



## **DEPARTMENT OF STATE**

### **22 CFR Part 40**

**[Public Notice: 10922]**

**RIN 1400-AE87**

#### **Visas: Ineligibility Based on Public Charge Grounds**

**AGENCY:** State Department.

**ACTION:** Interim final rule; request for public comment.

**SUMMARY:** This final rule amends Department of State (“Department”) regulations by prescribing how consular officers will determine whether an alien is ineligible for a visa under the Immigration and Nationality Act (“INA”), because he or she is likely at any time to become a public charge. Aliens who seek a visa, application for admission, or adjustment of status must establish that they are not likely at any time to become a public charge, unless Congress has expressly exempted them from this ground of ineligibility or if the alien obtained a waiver. This interim final rule adds certain definitions, including definitions of public charge, public benefit, alien’s household, and receipt of public benefit. This interim final rule reflects the Department’s interpretation of the pertinent section of the INA as it applies to visa applicants. This rulemaking is also intended to align the Department’s standards with those of the Department of Homeland Security, to avoid situations where a consular officer will evaluate an alien’s circumstances and conclude that the alien is not likely at any time to become a public charge, only for the Department of Homeland Security to evaluate the same alien when he seeks admission to the United States on the visa issued by the Department of State and finds the alien inadmissible on public charge grounds under the same facts. The Department is also

removing the reference to fee collection for review and assistance with submitting an affidavit of support at consular posts as consular posts do not collect this fee, and an obsolete process related to bonds.

**DATES:** This interim final rule is effective 12 a.m., Eastern Time, October 15, 2019.

The Department of State will accept comments up to [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** You may send comments, identified by [DOS-2019-0035 and/or RIN: 1400-AE87], by the Federal eRulemaking Portal: <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Megan Herndon, Deputy Director for Legal Affairs, Visa Services, Bureau of Consular Affairs, Department of State, 600 19<sup>th</sup> St, N.W., Washington, D.C. 20006, (202) 485-7586, [VisaRegs@state.gov](mailto:VisaRegs@state.gov).

**SUPPLEMENTARY INFORMATION:**

*I. What changes are in § 40.41?*

This interim final rule codifies changes to 22 C.F.R. 40.41, which is the Department of State's ("Department") interpretation and implementation of the public charge ground of visa ineligibility, section 212(a)(4) of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. 1182(a)(4). This interim final rule supersedes all prior inconsistent guidance on the public charge visa ineligibility. Accordingly, this supersedes all Department guidance that previously limited the interpretation of "likely at any time to become a public charge" as likely to become primarily dependent on the government (federal, state, or local) for subsistence (previously limited to public cash assistance for income maintenance or institutionalization for long-term care at government expense).

The INA renders inadmissible (and therefore ineligible for a visa, ineligible for admission to the United States, and ineligible for adjustment of status) any alien who, in the opinion of a consular officer (or the Departments of Homeland Security (“DHS”) or Justice (“DOJ”), as applicable) is likely at any time to become a public charge. The statute does not define the term “public charge.” The statutory public charge provision provides that administering agencies must “at a minimum consider the alien’s age; health; family status; assets, resources, and financial status; and education and skills.” The agencies may also consider any affidavit of support, under section 213A of the INA, 8 U.S.C. 1183a, (i.e., Form I-864, Affidavit of Support Under Section 213A of the INA) submitted on the alien’s behalf. INA 212(a)(4)(B), 8 U.S.C. 1182(a)(4)(B). In general, the public charge ineligibility applies to both nonimmigrants and immigrants, although some classes of nonimmigrants and immigrants are exempt from the ineligibility ground. The DHS regulation at 8 CFR 212.23(a) lists the categories of exempt aliens. This interim final rule neither alters the classifications of aliens who are exempt from this ineligibility ground nor bears on the classifications of visas available to aliens.

The interim final rule makes several changes to paragraph (a) *Basis for Determination of Ineligibility*. First, the interim final rule adds language from the statute, “at any time,” to the existing regulatory language. Next, the interim final rule adds a reference to INA 212(a)(4)(D), 8 U.S.C. 1182(a)(4)(D), the requirement that an employment-based immigrant whose relative filed the immigrant visa petition or has a significant ownership interest in the entity that filed the immigrant visa petition, is ineligible unless such relative has executed a sufficient affidavit of support for such alien. The interim final rule adds language indicating that the consular officer will “consider

whether any third party” listed in the affidavit of support will be “willing and able to financially support the alien while the alien is in the United States.” The Department is not changing the temporal reference for the consular officer’s determination, which currently and under the interim final rule, is any time “after admission.”

Next, in paragraph (a), the interim final rule incorporates “more likely than not,” the preponderance of the evidence standard, as the Department’s interpretation of “likely” relating to the standard that consular officers will use when evaluating whether an alien is likely to become a public charge.

Additionally in paragraph (a), the interim final rule cites to the statutory requirement from section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), that consular officers will at the time of visa application take into account statutory factors, including the alien’s age; health; family status; assets, resources, financial status; and education and skills. More specifically, the interim final rule codifies Department of State Foreign Affairs Manual (“FAM”) guidance that consular officers must consider, at a minimum, those factors as part of the totality of the applicant’s circumstances. This interim final rule then explains the Department’s interpretation of each factor.

*Age:* Consular officers will consider whether the alien’s age makes the alien more likely than not to become a public charge in the totality of the circumstances, such as by impacting the alien’s ability to work. Consular officers will consider an alien’s age between 18 and 62 as a positive factor. Age will be considered a negative factor for aliens who are under the age of 18 or over 62. However, consular officers may consider other factors, such as the support provided to a minor child by a parent, legal guardian, or other source, that in the totality of the circumstances may offset the alien’s age as a

negative factor. This generally restates current FAM guidance that being under 18 years old is a negative factor in the totality of the circumstances if the visa applicant is neither accompanied by a parent or guardian or following to join a parent or guardian. The interim final rule also codifies into regulation existing FAM guidance that an applicant's age is a negative factor in the totality of the circumstances, if the consular officer believes it adversely affects the person's ability to obtain or perform work or may increase the potential for healthcare related costs that would be borne by the public.

*Health:* Under the interim final rule, consular officers will consider whether the alien's health serves as a positive or negative factor in the totality of the circumstances, including whether the alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work (if authorized). This new provision clarifies current FAM guidance. The new provision adds that consular officers will consider the report of a medical examination performed by the panel physician where such examination is required, including any medical conditions noted by the panel physician. A Class B medical condition, including Class B forms of communicable diseases of public health significance, as defined in 42 CFR part 34, will not, standing alone, result in a finding of ineligibility for public charge. In assessing the effect of the alien's health on a public charge determination, the interim final rule provides that the consular officer will consider evidence of health insurance or the ability to pay for reasonably foreseeable medical expenses in the United States a positive factor in the totality of the circumstances. Under this standard, lack of health insurance alone would not make an alien more likely than not to become a public charge

at any time, but would instead be considered in the totality of the alien's circumstances. This standard generally reflects existing guidance that certain health issues could increase the burden on the applicant to provide information demonstrating the ability to pay for medical expenses in the United States, potentially including proof of health insurance.

*Family status:* The interim final rule reflects that when considering an alien's family status, consular officers will consider the size of the alien's household, and whether the alien's household size makes the alien likely to become a public charge at any time in the future. The term "alien's household" is defined in paragraph (d). Household size is a positive factor if the family size makes the alien unlikely to receive public benefits at any time in the future.

*Assets, resources, and financial status:* The interim final rule specifies several nonexclusive aspects of the alien's assets, resources, and financial status consular officers will consider. First, with regard to an alien's household gross income, the interim final rule specifies that annual gross income for the applicant's household size of at least 125 percent of the most recent Federal Poverty Guidelines based on the applicant's household size (or 100 percent for an applicant on active duty, other than training, in the Armed Forces), is a positive factor. Second, if the applicant's annual household gross income is less than 125 percent of the most recent Federal Poverty Guidelines (or 100 percent for an applicant on active duty, other than training, in the Armed Forces) based on the applicant's household size, the applicant can submit evidence of ownership of assets, which may affect the consular officer's determination. If the total value of the household assets, offsetting for liabilities, is at least five times the difference between the applicant's household gross income and 125 percent of the Federal Poverty Guidelines (or 100

percent for an applicant on active duty, other than training, in the Armed Forces) for the applicant's household size, then that will be considered a positive factor. However, if the alien is the spouse or child of a U.S. citizen, assets totaling three times the difference between the alien's household gross income and 125 percent of the Federal Poverty Guidelines (100 percent for those on active duty, other than training, in the Armed Forces) for the alien's household size is a positive factor. If the alien is a child who will be adopted in the United States and who will likely receive citizenship under INA 320, 8 U.S.C. 1432, then assets equivalent to or greater than the difference between the alien's household gross income and 125 percent of the Federal Poverty Guidelines (100 percent for those on active duty, other than training, in the Armed Forces) for the alien's household size is a positive factor. This reflects a change from existing FAM guidance, which recognizes income above 125 percent of the Federal Poverty Guideline and assets in the amount of five times 125 percent of the Federal Poverty Guideline generally as sufficient resources for overcoming public charge concerns.

The interim final rule provides that, when considering an alien's assets, resources, and financial status, consular officers may not consider any income from illegal activities or sources, such as proceeds from illegal gambling or drug sales, or income from public benefits, as defined in the interim final rule. This policy is being explicitly articulated for the first time. The interim final rule then lists several specific nonexclusive factors consular officers will consider in evaluating whether the alien's assets, resources, and financial status make an alien likely to become a public charge. These include the alien's household gross income; the alien's cash assets and resources; non-cash assets and resources that can be converted into cash within twelve months of the date of the visa

application; the alien's financial liabilities; whether the alien has applied for, been certified to receive or approved to receive, or received, one or more public benefits, as defined in paragraph (c) of this section on or after October 15, 2019, or whether the alien has disenrolled or requested to be disenrolled from such benefits; whether the alien has received an immigration benefit fee waiver from DHS on or after the interim final rule's effective date; and whether the applicant has private health insurance or other financial resources sufficient to pay for reasonably foreseeable medical costs. This interpretation introduces two factors: past DHS fee waivers and private health insurance or other means to cover reasonably foreseeable medical costs, both of which have direct bearing on the visa applicant's assets, resources, and financial status.

The interim final rule also changes how consular officers will consider past receipt of public benefits. Current FAM guidance directs consular officers to consider receipt of public assistance of any type by the visa applicant or a family member in the visa applicant's household when determining the likelihood a visa applicant would become a public charge. The interim final rule explicitly addresses the applicant's receipt of public benefits, and incorporates the Department's new definition of public benefit. Consular officers will only consider listed public benefits received on or after October 15, 2019, except that consular officers will consider as a negative factor, but not a heavily weighted negative factor, receipt of cash assistance for income maintenance or programs supporting institutionalization for long term care in the United States, received, or certified for receipt before October 15, 2019. Additionally, the current FAM guidance does not specifically limit a consular officer's consideration to U.S. forms of public

assistance, but the interim final rule only covers United States (federal, state, local, or tribal) public assistance.

*Education and skills:* When considering an alien's education and skills, consular officers will consider both positive and negative factors associated with whether the alien has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being likely to become a public charge. In assessing whether the alien's level of education and skills makes the alien likely to become a public charge, the consular officer must consider, among other factors, the alien's history of employment, educational level (high school diploma, or its equivalent, or a higher educational degree), any occupational skills, certifications, or licenses, and proficiency in English or proficiency in other languages in addition to English. This standard provides additional detail and in some respects changes the guidance currently given to consular officers in the FAM. Currently, FAM guidance directs consular officers to consider the applicant's skills, length of employment, and frequency of job changes, and permitted consular offices to consider that work experience is evidence of skills. The Department is superseding the FAM's treatment of work experience as evidence of skills, by requiring only that consular officers consider the alien's history of employment. The Department is also introducing the new concept of whether an alien is a primary caregiver, considering as a positive factor under the totality of the circumstances if the alien is over 18 years of age and has "significant responsibility for actively caring for and managing the well-being of a minor, elderly, ill, or disabled person residing in the alien's household, such that the alien lacks an employment history or current employment, or is not employed full time."

*Prospective Visa Classification:* The interim final rule adds consideration of the alien's prospective visa classification.

*Affidavit of Support:* The interim final rule states that a sufficient Affidavit of Support Under Section 213A of the INA, where it is required, is a positive factor in the totality of the circumstances if the sponsor is likely to actually provide the alien with the statutorily required amount of financial support and other related considerations that may indicate the ability or willingness of the sponsor to provide support. Department guidance has reflected this interpretation since January 2018. Also, in paragraph (a)(7), the Department removed reference to fee collection for review and assistance with submitting an affidavit of support at consular posts, as consular posts do not collect an affidavit of support fee overseas.

*Heavily Weighted Factors:* The interim final rule then introduces certain factors and factual circumstances that will weigh heavily in determining whether an alien is likely to become a public charge, including negative and positive factors. The heavily weighted negative factors are:

- The alien is not a full-time student and is authorized to work, but is unable to satisfy the consular officer that he or she is currently employed, has recent employment history, or a reasonable prospect of future employment;
- The alien has received, or has been certified or approved to receive, one or more public benefits, as defined in 22 CFR 40.41(c), 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' worth of benefits), beginning no

earlier than 12 a.m., October 15, 2019, or 36 months prior to the adjudication of the alien's visa application, whichever is later;

- The alien has been diagnosed with a medical condition that is likely to require extensive treatment or institutionalization or that will interfere with the alien's ability to provide for himself or herself, attend school, or work;
- The alien has no health insurance for use in the United States and has neither the prospect of obtaining private health insurance, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition;
- The alien was previously found inadmissible or deportable on public charge grounds by an Immigration Judge or the Board of Immigration Appeals.

The heavily weighted positive factors are:

- The alien's household has income, assets, resources, or support of at least 250 percent of the Federal Poverty Guidelines for the alien's household size. Consular officers may not consider any income from illegal activities, e.g., proceeds from illegal gambling or drug sales, or any income derived from any public benefit as defined in 22 CFR 40.41(c);
- The alien is authorized to work and is currently employed with an annual income of at least 250 percent of the Federal Poverty Guidelines for the alien's household size. Consular officers may not consider any income from illegal activities, e.g., proceeds from illegal gambling or drug sales; and
- The alien has private health insurance (other than health insurance obtained with premium tax credits under the Affordable Care Act) for use in the United States covering the expected period of admission.

*Treatment of forms of public assistance received before October 15, 2019.* Under this interim final rule, consular officers will consider as a negative factor, but not as a heavily weighted negative factor as described in paragraph (a)(8) of this section, forms of assistance received prior to October 15, 2019 only if such assistance would have been considered in the public charge determination between May 25, 1999 and January 2, 2018. These are limited to 1) any amount of cash assistance for income maintenance, including Supplemental Security Income (“SSI”), Temporary Assistance for Needy Families (“TANF”), State and local cash assistance programs that provide benefits for income maintenance (often called “General Assistance” programs), and 2) programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received before October 15, 2019. Short-term institutionalization for rehabilitation (including under Medicaid), received before October 15, 2019, will not be considered in the public charge determination under the interim final rule. Under this interim final rule, the Department will no longer authorize consular officers to consider other forms of public assistance, domestic or foreign, in the totality of the circumstances public charge calculation.

*Public Charge Definition:* In paragraph (b), the interim final rule introduces a new definition of public charge. Under previous Department guidance in effect since May 1999, consular officers considered an applicant likely to become a public charge if the applicant is likely, at any time after admission, to become primarily dependent on the U.S. Government (which includes Federal, state, or local governments) for subsistence. Public charge, for purposes of INA 212(a)(4)(A) and (B), 8 U.S.C. 1182(a)(4)(A) and (B), is defined under the interim final rule as an alien 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' worth of benefits).

*Public Benefit Definition:* In paragraph (c), the interim final rule introduces a new definition of public benefit. Prior guidance limited the types of benefits to receipt of public cash assistance for income maintenance and institutionalization for long-term care at U.S. Government expense. The Department adopted this interpretation in the FAM based on the former Immigration and Naturalization Service ("INS") interpretation of the public charge inadmissibility, as explained in the INS Notice, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689 (May 26, 1999).

Under the Department's new definition, "public benefit" means:

- Any Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits), including:
  - Supplemental Security Income (SSI), 42 U.S.C. 1381 et seq.;
  - Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 et seq.;
  - Federal, State or local cash benefit programs for income maintenance (often called "General Assistance" in the State context, but which also exist under other names);
- Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. 2011 et seq.;
- Medicaid under 42 U.S.C. 1396 et seq., except for:

- benefits received for an emergency medical condition as described in section 1903(v)(2)-(3) of Title XIX of the Social Security Act, 42 U.S.C. 1396b(v)(2)-(3), 42 CFR 440.255(c);
  - services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 et seq.;
  - school-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under State or local law; or
  - benefits received by an alien under 21 years of age, or a woman during pregnancy (and during the 60-day period beginning on the last day of the pregnancy).
- Public housing and rental assistance programs under sections 8-9 of the Housing Act of 1937, 42 U.S.C. 1437f-g.

*Exclusions from the Public Benefit Definition:* Public benefit, under the interim final rule, does not include any public benefit received by an alien who at the time of receipt of the public benefit, or at the time of visa application or visa adjudication, is or was:

- enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2) (or is the spouse or child of such person),
- serving in active duty or in the Ready Reserve component of the U.S. Armed Forces (or is the spouse or child of such person), or

- the spouse or child of an individual enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), or in the Ready Reserve component of the U.S. Armed Forces.

For the purpose of visa adjudication for which the public charge ground of ineligibility applies, public benefit, as defined in this section, does not include any public benefit received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in 8 CFR 212.23(a), or for which the alien received a waiver of public charge inadmissibility from DHS. Public benefit does not include health services for immunizations and for testing and treatment of communicable diseases, including communicable diseases of public health significance as defined in 42 CFR part 34. Public benefits are limited to benefits received from governmental and tribal entities in the United States and does not include benefits from foreign governments. Public benefit also does not include any public benefit received by:

- children of U.S. citizens whose lawful admission for permanent residence and subsequent residence in the legal and physical custody of their U.S. citizen parent will result automatically in the child's acquisition of citizenship under the Child Citizenship Act of 2000, Public Law 106-395, 114 Stat. 1631 (INA section 320(a)-(b), 8 U.S.C. 1431(a)-(b) in accordance with 8 CFR part 320);
- children of U.S. citizens whose lawful admission for permanent residence will result automatically in the child's acquisition of citizenship upon finalization of adoption, if the child satisfies the requirements applicable to adopted children under INA 101(b)(1), 8 U.S.C. 1101(b)(1) in the United States by the U.S. citizen

parent(s) and meets other eligibility criteria as required by the Child Citizenship Act of 2000, Public Law 106-395, 114 Stat. 16341 (INA section 320(a)-(b), 8 U.S.C. 1431(a)-(b), in accordance with 8 CFR part 320); or

- children of U.S. citizens who are entering the United States for the purpose of attending an interview under section 322 of the INA, 8 U.S.C. 1433, in accordance with 8 CFR part 322.

Additionally, the interim final rule makes clear that only certain forms of public assistance received on or after 12:00 a.m., October 15, 2019 fall within the definition of “public benefit” for the purpose of applying the public charge ground of ineligibility, with the exception of cash assistance for income maintenance and programs supporting institutionalization for long term care in the United States, as detailed in § 40.41(a)(9).

*Alien’s Household:* The interim final rule sets out new standards to determine the members of an “alien’s household” at paragraph (d). One standard applies to aliens who are twenty-one years of age or older and also applies to married individuals under twenty-one, whereas a separate standard applies to children, who are defined by the INA as unmarried persons under twenty-one years of age. If the alien is twenty-one years of age or older, or married and of any age, the alien’s household includes:

- The alien;
- The alien’s spouse, if physically residing or intending to physically reside with the alien in the United States;
- The alien’s children, as defined in 101(b)(1) of the INA, 8 U.S.C. 1101(b)(1), if physically residing or intending to physically reside with the alien;

- The alien's other children, as defined in section 101(b)(1) of the INA, 8 U.S.C. 1101(b)(1), not physically residing or not intending to physically reside with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;
- Any other individuals (including a spouse not physically residing or not intending to physically reside with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's United States federal income tax return; and
- Any individual who provides to the alien at least 50 percent of the alien's financial support, or who lists the alien as a dependent on his or her federal income tax return.

If the alien is a child as defined in section 101(b)(1) of the INA, 8 U.S.C.

1101(b)(1), the alien's household includes the following individuals:

- The alien;
- The alien's children as defined in section 101(b)(1) of the INA, 8 U.S.C. 1101(b)(1), physically residing or intending to physically reside with the alien;
- The alien's other children as defined in section 101(b)(1) of the INA, 8 U.S.C. 1101(b)(1), not physically residing or not intending to physically reside with the alien, for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or

agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;

- The alien's parents, legal guardians, or any other individual providing or required to provide at least 50 percent of the alien's financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided to the alien;
- The parents' or legal guardians' other children as defined in section 101(b)(1) of the INA, 8 U.S.C. 1101(b)(1), physically residing or intending to physically reside with the alien;
- The alien's parents' or legal guardians' other children as defined in section 101(b)(1) of the INA, 8 U.S.C. 1101(b)(1), not physically residing or not intending to physically reside with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and
- Any other individual(s) to whom the alien's parents or legal guardians provide, or are required to provide at least 50 percent of such individual's financial support or who is listed as a dependent on the parent's or legal guardian's federal income tax return.

This definition varies in certain aspects from existing FAM guidance. First, the Department is adopting different standards for applicants who are at least 21 years of age

(or married and any age), and children. Prior guidance did not make such distinctions and placed more focus on the alien's sponsor, if required. However, the text of INA 212(a)(4), 8 U.S.C. 1182(a)(4), focuses on whether the visa applicant will become a public charge and requires the Department to consider the applicant's family status.

*Receipt of Public Benefit:* In paragraph (e), the interim final rule sets out new standards for what constitutes "receipt of public benefit." Receipt of public benefit occurs when a public benefit granting agency provides a public benefit, as defined in § 40.41(c), to the visa applicant as a beneficiary, whether in the form of cash, voucher, services, or insurance coverage. Application or certification for a public benefit does not constitute receipt of public benefit, but it may be considered as a factor suggesting likelihood of future receipt. An alien's receipt of, application for, or certification for, a public benefit solely on behalf of another individual does not constitute receipt of, application for, or certification for, such alien, regardless of whether the alien might gain personally from the third party's benefit. This new standard will help consular officers implement the new "public charge" definition at paragraph (b), referring to an alien who receives one or more public benefits, as defined in paragraph (c) of this section, for more than 12 months in the aggregate within any 36-month period. It also clarifies that consular officers must evaluate whether the alien is likely to receive one or more public benefits, the impact of certification for future receipt of a public benefits, and that the relevant consideration is the alien's future receipt, or expected receipt, of public benefits, not an application or certification solely on behalf of another person. Because 40.41(c) limits the definition of "public benefit" to specified forms of public assistance received

on or after 12 a.m., October 15, 2019, an alien will not be considered to have received a public benefit before that date.

The paragraph in § 40.41 titled *Prearranged Employment*, formerly (e), is redesignated (f). The interim final rule does not change the text of these sections. Finally, the Department is removing *Posting of a Bond*, formerly (d), and *Joint Sponsors*, formerly paragraph (c) and *Use of the Federal Poverty Line Where INA 213A Not Applicable*, formerly paragraph (f). These paragraphs were removed because language was not necessary; they either restated statutory requirements or were obsolete.

## II. *Why is the Department promulgating this rule?*

### A. Background

On August 14, 2019, DHS issued a final rule outlining its new interpretation of the public charge ground of inadmissibility. *See Inadmissibility on Public Charge Grounds*, 84 FR 41292. Under DHS's prior interpretation of "public charge" an alien would be inadmissible if he or she would be "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." Since May 1999, Department guidance has used the same standard. As a consequence, an alien's reliance on or receipt of non-cash benefits such as SNAP, Medicaid, housing vouchers and other housing subsidies, and other programs that DHS now considers "public benefit" pursuant to its new definition of "public charge" were not previously considered by DHS or the Department in determining whether an alien is deemed likely at any time to become a public charge.

DHS revised its interpretation of “public charge” to incorporate consideration of such benefits in order to better ensure that aliens subject to the public charge inadmissibility ground are not dependent on public resources to meet their needs, but rather rely on their own capabilities, as well as the resources of family members, sponsors, and private organizations. The DHS rule redefines the term “public charge” to mean an alien who receives one or more designated 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’ worth of benefits). The DHS final rule defines the term ‘public benefit’ with a finite list of public benefits that are considered for purposes of the public charge determination, including Federal, state, local or tribal cash assistance for income maintenance, Supplemental Security Income (“SSI”), SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (“HCV”) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing. *See* Inadmissibility on Public Charge Grounds, 84 FR 41292 (Aug. 14, 2019).

Because section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), renders inadmissible aliens ineligible to receive visas and ineligible to be admitted to the United States, the Department is also modifying its interpretation in some respects. The Department’s new standards are intended to avoid situations where a consular officer will evaluate an alien’s circumstances and conclude that the alien is not likely at any time to become a public charge, only for DHS to evaluate the same alien when he seeks admission to the United States on the visa issued by the Department of State and finds the alien inadmissible on public charge grounds under the same facts. Although the Department has chosen to

follow DHS's approach in many respects, this interim final rule reflects the Department's independent interpretations and policies. In addition, some aspects of the rule may deviate from the DHS approach due to the differing circumstances of visa applicants, who reside outside the United States and typically have not spent substantial time in the United States, as contrasted with applicants for USCIS-administered benefits, which applicants commonly are in the United States and have spent substantial time there.

#### B. Specific Provisions

In addition to the reasons cited in Section (II)(A), the Department adopts the interpretations set forth in the interim final rule based on the additional considerations below.

##### *1. Basis for Determination of Ineligibility*

The new reference to the Affidavit of Support provision for certain employment-based immigrants reflects the statutory requirement that aliens who are the beneficiary of petitions filed pursuant to section 212(a)(4)(D) of the INA, 8 U.S.C. 1182(a)(4)(D), by a relative or an entity in which a relative has a significant ownership interest are ineligible without an Affidavit of Support from such relative. Significant ownership interest means 5 percent or more under existing Department guidance. *See also* 8 C.F.R. 213a.1. This addition does not reflect a policy change. The Department is also clarifying that consular officers will consider whether a third party is willing and able to financial support the alien in the United States. A third party could be the sponsor, or, for example, for a B-1/B-2 applicant, the alien's parent or child. This clarifies current policy and is not a policy change.

Also in paragraph (a), the interim final rule incorporates “more likely than not” as the standard that consular officers will use when evaluating whether an alien is “likely” to become a public charge. Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), specifies that the public charge ground will apply to “any alien who, in the opinion of the consular officer...is likely at any time to become a public charge”. The Department believes that the word “likely” could be ambiguous to consular officers, particularly given the overall subjective nature of the standard (“in the opinion of the consular officer”), and that both consular officers and visa applicants would benefit from having a more clear standard of proof and adjudicatory framework.

The requisite degree of proof in civil matters is generally a preponderance of the evidence, which is synonymous with “more likely than not.” The standard of proof specified by the INA that must be met by individuals applying for visas is “to the satisfaction of the consular officer.” *See* INA 291, 8 U.S.C. 1361. However, most provisions in section 212(a) of the INA, 8 U.S.C. 1182(a), also require consular officers either to have a “reason to believe” or to evaluate whether as a factual matter something has happened in the past (e.g., that a visa applicant was convicted of a particular crime or engaged in trafficking activity). The public charge provision, like certain other provisions, requires a consular officer to assess the likelihood of an event happening in the future, which here serves as the sole criterion for whether the ineligibility applies. To clarify the standard for consular officers, the Department is interpreting “likely” as “more likely than not” in the context of the public charge ineligibility ground, which will eliminate ambiguity from the phrase “likely at any time” by requiring a consular officer to make a finding that it is probable, i.e., more likely than not, that an applicant will at

any time in the future become a public charge for this ground of ineligibility to apply. Conversely, this standard makes clear to applicants that they can avoid application of the public charge ground of ineligibility by demonstrating that it is *not* more likely than not that they will become a public charge at any time in the future.

The interim final rule also cites in paragraph (a) to the statutory requirement from section 212(a)(4)(B) of the INA, 8 U.S.C. 1182(a)(4)(B), that consular officers will, at the time of visa application, take into account statutory factors, including the alien's age; health; family status; assets, resources, financial status; and education and skills. The rule also explains that consular officers must consider those factors, among others, as part of the totality of the applicant's circumstances. The interim final rule then explains the Department's interpretation of each factor. The Department's standards will be implemented through guidance that is consistent with standards announced in the DHS final rule, and will mitigate against the possibility that consular officers would issue a visa to an individual whom DHS would find inadmissible based on the same facts. However, the Department's standards are in some ways tailored specifically for unique aspects of visa adjudication.

*a. Age*

Consular officers will consider whether the alien's age makes the alien more likely than not to become a public charge in the totality of the circumstances, such as by impacting the alien's ability to obtain and perform work. Consular officers will consider an alien's age between 18 and 62 as a positive factor, which takes into consideration "early retirement age" for Social Security set forth in 42 U.S.C. 416(l)(2). The 18-through-62 age range is based on the ages at which people are generally able to work full-

time and prior to an individual's general ability to retire with some social security retirement benefits under Federal law.

Under this provision, being under 18 would be a negative factor. The Department notes this approach reflects the common understanding of when people are generally able to work full-time and that children under the age of 18 generally face difficulties working full-time. Federal laws, such as the Fair Labor Standards Act, and some state laws place restrictions on the ability of children under the age of 18 to work full-time. Additionally, individuals under the age of 18 may be more likely to qualify for and receive public benefits. For example, the U.S. Census reported that persons under the age of 18 were more likely to receive means-tested benefits than other age groups. See Jessica L. Semega et al., U.S. Census Bureau, *Income and Poverty in the United States: 2016*, at 13 tbl.3 (Sept. 2017), available at <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>.

However, consular officers will also review the support provided by a parent or other source (assets, resources, and financial status) as part of the totality of the circumstances. For example, in the case of a 17-year old child in a United States boarding school, consular officers would consider age to be a negative factor. However, the alien's financial status or support, such as having education and living expenses paid for by someone else, would be a positive factor that in the totality of the circumstances could lead to the conclusion that the applicant is not likely to become a public charge. Likewise, in the case of a 17-year-old who has a credible offer of lawful employment that would make him- or herself-sufficient, the alien's age would be a negative factor, but a

credible offer of employment that would make the alien self-sufficient would be a positive factor.

In codifying existing FAM guidance that an applicant's age above early retirement age is a negative factor in the totality of the circumstances if the consular officer believes it negatively affects the person's ability to work or may increase the potential for healthcare related costs, the Department does not intend this standard to imply that individuals over early retirement age are unable to work. These factors will be weighed by consular officers in analyzing the totality of the applicant's circumstances.

*b. Health*

The interim final rule generally restates FAM guidance that directs consular officers to consider a visa applicant's health when assessing whether the applicant is likely to become a public charge. As explained below, the rule introduces additional factors related to assets, resources, and financial status, including whether an applicant will have health insurance or other means to cover reasonably foreseeable medical costs (relating to health issues existing at the time of visa adjudication). Lack of health insurance alone would not make an alien more likely than not to become a public charge at any time, but would instead be considered in the totality of the alien's circumstances.

*c. Family Status*

Under the interim final rule, consular officers will consider whether the alien has a household to support, or whether the alien is being supported by another household and whether the alien's household size makes the alien likely to become a public charge. Household size is a positive factor if the family size makes the alien unlikely to receive public benefits at any time in the future.

The Department notes that consular officers will frequently view family status in connection with, among other things, the alien's assets and resources, because the amount of assets and resources necessary to support a larger number of people in a household is generally greater. Thus, as described in the section below on "Assets, resources, and financial status," consular officers will consider annual gross income for the applicant's household size of at least 125 percent of the most recent Federal Poverty Guidelines based on the applicant's household size (or 100 percent for an applicant on active duty, other than training, in the Armed Forces) a positive factor. The Department also recognizes DHS analyses showing that receipt of non-cash benefits generally increases as family size increases, and therefore family size is relevant to assessing whether an alien is likely to become a public charge. *See Inadmissibility on Public Charge Grounds*, 83 FR 51114, 51185, Tables 16 and 17 (proposed Oct. 10, 2018). Regardless of household size, an alien may present other factors (e.g., assets, resources, financial status, education, and skills) that weigh for or against a finding that the alien is likely to become a public charge. For instance, an alien who is part of a large household may have his or her own income or access to additional assets and resources that would assist in supporting the household. All of these factors would be considered in the totality of the circumstances.

The Department notes that this approach deviates somewhat from the DHS rule, in that the Department's approach focuses on the alien's intended household in the United States, rather than any members of his foreign household he or she will leave behind. This difference in effect aligns the two Departments' approaches.

*d. Assets, resources, and financial status*

The Department's interpretation of this factor in the interim final rule comports with the totality of the circumstances test. Household gross income above 125 percent of the Federal Poverty Guidelines for the alien's household size (100 percent for an alien on active duty, other than training, in the Armed Forces), or assets five times the difference between the applicant's household gross income and the Federal Poverty Guidelines for the applicant's household, is a positive factor. However, if the alien is the spouse or child of a U.S. citizen, assets totaling three times the difference between the alien's household gross income and 125 percent of the Federal Poverty Guidelines (100 percent for those on active duty, other than training, in the Armed Forces) for the alien's household size is a positive factor. If the alien is a child who will be adopted in the United States and who will likely receive citizenship under INA 320, 8 U.S.C. 1432, then assets equivalent to or greater than the difference between the alien's household gross income and 125 percent the Federal Poverty Guidelines (100 percent for those on active duty, other than training, in the Armed Forces) for the alien's household size is a positive factor. This significant assets provision allows an alien whose income is below the applicable income threshold to demonstrate assets to support himself or herself, thereby reducing the likelihood of becoming a public charge. This reflects a change from existing FAM guidance, which recognizes income above 125 percent of the Federal Poverty Guidelines and assets in the amount of five times 125 percent of the Federal Poverty Guidelines generally as sufficient resources for overcoming public charge concerns. This new standard is more consistent with DHS Affidavit of Support requirements, outlined in 8 CFR 213a.2(c)(2)(iii)(B), and the framework DHS will use for public charge inadmissibility determinations. *See* 8 CFR 212.22(b)(4).

It is still possible that other factors, such as an alien's health and inability to pay for reasonably foreseeable health costs, could mean that a consular officer could find an alien with such financial resources likely to become a public charge. The Department recognizes that this factor will be more relevant to immigrant visa applicants who will reside permanently in the United States than nonimmigrant applicants who intend to travel to the United States for a short duration.

The interim final rule introduces two factors related to assets, resources, and financial status: previous DHS fee waivers and health insurance or other means to cover foreseeable medical costs. DHS fee waivers are based on an individual's inability to pay. 8 CFR 103.7(c). A recently granted fee waiver is relevant to whether an applicant is likely to become a public charge, although the factor is less relevant if the applicant's financial status has materially improved since the waiver was granted. Additionally, a fee waiver granted by DHS is not considered as a factor in the public charge inadmissibility determination if the alien applied for and was granted a fee waiver as part of an application for a benefit request for which a public charge inadmissibility under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4) was not required.

The interim final rule's addition of private health insurance as a factor relevant to assets, resources, and financial status reflects the fact that medical costs can be significant and certain public benefits are designed to help individuals with limited resources to cover medical costs. The fact that an applicant has health insurance or other sufficient financial resources makes it less likely that an alien will resort to public benefits to cover medical expenses. A consular officer will consider an alien's health insurance coverage or other financial resources, in light of reasonably foreseeable medical costs (those

related to medical issues existing at the time of visa adjudication), in the totality of the applicant's circumstances. Lack of health insurance alone would not make an alien more likely than not to become a public charge at any time, but would instead be considered in the totality of the alien's circumstances.

The Department also considered whether to include a visa applicant's credit score or credit report among the other factors relevant to assets, resources, and financial status. The Department is aware that the DHS final rule includes an alien's credit history and credit score among the types of evidence USCIS adjudicators consider. The Department did not include credit history or credit score in this interim final rule, primarily because visa applicants generally would not have an active or recent credit history in the United States.

The interim final rule codifies some changes to how consular officers will consider past receipt of public benefits. Current guidance directs consular officers to consider receipt of public assistance of any type by the visa applicant or a family member in the visa applicant's household when determining the likelihood a visa applicant would become a public charge. The interim final rule revises this by focusing on receipt of public benefits only by the applicant and incorporates the Department's new definition of public benefit. Both of these elements align with the DHS rule, ensure consistent administration of the INA's public charge provisions, and minimize the possibility of a consular officer issuing a visa to an alien who is later found to be inadmissible by DHS on the same facts.

The Department's new definition of "public benefit" includes only certain forms of public assistance received on or after 12 a.m., October 15, 2019, although, as

explained below in Section (II)(B)(1)(i), consular officers may consider any amount of cash assistance for income maintenance, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), State and local cash assistance programs that provide benefits for income maintenance (often called “General Assistance” programs), and programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received, or certified for receipt, before October 15, 2019 as a negative factor (but not a heavily weighted negative factor).

*e. Education and Skills*

When considering an alien’s education and skills, consular officers will consider whether the alien has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being likely to become a public charge. In assessing whether the alien’s level of education and skills makes the alien likely to become a public charge, the consular officer must consider, among other factors, the alien’s history of employment, educational level (high school diploma or higher educational degree), any occupational skills, certifications or licenses, and language proficiency. Current guidance directs consular officers to consider the applicant’s skills, length of employment, and frequency of job changes, and permitted consular offices to consider work experience as evidence of skills. Although the interim final rule does not treat work experience as evidence of skills, it does require that consular officers consider the alien’s history of employment. Section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), directs officers to consider the alien’s education and skills. The interim final rule implements Congress’s directive on this mandatory statutory factor. This formulation is also more similar to the new DHS guidance, and is aimed to mitigate against situations

where a consular officer will issue a visa to an alien who is later found inadmissible by DHS on the same facts.

The interim final rule introduces a requirement that consular officers consider the following additional information relevant to education and skills: educational level (high school diploma, or its equivalent, or higher educational degree), any occupational skills, certifications or licenses, and language proficiency. Various studies and data show that a higher level of education and skills is a positive indicator of self-sufficiency. The U.S. Bureau of Labor Statistics (BLS) observed in 2016 a relationship between educational level and the unemployment rate. *See* U.S. Bureau of Labor Statistics, *Employment Projections, Unemployment Rates and Earnings by Educational Attainment, 2016*, available at <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm> (last updated Mar. 27, 2018). According to that report, the unemployment rate for an individual with a doctoral degree was only 1.6 percent, compared to 7.4 percent for an individual with less than a high school diploma. According to the U.S. Census Bureau, lower educational attainment was associated with higher public benefit program participation rates for people over the age of 18. *See* Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009-2012: Who Gets Assistance?* (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>. That report reflected that in 2012, 37.3 percent of people who did not graduate from high school received means-tested benefits, compared with 21.6 percent of high school graduates and 9.6 percent of individuals with one or more years of college.

Additionally, data suggest that people who have lower education levels are not only more likely to receive public benefits but also more likely to receive them for longer periods. For example, 49.4 percent of people with less than four years of high school who received public benefits from a major means-tested program between January 2009 and December 2012 continued to participate in the benefit program for 37 to 48 months. In contrast, only 39.3 percent of high school graduates and 29.0 percent of those with one or more years of college who received public benefits during the same time period continued to participate in the public benefit program for 37 to 48 months. *See id.* The data suggests that a lack of education increases the likelihood of poverty and unemployment, which may in turn increase the likelihood of applying for, and participating in, public assistance programs.

The Department's treatment of education and skills in the interim final rule is supported by DHS's analysis of Survey of Income and Program Participation data, which shows a relationship between education level and self-sufficiency. *See Inadmissibility on Public Charge Grounds*, 83 FR 51114, 51190-51196 (proposed Oct. 10, 2018).

The interim final rule recognizes the implications of whether the alien is a primary caregiver. This factor is intended to take into consideration difficult-to-monetize contributions by aliens who may lack current employment or an employment history due to their full-time, unpaid care of household members. For example, a visa applicant may care for a household member who will not travel with the visa applicant to the United States. The visa applicant's employment history would not accurately reflect the alien's unpaid work as a primary caregiver. In this respect, serving as a primary caregiver could be a positive factor in the totality of the circumstances.

*f. Prospective Visa Classification*

The interim final rule adds that consular officers will consider the visa classification sought. This factor relates to the alien's ability to financially support himself or herself and the members of his or her household while in the United States. For example, a consular officer's public charge analysis of an applicant for a B-1 nonimmigrant visa, who plans to attend a week-long business meeting, would differ from a longer term nonimmigrant applicant, such as an H-1B nonimmigrant specialty worker, who would reside and work in the United States for years at a time, and would differ even more from an immigrant visa applicant who intends to reside permanently in the United States and may not have pre-arranged employment. In this respect, the visa classification, including the purpose and duration of travel, are relevant to assessing the likelihood that an alien would avail himself or herself of public benefits (noting that in many cases visa applicants may not be eligible for public benefits in the United States), and therefore consular officers must evaluate these factors on a case-by-case basis.

That is not to say that a B-1 nonimmigrant applicant is subject to a lower standard than an H-1B nonimmigrant or immigrant under the statute or this interim final rule, but the immigration status sought by the applicant will be highly relevant context for the consular officer's totality of the circumstances determination. An applicant with a serious chronic health condition seeking medical treatment in the United States on a tourist visa would be expected to establish that he or she has the means and intent to pay for all reasonably foreseeable treatment. By demonstrating the ability to cover the medical expenses anticipated on a short-term trip to the United States, the applicant can demonstrate that even though health presents as a negative factor, the applicant has

financial resources that make it unlikely the applicant would avail himself or herself of one or more public benefits. However, an immigrant visa applicant with the same serious chronic health condition and need for ongoing treatment would have to satisfy a consular officer that he or she has the means to pay for long-term care.

*g. Affidavit of Support*

The interim final rule provides that a properly filed, non-fraudulent, and sufficient Affidavit of Support, in those cases where it is required, is a positive factor in the totality of the circumstances. In the totality of the circumstances review, the consular officer would take into consideration the likelihood that the sponsor actually would provide the required financial support, based on the any available relevant information about the sponsor. Since January 2018, FAM guidance has reflected that a properly filed, non-fraudulent Affidavit of Support, in those cases where it is required, is a positive factor in the totality of the circumstances analysis, and that an alien who is required to submit an Affidavit of Support but who fails to submit a sufficient Affidavit of Support is ineligible as a public charge. To be sufficient, an Affidavit of Support must meet the requirements of 8 CFR part 213a. Also, in paragraph (b), the Department removed reference to fee collection for review and assistance with submitting an affidavit of support at consular posts because consular posts do not collect an affidavit of support fee overseas.

*h. Heavily Weighted Factors*

The interim final rule provides that certain factors or factual circumstances will weigh heavily in determining whether an alien is likely to become a public charge. The mere presence of one of these enumerated circumstances would not, alone, be determinative. A heavily weighted factor could be outweighed by countervailing

evidence in the totality of the circumstances. While heavily weighted factors are circumstances the Department considers particularly indicative of the likelihood an alien will become a public charge, they are evaluated in conjunction with other relevant positive and negative factors in the totality of the alien's circumstances.

*i. Heavily Weighted Negative Factors*

The interim final rule provides that certain factors are weighted as heavily negative because these factors are particularly indicative of a likelihood that the alien would become a public charge, particularly with regard to the alien's ability to be self-sufficient. Heavily weighted negative factors include:

*a. Lack of Recent Employment or Prospect of Future Employment*

As long as an alien is not a full-time student and is authorized to work in the alien's place of residence abroad and, if relevant, in the United States, the interim final rule sets the absence of current employment, employment history, or reasonable prospect of future employment as a heavily weighted negative factor. Self-sufficiency generally involves people being capable and willing to work and being able to secure and maintain gainful employment. Various studies and data show that a person's education, skills, and employment history, are positive factors for self-sufficiency. *See* Section (II)(B)(1)(e), above. In addition, the lack of positive employment history and demonstrable marketable skills are indicative of an increased likelihood that an individual would avail himself or herself of public benefits. This concept is supported by two Census Bureau studies covering 2004 to 2007 and 2009 to 2012, which show that, in each of the covered years, individuals with full-time work were less likely to receive means-tested benefits during the year (ranging from 4.5 percent to 5.1 percent of full-time workers who received

benefits) than those who were unemployed (ranging from 24.8 percent to 31.2 percent of unemployed individuals who received benefits). See Jeongsoo Kim, Shelley K. Irving, & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2004 to 2007 and 2009—Who Gets Assistance?* (July 2012), available at <https://www2.census.gov/library/publications/2012/demo/p70-130.pdf>; Shelley K. Irving & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2009-2012: Who Gets Assistance?* (May 2015), available at <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p70-141.pdf>. The Department recognizes that not everyone authorized to work needs to work and thus the Department does not require a working age alien to have an employment history as part of the public charge determination. Some aliens may have sufficient assets and resources, including a household member's income and assets, which may overcome any negative factor related to lack of employment. For example, some student visa applicants may have scholarships that cover the cost of education as well as living expenses during the time of their studies. Further, students generally acquire skills as part of their studies so that post-education they will be able to obtain employment. Consular officers will review those considerations in the totality of the circumstances.

*b. Current or Certain Past Receipt of Public Benefits*

Under § 40.41(a)(8)(i)(B), receipt of one or more public benefits, as defined in § 40.41(c), is a heavily weighted negative factor in a consular officer's public charge determination if an alien has received or has been certified or approved to receive one or more public benefits for more than 12 months in the aggregate within any 36-month

period, beginning no earlier than 36 months prior to the alien's visa application or after October 15, 2019, whichever is later. Under this interim final rule, receipt of two benefits in one month counts as two months' worth of benefits. Current receipt of one or more public benefits, alone, will not always justify a finding of ineligibility on public charge grounds. However, an alien's current receipt of one or more public benefits suggests that the alien may continue to receive one or more public benefits in the future and would be more likely to be a public charge as defined under § 40.41(b).

With regard to current receipt of public benefits, according to U.S. Census Bureau data, the largest share of participants (43.0 percent) who benefited from one or more means-tested assistance programs between January 2009 and December 2012 continued to receive program benefits for between 37 and 48 months. *See* U.S. Census Bureau, *News Release: 21.3 Percent of U.S. Population Participates in Government Assistance Programs Each Month* (May 28, 2015), available at <https://www.census.gov/newsroom/press-releases/2015/cb15-97.html>. A separate U.S. Census Bureau study showed that an individual who received benefits at any point during a two-year timespan was likely to receive benefits every month during the period studied, suggesting relatively long periods of receipt of benefits. Between January 2004 and December 2005, a greater share of the population received one or more means-tested benefits for the entire 24-month study period (10.2 percent) than for either one to 11 months (8.5 percent) or 12 to 23 months (6.5 percent). *See* Jeongsoo Kim, Shelley K. Irving, & Tracy A. Loveless, U.S. Census Bureau, *Dynamics of Economic Well-Being: Participation in Government Programs, 2004 to 2007 and 2009—Who Gets Assistance?* (July 2012), available at

130.pdf. The Department views current receipt of public benefits as a strong indicator that an alien will continue to receive public benefits after admission to the United States and is, therefore, likely to become a public charge. However, an alien may be able to establish circumstances indicating that the receipt of public benefits will stop in the near future, prior to admission to the United States on the visa being sought.

An alien's past receipt of public benefits at any time on or after October 15, 2019, for more than 12 months in the aggregate within the 36 months immediately preceding his or her application is a heavily weighted negative factor in determining whether the alien is likely to become a public charge. However, an alien's past receipt of any designated public benefits is considered a negative factor, even if not a heavily weighted one. For example, the receipt of a public benefit five years ago (assuming the evaluation was on or after October 1, 2024) would be a negative factor; however, a public benefit received within the previous three years prior to the visa application and for more than twelve months (assuming the twelve months occurred after October 15, 2019 and was for more than 12 of 36 months in the aggregate) is considered a heavily weighted negative factor. The weight given to the receipt of public benefits will depend not only on how long ago and for how long the alien received the benefits, but also on whether the alien received multiple benefits.

The interim final rule makes clear that consular officers will only consider past receipt of public benefits on or after October 15, 2019, as a heavily weighted negative factor. The definition of "public benefit" in § 40.41(c) only applies to benefits received on or after October 15, 2019.

*c. Lack of Financial Means to Pay for Medical Costs*

An alien presents a high risk of becoming a public charge if he or she does not have private health insurance and also lacks the prospect of obtaining private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to an existing medical condition. The risk increases if the alien is likely to require extensive medical treatment or institutionalization or the condition will interfere with the alien's ability to provide care for him- or herself, to attend school, or to work. If the applicant has no medical conditions existing at the time of visa adjudication, he or she would have no reasonably foreseeable medical costs.

Certain chronic medical conditions can be costly to treat and an alien is a high risk of incurring significant medical costs if he or she has such a condition. *See* U.S. Dep't of Health & Human Servs., *Research In Action, Issue #19: The High Concentration of U.S. Health Care Expenditures* (June 2006), available at <https://archive.ahrq.gov/research/findings/factsheets/costs/expriach/ependria.pdf>; *see also* <https://www.cdc.gov/chronicdisease/about/costs/index.htm> (costs associated with certain chronic diseases).

Certain conditions may adversely affect an applicant's ability and capacity to obtain and retain gainful employment. Other conditions could result in long-term institutionalization in a health care facility. *Id.* According to the *Multiple Chronic Conditions Chartbook 2010 Medical Expenditure Panel Survey Data*, 86 percent of the nation's \$2.7 trillion annual health care expenditures were for individuals with chronic or mental health conditions. *Id.* Consular officers will learn of medical conditions through panel physician medical examinations or the alien's disclosure of a medical condition. If a consular officer has reason to believe a visa applicant's medical condition will require

extensive medical treatment or institutionalization, or will interfere with the alien's ability to provide for himself or herself, attend school, or work, the consular officer will require the visa applicant to explain how he or she will cover medical costs in the United States. It is a heavily weighted negative factor if such an alien does not have private health insurance to cover such expenses in the United States and has neither the prospect of obtaining private health insurance to cover medical expenses in the United States, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition.

*d. Prior Public Charge Inadmissibility or Deportability Finding*

A prior finding by an Immigration Judge or the Board of Immigration Appeals that the visa applicant was inadmissible under INA 212(a)(4), 8 U.S.C. 1182(a)(4), or deportable under INA 237(a)(5), 8 U.S.C. 1227(a)(5) (for having become a public charge within five years after date of entry to the United States, not from causes affirmatively shown to have arisen since entry) is a heavily weighted negative factor; however, a past public charge finding is not necessarily dispositive of whether the individual subsequently will be denied a visa on public charge grounds. The Department recognizes that individual circumstances can change with the passage of time. This approach aligns with the DHS final rule.

*ii. Heavily Weighted Positive Factors*

The interim final rule provides that certain factors will be weighted as heavily positive, because they strongly indicate the alien would not become a public charge.

Heavily weighted positive factors include:

*a. Alien's Household Has Income, Assets, Resources, or Support of at Least 250 Percent of the Federal Poverty Guidelines*

If the alien's household has financial assets, resources, support or annual income of at least 250 percent of the Federal Poverty Guidelines for the alien's household size, then that will be considered a heavily weighted positive factor in the totality of the circumstances. DHS's analysis of Survey of Income and Program Participation data on income and participation in public benefit programs shows that participation in programs that administer "public benefits," as defined for the purpose of this rule, declines significantly for individuals with an income at least 250 percent of the Federal Poverty Guidelines. *See Inadmissibility on Public Charge Grounds*, 83 FR 51206, (October 10, 2018) (noting, *e.g.*, that use of SNAP benefits declines from a 21.2 percent participation rate for those with income between 125-250 percent of the Federal Poverty Guidelines to 15 percent for those with incomes between 250-400 percent of the Federal Poverty Guidelines). This approach aligns with the DHS final rule. Accordingly, the Department will treat income, assets, resources, or support that is at least 250 percent of the Federal Poverty Guidelines as a heavily weighted positive factor.

*b. Alien With Work Authorization Has Income of at Least 250 Percent of the Federal Poverty Guidelines*

The Department will consider an alien with work authorization and income of at least 250 percent of the Federal Poverty Guidelines as a heavily weighted positive factor. In addition to the reasons provided in the prior paragraph, this level of income suggests that the alien has obtained a level of self-sufficiency and that he or she would be less likely to

become a public charge, barring unforeseen changes in circumstances. This aligns with the DHS final rule.

*c. Alien Has Private Health Insurance*

Additionally, consular officers will consider as a heavily weighted positive factor that an alien is covered by private health insurance (other than health insurance obtained with premium tax credits under the Affordable Care Act) that can be used in the United States during the entire period of the alien's anticipated stay in the United States. This approach is supported by DHS's analysis of Survey of Income and Program Participation data, which indicates that the fact that an alien has health insurance is indicative of the alien's ability to be self-sufficient. *See Inadmissibility on Public Charge Grounds*, 84 FR 41292, 41449 (Aug. 14, 2019). In excluding health insurance obtained with premium tax credits under the Affordable Care Act from the category of heavily weighted positive factors, though not from consideration as a positive factor, the Department observes that DHS adopted this approach in its final rule.

*i. Treatment of benefits received before October 15, 2019*

Under the interim final rule, consular officers will consider, as a negative factor, but not as a heavily weighted negative factor, any amount of cash assistance for income maintenance, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), State and local cash assistance programs that provide benefits for income maintenance (often called "General Assistance" programs), and programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received, or certified for receipt, before October 15, 2019. This is reflective of the fact that under previous Department guidance in effect since May 1999, consular officers

considered an applicant likely to become a public charge if the applicant was likely, at any time after admission, to become primarily dependent on the U.S. Government (which includes Federal, state, or local governments) for subsistence. However, the mere receipt of these benefits does not automatically make an alien ineligible for the visa. Consular officers will make each determination on a case-by-case basis in the context of the totality of the circumstances. The Department will not consider as a negative factor any other public assistance received, or certified for receipt, before October 15, 2019.

## *2. Public Charge Definition*

The Department's interim final rule interprets public charge as the receipt of one or more public benefits, as defined in paragraph (b) of § 40.41, for more than 12 months in the aggregate within any 36-month period. Receipt of two benefits in one month counts as receiving benefits for two months. Prior Department guidance limited the interpretation of "likely to become a public charge" to "likely to become primarily dependent on the U.S. Government (which includes Federal, state, or local governments) for subsistence" (previously meaning receipt of public cash assistance for income maintenance or institutionalization for long-term care at U.S. Government expense). The Department believes this new, more rigorous implementation of the public charge visa ineligibility is consistent with section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4), and congressional objectives stated in the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA), where Congress noted that aliens subject to the public charge visa ineligibility should "not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations." *See* 8 U.S.C. 1601(2)(A).

There is a scarcity of legislative guidance and case law interpreting public charge. Legislative history, however, suggests a link between public charge and the receipt of public benefits. According to a 1950 Senate Judiciary Committee report, which led up to passage of the INA in 1952, a Senate subcommittee highlighted concerns raised by an immigration inspector about aliens receiving old age assistance. The Senate subcommittee recommended against establishing a strict statutory definition of public charge. Because the circumstances that indicate any given individual's likelihood of becoming a public charge vary, the subcommittee instead recommended that the determination of whether an alien is likely to become a public charge should rest within the discretion of consular officers and the Commissioner. *See* 1950 Omnibus Report of the Senate Judiciary Committee, S. Rep. No. 81-1515, at 349 (1950).

In setting the standard as receipt of 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' worth of benefits) the Department recognizes that States have developed widely varying approaches to the imposition of time limits for the receipt of public benefits. On the Federal level, PRWORA established a 60-month time limit on the receipt of federally funded Temporary Assistance for Needy Families (TANF) program benefits. *See* 42 U.S.C. 608(a)(7) and 45 CFR 264.1. Some states have adopted shorter lifetime limits on benefit receipt; in 2017, fourteen States had lifetime limits of less than 60 months and nine states had intermittent time limits. *See* Heffernan, Christine, Benjamin Goehring, Ian Hecker, Linda Giannarelli, and Sarah Minton (2018). Welfare Rules Databook: State TANF Policies as of July 2017, OPRE Report 2018- 109, Washington, DC: Office of Planning, Research, and Evaluation, Administration for

Children and Families, U.S. Department of Health and Human Services

[https://wrđ.urban.org/wrd/data/databooks/2017%20Welfare%20Rules%20Databook%20\(final%2010%2031%2018\).pdf](https://wrđ.urban.org/wrd/data/databooks/2017%20Welfare%20Rules%20Databook%20(final%2010%2031%2018).pdf) (last visited Sept. 13, 2019).

The Department's position is that an individual who receives public benefits for more than 12 months, in the aggregate, during a 36-month period is neither self-sufficient nor on the road to achieving self-sufficiency, and may appropriately be considered a public charge. The Department's implementation deems receipt of public benefits for such a duration as exceeding what could reasonably be defined as a nominal level of support that merely supplements an alien's independent ability to meet his or her basic living needs. This new definition aligns with the new DHS rule.

### *3. Public Benefit*

*In general:* As described above, the Department's prior guidance interpreted the public charge ground of ineligibility to include only public cash assistance for income maintenance and institutionalization for long-term care at U.S. Government expense. Guidance on public cash assistance for income maintenance was further clarified to include supplemental security income (SSI); TANF cash assistance, but not supplemental cash benefits or any non-cash benefits provided under TANF; and state and local cash assistance programs that provide for income maintenance (often referenced as "state general assistance"). This previous guidance explicitly excluded other benefits including non-cash benefits such as the SNAP, Medicaid, housing vouchers and other housing subsidies, and other programs. The Department adopted this interpretation based on an INS interpretation of the public charge inadmissibility, as explained in the INS Notice,

*Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 FR 28689 (May 26, 1999).

The new rule broadens the Department's interpretation of "public benefit" for purposes of applying the public charge ground of ineligibility to include public cash assistance for income maintenance, SNAP, most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing.

The Department believes this interpretation of public benefit is consistent with INA section 212(a)(4), 8 U.S.C. 1182(a)(4). The sparse statutory language and legislative history allows for a wide range of interpretations, including both the Department's previous more limited definition of public benefit focused on cash assistance and this broader definition.

The definition of "public benefit" in this interim final rule is also consistent with PRWORA. That statute includes broad definitions of "federal public benefit" and "state or local public benefit" that extend significantly beyond the Department's prior guidance in the public charge context. While PRWORA allows some aliens to receive certain benefits covered under its expansive definitions, Congress did not exclude the lawful receipt of such benefits from consideration for purposes of INA section 212(a)(4), 8 U.S.C. 1182(a)(4). Further, the Department's definition of "public benefit" is consistent with the Congressional goals articulated in PRWORA, specifically that aliens subject to the public charge visa ineligibility should "not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations." See 8 U.S.C. 1601(2)(A). The Department chose

to include the specific non-cash benefits covered under the definition of “public benefit” because these benefits assist recipients in meeting basic living requirements, namely food, housing, and medical care. The receipt of any of the listed benefits indicates that the recipient, rather than being self-sufficient, needs the government's assistance to meet basic living requirements.

Since 1999, the Department, when applying the public charge ineligibility ground, has considered only whether an alien is likely to become primarily dependent for subsistence on the U.S. Government, which includes Federal, state, or local governments, by resorting to income maintenance and institutionalization for long-term care at government expense. However, current FAM guidance says:

There are many forms of public assistance that an applicant may have accepted in the past, or that you may reasonably believe an applicant might receive after admission to the United States, that are of a non-cash and/or supplemental nature and should not be considered to be benefits when examining the applicant under INA 212(a)(4), and may only be considered as part of the totality of the applicant's circumstances in determining whether an applicant is likely to become a public charge.

Under the interim final rule, the Department will only treat receipt of the specified forms of public assistance on or after 12:00 a.m., October 15, 2019 as a “public benefit” for the purposes of applying the public charge ground of ineligibility, and will only consider cash assistance for income maintenance and programs supporting institutionalization for long term care in the United States that are not included in the new definition of “public benefit” that were received or certified for receipt prior to October 15, 2019. The Department believes that consideration of these forms of assistance represent an appropriately comprehensive and also readily administrable application of the public charge ground of ineligibility. The interim final rule will supersede the current policy,

which allows consular officers to consider past receipt of any forms of public assistance, at any time. The Department observes that DHS proposed a similar approach in its NPRM, but, following public comments, opted for the approach reflected in this interim final rule when it finalized its rule. For consistency with the DHS standard, as well as for increased transparency and to provide a clear and helpful limitation on the scope of review for consular officers and visa applicants, the Department is adopting the DHS final rule's approach.

*a. Exception for Certain Individuals Enlisted or Serving in the U.S. Armed Forces, Spouse, and Children*

Under the interim final rule, consular officers will not consider receipt of public benefits by those enlisted in the U.S. Armed Forces, or serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, and their families, when assessing whether such individuals are likely to become a public charge. The United States Government is profoundly grateful for the unparalleled sacrifices of the members of our armed services and their families. The Department recognizes that some service members, during their service, or their family members, qualify for and receive public benefits in addition to the salary and benefits provided by the U.S. government. Their sacrifices, including risking life and limb, are so vital to the public's safety and security that the Department finds this exception warranted. The Department understands that many of the individuals who enlist in the military are early in their careers, and therefore, consistent with statutory pay authorities, earn relatively low salaries that are supplemented by certain other allowances and tax advantages provided by the U.S. government. *See Inadmissibility on Public Charge Grounds, 84 FR 41371*; see also

*Final Rule, Inadmissibility on Public Charge Grounds; Correction*, 84 FR 52357 (Oct. 10, 2019). This approach is consistent with the DHS rule. For these reasons, the Department's interim final rule excludes consideration of the receipt of any public benefits by active duty service members and their spouses and children.

*b. Exception for Aliens Present in the United States in an Immigration Category Exempt from the Public Charge Ground*

For the purpose of immigration benefit adjudication, DHS does not consider public benefits received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility or for which the alien received a waiver of public charge inadmissibility. 8 CFR 212.21(b)(8). Likewise, for the purpose of adjudicating visa applications, consular officers will not consider public benefits an alien received during any periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of visa ineligibility, or if the alien was the recipient of a waiver of the public charge ground of ineligibility.

*c. Exception for Foreign-Born Children of U.S. Citizens*

In some cases, the children of U.S. citizens will acquire citizenship upon finalization of their adoption in the United States, under section 320 of the INA, 8 U.S.C. 1431, or the children will naturalize upon taking the Oath of Allegiance (or having it waived) under section 322 of the INA, 8 U.S.C. 1433. In other cases, the children of U.S. citizens will acquire citizenship upon taking up residence in the United States in the legal and physical custody of their U.S. citizen parent pursuant to a lawful admission. The

definition of “public benefits” does not include any benefits that were or will be received by aliens described in this paragraph.

Children of U.S. citizens eligible for automatic acquisition of citizenship under section 320 of the INA, 8 U.S.C. 1431, are exempt from the affidavit of support requirement. See *Child Citizenship Act*, Public Law 106-395, 114 Stat. 1631 (Oct. 30, 2000); 8 CFR 213a.2(a)(2)(ii)(E). Therefore, consular officers will not require any affidavit of support forms from sponsors of visa applicants who will benefit from section 320 of the INA, 8 U.S.C. 1431.

Children of U.S. citizens, including those adopted abroad, typically receive one of several types of immigrant visas as listed below and are lawfully admitted to the United States for permanent residence. Such children may become U.S. citizens (1) automatically, (2) following their admission to the United States and upon the finalization of their adoption, or (3) upon meeting other eligibility criteria. International adoptions vary depending on the laws of the country of origin, the laws of the U.S. State of residence, and multiple other factors. In the majority of cases, adoptions are finalized in the country of origin before the child enters the United States and the child automatically acquires U.S. citizenship upon admission to the United States. Children whose adoptions are not finalized until after their admission or who were subject to custody orders permitting immigration to and adoption in the United States do not automatically acquire citizenship after admission. They may acquire citizenship, however, upon completing an adoption in the United States or having the foreign adoption recognized by the State where they are permanently residing, after which they would be eligible to naturalize. See *U.S. Dep't of State, 2018 Annual Report on Intercountry Adoptions*, available at

[https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt\\_ref/adoption-publications.html](https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-publications.html).

The following categories of children acquire citizenship upon lawful admission for permanent residence and beginning to reside in the legal and physical custody of their U.S. citizen parent(s):

- IR-2/IR-7 (Child of a U.S. citizen)—requires an approval of a Form I-130 (Petition for Alien Relative). These children, excluding stepchildren who have not been adopted by the U.S. citizen parent, are generally lawfully admitted for permanent residence or their status is adjusted to that of lawful permanent resident. The child must then file a Form N-600 (Application for Certificate of Citizenship) to receive the Certificate of Citizenship. The Certificate generally uses the date the child was lawfully admitted for permanent residence.
- IR-3/IR-8 (Orphan adopted abroad by a U.S. citizen)—requires an approval of the Form I-600 (Petition to Classify Orphan as an Immediate Relative). These children are generally admitted for permanent residence, and USCIS will send a Certificate of Citizenship to the child without a Form N-600 being filed or adjudicated.
- IH-3 (Hague Convention orphan adopted abroad by a U.S. citizen)—requires an approval of the Form I-800 (Petition to Classify Convention Adoptee as an Immediate Relative). These children are generally admitted for permanent residence and USCIS will send a Certificate of Citizenship to the child without a Form N-600 being filed or adjudicated.

The following categories of children are lawfully admitted for permanent residence for finalization of adoption:

- IR-4/IR-9 (Orphan to be adopted by a U.S. citizen). Generally, the parent(s) must complete the adoption in the United States. However, the child will also be admitted as an IR-4 if the foreign adoption was obtained without either parent having seen the child during the adoption proceedings, or when the parent(s) must establish that they have either “readopted” the child or obtained recognition of the foreign adoption in the State of residence (this requirement can be waived if there is a statute or precedent decision that clearly shows that the foreign adoption is recognized in the State of residence). See 8 CFR 320.1.
- IH-4 (Hague Convention Adoptee to be adopted by a U.S. citizen). These children are lawfully admitted for permanent residence and the parent(s) must complete the adoption in the United States. INA section 101(b)(1), 8 U.S.C. 1101(b).

Furthermore, children of U.S. citizens, who are residing outside of the United States and are eligible to naturalize under section 322 of the INA, 8 U.S.C. 1433, must apply for an immigrant or nonimmigrant visa to enter the United States before they naturalize. These children are generally issued a B-2 nonimmigrant visa in order to complete the process for naturalization through an interview and take the Oath of Allegiance under section 322 of the INA, 8 U.S.C. 1433. Congress has enacted numerous laws over the last two decades to ensure that foreign-born children of U.S. citizens are not subject to adverse immigration consequences in the United States on account of their foreign birth. Most notably, the Child Citizenship Act of 2000 provides that children, including adopted children, of U.S. citizen parents automatically acquire

U.S. citizenship if certain conditions are met. See *Dep't of State, FAQ: Child Citizenship Act of 2000*, available at [https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt\\_ref/adoption-FAQs/child-citizenship-act-of-2000.html](https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-FAQs/child-citizenship-act-of-2000.html) (last visited July 30, 2019). See also 8 CFR part 320. The same year, Congress passed the Intercountry Adoption Act of 2000 (IAA), 42 U.S.C. 14901-14954, to implement the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which established international standards of practices for intercountry adoptions. The United States signed the Convention in 1994, and the Convention entered into force for the United States on April 1, 2008. *Deposit of Instrument of Ratification by the United States of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 72 FR 71730 (Dec. 18, 2007). The full text of the Convention is available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> (last visited July 30, 2019). The IAA protects the rights of children, birth families, and adoptive parents, and improves the Government's ability to assist U.S. citizens seeking to adopt children from abroad. IAA section 2, 42 U.S.C. 14901(a). See also *Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons*, 71 FR 8064 (Feb. 15, 2006).

Many U.S. citizens seek to adopt children with disabilities or serious medical conditions, and a significant proportion of children adopted abroad by U.S. citizens have special medical needs. U.S. citizens seeking to adopt foreign-born children abroad generally must undergo a rigorous home study that includes a detailed assessment of finances, emotional, mental, and physical health, and other factors to determine their eligibility and suitability as prospective adoptive parents. See 8 CFR 204.3(e),

204.311(g)(3). Accordingly, such parents generally will have sufficient financial resources to provide for the child. See 8 CFR 204.311(h) (financial considerations); see also USCIS, Home Study Information, available at <https://www.uscis.gov/adoption/home-study-information> (last visited July 30, 2019).

Nevertheless, many U.S. citizens who have adopted or are in the process of adopting foreign-born children with special medical needs may seek Medicaid for their children. See Public Law 97-248, 96 Stat. 324. Medicaid programs vary by State, and may be based on the child's disability alone rather than financial means of the parents, or have higher income eligibility thresholds. As enrollment in Medicaid programs by children who are under 21 years of age will not be considered a "public benefit" for the purposes of this interim final rule, and because the adoptive parents have been found to have sufficient resources to meet the needs of their adoptive child, these visa applicants will not be considered likely to become public charges. Specifically, Congress has already imposed a requirement on adoptees under INA sections 101(b)(1)(F) or (G), 8 U.S.C. 1101(b)(1)(F) or (G), that requires their parents to demonstrate to the government that "proper care will be furnished the child if admitted to the United States." Federal regulations already require submission of a home study in cases involving the proposed adoption of children with special needs. The home studies in those cases must assess the adoptive parents' "preparation, willingness, and ability" to provide proper care for such children. 8 CFR 204.3(e)(4) and 204.311(p). The Department believes that Congress, by imposing a parental suitability determination that must be satisfied before an immigrant petition may be approved or a visa may be granted, has frontloaded aspects of the public charge determination for certain adoptive children and conveyed a preference that

concerns directly related to public charge for adoptive families be assessed at early stages of the immigration process, rather than waiting until the time of the visa application at the very end of the process. Additionally, excluding consideration of the receipt of public benefits by such children is consistent with Congress' strong interest in supporting U.S. citizens seeking to adopt and welcome foreign-born children into their families, as reflected in the IAA section 2, 42 U.S.C. 14901(a). *See also* 146 Cong. Rec. S8938-01, S8938 (daily ed. Sept. 21, 2000) (statement by Sen. Landrieu) ("I have said it before and I believe it rings true here, adoption brings people, whether they are Republican, Democrat, conservative, liberal, American, Russian or Chinese, together. United by the belief that all children deserve to grow in the love of a permanent family. Adoption breaks down barriers and helps build families."). *See also* Public Law 106-139, 113 Stat. 1696 (1999) (amending the definition of "child" in section 101(b)(1)(E) of the INA, 8 U.S.C. 1101(b)(1)(E), a change that allowed children adopted abroad to maintain their familial relationship with their natural siblings, making it easier for siblings to be adopted together).

Furthermore, because these children are being brought to the United States by their U.S. citizen parents (including adoptive parents) and will generally become U.S. citizens upon or after admission, and because the adoptive families have been found to have the resources to care for them, such an interpretation is not at odds with Congress' concerns in enacting PRWORA, or as reflected in concurrent immigration legislation restating the public charge ground of visa ineligibility noting that aliens should rely on their own capabilities and the resources of their families, their sponsors, and private

organizations; and that the availability of public benefits should not constitute an incentive for immigration to the United States. 8 U.S.C. 1601.

This provision also aligns with the DHS final rule. Accordingly, the interim final rule excludes receipt of benefits by foreign-born children of United States citizens from its interpretation of “public benefits,” as explained in Section I, above.

#### 4. *Alien’s household*

The federal poverty guidelines do not define how to determine household size, and different agencies and programs have different requirements. See *Annual Update of the HHS Poverty Guidelines*, 84 FR 1167 (Feb. 1, 2019). Public benefit-granting agencies generally consider an applicant’s income for purposes of public benefit eligibility and either use the household size or family size to determine the income threshold needed to qualify for a public benefit. Each federal program administrator or State determines the general eligibility requirements needed to qualify for the public benefits and how to determine whose income is included for purposes of determining income based eligibility thresholds. For example, SNAP uses the term “household” to include “individuals who live together and customarily purchase food and prepare meals together for home consumption.” 7 U.S.C. 2012(m)(1). The Department did not incorporate the SNAP definition because an alien may have significant financial obligations to children who do not reside in the same residence. Instead, the standard in the interim final rule takes into account individuals for whom the alien or the alien’s parent(s) or legal guardian(s) or other individual is providing at least 50 percent of financial support because such expenditure would have significant bearing on whether

the alien has sufficient assets, resources, and financial status in the context of a public charge determination.

The U.S. Department of Housing and Urban Development (HUD) uses the term “families,” which includes:

[F]amilies with children and, in the cases of elderly families, near-elderly families, and disabled families, means families whose heads (or their spouses), or whose sole members, are elderly, near-elderly, or persons with disabilities, respectively. The term includes, in the cases of elderly families, near-elderly families, and disabled families, 2 or more elderly persons, near-elderly persons, or persons with disabilities living together, and 1 or more such persons living with 1 or more persons determined under the public housing agency plan to be essential to their care or well-being.

42 U.S.C. 1437a(b)(3). The U.S. Housing Act of 1937 (the 1937 Act), 42 U.S.C. 1437 to 1437zz-10, requires that dwelling units assisted under it must be rented only to families who are low-income at the time of their initial occupancy. Section 3 of the 1937 Act also defines income, with respect to a family, as:

[I]ncome received from all sources by each member of the household who is 18 years of age or older or is the head of household or spouse of the head of the household, plus unearned income by or on behalf of each dependent who is less than 18 years of age, as determined in accordance with the criteria prescribed by the Secretary [of Housing and Urban Development], in consultation with the Secretary of Agriculture [...].

42 U.S.C. 1437a(b)(4), as amended by the Housing Opportunity Through Modernization Act of 2016, Public Law 114-201, section 102, 130 Stat. 782, 787 (2016). Beyond the statutory framework defining families, and as provided by the 1937 Act, HUD allows public housing agencies the discretion to determine particularities related to family composition, as determined under each public housing agency’s plan.

“Alien’s household,” under paragraph (e) of the interim final rule, encompasses many of the individuals identified in various HUD definitions of “family,” including

spouses and children as defined under the INA. The definition of child in INA section 101(b), 8 U.S.C. 1101(b), generally includes unmarried persons under 21 years of age who are born in or out of wedlock, stepchildren, legitimated children, adopted children if adopted under the age of 16 or the age of 18 if natural siblings of another adopted child. In addition, the Department's interpretation focuses on both individuals who the alien anticipates will live in the alien's home or physically reside with the alien in the United States, as well as individuals not living in the alien's home but for whom the alien and/or the alien's parent(s)/legal guardian(s) is providing or is required to provide at least 50 percent of financial support, whether in the United States or abroad.

The IRS defines "dependent" to include a qualifying child or a qualifying relative. See 26 U.S.C. 152; see also *IRS Publication 501* (Jan 2, 2018), available at <https://www.irs.gov/pub/irs-pdf/p501.pdf>. These tests generally include some type of relationship to the person filing (including step and foster children and their children) whether or not the dependent is living with the person filing and the amount of support being provided by the person filing (over 50 percent). *IRS Publication 501* (Jan 2, 2018), available at <https://www.irs.gov/pub/irs-pdf/p501.pdf>. In general, the dependent must also be a U.S. citizen or lawful permanent resident in order to qualify as a dependent for tax purposes. *Id.*

The IRS definition of "dependent" would generally exclude nonresident aliens. However § 40.41(d) does not. This will result in a larger number of people being included than if the Department tracked the IRS's definition of "dependent" in order to more accurately capture the alien's actual financial obligations. As used in paragraph (d), "alien's household" also considers those individuals who are supported by the alien and

are themselves aliens, or those who may be contributing to the alien's income, in order to determine whether the alien's financial resources are sufficient to support the alien and other members of the alien's household. For example, if an alien resides with a younger sibling who is attending school and the alien provides 50 percent or more financial support for the younger sibling, that sibling is a part of the alien's household, even though the younger sibling may be earning some wages from a part-time job. Those part-time wages would be counted toward the requisite income threshold. Similarly, if the alien has an older sibling who is providing 50 percent or more of financial support to the alien but not residing with the alien, that older sibling would also be included in the alien's household and his/her income counted toward the requisite income threshold along with any income earned by the alien.

As used in § 40.41(d), "alien's household" adopts the IRS standard of the amount of support being provided to the individual (50 percent) as the standard for deeming an individual part of the household in the public charge determination. See *Internal Revenue Serv., Dependency Exemptions*, available at [https://apps.irs.gov/app/vita/content/globalmedia/4491\\_dependency\\_exemptions.pdf](https://apps.irs.gov/app/vita/content/globalmedia/4491_dependency_exemptions.pdf) (last visited Jul. 30, 2019); see also *Internal Revenue Serv., Table 2: Dependency Exemption for Qualifying Relative*, available at [https://apps.irs.gov/app/vita/content/globalmedia/table\\_2\\_dependency\\_exemption\\_relative\\_4012.pdf](https://apps.irs.gov/app/vita/content/globalmedia/table_2_dependency_exemption_relative_4012.pdf) (last visited Jul. 30, 2019). The Department believes that the "at least 50 percent of financial support" standard used by the IRS is reasonable to apply to the determination of who is a member of an alien's household, without regard to whether these individuals physically reside in the alien's home. This would include those individuals the alien may not have a legal responsibility to support but may nonetheless

be supporting. For example, this could include a parent, sibling, or a grandparent living with the alien, or an adult child, sibling, or any other adult who the alien may be supporting or required to support or who contributes to the alien's financial support.

#### *5. Receipt of public benefits*

The interim final rule clarifies that receipt of public benefits occurs when a public benefit-granting agency provides a public benefit, as defined in § 40.41(c), to the visa applicant as a beneficiary, whether in the form of cash, voucher, services, or insurance coverage. The Department clarifies that application or certification for a public benefit does not constitute receipt of public benefits, but it may be considered as a factor suggesting likelihood of future receipt. Likewise, certification for future receipt of a public benefit does not constitute receipt of public benefits, although it may suggest a likelihood of future receipt. An alien's receipt of, application for, or certification for, public benefits solely on behalf of another individual does not constitute receipt of, application for, or certification for, such alien. This standard will help consular officers implement the new "public charge" definition at § 40.41(b) as an alien who receives one or more public benefits, as defined in paragraph (c) of § 40.41, 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' worth of benefits). It also clarifies that consular officers must evaluate whether the alien is likely to receive one or more public benefits, the impact of certification for future receipt of public benefits, and that the relevant consideration is the alien's receipt of public benefits, not application or certification solely on behalf of another person.

#### *6. Deletion of Posting of Bond.*

The Department removed the provision in former 22 CFR 40.41(d), which said that a consular officer may issue a visa to an alien who is within the purview of INA 212(a)(4), 8 U.S.C. 1182(a)(4), upon receipt of notice from DHS of the giving of a bond, and provided the consular officer is satisfied that the giving of such bond removes the likelihood that the alien will become a public charge. The Department is removing this provision because it reflects an obsolete process.

*7. Deletion of Use of the Federal Poverty Line Where INA 213A Not Applicable*

The Department removed the discussion in former 22 CFR 40.41(f), which stated that an immigrant visa applicant, not subject to the requirements of INA 213A, 8 U.S.C. 1183a, and relying solely on personal income to establish eligibility under INA 212(a)(4), 8 U.S.C. 1182(a)(4), who does not demonstrate an annual income above the Federal poverty line, as defined in INA 213A(h), 8 U.S.C. 1183a(h), and who is without other adequate financial resources, shall be presumed ineligible under INA 212(a)(4), 8 U.S.C. 1182(a)(4). The new language in sections (a) through (g) provide the framework consular officers will use to assess the public charge visa ineligibility, including for immigrant visa applicants who are subject to the public charge ground of ineligibility, but not the Affidavit of Support requirement. Instead of retaining a second framework for one subset of individuals subject to the public charge ground, the Department will apply this standard uniformly.

*8. Deletion of Joint Sponsor*

The Department removed the discussion in former 22 CFR 40.41(g), which stated that submission of one or more additional affidavits of support by a joint sponsor is

required if the relative sponsor's income and assets and the immigrant's assets do not meet the Federal poverty requirements. This language has been deleted as it merely restates statutory requirements of INA 213A, 8 U.S.C. 1183a, and as such is not necessary in the 22 CFR 40.41.

## **REGULATORY FINDINGS**

### *Administrative Procedure Act*

The Department has concluded that the good cause exceptions in 5 U.S.C. 553(b)(B) and (d)(3) apply to this rule, as the delay associated with notice and comment rulemaking would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(3)(B); 5 U.S.C. 553(d)(3). Those exceptions relieve agencies of the notice-and-comment requirement in emergency situations, or in circumstances where “the delay created by the notice and comment requirements would result in serious damage to important interests.” *Woods Psychiatric Inst. v. United States*, 20 Cl. Ct. 324, 333 (1990), *aff'd*, 925 F.2d 1454 (Fed. Cir. 1991); *see also United States v. Dean*, 604 F.3d 1275, 1279 (11th Cir. 2010); *Nat'l Fed'n of Federal Emps. v. Nat'l Treasury Emps. Union*, 671 F.2d 607, 611 (D.C. Cir. 1982).

Notice and comment on this rule, along with a 30-day delay in its effective date, would be impracticable and contrary to the public interest. On August 14, 2019, DHS published a final rule on inadmissibility on public charge grounds of inadmissibility. 84 FR 41292. That rule, which will be effective October 15, 2019, changes how DHS interprets the public charge ground of inadmissibility, section 212(a)(4) of the INA, 8 U.S.C. 1182(a)(4). Coordination of Department and DHS implementation of the public charge inadmissibility ground is critical to the Department's interest in preventing

inconsistent adjudication standards and different outcomes between determinations of visa eligibility and determinations of admissibility at a port of entry. If implementation of the rule is delayed pending completion of notice and comment, consular officers would apply public charge-related ineligibility standards differing from those applied by DHS and, consequently, might issue visas to applicants who would later arrive at a port of entry and be found inadmissible by U.S. Customs and Border Protection under the new DHS public charge standards, based on the same information that was presented to the adjudicating consular officer. This inconsistency between the two agencies' adjudications would create a public harm and would significantly disrupt the Department's interest in issuing visas only to individuals who appear to qualify for admission to the United States. The Department has determined that the need to minimize the occurrence of situations in which visa holders arrive at a port of entry and are found inadmissible under the new DHS public charge standards supports a finding of good cause under 5 U.S.C. 553.

*Regulatory Flexibility Act/Executive Order 13272: Small Business*

Because this interim final rule is exempt from notice-and-comment rulemaking under 5 U.S.C. 553, it is exempt from the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Nonetheless, consistent with the Regulatory Flexibility Act, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities because this rule only regulates individual visa applicants and does not regulate any small entities or businesses.

*Small Business Regulatory Enforcement Fairness Act of 1996*

The Office of Information and Regulatory Affairs has determined that this is not a major rule as defined by 5 U.S.C. 804.

*Executive Orders 12866, 13563, and 13771*

The new public charge standards will impose additional costs on many individuals, by requiring applicants to provide detailed information about their age, health, family status, finances, and education and skills. These costs are analyzed in the notice required under the Paperwork Reduction Act of a new form, the DS-5540, Public Charge Questionnaire, which certain categories of applicants will be required to complete to help inform the consular officer's public charge assessment. The Department is separately seeking OMB approval of a new information collection (form) for this purpose. The Department estimates 12,736,034 visa applicants per year will be affected by this interim final rule based on the average number of visa applicants subject to the public charge ineligibility ground for the years 2017 and 2018. Specifically, in 2017, 624,317 immigrant visa applications were subject to the public charge ineligibility ground. The number was 630,340 in 2018. In 2017, 12,356,864 nonimmigrant visa applications were in categories subject to the public charge ineligibility, and 11,860,545 in 2018. While the Department estimates 12,736,034 visa applicants will be affected by this interim final rule per year, the Department estimates that only 450,000 applicants per year will be asked to submit this information; given that the majority of nonimmigrant visa applicants would not overcome 214(b) if they were also deemed likely to be a public charge and thus would be refused as such. The average burden per response is estimated to be 60 minutes. The Department estimates that the annual hour burden to visa applicants posed by the additional questions is 450,000 hours (450,000 applicants x 60

minutes). The weighted wage hour cost burden for this collection is \$15,737,400 based on the calculation of \$24.98<sup>1</sup> (average hourly wage) x 1.4 (weighted wage multiplier) x 450,000 hours.

The Department believes the benefits of rigorously applying the public charge ineligibility ground, informed by relevant information that can only be provided by applicants, outweighs the costs associated with the new rule. Visa applicants and their representatives will already need to adjust to the new DHS public charge inadmissibility standard, so the information requested for the purpose of enforcing the Department's new rule substantially overlaps with the information requested by DHS when the applicant applies for admission or other immigration-related benefits in the United States. Most importantly, this interpretation seeks to mitigate against the possibility that consular officers would issue a visa to an individual who DHS would find inadmissible and deny U.S. entry, based on the same facts. This benefits applicants by preventing the investment of time and expenditure of personal funds on travel to the United States in the event that DHS ultimately finds them inadmissible.

This rule is an E.O. 13771 regulatory action.

*Executive Orders 12372 and 13132: Federalism*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. The Department does not expect that this interim final rule will impose substantial direct compliance costs on State

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<sup>1</sup> Source: Data from the U.S. Bureau of Labor Statistics' May 2018 National Occupational Employment and Wage Estimates for all occupations (<http://www.bls.gov/oes>). Retrieved September 10, 2019.

and local governments, or preempt State law. The rule will not have federalism implications warranting the application of Executive Orders 12372 and 13132.

*Executive Order 12988: Civil Justice Reform*

The Department has reviewed the regulation in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

*Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments*

The Department has determined that this rulemaking will not have a substantial direct effect on one or more Indian tribes, will not impose substantial direct compliance costs on Indian tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, and will not pre-empt tribal law. Accordingly, the requirements of Section 5 of Executive Order 13175 do not apply to this rulemaking.

*Paperwork Reduction Act*

This rule imposes a new information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35. The Department is separately seeking OMB approval of a new form, which certain applicants will be required to complete to assist with the consular officer's public charge assessment.

**List of Subjects in 22 CFR Part 40**

Administrative practice and procedure, foreign relations, passports and visas, aliens.

For the reasons stated in the preamble, the Department amends 22 CFR part 40 as follows:

**PART 40—REGULATIONS PERTAINING TO BOTH NONIMMIGRANTS AND IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED**

1. The authority citation for part 40 is revised to read as follows:

**Authority:** 8 U.S.C. 1104, 1182, 1183a, 1641

2. Section 40.41 is revised to read as follows:

**§ 40.41 Public charge.**

(a) *Basis for determination of ineligibility.* Any determination that an alien is ineligible under INA 212(a)(4) must be predicated upon circumstances indicating that, taking into account any Affidavit of Support under section 213A of the INA that may have been filed on the alien's behalf, the alien is likely at any time to become a public charge after admission, or, if applicable, that the alien has failed to submit a sufficient Affidavit of Support Under Section 213A of the INA as set forth in either INA 212(a)(4)(C) or 212(a)(4)(D). Consular officers will consider whether any identified third party is willing and able to financially support the alien while the alien is in the United States. When considering the likelihood of an alien becoming a public charge at any time through receipt of public benefits, as defined in paragraph (c) of this section, consular officers will use a more likely than not standard and take into account the totality of the alien's circumstances at the time of visa application, including at a minimum: the alien's age; health; family status; assets, resources, and financial status; and education and skills. No one enumerated factor alone, apart from the lack of a

sufficient Affidavit of Support under section 213A of the Act where required, will make the alien more likely than not to become a public charge. For immigration classifications exempt from the public charge ground of ineligibility, see 8 CFR 212.23(a).

(1) *The alien's age.* Consular officers will consider whether the alien's age makes the alien more likely than not to become a public charge in the totality of the circumstances, such as by impacting the alien's ability to work. Consular officers will consider an alien's age between 18 and early retirement age as defined in 42 U.S.C. 416(l)(2) as a positive factor. Age is a negative factor for aliens who are under the age of 18. However, consular officers may consider other factors, such as the support provided to a minor child by a parent, legal guardian, or other source, that in the totality of the circumstances may offset the alien's age as a negative factor. An alien's age above early retirement age is a negative factor in the totality of the circumstances, if the consular officer believes it adversely affects the alien's ability to obtain or perform work, or may increase the potential for healthcare related costs that would be borne by the public.

(2) *The alien's health.* Consular officers will consider whether the alien's health is a positive or negative factor in the totality of the circumstances, including whether the alien, has been diagnosed with a medical condition that is likely to require extensive medical care or institutionalization, or that will interfere with the alien's ability to provide and care for himself or herself, to attend school, or to work, if authorized. Consular officers will consider the report of a medical examination performed by the panel physician where such examination is required, including any medical conditions noted by the panel physician. An individual with a Class B medical condition, including Class B forms of communicable diseases of public health significance, as defined in 42 CFR part

34, is not alone a determinative factor for public charge purposes. The medical condition will be taken into consideration with all factors under the totality of circumstances. In assessing the effect of the alien's health on a public charge ineligibility determination, the consular officer will consider evidence of health insurance or the ability to pay for reasonably foreseeable medical expenses in the United States a positive factor in the totality of the circumstances.

(3) *The alien's family status.* When considering an alien's family status, consular officers will consider the size of the alien's household, as defined in paragraph (e) of this section, and whether the alien's household size is a positive or negative factor in the totality of the circumstances.

(4) *The alien's assets, resources, and financial status—(i) In general.* Consular officers will consider, among other relevant factors, the following aspects of an alien's assets, resources, and financial status:

(A) If the alien's annual gross income for the alien's household size is at least 125 percent of the most recent Federal Poverty Guidelines based on the alien's household size (or 100 percent for an alien on active duty, other than training, in the Armed Forces), consular officers will consider the alien's income a positive factor;

(B) If the alien's annual household gross income is less than 125 percent of the most recent Federal Poverty Guidelines (100 percent for those on active duty, other than training, in the Armed Forces) based on the alien's household size, consular officers will consider a total value of the household assets and resources that is at least five times the difference between the alien's household gross income and 125 percent of the Federal Poverty Guidelines for the alien's household size as a positive factor. However, if the

alien is the spouse or child of a U.S. citizen, assets totaling three times the difference between the alien's household gross income and 125 percent of the Federal Poverty Guidelines (100 percent for those on active duty, other than training, in the Armed Forces) for the alien's household size is a positive factor. If the alien is a child who will be adopted in the United States and who will likely receive citizenship under section 320 of the INA, then assets equivalent to or greater than the difference between the alien's household gross income and 125 percent the Federal Poverty Guidelines (100 percent for those on active duty, other than training, in the Armed Forces) for the alien's household size is a positive factor.

(ii) *Factors to consider.* When considering an alien's assets, resources, and financial status, consular officers must consider assets, resources, and financial status including:

(A) The alien's household annual gross income;

(B) The alien's cash assets and resources;

(C) Non-cash assets and resources that can be converted into cash within twelve months of the visa application;

(D) The alien's financial liabilities;

(E) Whether the alien has applied for, been certified to receive, been approved to receive, or received one or more public benefits, as defined in paragraph (c) of this section on or after October 15, 2019, or whether the alien has disenrolled or requested to be disenrolled from such public benefits.

(F) Whether the alien has received an immigration benefit fee waiver from DHS on or after October 15, 2019, unless the fee waiver was applied for or granted as part of

an application for which a public charge inadmissibility under section 212(a)(4) of the Act was not required; and

(G) Whether the alien has private health insurance or other financial resources sufficient to cover reasonably foreseeable costs related to a medical condition in the United States.

(iii) *Income from illegal activities or sources.* Consular officers may not consider any income from illegal activities or sources, such as proceeds from illegal gambling or drug sales, or income from any public benefit listed in paragraph (c) of this section.

(5) *The alien's education and skills.* When considering an alien's education and skills, consular officers will consider both positive and negative factors associated with whether the alien has adequate education and skills to either obtain or maintain lawful employment with an income sufficient to avoid being likely to become a public charge. In assessing whether the alien's level of education and skills makes the alien likely to become a public charge, the consular officer must consider, among other factors, the alien's history of employment, educational level (high school diploma, or its equivalent, or higher educational degree), any occupational skills, certifications or licenses, and English language proficiency or proficiency in languages in addition to English. Consular officers will take into positive consideration an alien who is a primary caregiver 18 years of age or older who has significant responsibility for actively caring for and managing the well-being of a minor, elderly, ill, or disabled person residing in the alien's household, such that the alien lacks an employment history or current employment, or is not employed full time. Only one alien within a household can be considered a primary caregiver of the same individual within the household.

(6) *Prospective visa classification.* When considering the likelihood at any time of an alien becoming a public charge, consular officers will consider the visa classification sought.

(7) *Affidavit of Support Under Section 213A of the Act.* Any alien seeking an immigrant visa under INA 201(b)(2), 203(a), or 203(b), based upon a petition filed by a relative of the alien (or in the case of a petition filed under INA 203(b) by an entity in which a relative has a significant ownership interest), shall be required to present to the consular officer an Affidavit of Support Under Section 213A of the INA on a form that complies with terms and conditions established by the Secretary of Homeland Security. A properly filed, non-fraudulent, sufficient Affidavit of Support Under Section 213A of the INA, in those cases where it is required, is a positive factor in the totality of the circumstances if the sponsor is likely to actually provide the alien with the statutorily-required amount of financial support and other related considerations.

(8) *Heavily weighted factors.* The factors below will weigh heavily in an ineligibility determination based on public charge.

(i) *Heavily weighted negative factors.* The following factors will weigh heavily in favor of a finding that an alien is likely at any time in the future to become a public charge:

(A) The alien is not a full-time student and is authorized to work in his or her country of residence or the United States, as appropriate, but is unable to satisfy the consular officer that he or she is currently employed, has recent employment history, or a reasonable prospect of future employment;

(B) The alien has received or has been certified or approved to receive one or more public benefits, as defined in paragraph (c) of this section, 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' worth of benefits), beginning no earlier than October 15, 2019, or for more than 12 months in the aggregate within the 36 month period prior to the adjudication of the alien's visa application, whichever is later.

(C)(1) The alien has been diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the alien's ability to provide for himself or herself, attend school, or work; and

(2) The alien has no health insurance for use in the United States and has neither the prospect of obtaining private health insurance for use in the United States, nor the financial resources to pay for reasonably foreseeable medical costs related to such medical condition;

(D) The alien was previously found inadmissible or deportable on public charge grounds by an Immigration Judge or the Board of Immigration Appeals.

(ii) *Heavily weighted positive factors.* The following factors will weigh heavily in favor of a finding that an alien is not likely at any time to become a public charge:

(A) The alien's household has income, assets, resources, or support of at least 250 percent of the Federal Poverty Guidelines for the alien's household size. Consular officers may not consider any income from illegal activities, e.g., proceeds from illegal gambling or drug sales, or any income derived from any public benefit as defined in paragraph (c) of this section;

(B) The alien is authorized to work and is currently employed with an annual income of at least 250 percent of the Federal Poverty Guidelines for the alien's household size. Consular officers may not consider any income from illegal activities, e.g., proceeds from illegal gambling or drug sales;

(C) The alien has private health insurance (other than health insurance obtained with premium tax credits under the Affordable Care Act) for use in the United States covering the expected period of admission.

(9) *Treatment of benefits received before October 15, 2019.* When considering whether an alien is more likely than not to become a public charge under this section, consular officers will consider, as a negative factor, but not as a heavily weighted negative factor as described in paragraph (a)(8) of this section, any amount of cash assistance for income maintenance, including Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), State and local cash assistance programs that provide benefits for income maintenance (often called "General Assistance" programs), and programs (including Medicaid) supporting aliens who are institutionalized for long-term care, received, or certified for receipt, before October 15, 2019.

(b) *Public charge.* Public charge means, for the purpose of INA 212(a)(4)(A) and (B), an alien who receives one or more public benefits, as defined in paragraph (c) of this section, 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' worth of benefits).

(c) *Public benefit.* (1) Public benefit means any of the following forms of assistance received on or after October 15, 2019:

(i) Any Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits), including:

(A) Supplemental Security Income (SSI), 42 U.S.C. 1381 et seq.;

(B) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601 et seq.;

(C) Federal, State or local cash benefit programs for income maintenance (often called “General Assistance” in the State context, but which also exist under other names);  
and

(ii) Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. 2011 et seq.;

(iii) Housing Choice Voucher Program, as authorized under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f);

(iv) Project-Based Rental Assistance (including Moderate Rehabilitation) authorized under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f);

(v) Medicaid under 42 U.S.C. 1396 et seq., except for:

(A) Benefits received for an emergency medical condition as described in section 1903(v)(2)-(3) of Title XIX of the Social Security Act, 42 U.S.C. 1396b(v)(2)-(3), 42 CFR 440.255(c);

(B) Services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 et seq.;

(C) School-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under State or local law;  
and

(D) Benefits received by an alien under 21 years of age, or a woman during pregnancy (and during the 60-day period beginning on the last day of the pregnancy).

(vi) Public Housing under section 9 of the U.S. Housing Act of 1937 (42 U.S.C. 1437g).

(2) Public benefit, as defined in this section, does not include any form of assistance listed in paragraphs (c)(1)(i) through (vi) of this section received by an alien who at the time of receipt of the public benefit, or at the time of visa application or visa adjudication, is or was:

(i) Enlisted in the U.S. Armed Forces under the authority of 10 U.S.C. 504(b)(1)(B) or 10 U.S.C. 504(b)(2), or

(ii) Serving in active duty or in the Ready Reserve component of the U.S. Armed Forces, or

(iii) Is the spouse or child as defined in INA101(b), of an individual described in paragraph (c)(2)(i) or (ii) of this section, or of a citizen of the United States described in paragraph (c)(2)(i) or (ii).

(3) Public benefit, as defined in this section, does not include any form of assistance listed in paragraphs (c)(1)(i) through (vi) of this section received by an alien during periods in which the alien was present in the United States in an immigration category that is exempt from the public charge ground of inadmissibility, as set forth in 8 CFR 212.23(a), or for which the alien received a waiver of public charge inadmissibility from DHS. Public benefit does not include health services for immunizations and for testing and treatment of communicable diseases, including communicable diseases of public health significance as defined in 42 CFR part 34.

(4) Public benefit, as defined in this section, does not include any form of assistance listed in paragraphs (c)(1)(i) through (vi) of this section that were or will be received by:

(i) Children of U.S. citizens whose lawful admission as permanent residents and subsequent residence in the legal and physical custody of their U.S. citizen parent will result automatically in the child's acquisition of citizenship;

(ii) Children of U.S. citizens whose lawful admission as permanent residents will result automatically in the child's acquisition of citizenship upon finalization of adoption; or

(iii) Children of U.S. citizens who are entering the United States for the purpose of attending an interview under INA 322 in accordance with 8 CFR part 322.

(d) *Alien's household.* For purposes of public charge ineligibility determinations under INA 212(a)(4):

(1) If the alien is 21 years of age or older, or under the age of 21 and married, the alien's household includes:

(i) The alien;

(ii) The alien's spouse, if physically residing or intending to physically reside with the alien in the United States;

(iii) The alien's children, as defined in INA 101(b)(1), if physically residing or intending to physically reside with the alien in the United States;

(iv) The alien's other children, as defined in INA 101(b)(1), not physically residing or not intending to physically reside with the alien for whom the alien provides or is required to provide at least 50 percent of financial support, as evidenced by a child

support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;

(v) Any other individuals (including a spouse not physically residing or intending to physically reside with the alien) to whom the alien provides, or is required to provide, at least 50 percent of the individual's financial support or who are listed as dependents on the alien's United States federal income tax return; and

(vi) Any individual who provides to the alien at least 50 percent of the alien's financial support, or who lists the alien as a dependent on his or her federal income tax return.

(2) If the alien is a child as defined in INA 101(b)(1), the alien's household includes the following individuals:

(i) The alien;

(ii) The alien's children as defined in INA 101(b)(1), physically residing or intending to physically reside with the alien in the United States;

(iii) The alien's other children as defined in INA 101(b)(1) not physically residing or intending to physically reside with the alien for whom the alien provides or is required to provide at least 50 percent of the children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the alien;

(iv) The alien's parents, legal guardians, or any other individual providing or required to provide at least 50 percent of the alien's financial support to the alien as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided to the

alien;

(v) The alien's parents' or legal guardians' other children as defined in INA 101(b)(1), physically residing or intending to physically reside with the alien in the United States;

(vi) The alien's parents' or legal guardians' other children as defined in INA 101(b)(1), not physically residing or intending to physically reside with the alien for whom the parent or legal guardian provides or is required to provide at least 50 percent of the other children's financial support, as evidenced by a child support order or agreement, a custody order or agreement, or any other order or agreement specifying the amount of financial support to be provided by the parents or legal guardians; and

(vii) Any other individual to whom the alien's parents or legal guardians provide, or are required to provide at least 50 percent of each individual's financial support, or who is listed as a dependent on the parent's or legal guardian's federal income tax return.

(e) *Receipt of public benefit.* Receipt of public benefit occurs when a public benefit-granting agency provides a public benefit, as defined in paragraph (c) of this section, to the alien as a beneficiary, whether in the form of cash, voucher, services, or insurance coverage. Application or certification for a public benefit does not constitute receipt of public benefit, but it may be considered as a factor suggesting likelihood of future receipt. An alien's receipt of, application for, or certification for public benefit solely on behalf of another individual does not constitute receipt of, application for, or certification for such alien.

(f) *Prearranged employment.* An immigrant visa applicant relying on an offer of prearranged employment to establish eligibility under INA 212(a)(4), other than an offer of employment certified by the Department of Labor pursuant to INA 212(a)(5)(A), must provide written confirmation of the relevant information sworn and subscribed to before a notary public by the employer or an authorized employee or agent of the employer. The signer's printed name and position or other relationship with the employer must accompany the signature.

**Carl C. Risch,**

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