public charge as a person who is “primarily dependent on the government for subsistence, as

¹ Note that applicants for U- and T-nonimmigrant status are exempt from many grounds of inadmissibility, including public charge. See Section III below.

² See Section II below for more discussion of LPRs and the public charge ground of inadmissibility.

³ See INA § 101(a)(13)(C)(ii).

⁴ Note that the Executive Office for Immigration Review (EOIR), the agency that adjudicates adjustment of status applications for individuals in removal proceedings, is a component of the Department of Justice (DOJ) and will not apply the August 2019 public charge regulation published by the Department of Homeland Security (DHS), even in the event that injunctions currently preventing its implementation are lifted. See below for more information about this DHS rule. As a result, immigration judges who adjudicate adjustment of status applications in removal proceedings will follow relevant Board of Immigration Appeals (BIA) and circuit court precedent on public charge unless and until the DOJ officially adopts its own public charge regulation.

demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”⁵ No other types of public services or benefits are counted against a person in this assessment. Although the Trump administration has proposed radical changes to the definition of public charge, this definition continues to guide USCIS public charge determinations at the time this advisory was drafted.⁶

NOTE: In August 2019, USCIS published a new public charge regulation that was intended to go into effect on October 15, 2019, but it was enjoined by multiple federal courts.⁷ The regulation defined public charge as a person “who receives one or more public benefits, . . . for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).”⁸ It also considered receipt of an expanded list of public benefits, including federal Medicaid, SNAP, and certain federal housing programs.⁹ The USCIS regulation also created new “heavily weighted” positive and negative factors, such as receipt of the relevant public benefits for more than 12 months in the past 36 months, or having a medical condition without qualifying health insurance or the means to pay for necessary treatment.¹⁰

Note that this USCIS regulation did not directly change the guidance applied by the Department of State (DOS), nor did it change the public charge rules applied by immigration judges in the Department of Justice (DOJ). USCIS cannot apply this new definition while litigation is pending. Furthermore, any newly added public benefits used while this injunction is in place would not count against applicants if the USCIS rule were implemented in the future.

Additionally, most people immigrating through a family visa petition *must* have an affidavit of support, Form I-864, submitted by a sponsor on their behalf, or they will be found inadmissible as a public charge.¹¹ There are some exemptions, and those who fall within these exemptions must file Form I-864W instead. The I-864 affidavit of support requires the person to have a certain level of income or assets (for income, 125 percent of the Federal Poverty Guidelines¹²), and it is legally enforceable.¹³

2. Public Charge Inadmissibility – Consular Processing with Department of State (DOS)

The public charge determination currently used by DOS at U.S. embassies and consulates abroad is found in the Foreign Affairs Manual (FAM).¹⁴ Although the FAM uses the same definition of “public charge” as USCIS, consular officers consider factors that are part of the totality of the circumstances analysis in addition to determining the sufficiency of any affidavits of support.¹⁵ Because of this requirement, consular officers question applicants about their use of various benefits as well as benefits received by family members and sponsors. Officers also require

⁵ See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).

⁶ For more information about the status of public charge inadmissibility as applied by USCIS, see ILRC, *Public Charge Legal Services Toolkit*, (Dec. 2019), available at <https://www.ilrc.org/public-charge-legal-services-toolkit>.

⁷ For updated information on the status of this litigation, see www.protectingimmigrantfamilies.org.

⁸ See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41501 (Aug. 14, 2019).

⁹ *Id.*

¹⁰ *Id.* at 41504.

¹¹ INA § 212(a)(4)(C).

¹² The Federal Poverty Guidelines are available at <https://aspe.hhs.gov/poverty-guidelines> (last visited Dec. 2019).

¹³ For more information about the Affidavit of Support and applicants who are exempt from this requirement, see ILRC, *Introductory Guide to the Affidavit of Support*, (Apr. 2018), available at <https://www.ilrc.org/introductory-guide-affidavit-support>.

¹⁴ 9 FAM § 302.8.

¹⁵ For more information about the status of public charge inadmissibility as applied by DOS, see ILRC, *Public Charge Legal Services Toolkit*, (Dec. 2019), available at <https://www.ilrc.org/public-charge-legal-services-toolkit>.

greater amounts of documentation to show the sponsor's (and joint sponsor's, if applicable) ability to financially support the immigrant visa applicant.¹⁶

NOTE: On October 11, 2019, DOS issued an Interim Final Rule (IFR) to align its public charge standards with those of the August 2019 USCIS regulation, which is currently enjoined.¹⁷ The IFR was intended to be effective on October 15, 2019. On October 24, 2019, DOS issued a statement that it will not implement the IFR until a new DS-5540, Public Charge Questionnaire is approved.¹⁸ The public may comment on this form until December 23, 2019, after which DOS will review comments and decide whether to modify the form. Because of this, the IFR likely will not be implemented until sometime in 2020. Until the IFR is implemented, DOS will use the guidance currently contained in the FAM.

B. Relief Subject to Public Charge Inadmissibility With a Waiver

Select forms of relief are subject to the public charge ground of inadmissibility but allow for a waiver if the applicant is determined likely to become a public charge. These applications are primarily:

- Adjustment of status based on T-nonimmigrant status¹⁹ under INA § 245(I)—but note that people in valid T-nonimmigrant status are “qualified aliens” that are exempt from public charge!²⁰
- S-nonimmigrant status²¹

Applicants for these forms of relief are subject to public charge inadmissibility and could be found likely to become a public charge by USCIS. See Section I.A.1 above for more information about the public charge test applied by USCIS. However, the INA allows USCIS to grant a discretionary waiver to these applicants if the agency finds such a waiver should be granted in the national interest.

II. Which Categories of Immigrants are Exempt from Public Charge Inadmissibility?

Several groups of immigrants are not affected by the public charge ground of inadmissibility because the INA exempts them or because they have already been admitted to the United States. Other groups of immigrants are not personally exempt from public charge but are, instead, not subject to the public charge test when they apply for certain forms of immigration status. See Section III below for an explanation of forms of immigration relief that are exempt from public charge inadmissibility.

A. “Qualified Aliens”

¹⁶ For more information about preparing clients for public charge determinations at the consulates, see ILRC, *Consular Processing Practice Alert on Public Charge and Affidavit of Support Issues*, (July 2019), available at <https://www.ilrc.org/consular-processing-practice-alert-public-charge-and-affidavit-support-issues>.

¹⁷ See Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54996 (Oct. 11, 2019).

¹⁸ See <https://travel.state.gov/content/travel/en/traveladvisories/ea/Information-on-Public-Charge.html> (last visited Dec. 2019).

¹⁹ T-nonimmigrant status is a temporary status that allows noncitizen survivors of severe forms of human trafficking to stay in the United States, obtain employment authorization, apply for LPR status, and help certain family members obtain derivative T-visa status as well. INA § 101(a)(15)(T).

²⁰ INA § 245(I)(2)(A) (waiver may be granted “in the national interest”). See also Section II below for an explanation of groups of immigrants that are exempt from public charge.

²¹ S-nonimmigrant status is a temporary status that allows those with information regarding a criminal organization or enterprise to remain in the United States. INA § 101(a)(15)(S). See also INA § 212(d)(1) (waiver may be granted “in the national interest”).

“Qualified aliens” as defined in 8 U.S.C. § 1641(c) are exempt from public charge.²² This group is made up primarily of VAWA self-petitioners, VAWA cancellation applicants, and people with a pending or approved application for a T visa.²³ These groups of immigrants are arguably exempt from public charge inadmissibility regardless of the type of immigration relief that they seek.

Example: Jenin is an approved VAWA self-petitioner. She is eligible for several public benefits as a VAWA self-petitioner but is worried that her receipt of public benefits could impact her ability to get a green card later. However, as a VAWA self-petitioner she is statutorily exempt from the public charge ground of inadmissibility when she adjusts status or consular processes. This means that, while she has an approved VAWA self-petition, she is not subject to public charge inadmissibility when she adjusts status or consular processes based on this approved VAWA self-petition.

B. Lawful Permanent Residents (LPRs)

An LPR has been admitted to the United States and so is not subject to the public charge ground of inadmissibility, with limited exceptions.²⁴ This means that an LPR need not worry about a public charge test when petitioning to remove conditions on their residence, when applying to renew their green card, or when making short trips outside of the United States. However, note that an LPR may be subject to public charge inadmissibility if they spend more than 180 consecutive days outside of the United States and then seek to reenter the country.²⁵

IMPORTANT: The enjoined USCIS regulation specifically exempts certain categories of U-visa or T-visa holders from public charge inadmissibility if they apply for adjustment of status under INA § 245(a) or 245(I). However, this regulation has been blocked in full by federal courts. Advocates should remember that U-visa holders remain exempt from public charge inadmissibility if they adjust under INA § 245(m) but will be subject to public charge inadmissibility if they adjust through a relative or employer under section 245(a). Additionally, see Section V below for a discussion about adjustment of status for T-visa holders under INA § 245(I).

III. What Immigration Relief is Not Subject to Public Charge?

A. Relief Specifically Exempt from the Public Charge Ground of Inadmissibility

Many forms of immigration relief are statutorily exempt from the public charge ground of inadmissibility.²⁶ This means that immigration officers will not apply a public charge test to decide if a person is eligible to receive that immigration status or benefit. The following categories of applicants are exempt from the public charge ground of inadmissibility by statute or regulation:

- People who seek to enter as refugees²⁷

²² INA § 212(a)(4)(E)(iii) (stating that “qualified alien[s]” are exempt from INA § 212(a)(4)(A)–(C)).

²³ See 8 U.S.C. § 1641(c) for a full list of individuals classified as “qualified aliens” who are exempt from public charge inadmissibility.

²⁴ See INA § 101(a)(13)(C). While LPRs are subject to the public charge ground of deportability at INA § 237(a)(5), this standard is very narrow. Thus, few LPRs have been charged as deportable for having become a public charge. For more information, see ILRC, *Public Charge as a Ground of Deportability*, (June 2019), available at <https://www.ilrc.org/public-charge-ground-deportability>.

²⁵ INA § 101(a)(13)(C)(ii). See Section I above for more details about when LPRs are subject to the public charge ground of inadmissibility.

²⁶ For a complete list of groups not subject to public charge, see ILRC, *An Overview of Public Charge*, (Dec. 2018), available at <https://www.ilrc.org/overview-public-charge>.

²⁷ INA § 207(c)(3).

- Refugees and asylees applying for adjustment to permanent resident status²⁸
- Individuals applying for a T visa²⁹
- Individuals applying for a U visa³⁰
- Individuals who hold a U visa and are applying for adjustment to permanent resident status based on that U visa³¹
- Individuals applying for Special Immigrant Juvenile Status (SIJS) and those who are applying for adjustment of status based on SIJS³²
- VAWA self-petitioners,³³ those who are applying for adjustment of status based on an approved VAWA self-petition,³⁴ and individuals applying for suspension of deportation or cancellation of removal under VAWA³⁵
- Individuals applying for TPS³⁶
- Individuals applying for adjustment of status based on S-nonimmigrant status³⁷
- Amerasian immigrants (for their initial admission)³⁸
- Individuals granted relief under the Cuban Adjustment Act (CAA)³⁹
- Nicaraguans and Cubans who are eligible to adjust status under the Nicaraguan Adjustment and Central American Relief Act (NACARA)⁴⁰
- Individuals granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)⁴¹

Example: Saul is 14 years old and came to the United States because his father was abusive toward him. He can apply for Special Immigrant Juvenile Status (SIJS) and adjustment of status based on SIJS without worrying about a public charge test because the inadmissibility ground of public charge does not apply to SIJS applicants under INA § 245(h).

IMPORTANT: The enjoined USCIS regulation specifically lists immigrant categories that are exempt from public charge at 8 CFR § 212.23(a). Because this regulation is enjoined, advocates should instead argue that a client is not subject to public charge based on the INA or regulatory provisions stating that public charge inadmissibility does not apply to these forms of relief.

B. Relief Not Subject to Any Grounds of Inadmissibility

²⁸ INA § 209(c).

²⁹ INA § 212(d)(13)(A).

³⁰ INA § 212(a)(4)(E)(ii).

³¹ INA § 245(m).

³² INA § 101(a)(27)(J); INA § 245(h)(2)(A).

³³ INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(1)(B).

³⁴ INA § 212(a)(4)(E)(i).

³⁵ INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(1)(B)(iii), (v). Note that these individuals are also “qualified aliens” who are exempt from public charge.

³⁶ 8 CFR § 244.3(a).

³⁷ INA § 245(j)(1)–(2) (authorizing adjustment of status “if the [applicant] is not described in section 212(a)(3)(E),” barring the admission of Nazi sympathizers).

³⁸ INA § 101, note 5.

³⁹ *Matter of Mesa*, 12 I. & N. Dec. 432, 437 (BIA 1967) (“We conclude that Congress ... did not intend requiring application of [public charge] in light of the Congressional history showing the recognized impoverished circumstances of many of the refugees it proposed to benefit and the special legislation enacted to render them Federal assistance.”)

⁴⁰ INA § 245, note 9.

⁴¹ INA § 245, note 10.

The INA provides that certain forms of relief are not subject to the grounds of inadmissibility and thus may be granted to someone regardless of any likelihood of becoming a public charge. While these forms of relief are not explicitly “exempt” from public charge, people applying for them do not have to undergo a public charge test. The following forms of relief do not require applicants to show they are unlikely to become a public charge:

- Applicants for asylum⁴²
- Recipients of Deferred Action for Childhood Arrivals (DACA) who are applying to renew their deferred action⁴³
- Applicants for cancellation of removal for certain nonpermanent residents⁴⁴
- Applicants for cancellation of removal for permanent residents⁴⁵
- Applicants for suspension of deportation under former INA § 244
- Individuals applying for suspension of deportation or cancellation of removal under the Nicaraguan and Central American Relief Act (NACARA)⁴⁶
- Individuals applying for registry⁴⁷

Example: Douglas is HIV-positive and receives a variety of cash and non-cash benefits from the State of California. He is eligible to apply for cancellation of removal for nonpermanent residents. Douglas does not have to worry about using any public benefits because cancellation of removal is not subject to any grounds of inadmissibility, including public charge.

Finally, it is important to remember that lawful permanent residents are not subject to a public charge test at the time of applying for naturalization.⁴⁸

IV. Considerations When a Client “Switches Tracks” to Apply for Adjustment of Status or Consular Processing Based on a Family or Employer Petition

As explained above, many types of immigration relief are exempt from public charge inadmissibility, including some forms of adjustment of status based on types of humanitarian relief. People who are on these tracks can, in theory, travel the entire path to citizenship without being subject to public charge inadmissibility. For example:

- Refugees and asylees may apply for adjustment of status under INA § 209
- Certain youth under 21 may apply for adjustment of status under INA § 245(h), based on a grant of Special Immigrant Juvenile Status

⁴² INA § 208(b).

⁴³ See USCIS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁴⁴ INA § 240A(b).

⁴⁵ INA § 240A(a).

⁴⁶ INA § 101, note A-9.

⁴⁷ INA § 249.

⁴⁸ For additional information about how public charge impacts lawful permanent residents who are naturalizing, see ILRC, *Public Charge and Naturalization*, (Sept. 2019), available at <https://www.ilrc.org/public-charge-and-naturalization>.

- People who have been granted U-nonimmigrant status can apply for U adjustment of status under INA § 245(m)
- Certain individuals from Cuba may be granted relief under the Cuban Adjustment Act (CAA)⁴⁹
- Some Nicaraguans and Cubans are eligible to adjust status under the Nicaraguan Adjustment and Central American Relief Act (NACARA)⁵⁰
- Haitians may be granted relief under the Haitian Refugee Immigration Fairness Act (HRIFA)⁵¹

Additionally, certain people who are applying to adjust status under INA § 245(a) are statutorily exempt from public charge inadmissibility. For example, an applicant designated as a “VAWA self-petitioner” under INA § 101(a)(51) is exempt from public charge inadmissibility when they adjust under INA § 245(a), although they are subject to most other grounds of inadmissibility.⁵² Similarly, people in T-nonimmigrant status are “qualified aliens” who are exempt from public charge inadmissibility when they apply for adjustment of status under INA § 245(l).⁵³ In turn, widows and widowers (and their children) of deceased U.S.-citizen spouses are “qualified aliens” who are exempt from public charge inadmissibility when they apply for adjustment of status or are consular processing through a family petition filed by this relative.⁵⁴

Some people may find it beneficial to “switch tracks” from a path that is not subject to public charge and apply for adjustment of status under INA § 245(a) or for an immigrant visa through consular processing. For example, DACA and TPS recipients may decide to forgo the temporary protection offered by those programs because they have become eligible for adjustment of status or an immigrant visa through their relationship to a U.S.-citizen or LPR family member. Additionally, people with U- or T-nonimmigrant status may be interested in applying for adjustment of status through a U.S.-citizen or LPR family member without having to wait the requisite three years in their respective nonimmigrant status. Although these individuals were not subject to public charge inadmissibility when applying for their current immigration status, they will be subject to public charge when applying for permanent residence based on this family petition. This section reviews public charge inadmissibility considerations to keep in mind when assessing whether clients in these situations can or should apply to adjust or consular process based on a family petition.

A. DACA Recipients

Because DACA is an exercise of prosecutorial discretion, applicants do not have to be admissible in order to be granted this status. For this reason, DACA recipients who apply to renew DACA are not subject to public charge inadmissibility. However, the future status of DACA is uncertain, as the program’s fate is being litigated in the federal courts. Additionally, DACA protections are temporary and limited, so many DACA recipients are eager to obtain more permanent status in the United States.

⁴⁹ Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161.

⁵⁰ INA § 245, note 9.

⁵¹ INA § 245, note 10.

⁵² INA § 212(a)(4)(E)(i).

⁵³ See Section V below for a more detailed discussion of issues to consider when T-visa holders apply for adjustment of status.

⁵⁴ INA § 212(a)(4)(E)(iii); 8 U.S.C. § 1641(c)(1)(B)(i).

NOTE: While an applicant is not subject to a public charge test when they apply for DACA status, they are not *exempt* from public charge. This means that any relevant benefits received by someone who is in DACA status may be considered if they are subject to public charge inadmissibility in the future. However, it is important to remember that DACA recipients are generally ineligible to receive the relevant public benefits that are considered in the current and proposed public charge tests from DHS and DOS. See Section I.A above.

Many DACA recipients have become eligible for adjustment of status or immigrant visas based on a relationship to a family member or employer because of their long-standing ties to the United States. When these DACA recipients apply for adjustment of status or an immigrant visa based on a family or employer petition, they will be subject to public charge inadmissibility. As with all clients pursuing status based on a family or employer petition, the applicable public charge test depends on whether the client is adjusting status with USCIS or going through consular processing with DOS. See section I.A above for more information about these tests.

Because a grant of DACA status is not considered an admission or parole for purposes of INA § 245(a), an advocate first needs to determine if the client has been independently admitted or paroled into the United States. For example, a DACA recipient may have an admission or parole if they:

- Were waived through at a border⁵⁵
- Entered with a visa or border crossing card⁵⁶
- Traveled outside of and reentered the United States with DACA-based advance parole

A client may also apply for adjustment of status pursuant to INA § 245(i) if a petition was filed on behalf of them or their parents on or before April 30, 2001.⁵⁷

If a DACA recipient has not been admitted or paroled, they will have to apply for an immigrant visa, which requires attending an interview abroad at a U.S. consulate or embassy under the jurisdiction of the DOS. It is important to remember that the public charge test applied by DOS varies from the USCIS standard, which means that advocates must prepare clients for a “totality of the circumstances” determination when they consular process. See Section I.A above for more details about the policies related to public charge inadmissibility applied by USCIS and DOS.

PRACTICE TIP: It is important to screen clients for all potential inadmissibility issues when assessing eligibility to adjust status or consular process through a family or employer petition. For example, many individuals were able to obtain DACA or TPS despite being inadmissible for having a removal order entered against them by an immigration court or at the border. This prior removal order will make the client ineligible for adjustment of status or consular processing unless it is first resolved via a motion to reopen with the immigration court. Clients with prior removal orders, especially prior expedited removal orders, can be at high risk for removal. Therefore, applications for immigration relief on behalf of these clients should only be taken on by advocates with substantial experience.

⁵⁵ See *Matter of Quilantan*, 25 I. & N. Dec. 285, 290–91 (BIA 2010) (holding that an admission only requires procedural regularity for purposes of adjustment of status, rather than compliance with substantive legal requirements); *Matter of Areguillin*, 17 I. & N. Dec. 308, 310 (BIA 1980).

⁵⁶ INA § 101(a)(13)(A).

⁵⁷ For more information about adjustment of status options, see ILRC, *Family-Based Adjustment of Status Options*, (Dec. 2018), available at <https://www.ilrc.org/family-based-adjustment-status-options>.

B. TPS Holders

People who apply for TPS are exempt from public charge inadmissibility.⁵⁸ This means that there is no public charge test when individuals apply for TPS, and when TPS holders apply to renew their TPS. However, like DACA recipients, the future of many TPS designations has been uncertain during the Trump administration. Many people with TPS have been in the United States for decades and have ties to family members or employers that may allow them to adjust status through a family or employer petition under INA § 245(a) or 245(i).

Many TPS holders may also be able to apply for adjustment of status because they live in a federal circuit where a grant of TPS qualifies as an “admission” for purposes of INA § 245(a).⁵⁹ Additionally, many TPS recipients have traveled outside of and reentered the United States on advance parole, which enables them to apply for family- or employer-based adjustment of status under INA § 245(a) if they are otherwise eligible.⁶⁰ Finally, a TPS recipient may also apply for adjustment of status pursuant to INA § 245(i) if a petition was filed on behalf of them, their spouse, or their parent on or before April 30, 2001.

As explained in Section I.A above, applicants for adjustment of status under INA § 245(a) or 245(i) will be subject to the 1999 Field Guidance on public charge, as applied by USCIS.⁶¹ TPS holders who do not qualify for adjustment of status may instead opt to apply for an immigrant visa through consular processing. Applicants in this scenario will be subject to the public charge guidance applied by DOS. See Section I.A above for more details about public charge policy applied by DOS.

NOTE: On October 11, 2019, DOS issued an Interim Final Rule (IFR) to align its standards with those of the August 2019 USCIS regulation.⁶² The IFR specifically prohibits DOS officers from considering use of benefits by an individual who “was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility.”⁶³ Because TPS is explicitly exempt from public charge inadmissibility in the regulations, when the IFR is implemented, DOS officers cannot consider benefits received when a person had TPS upon adjudicating the person’s application for an immigrant visa through consular processing. Although the IFR is not currently in effect, this is important to keep in mind for individuals with TPS who may consular process once the IFR is implemented by DOS officials.

C. U-Visa Recipients

Applicants for U-nonimmigrant status and U-based adjustment of status are not subject to public charge inadmissibility and so have a legalization path free from a public charge test. However, U-based adjustment of status requires an applicant to accrue three years in U-nonimmigrant status before applying for adjustment of status under INA § 245(m). Because current applicants for U-nonimmigrant status must undergo long waits to receive this status and to start the three-year clock, many U-visa recipients may be eager to consider faster paths to permanent residence that are available to them after receiving a U visa. Many U-visa holders who were previously ineligible for

⁵⁸ 8 CFR § 244.3(a).

⁵⁹ See *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), and *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017). The Sixth Circuit includes the states of Kentucky, Michigan, Ohio, and Tennessee. The Ninth Circuit contains the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

⁶⁰ See INA § 212(d)(5)(A). For more information about advance parole in the context of family-based adjustment of status options, see ILRC, *Family-Based Adjustment of Status Options*, (Dec. 2018), available at <https://www.ilrc.org/family-based-adjustment-status-options>.

⁶¹ For more information about adjustment of status considerations for TPS holders, see ILRC, *After TPS: Options and Next Steps*, (June 2018), available at <https://www.ilrc.org/after-tps-options-and-next-steps>.

⁶² 84 Fed. Reg. 54996.

⁶³ *Id.* at 55014.

family-based adjustment of status under INA § 245(a) may become eligible when they obtain U-nonimmigrant status because:

- They were otherwise admissible but did not have a prior admission until they were officially admitted upon receiving U-nonimmigrant status; or
- In the process of waiting for their U-visa application to be approved, they acquired a family member who could petition for them, such as a U.S.-citizen or LPR spouse or a U.S.-citizen child who turned 21 years old.

Unlike adjustment of status under INA § 245(m), U-visa recipients are subject to public charge inadmissibility when applying for adjustment of status with USCIS under INA § 245(a). Under USCIS's current public charge test, immigration officers consider only the applicant's receipt of cash aid and long-term care at government expense. USCIS will also consider the sufficiency of an affidavit of support submitted by the sponsor and, if necessary, a joint sponsor. See Section I.A above for more information about the public charge test applied by USCIS.

Remember that an applicant for adjustment of status under INA § 245(a) must be otherwise admissible and public charge may not be the primary inadmissibility ground that applies to the client. Applicants who received a waiver for other grounds of inadmissibility – such as for criminal convictions or bars based on prior removal orders or unlawful entries – may be found inadmissible if they apply under INA § 245(a). Because of the broad exemption from the grounds of inadmissibility under INA § 245(m), advocates may decide that U-based adjustment of status under INA § 245(m) remains the best option for a client who has been granted U-nonimmigrant status

IMPORTANT: The enjoined USCIS regulation specifically exempts certain categories of U-visa holders from public charge inadmissibility if they apply for adjustment under INA § 245(a). However, this regulation has been blocked in full by federal courts. Advocates should remember that U-visa holders remain exempt from public charge inadmissibility if they adjust under INA § 245(m) but will be subject to public charge inadmissibility if they instead adjust through a relative under 245(a).

V. Special Considerations for T-Visa Holders Who Plan to Adjust Status

T-visa status is a nonimmigrant status that allows noncitizen survivors of a severe form of human trafficking to remain in the United States temporarily, obtain employment authorization, apply for LPR status, and help certain family members obtain derivative T-visa status. As “qualified aliens” under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),⁶⁴ T-visa holders are also eligible for federal means-tested public benefits, including Medicaid, TANF, and SNAP.⁶⁵ Certain trafficking survivors without approved T-nonimmigrant status can access federal refugee benefits, including cash and medical assistance, food stamps, and job training,⁶⁶ as well as public benefits in some states.⁶⁷

⁶⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996). See also 8 U.S.C. § 1641(c)(4) (codifying PRWORA insofar as it pertains to T-nonimmigrant status applicants and recipients).

⁶⁵ See, e.g., Tanya Broder et al., *Overview of Immigrant Eligibility for Federal Programs*, NATIONAL IMMIGRATION LAW CENTER, (Dec. 2015), available at <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf>.

⁶⁶ *Id.*

⁶⁷ In California, for example, trafficking survivors who are taking steps to pursue a T visa are eligible for state public benefits, including cash assistance, Medi-Cal, and food stamps. For more information, see ILRC, *T Visas: What They Are and How They Can Help Your Clients*, (Apr. 2017), available at <https://www.ilrc.org/sites/default/files/resources/t visa advisory-20170509.pdf>; NILC, *Benefits for Immigrant Survivors of Trafficking, Domestic Violence, and Other Serious Crimes in California*, (Sept. 2015), available at <https://www.nilc.org/wp-content/uploads/2015/11/TraffickingReport-2015-09.pdf>.

A. Public Charge Inadmissibility When Applying for T-Nonimmigrant Status

Individuals applying for T-nonimmigrant status are statutorily exempt from the public charge ground of inadmissibility.⁶⁸ However, applicants for T-nonimmigrant status are subject to the other grounds of inadmissibility in INA § 212(a), albeit with the opportunity to apply for a waiver of such grounds.⁶⁹ These grounds could bar an applicant from eligibility for T-nonimmigrant status or adjustment of status to lawful permanent residence, as discussed below. But because the *public charge* ground of inadmissibility does not apply to an applicant for T-nonimmigrant status, no waiver of this ground is necessary when applying for a T visa and no separate waiver is required.⁷⁰

B. Public Charge Inadmissibility When Applying for T-Based Adjustment of Status

Although T-visa applicants are exempt from public charge inadmissibility, the public charge ground of inadmissibility applies when approved T nonimmigrants file for adjustment of status based on their T-visa status under INA § 245(l).⁷¹ T nonimmigrants may not adjust to LPR status based on their T-visa status if they are “inadmissible to the United States by reason of a ground that has not been waived under section 212.”⁷² Because INA § 212(a)(4) is inapplicable to T-visa applicants,⁷³ and because T-visa recipients are eligible for certain means-tested benefits, T-visa holders who have received cash aid or long-term care at government expense and apply to adjust under INA § 245(l) could find themselves inadmissible to the United States by reason of the public charge ground.⁷⁴

Fortunately, individuals who are found likely to become a public charge may apply for a discretionary waiver of the public charge ground of inadmissibility.⁷⁵ This means that a T-visa holder may apply for a waiver and adjust their status to permanent residence based on that T visa, despite a USCIS finding that they are likely to become a public charge.

PRACTICE TIP: T nonimmigrants are “qualified” immigrants, so they are eligible to receive federal public benefits, including cash assistance. If a T-nonimmigrant client is applying for adjustment of status, it is important to determine whether the client has received cash aid and to prepare a strong adjustment of status application to avoid a potential public charge determination. Remember that, under the totality of circumstances analysis in the 1999 Field Guidance, use of cash aid alone does not make an applicant a public charge. In these cases, it is important to provide robust documentation to show that the applicant is not likely to become a public charge despite having received cash aid.⁷⁶

Practitioners can also argue that INA § 212(a)(4) should not even apply to individuals who are in valid T-nonimmigrant status at the time of adjustment based on their T-visa status under INA § 245(l). INA § 212(a)(4)(E)

⁶⁸ INA § 212(d)(13)(A).

⁶⁹ A waiver is available for most grounds of inadmissibility “if the activities rendering the alien inadmissible under the provision were caused by, or were incident to, the victimization” leading to eligibility for the T visa. INA § 212(d)(13)(B).

⁷⁰ 8 CFR § 212.16(b).

⁷¹ INA § 245(l)(2)(A).

⁷² INA § 245(l)(2).

⁷³ See INA § 212(d)(13)(A).

⁷⁴ INA § 245(l)(2)(A).

⁷⁵ *Id.*

⁷⁶ For more information on the “totality of the circumstances” test, see ILRC, *Totality of the Circumstances: Assessing the Public Charge Ground of Inadmissibility*, (May 2019), available at https://www.ilrc.org/sites/default/files/resources/total_circum_assess_pub_charge_inadmis-20190503.pdf.

provides a “[s]pecial [r]ule” explicitly exempting “qualified alien[s]” from INA § 212(a)(4)(A).⁷⁷ Because T-visa holders are included among the groups of “qualified aliens,”⁷⁸ a colorable argument can be made that the public charge ground of inadmissibility is inapplicable to T-visa recipients who apply for T-based adjustment of status. In sum, a practitioner whose T-adjustment client is facing a possible public charge finding has two avenues of advocacy:

1. Argue that INA § 212(a)(4)(A) is inapplicable to their T-nonimmigrant client seeking to adjust based on their T-visa status because, according to INA § 212(a)(4)(E)(iii), public charge inadmissibility does not apply to them as a “qualified alien.”
2. If the argument above is unsuccessful, the advocate can submit evidence showing that the client is not likely to become a public charge in the “totality of the circumstances,” despite receiving cash aid.
3. If the T-based adjustment client is found inadmissible on public charge grounds, the advocate can pursue a waiver of the public charge ground of inadmissibility under INA § 245(l)(2)(A).

However, remember that an applicant for adjustment of status under INA § 245(l) must be otherwise admissible (unless they have received a prior waiver of such grounds of inadmissibility),⁷⁹ and, as is the case with U-visa adjustment discussed above, public charge may not be the main inadmissibility ground that applies to the client.

IMPORTANT: The enjoined DHS regulation specifically exempts certain categories of T-visa holders from public charge inadmissibility if they apply for adjustment under INA § 245(a), but this regulation is currently blocked from implementation. Advocates should remember that the “[s]pecial [r]ule” under INA § 212(a)(4)(E)(iii) provides a potential pathway for a T-visa adjustment application under INA § 245(a) to be exempt from public charge.

C. Public Charge Inadmissibility for T Nonimmigrants When Applying for Adjustment of Status Based on a Family or Employer Petition

Because of the language of the “[s]pecial [r]ule” described above, individuals in valid T-visa status applying to adjust based on a family petition under INA § 245(a) (as opposed to the T adjustment process under INA § 245(l)) should also be exempt from public charge.⁸⁰

However, because INA § 212(a)(4)(E) does not state that qualified immigrants are exempt from the requirement under INA § 212(a)(4)(D), an individual in valid T-nonimmigrant status who elects to adjust status via certain employer petitions would be subject to the requirement to file an affidavit of support despite being a “qualified” immigrant under 8 U.S.C. § 1641(c).⁸¹ This situation applies only to applicants for admission or adjustment of status “by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest).”⁸²

⁷⁷ INA § 212(a)(4)(E)(iii).

⁷⁸ 8 U.S.C. § 1641(c)(4).

⁷⁹ INA § 245(l).

⁸⁰ INA § 212(a)(4)(E)(iii) (explicitly exempting “qualified alien victims” from INA § 212(a)(4), subparagraphs (A) (describing “public charge” in general), (B) (describing the factors to be considered in the totality of the circumstances test), and (C) (regarding family-sponsored immigrants)).

⁸¹ See INA § 212(a)(4)(D); 8 U.S.C. § 1641(c)(4).

⁸² INA § 212(a)(4)(D).

IMPORTANT: The enjoined DHS regulation specifically exempts certain categories of T-visa holders from public charge inadmissibility if they apply for adjustment under INA § 245(a), but this regulation is currently blocked from implementation. Advocates should remember that the “[s]pecial [r]ule” under INA § 212(a)(4)(E)(iii) provides a potential pathway for a T-visa client to be exempt from public charge when applying to adjust under INA § 245(a).

D. Public Charge Inadmissibility for Individuals Applying for Adjustment of Status Based on a Family or Employer Petition After Their T-Nonimmigrant Status Has Lapsed

Individuals whose valid T-nonimmigrant status has expired may be subject to public charge inadmissibility if they later apply for adjustment of status based on a family or employer petition. As explained above, 8 U.S.C. § 1641(c)(4) classifies T-visa holders and T-visa applicants with prima facie eligibility for T nonimmigrant status as “qualified aliens,” who are exempt from public charge inadmissibility under INA § 212(a)(4)(E)(iii). In exempting this group of individuals, the statute describes the group as “alien[s] who *ha[ve] been granted* nonimmigrant status under section 1101(a)(15)(T) of this title” (emphasis added).

The capacious language of 8 U.S.C. § 1641(c)(4) suggests that the “[s]pecial [r]ule” exempting “qualified alien[s]” from INA § 212(a)(4)(A)–(C)⁸³ may apply to individuals whose T-nonimmigrant status is no longer valid when they apply for admission or to adjust status via a method other than INA § 245(l). A plain reading of the statute suggests that an individual whose T-visa status has lapsed remains someone who, in the past, “has been granted nonimmigrant status under section 1101(a)(15)(T).” However, it is unclear whether USCIS would instead interpret 8 U.S.C. § 1641(c)(4) as only referring to individuals who have been granted *and remain in* T-nonimmigrant status.

Notwithstanding these possible divergent statutory interpretations, a defensible argument can be made that the broad phrasing of the statute indicates Congress’s intention to include in the “qualified alien” category all individuals who have been granted T-nonimmigrant status, regardless of expiration date.⁸⁴ This is arguable considering that while T-nonimmigrant status lasts for up to four years,⁸⁵ its duration may be extended in some situations.⁸⁶

VI. Additional Resources

This is a rapidly changing area of the law, so it is important to stay up to date in order to best assist clients in applying for immigration relief. The following resources can help advocates track the current and proposed public charge rules and pending lawsuits against them, as well as provide practice updates:

- Immigrant Legal Resource Center (ILRC), Public Charge – <https://www.ilrc.org/public-charge>
- Protecting Immigrant Families (PIF) – <https://protectingimmigrantfamilies.org/>
- National Immigration Law Center (NILC), Economic Support – <https://www.nilc.org/issues/economic-support/>

⁸³ See INA 212(a)(4)(E)(iii).

⁸⁴ Note that the “[s]pecial [r]ule” at INA § 212(a)(4)(E) does not apply to employment-based immigrants seeking admission or adjustment “by virtue of a classification petition filed by a relative of the alien (or by an entity in which such relative has a significant ownership interest).” See INA § 212(a)(4)(D).

⁸⁵ INA § 214(o)(7)(A).

⁸⁶ INA § 214(o)(7)(B)–(C). See *T Visas: A Critical Immigration Option for Survivors of Human Trafficking* (ILRC) for more information about extending T-nonimmigrant status past the initial four-year period. More generally, the Coalition to Abolish Slavery and Trafficking (CAST) also produces helpful written resources on T-visa status and provides free individualized technical assistance to attorneys assisting trafficking survivors with immigration legal needs. See *Training & Resources*, <https://www.castla.org/training-resources/> (last visited Dec. 2019).



San Francisco

1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C.

1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin

6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio

500 6th Street
Suite 204
San Antonio, TX 78215
t: 210.760.7368

About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.