U.S. Citizenship and Immigration Services

October 14, 2019

Inadmissibility on Public Charge Grounds

Small Entity Compliance Guide

Introduction and Purpose

The U.S. Department of Homeland Security (DHS) has prepared this document as the "small entity compliance guide" required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. On August 14, 2019, DHS issued a final rule, Inadmissibility on Public Charge Grounds (the "final rule"). 84 Fed. Reg. 41292. The final rule was implemented on February 24, 2020. This guide summarizes and explains the final rule but is not a substitute for the rule itself. It is a reference for small entities seeking information about the impact of the final rule on them. Only the final rule itself can provide complete and definitive information regarding its requirements.

Overview

The final rule amended DHS regulations to prescribe how DHS will determine whether an alien applying for admission or adjustment of status is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. 1182(a)(4), because he or she is likely at any time to become a public charge. The final rule includes definitions of certain terms critical to the public charge inadmissibility determination, such as "public charge" and "public benefit," which are not defined in the statute, and explains the statutory and regulatory factors and evidence DHS will consider in the totality of the alien's circumstances when making a public charge inadmissibility determination. The final rule also addresses U.S. Citizenship and Immigration Services' (USCIS) authority to issue public charge bonds under section 213 of the Act, 8 U.S.C. 1183, in the context of applications for adjustment of status. Finally, this rule includes a requirement that certain aliens seeking an extension of nonimmigrant stay under section 214 of the Act, 8 U.S.C. 1184, or change of nonimmigrant status under section 248 of the Act, 8 U.S.C. 1258, demonstrate that they have not received public benefits (as defined in the final rule) over the designated threshold since obtaining the nonimmigrant status they seek to extend or change.

Applicability

Except for aliens exempt from the public charge ground of inadmissibility, the final rule applies to applicants for admission and adjustment of status, and to certain nonimmigrants seeking extension of nonimmigrant stay and change of nonimmigrant status in the United States.

The final rule does not create any penalty or disincentive for past, current, or future receipt of public benefits by U.S. citizens or aliens whom Congress has exempted from the public charge ground of inadmissibility. The final rule does not apply to U.S. citizens, even if the U.S. citizen is related to an alien subject to the public charge ground of inadmissibility. The final rule also does not apply to aliens whom Congress exempted from the public charge ground of inadmissibility (such as asylees, refugees, or other vulnerable populations listed as exempt in this final rule). Nor does the final rule apply to aliens for whom DHS has statutory discretion to waive this ground of inadmissibility, if DHS has exercised such discretion.

In addition, the final rule excludes from consideration receipt of public benefits by certain members of the U.S. Armed Forces and their spouses and children; certain children of U.S. citizens who will acquire citizenship upon admission to the United States or shortly thereafter; and receipt of Medicaid in certain contexts, for example, by aliens under the age of 21, pregnant women (and women for up to 60 days after giving birth), Medicaid for an emergency medical condition, and certain education-related services funded by Medicaid, including under the Individuals with Disabilities Education Act (IDEA). Aliens subject to the final rule should study the final rule carefully to understand how these provisions work.

This final rule also clarifies that DHS will only consider public benefits received directly by the alien for the alien's own benefit, or where the alien is a listed beneficiary of the public benefit. DHS will not consider public benefits received on behalf of another person. DHS also will not attribute receipt of a public benefit by one or more members of the alien's household to the alien unless the alien is also a listed beneficiary of the public benefit.

This final rule supersedes the 1999 Interim Field Guidance on Deportability and Inadmissibility on Public Charge Grounds.

Summary of the Key Provisions

As reflected in the final regulations, the rule –

- Establishes key definitions, including "public charge," "public benefit," "likely at any time to become a public charge," "alien's household," "receipt of public benefits," and "primary caretaker." (new 8 CFR 212.21);
- Clarifies that evaluating public charge inadmissibility is a prospective determination based on the totality of the alien's circumstances (new 8 CFR 212.22);
- Outlines the minimum statutory and additional regulatory factors considered when evaluating whether an alien is inadmissible based on the public charge ground. Positive and negative factors, including heavily weighted positive and negative factors, are weighed in the totality of the alien's circumstances to determine an alien's likelihood of becoming a public charge at any time in the future (new 8 CFR 212.22);
- Outlines exceptions and waivers from the public charge ground of inadmissibility (new 8 CFR 212.23);

- Provides, with limited exceptions, that an application or petition for extension of stay or change of status will be denied unless the applicant or petitioner demonstrates that the alien has not, since obtaining the nonimmigrant status that he or she is seeking to extend or change, as defined in final 8 CFR 212.21(b), received public benefits for more than 12 months in the aggregate within a 36 month period (such that, for instance, receipt of two benefits in one month counts as two months) [new 8 CFR 214.1(a)(3)(iv) and new 8 CFR 248.1(b), revising 8 CFR 248(a) and (c)(4).];

- Requires that applicants for adjustment of status submit a Declaration of Self-sufficiency (Form I-944) and any other evidence requested by DHS in the public charge inadmissibility determination (new 8 CFR 245.4(b));

- Sets forth the Secretary's discretion to approve bonds, cancellation, bond schedules, and breach of bond, and establishes specific provisions governing public charge bonds in the context of adjustment of status, including the discretionary availability of bonds, and the minimum amount required for a public charge bonds (amended 8 CFR 103.6, and 8 CFR 213.1);

- Adds fees for new Public Charge Bond (Form I-945), and Request for Cancellation of Public Charge Bond (Form I-356) (new 8 CFR 103.7(b)(1)(i)(LLL) and (MMM)); and

Entities Subject to the Rule

The U.S. Small Business Administration (SBA) Size Standards define "small entities" as comprising small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.[1] Most of the final rule's regulatory changes do not apply to small entities because they directly regulate individuals who are not within the definition of small entities established by 5 U.S.C. 601(6). However, DHS recognizes that there may be some provisions of this final rule that would directly regulate small entities, and, therefore, DHS has prepared this Small Entity Compliance Guide.

While most of the final rule's regulatory changes do not apply to small entities because the final rule directly regulates aliens seeking admission, adjustment of status, extension of stay, or change of status, some provisions would directly regulate small entities, primarily through increased time burdens for completing applicable existing forms and/or fees and new time burdens for new forms. As discussed in the Executive Order (E.O.) 12866 section of the final rule and the accompanying regulatory Impact Analysis,[2] DHS estimates an annual population of 336,335 beneficiaries seeking extension of stay or change of status through a petitioning employer using Petition for a Nonimmigrant Worker (Form I-129). In addition, DHS estimates

[1] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.
[2] Regulatory Impact Analysis, Inadmissibility on Public Charge Grounds, Final Rule https://www.regulations.gov/document?D=USCIS-2010-0012-63741

an annual population of 6,307 beneficiaries seeking extension of stay or change of status through a petitioning employer using Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW).

The provisions regarding the public charge bond process included in the final rule will allow certain individuals or a surety companies to become public charge bond obligors by submitting Public Charge Bon (Form I-945) and, later, to request a cancellation of such a bond by submitting Request for Cancellation of Public Charge Bond, Form I-356. Therefore, this final rule could have some impacts on surety companies, some of which are small entities. The number of surety bond companies that might complete and file Form I-945 and Form I-356 is not known due to a lack of historical data and uncertainty in the number individuals that may be granted the opportunity to post a public charge bond. However, DHS estimates that the filing volume for Form I-945 might be about 960 and the filing volume for Form I-356 might be approximately 25. While DHS cannot predict the exact number of surety companies that might be impacted by this final rule, nine out of 273 Treasury-certified surety companies in fiscal year 2015 posted new immigration bonds with U.S. Immigration and Customs Enforcement (ICE).[3] DHS found that of the nine surety companies, four entities were considered "small" based on the number of employees or revenue being less than their respective SBA size standard.[4] Assuming these nine surety companies post public charge bonds with USCIS, we can assume that four surety companies may be considered as small entities. However, USCIS cannot predict the exact impact to these small entities at this time. We expect that obligors would be able to pass along the costs of this rulemaking to the aliens. Under section 213 of the Act (8 U.S.C. 1183) DHS may exercise discretion to allow an alien to adjust his or her status in the United States to that of a lawful permanent resident upon the giving of a suitable and proper public charge notwithstanding a public charge inadmissibility determination if the alien is only inadmissible on that ground. Note that a public charge bond cannot be submitted unless USCIS invites the adjustment of status applicant to submit a public charge bond.

[3] *See* DHS, Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches NPRM, 83 FR 25951, 25962-25965 (June 5, 2018).
[4] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System (NAICS) Codes, October 1, 2017. https://www.sba.gov/sites/default/files/files/Size_Standards_Table_2017.pdf. (Last visited July 26, 2019).

Description of the Projected Reporting, Record-keeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities That Are Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

Estimated Paperwork Burden on Small Entities

Table 1 shows the estimated number of hours and costs to collect required information under specific provisions for small entities. The table illustrates the burden imposed upon small entities in order to comply with the revised regulations. Estimated hour and cost burden of each information collection requirement is discussed in more detail under the Paperwork Reduction Act of 1995 section of the final regulations. In total, these changes are estimated to increase the burden on small entities by 2,431,710 hours annually. The monetized cost of this additional paperwork burden on institutions is estimated to be $132,833,723.

Table 1. Estimated Paperwork Burden on Small Entities

Provision	Hours	Costs
Form I-129	2,417,609	$132,368,220
Form I-129, E-1/ E-2 Classification Supplement		
Form I-129, Trade Agreement Supplement		
Form I-129, H Classification Supplement		
Form I-129, H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement		
Form I-129, L Classification Supplement		
Form I-129, O and P Classifications Supplement		
Form I-129, Q-1 Classification Supplement		
Form I-129, R-1 Classification		
Form I-129CW	13,122	$459,253
Form I-945	960	$0
Form I-356	19	$6,250
Total	**2,431,710**	**$132,833,723**

Resources to Support Compliance Among Small Entities

The final regulations are on the Office of the Federal Register web site at https://www.federalregister.gov/documents/2019/08/14/2019-17142/inadmissibility-on-public-charge-grounds.

USCIS has a dedicated web page for the final rule: https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge

USCIS has a dedicated chapter of the Policy Manual for public charge inadmissibility determinations under the final rule: https://www.uscis.gov/policy-manual/volume-8-part-g

Additional resources for small entities can be found at the USCIS web site for the Small Business Regulatory Enforcement Fairness Act (SBREFA): https://www.uscis.gov/legal-resources/small-business-regulatory-enforcement-fairness-act-sbrefa.

USCIS is happy to assist small entities with questions regarding the final rule. Please refer to the above website for information on directing questions to the help desk via phone and other inquiries and resources.