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Public Charge Grounds of Inadmissibility and Deportability: Legal Overview

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February 6, 2017

Congressional Research Service
7-....
www.crs.gov
R43220

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The Immigration and Nationality Act (INA) has long provided for aliens' exclusion and deportation from the United States on "public charge" grounds. Under current law, aliens outside the United States who seek to obtain visas at U.S. consulates overseas, or admission at U.S. ports of entry, are generally denied entry if they are deemed "likely at any time to become a public charge." Aliens within the United States who seek to adjust their status to that of lawful permanent resident (LPR), or who entered the United States without inspection, are also generally subject to this ground of inadmissibility. Similarly, LPRs and other aliens who have been admitted to the United States are removable if they become a public charge within five years after the date of their entry due to causes that preexisted their entry. These public charge grounds are of recurring interest to Members of Congress because of questions about whether aliens who receive various forms of public assistance are inadmissible or deportable on public charge grounds.

The INA does not expressly define what it means for an alien to be a public charge, and, prior to 1996, there was no statutory guidance on what was to be considered in determining whether an alien is inadmissible or deportable on public charge grounds. Then, in 1996, the INA was amended to require that certain factors be taken into account when determining whether aliens are inadmissible on public charge grounds. These factors include the alien's age, health, family status, financial resources, education, and skills. There is no similar statutory guidance on what factors are to be considered in determining whether an alien is deportable on public charge grounds.

Given this general lack of statutory guidance, the executive and judicial branches initially construed the meaning of *public charge* in adjudicating cases involving individual aliens. In so doing, administrative authorities interpreted *public charge* differently for purposes of the grounds of inadmissibility than for the grounds of deportability. Specifically, *public charge* was construed broadly in the context of admissibility, with determinations based on a "totality of the circumstances" test that considered factors like those codified in the INA in 1996. In contrast, in the context of deportability, "public charge" was construed more narrowly. Aliens could only be found to be deportable on public charge grounds if (1) they received government assistance that they were legally obligated to repay; (2) the government entity providing the assistance demanded repayment; and (3) the alien or the alien's sponsor was unable to pay.

Following the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, executive agencies issued guidance regarding the public charge grounds. While PRWORA generally restricts noncitizens' eligibility for "public benefits," it permits them to receive specified benefits. Thus, its enactment raised questions about whether aliens who receive benefits for which they are eligible under PRWORA could potentially be removable on public charge grounds. Immigration officials addressed these questions in a 1999 policy letter that defined *public charge* and identified which benefits are considered in public charge determinations. This policy letter underlies current regulations and other guidance on the public charge grounds of inadmissibility and deportability.

Collectively, the various sources addressing the meaning of *public charge* have historically suggested that an alien's receipt of public benefits, per se, is unlikely to result in the alien being deemed to be removable on public charge grounds. Neither the INA nor implementing regulations address the role that receipt of public benefits plays in public charge determinations. Other agency guidance and court decisions have generally indicated that, while receipt of certain public benefits could be considered in public charge determinations, other factors are also considered (e.g., age, obligation to repay).

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Congress has long sought to ensure that aliens immigrating to the United States are able to support themselves. The country's first general immigration law, enacted in 1882, excluded aliens who were deemed "likely to become a public charge" after they came to the United States.[1] A little over 20 years later, in 1903, Congress made aliens who had migrated to the United States deportable if they became public charges within two years after entry (subsequently increased to five years).[2] Both provisions have been modified somewhat over the years, but remain part of the Immigration and Nationality Act (INA). Congress has also enacted other provisions designed to promote the "national policy" that "aliens within the Nation's borders 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."[3] Key among these provisions is the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, which generally restricts noncitizens' eligibility for public benefits.[4] The public charge grounds are of recurring interest to Members of Congress because of questions about whether aliens who receive various forms of public assistance are inadmissible or deportable on public charge grounds.

This report provides an overview of the public charge grounds of inadmissibility and deportability. In particular, it describes the statutory basis for the public charge grounds; seminal administrative and judicial decisions construing the meaning of *public charge*; and regulations and other guidance promulgated by executive agencies after the enactment of PRWORA to address questions about whether aliens who receive public benefits that they are permitted to receive under PRWORA could potentially be subject to removal on public charge grounds. The report concludes by discussing why an alien's previous or present receipt of public benefits, in itself, has generally not sufficed to result in the alien being found to be removable.

The Immigration and Nationality Act

Since 1903, the INA has contained two separate provisions addressing the public charge grounds. One provision, currently codified in Section 212 of the INA, addresses the public charge grounds of *inadmissibility* (formerly, excludability) and specifies that "[a]ny alien who ... is likely at any time to become a public charge is inadmissible."[5] This provision generally applies to

- aliens seeking to obtain visas or admission at ports of entry;
- aliens within the United States who seek to adjust their status to that of lawful permanent resident (LPR); and
- aliens who entered the United States without inspection.[6]

[1] Act of Aug. 3, 1882, 22 Stat. 58.

[2] Act of Mar. 3, 1903, 32 Stat. 1213.

[3] 8 U.S.C. § 1601(2)(A).

[4] P.L. 104-193, title IV, §§ 401-435, 110 Stat. 2261-2276 (Aug. 22, 1996) (generally codified, as amended, in 8 U.S.C. §§ 1601-1646). PRWORA did not amend the INA, so citations to it reference only Title 8 of the *United States Code*.

[5] INA § 212(a)(4), 8 U.S.C. § 1182(a)(4). The INA lists the grounds of inadmissibility separately from the grounds of deportability. *See* INA § 212, 8 U.S.C. § 1182 (inadmissibility); INA § 237, 8 U.S.C. § 1227 (deportability). The different grounds apply to different categories of aliens, as noted in the text. However, removal proceedings apply to all aliens, regardless of whether they are subject to the grounds of inadmissibility or deportability. INA § 240, 8 U.S.C. § 1229a.

[6] Certain aliens are, however, not subject to the public charge grounds when seeking admission or adjustment of status, including refugees and asylees seeking admission or adjustment to LPR status, respectively; Amerasian immigrants seeking admission pursuant to the Foreign Operations, Export Financing, and Related Programs Appropriations Act of (continued...)

If such aliens are found to be inadmissible on public charge grounds, they are, respectively, barred from entering the United States, denied adjustment of status, or subject to removal from the country.

Another provision, currently codified in Section 237 of the INA, addresses the public charge ground of *deportability* and specifies that "[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable."[7] This provision applies to LPRs and other aliens admitted to the United States.[8]

However, while the INA provides that an alien may be inadmissible or deportable on public charge grounds, it does not define what it means for an alien to be a public charge. Such determinations were historically made using certain tests developed by the case law, discussed below. Then, in 1996, Congress amended the INA provisions regarding the public charge ground of *inadmissibility* to require that consular and immigration officers take certain factors "into account" when determining whether aliens are inadmissible or ineligible for adjustment of status on public charge grounds.[9] These factors include, "at a minimum," the alien's age; health; family status; assets, resources, and financial status; and education and skills.[10] In addition, the 1996 amendments also authorize consular and immigration officers to consider any affidavit of support

(...continued)

1988; Cuban and Haitian entrants seeking admission or adjustment of status as described in the Immigration Reform and Control Act; Nicaraguans and other Central Americans adjusting status as described in the Nicaraguan Adjustment and Central American Relief Act; Haitians adjusting status as described in the Haitian Refugee Immigration Fairness Act of 1998; aliens who entered the United States prior to January 1, 1972, and who meet other conditions for being granted LPR status under Section 249 of the INA; and Syrian asylees adjusting status pursuant to P.L. 106-378. *See* INA § 207(c)(3), 8 U.S.C. § 1157(c)(3) (asylees and refugees); *Id.* § 209(c), 8 U.S.C. § 1159(c) (same); P.L. 100-202, § 584(a)(2), 101 Stat. 1329-183 (Dec. 22, 1987) (Amerasian immigrants); P.L. 99-603, § 202(a)(2), 100 Stat. 3404 (Nov. 6, 1986) (Cuban and Haitian entrants); P.L. 105-100, § 202(a)(1)(B), 111 Stat. 2193 (Nov. 19, 1997) (Nicaraguans and other Central Americans); P.L. 105-277, § 902(a)(1)(B), 112 Stat. 2681-538 (Oct. 21, 1988) (Haitians); INA § 249, 8 U.S.C. §1259 (aliens who entered prior to January 1, 1972); and 8 C.F.R. § 1245.20(c) (Syrian asylees). In addition, the public charge grounds of inadmissibility may be waived for certain "aged, blind, or disabled" applicants for adjustment of status under Section 245A of the INA. *See* 8 C.F.R. § 245a.3(g)(3)(ii).

[7] INA § 237(a)(5), 8 U.S.C. § 1227(a)(5).

[8] *See* INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").

[9] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), P.L. 104-208, § 531, 110 Stat. 3009-674 to 3009-675 (Sept. 30, 1996) (codified at INA § 212(a)(4)(B), 8 U.S.C. §1182(a)(4)(B)). As is discussed further below, consular officers of the Department of State (DOS) are responsible for the issuance of visas to aliens outside the United States. Department of Homeland Security (DHS) officials, in turn, determine whether aliens arriving at ports of entry are to be admitted, whether applications for adjustment of status are to be granted, and whether aliens within the United States are to be removed.

[10] INA § 212(a)(4)(B)(i)(I)-(V), 8 U.S.C. § 1182(a)(4)(B)(i)(I)-(V).

furnished on behalf of an alien[11] and provide that certain family-sponsored and employment-based immigrants are inadmissible if they do not have the requisite affidavit of support.[12]

No similar amendments have been made as to the public charge ground of *deportability*, which is still assessed based upon a three-part test developed by the case law, discussed below. It is important to note, however, that *public charge* has been construed more narrowly for purposes of the grounds of deportability than it has been construed for purposes of the grounds of inadmissibility, in part, due to the differences between deportation and exclusion. Because the "deportation statute dislodges an established residence" in the United States, it "must be strictly construed."[13] The same is not true with the INA's provisions regarding inadmissibility.[14]

Early Administrative and Judicial Decisions

Given this general lack of statutory guidance, the executive and judicial branches initially construed the term *public charge* in adjudicating cases involving individual aliens. Immigration officers would consider certain factors in determining whether particular aliens were inadmissible or deportable on public charge grounds. If the alien appealed, the determinations of these officers were subject to review by the Board of Immigration Appeals (BIA or Board), the highest administrative body for interpreting and applying immigration law. Then, if they were appealed, the BIA's decisions were subject to review by the federal courts. Numerous decisions, dating back to at least 1903, address the applicability of the public charge grounds to particular aliens.[15] However, two BIA decisions, in particular, helped establish what it means for an alien to be a public charge.

First, in its 1948 decision in *Matter of B—*, the BIA established the prevailing test for determining whether an alien is *deportable* on public charge grounds.[16] There, a majority of the Board granted the INS's motion to withdraw the order and warrant of deportation and dismiss removal

[11] INA § 212(a)(4)(B)(ii), 8 U.S.C. § 1182(a)(4)(B)(ii). Section 213a of the INA requires that sponsors of certain immigrants agree to "provide support to maintain" the immigrant at an annual income that is not less than 125% of the federal poverty line, and reimburse government entities for any "means-tested public benefit" that they provide to the immigrant, until specified conditions are met (e.g., the immigrant naturalizes or works for a certain period of time). INA § 213a, 8 U.S.C. § 1183a. Sponsors may also submit affidavits of support on behalf of other aliens. The affidavits of support required under Section 213a are submitted on Form I-864 and are generally seen to be legally binding. Other affidavits of support are submitted on Form I-134 and have historically not been viewed as binding. *Compare* Wood-Schultz v. Schultz, No. 11-C-975, 2011 U.S. Dist. LEXIS 150119 (E.D. Wis. Dec. 30, 2011) ("The law provides that the [Form I-864] affidavit is a binding contract.") *with* Cheshire v. Cheshire, No. 3:05-cv-00453-TJC-MCR, 2006 U.S. Dist. LEXIS 26602 (M.D. Fla. May 4, 2006) (Form I-134 affidavit of support "is not a legally enforceable contract").

[12] INA § 212(a)(4)(C)-(D), 8 U.S.C. §1182(a)(4)(C)-(D). *See, e.g., Matter of* Williams, No. A099 255 983, 2012 Immig. Rptr. LEXIS 4647 (BIA 2012) (alien's spouse failed to file an affidavit of support); *Matter of—*, No.—- Buffalo, NY, 2010 Immig. Rptr. LEXIS 7879 (BIA 2010) (spouse's income inadequate); *Matter of—*, No. A078-535-634, 2008 Immig. Rptr. LEXIS 5899 (BIA 2008) (affidavit of support was over four years old and reflected that respondent's wife has no income or assets).

[13] *Matter of* Harutunian, 14 I. & N. Dec. 583 (BIA 1974).

[14] *Id.*

[15] *See* The Japanese Immigrant Case, 189 U.S. 86 (1903) (affirming a lower court decision remanding an alien for deportation on public charge grounds, in part, on the grounds that the decisions of administrative or executive officers acting under their delegated powers constitute due process of law and are not subject to judicial review). *See also* Gegiow v. Uhl, 239 U.S. 3, 9-10 (1915) (reversing an order of deportation on public charge grounds that had been issued on the basis that the "labor market in the city of the [alien's] immediate destination is overstocked").

[16] 3 I. & N. Dec. 323 (BIA 1948). Two members of the Board dissented, which, pursuant to regulations in effect at that time, resulted in the case being certified to the Attorney General for review. The Acting Attorney General approved the majority's decision and order without discussion.

proceedings against an alien who had been committed by the courts to a state hospital.[17] In so doing, the BIA articulated a three-part test for determining whether an alien is deportable on public charge grounds that, it said, had been "implicit" in prior judicial decisions and "applied administratively over a long period of time."[18] For an alien to be deportable as a public charge under this test:

> (1) The State or other governing body must, by appropriate law, impose a charge for the services rendered to the alien ....
>
> (2) The authorities must make demand for payment of the charges upon those persons made liable under State law.
>
> (3) [T]here must be a failure to pay for the charges.[19]

Applying this test to the alien in question, the BIA found that the alien could not be deemed a public charge because the Illinois statute governing commitment at the state hospital provided that hospital residents were entitled to receive free maintenance, care, and treatment.[20] Residents were only legally liable for their clothing, transportation, and other incidental expenses, which the record "clearly show[ed]" that the alien's sister had paid.[21] In its decision, the Board also emphasized that "[t]he fact that the State or municipality pays for the services accepted by the alien is not, ... by itself, the test of whether the alien has become a public charge."[22]

Subsequently, in its 1974 decision in *Matter of Harutunian*, the BIA reaffirmed that a "totality of the circumstances" test—as opposed to the three-part test of *Matter of B*—applies in determining when an alien is *inadmissible* on public charge grounds.[23] In *Harutunian*, the Board affirmed immigration officials' determination that a 70-year-old alien who had relied on state "old-age assistance benefits" for support was ineligible for adjustment of status on public charge grounds.[24] The alien had sought to overturn this decision by citing the precedent of *Matter of B—*, since California did not require repayment of old-age assistance benefits of the type the alien received.[25] However, the BIA rejected this argument, primarily because it construed *public charge* as having a different meaning in Section 212 of the INA than it does in Section 237.[26] In support of this conclusion, the Board first noted the differences between deportation and exclusion. In particular, the Board noted that deportation "dislodges an established residence" in the United States, while aliens outside the United States generally have no constitutional right to enter the country.[27] Thus, it concluded that the grounds of deportability must be more "strictly construed"

[17] *Id*. at 323.

[18] *Id*. at 325-26 (citing, among other things, Nocchi v. Johnson, 6 F.2d 1 (1st Cir. 1925); *Ex parte* Kichmiriantz, 283 F. 697 (N.D. Cal. 1922); and Solicitor of Labor Opinions of January 22, 1929, file 55616/275 (case of B—D—), and Aug. 2, 1929, file 55612/741 (case of N—M—)).

[19] *Id*. at 326.

[20] *Id*. at 327. In particular, the Board noted that, under state law, the hospital could not bring suit against the alien or "any other person" to collect for these services, and any money received from the alien or another person on her behalf because of her care could only be treated as a donation, and not as a discharge of any liability she had incurred. *Id*.

[21] *Id*.

[22] *Id*. at 325.

[23] 14 I. & N. Dec. 583 (BIA 1974).

[24] *Id*. at 590.

[25] *Id*. at 584-85.

[26] *Id*. at 586-89.

[27] *Id*. at 588-89.

than the grounds of inadmissibility.[28] The Board also noted that the legislative history of the public charge ground of inadmissibility supported the view that Congress intended "elements" such as age, financial status, and family support be considered in determining whether an alien is a public charge.[29] The Board further emphasized that administrative authorities had historically taken the view that the alien's physical and mental condition, as well as the alien's economic circumstances, were to be considered in determining whether the alien is inadmissible on public charge grounds.[30] In addition, the BIA viewed the three-part test of *Matter of B*— as inappropriate in determining inadmissibility, since the public charge ground of inadmissibility is concerned with whether the alien is "likely to become a public charge at some time in the future, a prediction which necessarily precludes the element of reimbursement."[31]

Applying this "totality of the circumstances" test to the alien in question, the BIA found in *Harutunian* that immigration officials had properly determined that the alien was ineligible for adjustment of status on public charge grounds. The alien had been on welfare since her arrival in the United States, and she was receiving such assistance at the time she applied for adjustment of status.[32] In addition, the alien was aged, unskilled, uneducated, and without family or other support.[33] In light of these circumstances, the Board concluded that the alien could be deemed a public charge, "even though the state from which she will receive old age assistance [had not sought and] may not permit reimbursement."[34]

PRWORA and Resulting Guidance

The enactment of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 prompted the then Immigration and Naturalization Service (INS) to issue guidance defining *public charge* and describing the application of the public charge grounds.[35] PRWORA is best known for generally barring noncitizens who do not fall within PRWORA's definition of "qualifed aliens" from receiving federal, state, and local "public benefits" and for significantly restricting the receipt of "federal means-tested public benefits" by qualified aliens. However, even with these restrictions, noncitizens may receive certain public benefits under PRWORA. For example, PRWORA expressly exempts specified benefits—including emergency medical assistance and certain disaster relief—from its general prohibition upon the provision of

[28] 14 I. & N. Dec. at 588-89. Removable aliens within the United States have generally not been seen to have a constitutional right to remain in the United States. However, they are generally entitled to certain constitutional protections in the removal process and in other contexts. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 77 (1972) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.").

[29] 14 I. & N. Dec. at 587-88 (discussing, among other things, provisions in S. RPRT. 1515, 81st Cong., 2d Sess., Apr. 20, 1950, pp. 346-50).

[30] *Id*. at 588 (citing *Matter of* Martinez-Lopez, 10 I. & N. Dec. 409, 421-23 (AG 1964) and Foreign Affairs Manual).

[31] *Id*. at 589.

[32] *Id*. at 584.

[33] *Id*. at 590.

[34] *Id*.

[35] When the INA was enacted, and for some time thereafter, the primary authority to interpret, implement, and enforce its provisions was vested with the Attorney General, who delegated authority over immigration enforcement and benefits to the INS, a component of DOJ. The INS was dissolved and many (although not all) of its functions were transferred to the Department of Homeland Security (DHS) when DHS was created in 2002.

federal, state, and local public benefits to aliens who are not qualified aliens.[36] PRWORA also exempts specified categories of qualified aliens—including refugees, asylees, and certain victims of domestic violence—from the five-year bar upon their receipt of federal means-tested public benefits.[37] Because PRWORA permits noncitizens to receive some public benefits, aliens and commentators have raised questions about whether aliens who take advantage of such benefits could potentially be found to be removable as a result of doing so.[38] In 1999, the INS responded to these questions by proposing regulations and issuing a field guide defining *public charge*, and describing how immigration officials viewed receipt of public benefits when making public charge determinations.[39]

The proposed regulations would have defined *public charge*, for purposes of both the grounds of inadmissibility and the grounds of deportability, to mean:

> an alien who has become primarily dependent on the Government for subsistence as demonstrated by either: (i) [t]he receipt of public cash assistance for income maintenance purposes, or (ii) [i]nstitutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime).[40]

Government would have referred to any federal, state, or local entity.[41] *Public cash assistance for income maintenance*, in turn, would have been defined to include, but not be limited to, Supplemental Security Income (SSI) and, with certain exceptions, Temporary Assistance for Needy Families (TANF).[42] Forms of cash benefits "not intended for income maintenance" would have been expressly excluded from consideration in public charge determinations (e.g., the Low Income Home Energy Assistance Program (LIHEAP), Child Care and Development Block Grant Program (CCDBGP), food stamp benefits issued in cash).[43] Cash benefits that had been "earned" would also have been excluded, including benefits under Title II of the Social Security Act, government pension benefits, and veteran's benefits.[44]

The proposed regulation would also have spelled out the role that receipt of public cash assistance for income maintenance plays in determining whether an alien is inadmissible or deportable on public charge grounds. As to *inadmissibility*, the rule would have noted that Section 212 of the INA requires consular and immigration officers to consider, "'at a minimum, [the alien's] age, health, family status, assets, resources, financial status, education, and skills in making a decision on whether [the alien is] likely to become a public charge."[45] It would also have noted that public charge determinations are based on the "totality of the circumstances" and "[n]o single factor," other than the lack of any required affidavit of support, is controlling, including past or current

[36] 8 U.S.C. § 1611(b)(1)(A)-(B) (federal benefits); 8 U.S.C. § 1621(b)(1)-(2) (state and local public benefits).

[37] 8 U.S.C. § 1612(a)(2)(A) & (M).

[38] *See, e.g.*, Stanley Mailman & Stephen Yale-Loehr, *An Immigration Price for Receiving Public Benefits?*, 11-22 BENDER'S IMMIGR. BULL. 1 (2006); Charles Wheeler, *Public Charge and the Consequences of Receiving Public Benefits*, 3 BENDER'S IMMIGR. BULL. 278 (Apr. 1, 1998).

[39] *See* Dep't of Justice, Immigration & Naturalization Serv., Inadmissibility and Deportability on Public Charge Grounds: Proposed Rule, 64 Fed. Reg. 28676 (May 26, 1999).

[40] *Id*. at 28681, 28684.

[41] *Id*.

[42] *Id*. at 28682, 28684. For more information on these programs, see CRS In Focus IF10482, *Supplemental Security Income (SSI)*, by (name redacted) and CRS Report R42767, *Temporary Assistance for Needy Families (TANF): Welfare-to-Work Revisited*, by (name redacted)

[43] 64 Fed. Reg. at 28682, 28684.

[44] *Id*. at 28682, 28684-85.

[45] *Id*. at 28682.

receipt of public cash assistance.[46] As to *deportability*, the rule would have specified that aliens are generally not deportable on public charge grounds unless the INS shows that

1. the government entity that provided, or is providing, public cash assistance for income maintenance, or the costs of institutionalization for long-term care, has a legal right to seek repayment of those benefits;
2. that entity demanded repayment of the benefit within five years of the alien's entry to the United States;
3. the alien or any other party obligated to repay the benefit failed to do so;
4. there is a final administrative or court judgment requiring the alien or another party to repay the benefit; and
5. the benefit-granting agency, or other applicable government entity, has taken "all actions necessary to enforce the judgment," including "all collections actions."[47]

The INS never finalized these regulations.[48] However, at the same time it issued the proposed regulations, the INS also issued a field guide on inadmissibility and deportability on public charge grounds that incorporated the definition of *public charge* and other guidance provided in the proposed regulations.[49] Commonly referred to as the "Pearson memorandum," after its author, this field guidance has continued to be cited as an authoritative source on the public charge grounds of inadmissibility and deportability.[50] Similar guidance appears in other sources, most notably the State Department's Foreign Affairs Manual, discussed below.

Current Regulations and Other Guidance

The public charge grounds are currently discussed in the regulations of both the Departments of Homeland Security (DHS) and State (DOS), as well as in DOS's Foreign Affairs Manual. The DOS regulations address only the grounds of inadmissibility, since consular officers are responsible for the issuance of visas to aliens outside the United States, but generally play no role in determining whether aliens within the United States are deportable. DHS officials, in contrast, determine whether aliens arriving at U.S. ports of entry are to be admitted; whether applications for adjustment of status are to be granted; and whether aliens within the United States are to be removed. Thus, the DHS regulations address both inadmissibility and deportability.

DHS Regulations and Guidance

The INS never finalized the proposed regulations regarding the public charge grounds, discussed above, and DHS has not proposed or promulgated similar regulations. Instead, the INS and, later, DHS promulgated specific regulations regarding the "special rules" used in determining whether certain applicants for adjustment of status are public charges. For example, DHS regulations currently provide that "special agricultural workers" who meet certain requirements are subject to the public charge grounds, but may not be excluded if they have a "consistent employment

[46] *Id.*

[47] *Id.* at 28685.

[48] In part because the proposed regulations were never finalized, this guidance has generally been viewed as nonbinding. *See, e.g.*, Hernandez v. Gonzalez, 195 Fed. App'x 439 (6th Cir. 2006) (unpublished).

[49] *See* Dep't of Justice, Immigration & Naturalization Serv., Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).

[50] *See, e.g.*, 6-71 IMMIGR. L. & PROC. § 71.07[3] (deportability).

history" which shows the aliens' ability to support themselves and their families.[51] The regulations further provide that "[p]ast acceptance of public cash assistance within a history of consistent employment will enter into" public charge determinations for special agricultural workers, with "the length of time an applicant has received [such] assistance" being viewed as a "significant factor."[52] However, the weight given to the acceptance of public cash assistance is expressly said to "depend on many factors,"[53] and the overall analysis is "prospective in that [immigration officials] shall determine, based on the applicant's history, whether he or she is likely to become a public charge."[54] In other words, pursuant to these regulations, *prior* receipt of public cash assistance would not necessarily result in an alien being found ineligible for adjustment of status if other factors suggest that the alien is unlikely to become a public charge *in the future*. There are similar "special rules" for other aliens seeking adjustment of status.[55]

DHS regulations are currently silent as to the public charge grounds of deportability.

The Pearson memorandum has apparently continued to guide DHS's consideration of public charge determinations. The U.S. Citizenship and Immigration Service's (USCIS's) 2011 "fact sheet" on the public charge grounds, for example, defines *public charge* in the same way as the Pearson memorandum and expressly references the Pearson memorandum.[56] As of February 4, 2017, this fact sheet is publicly available on the DHS website.[57]

State Department Regulations and Guidance

The current DOS regulations, in contrast, address the public charge grounds of inadmissibility more broadly than the DHS regulations do. The DOS regulations emphasize the role that the alien's "circumstances" play in determining whether an alien is inadmissible, in part, by specifying that:

> [a]ny determination that an alien is ineligible [on public charge] grounds must be predicated upon circumstances indicating that, notwithstanding any affidavit of support that may have been filed on the alien's behalf, the alien is likely to become a public charge after admission, or, if applicable, that the alien has failed to fulfill the affidavit of support requirement ....[58]

Consular officers are expressly authorized to issue visas to aliens subject to the affidavit of support requirement, noted above, who "giv[e] ... a bond or undertaking in accordance with INA

[51] 8 C.F.R. § 210.3(e)(4).

[52] *Id.* These regulations further define *public cash assistance* as "income or needs-based monetary assistance," including "supplemental security income received by the alien or his immediate family members through federal, state, or local programs designed to meet subsistence levels," but excluding "assistance in kind" (e.g., food stamps, public housing), work-related compensation, and "certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age ...."). *See* 8 C.F.R. § 210.1(n).

[53] 8 C.F.R. § 210.3(e)(4).

[54] *Id.*

[55] *See* 8 C.F.R. §§ 245a.2(k)(4), 245a.3(g)(4) (applicants for adjustment of status under Section 245A of the INA); 8 C.F.R. § 245a.4(b)(11)(iv) (applicants for adjustment of status from certain countries for which extended voluntary departure has been made available); 8 C.F.R. § 245a.18(d)(1)-(3) (applicants for adjustment of status under the Legal Immigration Family Equity (LIFE) Act). Extended Voluntary Departure (EVD) is relief from removal that may be granted to nationals of specific countries.

[56] *See* USCIS, Public Charge: Fact Sheet, Apr. 29, 2011, *available at* http://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet (last reviewed/updated: Nov. 15, 2013).

[57] *Id.*

[58] 22 C.F.R. § 40.41(a).

213 and INA 221(g)," provided that the officer is satisfied that the giving of such bond or undertaking removes the likelihood that the alien will become a public charge, and the alien is otherwise eligible for a visa.[59] However, consular officers are also required to presume that aliens not subject to the affidavit of support requirement who are relying solely on personal income to establish that they are not likely to become a public charge are ineligible for a visa if they do not demonstrate "an annual income above the federal poverty line" and are without "other adequate financial resources."[60]

The DOS guidance in the Foreign Affairs Manual (FAM) largely parallels that in the 1999 INS proposed regulations and the Pearson memorandum.[61] However, the FAM expressly characterizes the types of public cash assistance for income maintenance considered in public charge determinations as "means tested benefits."[62] The FAM also defines *institutionalization for long-term care*, which is not defined in the Pearson memorandum, as "care for an indefinite period of time for mental or other health reasons, rather than temporary rehabilitative or recuperative care even if such rehabilitation or recuperation may last weeks or months."[63] Overall, though, like the Pearson memorandum, the FAM emphasizes that public charge determinations are to be made based upon the "totality of the circumstances," considering the factors specified in the INA (e.g., age, health), as well as "any other factors thought relevant by an officer in a specific case."[64] Past or current receipt of cash benefits for income maintenance or institutionalization at public expense "may be factored into" the determination when it constituted the alien's primary means of subsistence. However, under the FAM, "[a] finding of inadmissibility [on public charge grounds] cannot be based solely on the prior receipt of public benefits," or on institutionalization at public expense.[65]

Public Benefits and the Public Charge Grounds

Collectively, the various sources addressing the meaning of *public charge* suggest that an alien's receipt of public benefits, per se, has historically been unlikely to result in the alien being deemed removable on public charge grounds. As previously noted, the INA does not define *public charge*, or link the public charge grounds of inadmissibility and deportability with the receipt of public benefits. DHS and DOS regulations are also silent as to the definition of *public charge* and the role that receipt of public benefits may play in public charge determinations. Other guidance from

[59] 22 C.F.R. § 40.41(d).

[60] 22 C.F.R. § 40.41(f).

[61] Dep't of State, 9 FAM § 302.8. DOS does, however, define *public charge* in terms of dependency on the "U.S. Government for Subsistence," while the INS field guidance treated dependency on the government more broadly, defining "government" to include any federal, state, or local government entities. *Compare* 9 FAM § 302.8-2(B)(1) at a.1 *with* 64 Fed. Reg. at 28681.

[62] 9 FAM § 302.8-2(B)(1) at b.4 In addition to generally prohibiting aliens who are not qualified aliens (e.g., LPRs, asylees, refugees) from receiving public benefits, PRWORA also generally precludes qualified aliens from receiving "means-tested public benefits" for five years after obtaining a status within the meaning of the term *qualified alien*. 8 U.S.C. § 1613(a) (general limitations upon receipt of means-tested public benefits); 8 U.S.C. § 1641 (definition of *qualified alien*). The Foreign Affairs Manual is a DOS publication containing the functional statements, organizational responsibilities, and authorities of each of the major components of the Department.

[63] 9 FAM § 302.8-2(B)(1) at d.1. The FAM further notes that "public assistance" used to support aliens who reside in an institution for long-term care, including Medicaid, may be considered an "adverse factor" in the totality of the circumstances. However, short-term institutionalization for rehabilitation is "not subject to public charge consideration." *Id*. at d.2.

[64] 9 FAM §§ 302-8(B)(2) at a.2, 302.8-2(B)(3) at a.2.

[65] 9 FAM § 302.8-2(B)(3) at b.1.

DHS and DOS does link the INA's public charge grounds with public benefits, in part, by defining public charge in such a way as potentially to encompass aliens who receive certain public benefits (i.e., SSI; certain TANF assistance; state and local cash assistance for income maintenance). However, this guidance also indicates that prior or current receipt of public benefits, in itself, has generally not sufficed for an alien to be found removable on public charge grounds. This guidance emphasizes that determinations as to *admissibility* involve projections regarding whether the alien is "likely to become a public charge" in the future that are based on the totality of the circumstances. These circumstances include, but are not limited to, prior receipt of benefits. The guidance similarly emphasizes that determinations as to *deportability* are made by applying a three-part test, previously discussed, which considers whether payment for any government-provided assistance was legally required, was demanded, and could be made.

The case law interpreting and applying the public charge grounds similarly suggests that receipt of certain public benefits could result in a determination that an alien is inadmissible or deportable on public charge grounds, if certain other conditions are met.[66] However, these cases also illustrate that prior receipt of public benefits, in itself, has not necessarily resulted in a determination that an alien is a public charge. For example, in *Matter of A—*, the BIA sustained an alien's appeal of a decision finding her ineligible for adjustment of status on public charge grounds. The INS district director had determined that the alien was ineligible because the alien's family had received "public cash assistance" for nearly four years, and neither the alien nor her spouse had worked for four years prior to filing the application for adjustment of status. The district director thus viewed the alien as "unable to support herself and her family without public assistance."[67] The Board, however, disagreed, noting that the alien was "young" and had no "physical or mental defect which might affect her earning capacity."[68] It also noted that the alien had recently begun working, and that during the time when she was absent from the workforce, she had been caring for her children.[69]

Likewise, in *Matter of T—*, the BIA sustained the appeal of a mother and child who had been excluded on public charge grounds after their husband/father was excluded for having committed a crime involving moral turpitude.[70] The mother and son sought permanent residence in the United States independent of the father, but were denied. In reversing this denial, the BIA noted that the mother was "quite capable of earning her own livelihood independent of her husband," and the child had training in a field which represented "a wide field of employment for this country."[71] Prior or current receipt of public benefits was not at issue in this case. However, the

[66] These cases focus exclusively upon applications of the public charge grounds by immigration officers, as opposed to consular officers, since consular officers' determinations about whether to grant visas are broadly shielded from judicial review by the doctrine of consular non-reviewability. *Compare* Saavedra v. Albright, 197 F.3d 1153, 1158-64 (D.C. Cir. 1999) (consular officials decisions to issue or withhold a visa are generally beyond judicial review) *with* Lisotta v. United States, 3 F.2d 108 (5th Cir. 1924) (rejecting the view that determinations as to whether aliens may be excluded on public charge grounds are committed to the unreviewable discretion of immigration officials). In addition, because of amendments made to the INA in 1996, some cases use the term *excludability*, while others use *inadmissibility*. Prior to 1996, arriving aliens seeking admission were subject to grounds of excludability, while aliens physically present within the United States were subject to the grounds of deportability. However, after the 1996 amendments, aliens physically present in the United States without having been admitted (i.e., those who entered unlawfully) were subject to the grounds of inadmissibility, along with aliens seeking admission to the United States.

[67] 19 I. & N. Dec. 867, 867 (BIA 1988).

[68] *Id*. at 870.

[69] *Id*. at 867, 870.

[70] 3 I. & N. Dec. 641 (BIA 1949).

[71] *Id*. at 644.

Board's focus on the aliens' ability to earn a living, even without the contributions of the husband/father, is illustrative, and recurs in cases where aliens did receive public benefits (e.g., "welfare services," food stamps, "public assistance," Aid to Families with Dependent Children (AFDC), Medi-Cal).[72]

Similar conclusions have been reached in the cases construing and applying the public charge grounds of deportability. As *Matter of B—* illustrates, receipt of public assistance has been merely one factor in determining deportability. There must also be (1) a legal obligation to repay that assistance; (2) a demand for repayment; and (3) a failure to repay the assistance. Where there is no legal obligation to repay the assistance, the alien has not been found deportable on public charge grounds. This was the case in *Matter of B—*, where Illinois law provided that residents at the state hospital were entitled to receive free maintenance, care, and treatment.[73] In other cases, the government authorities did not request repayment,[74] or the alien (or another responsible party) had the ability to pay. Thus, in *Matter of P—*, the BIA terminated removal proceedings against an alien, in part, because no demand for payment was made upon the alien or his relatives, and "it appears that the respondent had property" which could have been used for making payment had payment been demanded.[75] The situation was the same in *Matter of C—*, because no demand for repayment of the assistance provided was made by the state within five years of the alien's last entry, and her husband had "some ability to pay."[76] It should also be noted that, in making determinations regarding aliens' deportability on public charge grounds, only causes that pre-date

[72] *See, e.g.*, *Ex Parte* Nunez, 93 F.2d 41 (9th Cir. 1937) (directing that an alien who had received monthly "grocery orders" and clothes from the government be discharged from immigration custody and not deported); *Matter of X—*, No. MSC-05-313-12160-Los Angeles, 2008 Immig. Rptr. LEXIS 17965 (AAO 2008) (alien who had received "welfare services" and food stamps for 18 years was eligible for adjustment of status under the special rule because she was employed); *Matter of—*, No. 02 143 63322-Los Angeles, 2007 Immig. Rptr. LEXIS 17474 (AAO 2007) (alien who had received "public assistance" for herself and her daughter was eligible for adjustment of status under the special rule because she had a consistent employment history); *Matter of—*, No. MSC 01 335 60316-Los Angeles, 2007 Immig. Rptr. LEXIS 17438 (AAO 2007) (same); *Matter of—*, No. MSC 02 058 61384-Los Angeles, 2006 Immig. Rptr. LEXIS 20378 (AAO 2006) (alien who received AFDC, food stamps, and Medi-Cal for 22 years for herself and her three children was eligible for adjustment of status under the special rule because she had a consistent employment history); *Matter of X—*, No. A 34 199 222 New York, 6 Immig. Rptr. B2-48 (AAO 1988) (alien was presently employed, and "the only occasion she received welfare payments was when she was pregnant and immediately after the birth of her child").

[73] 3 I. & N. Dec. at 327 ("State authorities could not and did not demand payment for these services and could not bring suit against respondent or any other person to collect for [them]."). *But see Matter of M—*, 2 I. & N. Dec. 694 (BIA 1946) (New York state law making those treated liable for the costs of institutionalization at hospitals for the "insane").

[74] Similarly, an alien is not subject to deportability on public charge grounds where any requisite payment is declined. *See, e.g.*, *Matter of V—*, 2 I. & N. Dec. 78 (BIA 1944) (government entity refused payment). However, payment need not be demanded if a demand for payment would be futile. *See, e.g.*, *Harutunian*, 14 I. & N. Dec. at 583.

[75] 4 I. & N. Dec. 565 (BIA 1951). The BIA found, in the alternative, that the alien was not subject to deportation on public charge grounds because he was confined to a penal institution and, thus, not subject to deportability on public charge grounds. *See also Matter of V—*, 5 I. & N. Dec. 725 (BIA 1954) (alien confined in penal institution does not constitute a public charge).

[76] 2 I. & N. Dec. 538 (BIA 1946). Actual payment is not necessarily required, so long as the alien or the alien's sponsor had the ability to pay. *See, e.g.*, Nocchi v. Johnson, 6 F.2d 1 (1st Cir. 1925) (parents able and willing to pay, but did not understand that they should do so); *Ex parte Orzechowska*, 23 F. Supp. 428 (D. Or. 1938) (parents' failure to pay was due to a misunderstanding); *Matter of V—*, 2 I. & N. Dec. 78 (BIA 1944) (mother had resources to pay).

their entry are considered.[77] Causes which the alien can "affirmatively show" developed subsequent to entry do not factor into public charge determinations.[78]

Conclusion

Congressional interest in the public charge grounds of inadmissibility and deportability seems likely to persist, in part, because of the interplay between the provisions of the INA providing for aliens' removability on public charge grounds and other provisions of immigration law that permit noncitizens to receive certain benefits. On the one hand, Congress has provided that aliens may be excluded or deported if they are likely to become, or have become, a *public charge*, a term which the executive branch has construed to mean that they are primarily dependent on the government for subsistence. On the other hand, Congress has also provided that certain public benefits (e.g., certain disaster relief) are exempt from PRWORA's restrictions upon the provision of federal, state, or local public benefits to aliens who are not qualified aliens. These two provisions could be seen to be reconcilable, especially if one focuses upon whether specific programs "count" as public benefits, or for purposes of public charge determinations. However, the overall picture may raise questions about how and why noncitizens can receive benefits without being subject to removal.

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[77] As used here, "entry" can mean the date of the most recent entry, not the initial entry. *See, e.g.,* Canciamilla v. Haff, 64 F.2d 875 (9th Cir. 1933) (relevant date of entry); *Ex parte* Kichmiriantz, 283 F. 697 (N.D. Cal. 1922) (date of last entry); *Matter of L—*, 6 I. & N. Dec. 349 (BIA 1954).

[78] *See, e.g., Ex parte* Orzechowska, 23 F. Supp. at 429 (no proof that alleged reasons for alien's institutionalization pre-dated her entry); United States *ex rel.* Mandel v. Day, 19 F.2d 520 (E.D. N.Y. 1927) ("After careful perusal ..., the court finds no evidence to sustain the contention that [the] alien suffered from some mental defect at the time of entry."); United States *ex rel.* Romanow v. Flynn, 17 F.2d 378 (W.D. N.Y. 1927); *Matter of B—*, 9 I. & N. Dec. 57 (BIA 1960); *Matter of S—*, 5 I. & N. Dec. 21 (BIA 1954); *Matter of F—*, 5 I. & N. Dec. 209 (BIA 1953).