

DEPARTMENT OF JUSTICE**Immigration and Naturalization Service****8 CFR Parts 212 and 237**

[INS No. 1989-99; AG Order No. 2225-99]

RIN 1115-AF45

Inadmissibility and Deportability on Public Charge Grounds**AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Proposed rule.

SUMMARY: This rule proposes to amend the Department of Justice's (Department's) regulations to establish clear standards governing a determination that an alien is inadmissible or ineligible to adjust status, or has become deportable, on public charge grounds. This proposed rule is necessary to alleviate growing public confusion over the meaning of the currently undefined term "public charge" in immigration law and its relationship to the receipt of Federal, State, or local public benefits. By defining "public charge," the Department seeks to reduce the negative public health consequences generated by the existing confusion and to provide aliens with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.

DATES: Written comments must be submitted on or before July 26, 1999.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1989-99 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange an appointment.

FOR FURTHER INFORMATION CONTACT: Sophia Cox or Kevin Cummings, Immigration and Naturalization Service, Office of Adjudications, 425 I Street, NW, Washington, DC 20536; telephone (202) 514-4754.

SUPPLEMENTARY INFORMATION:**Background and Necessity for Definition of "Public Charge"**

Recent immigration and welfare reform laws have generated considerable public confusion about whether the receipt of Federal, State, or local public benefits for which an alien may be eligible renders him or her a

"public charge" under the immigration statutes governing admissibility, adjustment of status, and deportation. (See 8 U.S.C. 1182(a)(4); 8 U.S.C. 1227(a)(5).) (See also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C, Title V, 110 Stat. 3009-670 (codified as amended in different sections of 8 U.S.C.) (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, Title IV, 110 Stat. 2260 (codified as amended generally at 8 U.S.C. 1601, *et seq.*) (1996).)

Under section 212(a)(4) of the Immigration and Nationality Act (the Act), the determination of whether an individual alien "is likely at any time to become a public charge" is made by a Department of State consular officer at the time the alien's visa application is adjudicated overseas, by an Immigration and Naturalization Service (Service) officer at the time an alien seeks admission into the United States, or by the Service at the time an alien applies for adjustment of status if he or she is already in the United States. 8 U.S.C. 1182(a)(4). The statute further states that the decision shall be "in the opinion of" the consular officer or the Attorney General, who has delegated this authority to the Service. *Id.*; 8 CFR part 2.1. Under section 237(a)(5) of the Act, an alien is also deportable if he or she "has become a public charge" within 5 years after his or her "date of entry" into the United States for causes not shown to have arisen since entry. 8 U.S.C. 1227(a)(5). An immigration judge will make the determination if any of these issues arise during removal proceedings for an alien.

On August 22, 1996, the President signed PRWORA, known as the welfare reform law. The welfare reform law and its amendments imposed new restrictions on the eligibility of aliens, whether present in the United States legally or illegally, for many Federal, State, and local public benefits. 8 U.S.C. 1601-1646 (as amended). Despite these new restrictions, many legal aliens remain eligible for at least some forms of public assistance, such as Medicaid, Food Stamps, Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), the Children's Health Insurance Program (CHIP), and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), among other benefits. Congress also chose not to apply the alien eligibility restrictions in the welfare reform law to emergency medical assistance; short-term, in-kind, non-cash emergency disaster relief; public health assistance related to

immunizations and to treatment of the symptoms of a communicable disease; certain in-kind services (e.g., soup kitchens, etc.) designated by the Attorney General as necessary for the protection of life and safety; and assistance under certain Department of Housing and Urban Development (HUD) programs. 8 U.S.C. 1611(b)(1).

Numerous states and localities also have funded public benefits, particularly medical and nutrition benefits, for aliens who are now ineligible for certain Federal public benefits. Congress further authorized states to enact laws after August 22, 1996, that affirmatively provide illegal aliens who would otherwise be ineligible for certain State and local benefits under the welfare reform law with such benefits. 8 U.S.C. 1621(d). A complete overview of all the public benefits and programs that remain available to various categories of aliens under the welfare reform law, as amended, is beyond the scope of this discussion.

Although Congress has determined that certain aliens remain eligible for some forms of medical, nutrition, and child care services, and other public assistance, numerous legal immigrants and other aliens are choosing not to apply for these benefits because they fear the negative immigration consequences of potentially being deemed a "public charge." This tension between the immigration and welfare laws is exacerbated by the fact that "public charge" has never been defined in statute or regulation. Without a clear definition of the term, aliens have no way of knowing which benefits they may safely access without risking deportation or inadmissibility.

Additionally, the Service has been contacted by many State and local officials, Members of Congress, immigrant assistance organizations, and health care providers who are unable to give reliable guidance to their constituents and clients on this issue. According to Federal and State benefit-granting agencies, this growing confusion is creating significant, negative public health consequences across the country. This situation is becoming particularly acute with respect to the provision of emergency and other medical assistance, children's immunizations, and basic nutrition programs, as well as the treatment of communicable diseases. Immigrants' fears of obtaining these necessary medical and other benefits are not only causing them considerable harm, but are also jeopardizing the general public. For example, infectious diseases may spread as the numbers of immigrants who

decline immunization services increase. Concern over the public charge issue is further preventing aliens from applying for available supplemental benefits, such as child care and transportation vouchers, that are designed to aid individuals in gaining and maintaining employment. In short, the absence of a clear public charge definition is undermining the Government's policies of increasing access to health care and helping people to become self-sufficient. The Department seeks to remedy this problem with this proposed rule.

Overview of the Proposed Rule

First, the proposed rule provides a definition for the ambiguous statutory term "public charge" that will be used for purposes of both admissibility and adjustment of status under section 212(a)(4) of the Act and for deportation under section 237(a)(5) of the Act. Second, the proposed rule describes the kinds of public benefits that, if received, could result in a finding that a person is a "public charge." The proposed rule also provides examples of the types of public benefits that will not be considered in public charge determinations. Third, the proposed rule adopts long-standing principles developed by the case law. As discussed below, the cases have established prerequisites and factors to be considered in making public charge determinations. The rule makes clear that the mere receipt of public assistance, by itself, will not lead to a public charge finding without satisfaction of these additional legal requirements.

The Meaning of "Public Charge" and Public Benefits That Demonstrate Primary Dependence on the Government for Subsistence

Following extensive consultation with benefit-granting agencies, the Department is proposing to define "public charge" to mean an alien who has become (for deportation purposes) or who is likely to become (for admission or adjustment purposes) "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." Institutionalization for short periods of rehabilitation does not constitute such primary dependence. This interpretation of "public charge" is reasonable because it is based on the plain meaning of the word "charge," the historical context of public dependency when the public charge immigration provisions were first enacted more than

a century ago, and the expertise of the benefit-granting agencies that deal with subsistence issues. It is also consistent with factual situations presented in the public charge case law.

When a word is not defined by statute and legislative history does not provide clear guidance, courts often construe it in accordance with its ordinary or natural meaning as contained in the dictionary. (See, e.g., *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 898 (10th Cir. 1997), cert. granted, 119 S. Ct. 790 (1999) (citations omitted).) The word "charge" has many meanings in the dictionary, but the one that can be applied unambiguously to a person and best clarifies the phrase "become a public charge" is "a person or thing committed or entrusted to the care, custody, management, or support of another." *Webster's Third New International Dictionary of the English Language* 377 (1986). The dictionary gives the following apt sentence as an example of usage: "[H]e entered the poorhouse, becoming a county charge." *Id.* (See also 3 *Oxford English Dictionary* 36 (2d ed. 1989) (definition #13 for "charge"—"The duty or responsibility of taking care of (a person or thing); care, custody, superintendence").)

This language indicates that a person becomes a public charge when he or she is committed to the care, custody, management, or support of the public. The dictionary definition suggests a complete, or nearly complete, dependence on the Government rather than the mere receipt of some lesser level of financial support. Historically, individuals who became dependent on the Government were institutionalized in asylums or placed in "almshouses" for the poor long before the array of limited-purpose public benefits now available existed. This primary dependence model of public assistance was the backdrop against which the "public charge" concept in immigration law developed in the late 1800s.

Although no case has specifically identified the types of public benefits that can give rise to a public charge finding, a definition based on primary dependence on the Government is consistent with the facts found in the deportation and admissibility cases. (See, e.g., *Matter of C-R-*, 7 I. & N. Dec. 124 (BIA 1956) (deportation based on public mental hospital institutionalization); *Matter of Harutunian*, 14 I. & N. Dec. 583 (R.C., Int. Dec. 1974) (receipt of old age assistance for principal financial support was an important factor in denying admission).)

The Service has also sought the advice and relied on the expertise of

various Federal agencies that administer a wide variety of public benefits. The Service consulted primarily with the Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA). The HHS, which administers TANF, Medicaid, CHIP, and many other benefits, has advised that the best evidence of whether an individual is relying primarily on the Government for subsistence is either the receipt of public cash benefits for income maintenance purposes or institutionalization for long-term care at Government expense. (See letter to INS Commissioner Doris Meissner from HHS Deputy Secretary Kevin Thurm, dated March 25, 1999) (hereinafter "HHS Letter" and appearing in an appendix to this document.) The USDA, which administers Food Stamps, WIC, and other nutrition assistance programs, and SSA, which administers SSI and other programs, and other benefit-granting agencies have concurred with the HHS advice to the Service that receipt of cash assistance for income maintenance is the best evidence of primary dependence on the Government. (See letter to INS Commissioner Doris Meissner from Shirley R. Watkins, USDA Under Secretary for Food, Nutrition and Consumer Services, dated April 15, 1999) (hereinafter "USDA Letter" and appearing in an appendix to this document); letter to Robert L. Bach, INS Executive Associate Commissioner for Policy and Planning from Susan M. Daniels, SSA Deputy Commissioner for Disability and Income Security Programs, dated May 14, 1999) (hereinafter "SSA Letter" and appearing in an appendix to this document.)

Cash assistance for income maintenance includes (1) SSI, (2) cash TANF (other than certain supplemental cash benefits not defined as "assistance" under TANF rules, as provided in §§ 212.103 and 237.13 of this proposed rule), and (3) State or local cash benefit programs for income maintenance (often called "General Assistance" programs, but which may exist under other names). Acceptance of these forms of public cash assistance is one factor that could be considered in determining whether a person is, or is likely to be, a public charge, provided the additional requirements for deportation or inadmissibility discussed later in this Supplementary Section and in the regulation are also met.

According to HHS and other benefit-granting agencies consulted by the Service, non-cash benefits generally provide supplementary support in the form of vouchers or direct services to

support nutrition, health, and living condition needs. (See HHS Letter.) These benefits are often provided to low-income working families to sustain and improve their ability to remain self-sufficient. A few examples of these non-cash benefits that do not directly provide subsistence are Medicaid, Food Stamps, CHIP, and their related State analogues, WIC, housing benefits, transportation vouchers, and certain kinds of special-purpose non-cash benefits provided under the TANF program. These forms of benefits, and others discussed below and in the proposed regulation, will not be considered for public charge purposes. The HHS further stated that “* * * it is extremely unlikely that an individual or family could subsist on a combination of non-cash support benefits or services alone. * * * HHS is unable to conceive of a situation where an individual, other than someone who permanently resides in a long-term care institution, could support himself or his family solely on non-cash benefits so as to be primarily dependent on the [G]overnment.” (See HHS Letter.)

The one exception identified by HHS to the principle that non-cash benefits do not demonstrate primary dependence is the instance where Medicaid or related programs pay for the costs of a person's institutionalization for long-term care (other than imprisonment for conviction of a crime). Such institutionalization costs, therefore, may be considered in public charge determinations. However, the proposed rule makes clear that a short period of institutionalization necessary for rehabilitation purposes does not demonstrate that an individual is, or is likely to become, primarily dependent on the Government for public charge purposes.

This distinction between cash benefits that can lead to primary dependence on the Government and non-cash benefits that do not create such dependence is already applied by the State Department with regard to Food Stamps, a non-cash benefit program. The Foreign Affairs Manual (FAM) for consular officers excludes Food Stamps from public charge admissibility consideration because it is an essentially supplementary benefit that does not make recipients dependent on the Government for subsistence. (See 9 FAM section 40.41, N.9.1.) The proposed definition of “public charge” is consistent with this existing State Department policy and that agency's recognition that certain supplemental forms of public assistance should not be considered in a public charge determination.

Receipt of Non-cash Public Benefits That do not Demonstrate Primary Dependence on the Government for Subsistence

It has never been Service policy that the receipt of any public service or benefit must be considered for public charge purposes. The nature of the program is important. For instance, attending public schools, taking advantage of school lunch or other supplemental nutrition programs, such as WIC, obtaining immunizations, and receiving public emergency medical care typically do not make a person inadmissible or deportable. Non-cash benefits, such as these and others, are by their nature supplemental and frequently support the general welfare. By focusing on cash assistance for income maintenance, the Service can identify those individuals who are primarily dependent on the Government for subsistence without inhibiting access to non-cash benefits that serve important public interests. Certain Federal, State, and local benefits are increasingly being made available to families with incomes far above the poverty level, reflecting broad public policy decisions about improving general health and nutrition, promoting education, and assisting working-poor families in the process of becoming self-sufficient. For example, many states provide CHIP to children in families with resources up to 200 percent of the poverty line and sometimes higher. (See HHS Letter at p. 3.) Thus, participation in such programs is not evidence of poverty or dependence.

The proposed rule identifies the major forms of cash benefits that may be considered for public charge purposes and several examples of non-cash benefits that will not be considered. Due to the ever-changing character of the Federal, State, and local public benefits still available to aliens, it is not possible to name every benefit that will or will not be considered for public charge purposes. Aliens and their advisors should carefully consider the nature of the specific public benefits involved. If they could be construed as cash assistance for income maintenance, as distinguished from in-kind services, medical or nutrition benefits, vouchers or other forms of non-cash benefits, then a Service officer may consider their receipt in making a public charge decision, even if the benefit is not specifically addressed by name in the proposed rule. Again, receipt of SSI, cash TANF (except supplemental cash-TANF excluded in the rule), and State or local cash assistance programs for income maintenance (e.g., “General

Assistance”) will be considered as part of the public charge analysis. Although these benefits are the only examples of “cash assistance for income maintenance” that the Service and other Federal benefit-granting agencies have been able to identify, public comment is requested on whether there are any other specific forms of public cash assistance for income maintenance that should be mentioned. The Service will also consider public benefits (including Medicaid) for supporting aliens who reside in an institution for long-term care (e.g., a nursing home or mental health institution).

A person's mere receipt of any of these forms of cash assistance for income maintenance, or being institutionalized for long-term care, does not necessarily make him or her inadmissible, ineligible to adjust status, or deportable on public charge grounds. As discussed in detail in the next part of this Supplementary Information section, the law requires that a variety of other factors and prerequisites must be considered as well. These additional requirements have been carefully described in both the admissibility and deportation sections of this proposed rule at §§ 212.104, 212.106, 212.108, 212.109, 237.11, 237.15, 237.16, and 237.18. Every public charge decision will continue to be made on a case-by-case basis. In other words, the proposed rule does not create any blanket requirements that individuals who receive public cash assistance or who are institutionalized for long-term care must be removed from the United States or denied admission or adjustment.

Some cash benefits received by aliens from the Government are not intended for income maintenance, and thus will not be considered for public charge purposes under this rule. Examples of such special-purpose cash benefits that do not lead to primary dependence on the Government include the Low Income Home Energy Assistance Program (LIHEAP), 42 U.S.C. 8621, *et seq.*; the Child Care and Development Block Grant Program (CCDBGP), 42 U.S.C. 9858 *et seq.*; Food Stamp benefits issued in cash (see e.g., 7 U.S.C. 2026(b)); certain educational assistance programs, and non-recurrent, short-term crisis benefits funded in cash by TANF but excluded from the TANF program's definition of “assistance.” (See 64 FR 17720, 17880 (April 12, 1999) (codified at 45 CFR 260.31).) In addition, and consistent with existing Service practice, the proposed rule states that cash payments that have been earned, such as benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, Government pensions, veterans'

benefits, among other forms of earned benefits, do not support a public charge finding.

Other non-cash public benefits that will not be considered and that are listed in the proposed rule include, but are not limited to: Medicaid; CHIP; emergency medical assistance; other health insurance and health services for the testing and treatment of symptoms of communicable diseases; emergency disaster relief; nutrition programs, such as Food Stamps and WIC; housing benefits; energy benefits; job training programs; child care; and non-cash benefits funded under the TANF program. State and local non-cash benefits of a similar nature also will not be considered. It is the underlying nature of the program, not the name adopted in a particular State, that will determine whether it is relevant for public charge consideration.

Additional Requirements for Public Charge Determinations

After defining "public charge," the separate admissibility and deportation sections of the proposed rule incorporate principles established by case law and statute for each of those public charge determinations.

Admission and Adjustment of Status

The provisions that relate to admission and adjustment of status incorporate the "totality of the circumstances" analysis that officers must employ in making a prospective public charge decision. (See, e.g., *Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974).) Under section 212(a)(4)(B) of the Act, officers are required to consider specific minimum factors in determining whether the alien's circumstances indicate that he or she is likely to become a public charge. These factors include the alien's age, health, family status, assets, resources, financial status, education, and skills. No single factor, other than the lack of an Affidavit of Support as described below, will determine whether an alien is likely to become a public charge, including past or current receipt of public cash benefits.

In addition, most aliens intending to immigrate or adjust status in family-based and certain employment-based categories after December 19, 1997, are required to file the new Form I-864, "Affidavit of Support Under Section 213A of the Act," signed by their sponsor(s). 8 U.S.C. 1182(a)(4)(C-D); 8 U.S.C. 1183a; 8 CFR part 213a.2. The new Affidavit of Support is legally binding and requires sponsors to maintain the sponsored alien at an annual income of not less than 125

percent of the Federal poverty line for the relevant family size. 8 U.S.C. 1183a(a); 8 CFR part 213a.2. If an Affidavit of Support is not filed, the intending immigrant will be denied admission or adjustment on public charge grounds, unless he or she is exempt from the Affidavit of Support requirement under section 212(a)(4)(C-D) of the Act. As one of the circumstances considered in determining whether a person is likely to become a public charge, officers may also consider any Affidavit of Support filed by a sponsor on behalf of an alien under section 213A of the Act and are encouraged to do so. (See 8 U.S.C. 1182(a)(4)(B)(ii).) Certain categories of aliens seeking to become lawful permanent residents are exempt from the Affidavit of Support requirement—including those who qualify as widows or widowers of citizens or as battered spouses, and their children. Id.

In one significant respect, a public charge determination for purposes of inadmissibility differs from the context of deportability. As the next section describes in detail, deportation on public charge grounds requires the Service to prove that the alien or another obligated party has failed to repay a legal demand for the public benefits at issue. The proposed rule adopts the case-developed doctrine that this failure-to-reimburse prerequisite for deportation does not apply to public charge decisions for admissibility or adjustment of status. (See *Matter of Harutunian*, 14 I. & N. Dec. at 589-590.) Applicants for admission or adjustment of status, therefore, could be found inadmissible or ineligible to adjust status on public charge grounds even if there is no duty to reimburse the agency that provides the cash assistance. Again, this receipt of public cash benefits will result in such a finding only if the totality of the alien's circumstances, including the minimum factors in section 212(a)(4)(B) of the Act, indicate that he or she is likely to become a public charge.

The provisions on admissibility and adjustment in the proposed rule conclude with a section that lists categories of aliens to whom the public charge ground contained in section 212(a)(4) of the Act does not apply. These categories include refugees, asylees, Amerasians, and certain Nicaraguans, Central Americans, Haitians, and Cuban/Haitian entrants. Although these statutory exemptions are codified throughout the Act and other laws, the rule collects them in one place for the public's ease of reference.

Deportation

The provisions on deportation in the proposed rule incorporate the Attorney General's decision in the leading case, *Matter of B-*, 3 I. & N. Dec. 323 (AG and BIA 1948), that the Service can prove public charge deportability only if there has been a failure to comply with a legally enforceable duty to reimburse the assistance agency for the costs of care. In addition, the benefit agency's demand for repayment of the specific public benefit must have been made within the alien's initial 5-year period after entry, unless it is shown that demand would have been futile because there was no one against whom payment could be enforced. *Matter of L-*, 6 I. & N. Dec. 349 (BIA 1954). Under the proposed definition for public charge previously discussed, only the failure to meet an agency's demand for repayment of a cash benefit for income maintenance or for the costs of institutionalization for long-term care will be considered for deportation. If the alien can show that the causes for which he or she received one of these types of public cash benefits during his or her initial 5 years after entry arose after entry, he or she will not be deportable on public charge grounds. (See 8 U.S.C. 1227(a)(5).) The requirements and procedures concerning the demand for the repayment of a public benefit are governed by the specific program rules established by law and administered by the benefit granting agencies, or by State or local governments, not by the Service. This rule does not alter those existing procedures. The Service does not make determinations about which public benefits must be repaid. The Federal, State, and local benefit-granting agencies are responsible for those decisions. The Service may only initiate removal proceedings based on the public charge ground after the benefit agency has chosen to seek repayment, obtained a final judgment, taken all steps to collect on that judgment, and been unsuccessful.

The proposed rule also provides that the Affidavit of Support is relevant to the public charge inquiry for deportation purposes. Under the new Affidavit of Support rules, if a sponsored alien obtains Federal, State, or local means-tested public benefits, the sponsor is obligated to repay those benefits if the benefit-granting agency makes a demand for repayment. (See 8 U.S.C. 1183a(b); 8 CFR parts 213a.2, 213a.4.) Various Federal agencies have designated certain assistance programs that they administer to be "means-tested public benefits." For example, SSI, TANF, Medicaid, Food Stamps, and

CHIP have been designated as Federal means-tested public benefits and could give rise to a repayment obligation under the Affidavit of Support. If states designate means-tested public benefits in the future, such benefits also could give rise to such an obligation. However, only demands for the repayment of cash benefits for income maintenance purposes, such as SSI, cash TANF and State General Assistance programs, or the costs of institutionalization for long-term care, will be relevant for deportation determinations under the proposed definition of "public charge."

The Department has determined that the existing three-part *Matter of B-* test for public charge deportations also applies to demands for repayment of means-tested benefits under the new Affidavit of Support. The Government entity providing the benefit must have a legal right to seek repayment under the Affidavit of Support; the agency must have made a demand for repayment; and the obligated party or parties must have failed to meet this demand. The rule also requires that, before a deportation action may be initiated, the agency seeking repayment must have taken all steps necessary to obtain and enforce a final judgment requiring the sponsor or other person responsible for the debt to pay. Without such a requirement, an alien could be wrongly deported as a public charge based on a debt that a court might later determine was not legally enforceable. Although the demand for repayment must be made within 5 years of the alien's admission, there is no time limit on obtaining a final judgment as long as it is obtained prior to the public charge proceedings.

Welfare Reform and Other Significant Factors That Limit Potential for Aliens to Become "Public Charges"

The proposed rule is not expected to alter substantially the number of aliens who will be found deportable or inadmissible as public charges. Deportations on public charge grounds have always been rare due to the strict *Matter of B-* requirements that agencies first must demand repayment, assuming they have a legal right to do so, and the obligated party or parties must have failed to pay. This is unlikely to change.

Several recently enacted welfare and immigration reform measures have also contributed to reducing the possibility that aliens will be found likely to become public charges under section 212(a)(4) of the Act. Due to the increased restrictions of the welfare reform law, as amended, many aliens are no longer eligible to receive some public benefits formerly available to

them. For example, one significant new restriction prohibits legal, "qualified aliens" from receiving Federal means-tested public benefits, with some exceptions, for 5 years if they arrive after August 22, 1996. 8 U.S.C. 1613. Combined with the 5-year limitation in section 237(a)(5) of the Act, the welfare reform restriction means fewer aliens are likely to become deportable public charges. Under new "deeming" rules, some aliens who might otherwise have been able to obtain certain Federal, State, or local means-tested public benefits can no longer do so because their sponsors' resources may now count as resources available to the aliens (*i.e.*, the sponsors' resources are "deemed" available to the alien), which would normally raise the alien's income over the benefit eligibility threshold. 8 U.S.C. 1631, 1632. In addition, the requirement of a legally binding Affidavit of Support obligating sponsors to support their immigrating family members above the poverty level before they will be granted admission or adjustment has significantly raised the bar for people who might, in the past, have entered and become public charges. These new laws work together to limit the potential for immigrants to become dependent on the Government. The proposed rule defining "public charge" will not change or negatively affect the operation of these provisions.

Conclusion

The Department believes that this rule will provide for better overall administration of the public charge provisions of the Act. It will also help alleviate the increasing, negative public health and nutrition consequences caused by the confusion over the meaning of "public charge." The rule will provide rules of decision that will apply in proceedings before the Executive Office for Immigration Review (EOIR), as well as proceedings before the Service. The Department anticipates, based on the Service's consultations, that the State Department will adopt the same view and will issue guidance to consular officers accordingly.

At a later date, the Department plans to propose additional revised sections for part 212 concerning the other grounds of inadmissibility under section 212 of the Act. Sections 212.100 through 212.112 of this proposed rule are being issued in advance as Subpart G. The Department will amend the labeling of this subpart or section numbers, if necessary, at the time of final publication of any revised sections to this part.

Regulatory Flexibility Act

The Attorney General has determined, in accordance with 5 U.S.C. 605(b), that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination is that this rule will apply to individual aliens, who are not within the definition of small entities established by 5 U.S.C. 601(6).

Unfunded Mandates Reform Act

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the Unfunded Mandates Reform Act of 1995. 2 U.S.C. 658(7)(A)(ii).

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined in 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice to be a "significant regulatory action" under section 3(f)(4) of E. O. 12866, Regulatory Planning and Review. Accordingly, this proposed rule has been submitted to the Office of Management and Budget for review.

Executive Order 12612

This rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with E. O. 12612, it is determined that this rule would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988: Civil Justice Reform

This proposed rule meets the applicable standards set forth in subsections 3(a) and 3(b)(2) of E. O. 12988.

Plain Language in Government Writing

The President's June 1, 1998, Memorandum published at 63 FR 31885, concerning Plain Language in Government Writing, applies to this proposed rule.

Paperwork Reduction Act of 1995

This proposed rule does not specifically impose an information collection burden on the public separate from existing provisions of the Act or other regulations. However, the Service anticipates revising the Form I-485, "Application to Register Permanent Status or Adjust Status," as necessary, to make it consistent with the final public charge rule. The Department requests public comment on proposed revisions to the I-485, or any other immigration forms, that may be necessary as a result of this public charge rule.

List of Subjects**8 CFR Part 212**

Administrative practice and procedure, Aliens, Admission, Adjustment of status, Public charge determinations.

8 CFR Part 237

Administrative practice and procedure, Aliens, Deportation, Public charge determinations.

Accordingly, chapter I of title 8 of the Code of Federal Regulations, is proposed to be amended as follows:

PART 212—DOCUMENTARY REQUIREMENTS; NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

1. The authority citation for part 212 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1183, 1183a, 1184, 1187, 1225, 1226, 1227, 1228, 1252, 8 CFR part 2, 8 CFR part 213A.

2. Sections 212.1 through 212.15 are designated as Subpart A.

3. The heading for Subpart A is added to read as follows:

Subpart A—General

4. Part 212 is amended by adding and reserving Subparts B through F.

5. Subpart G is added to read as follows:

Subpart G—Public Charge Inadmissibility
Sec.

212.100 What issues do §§ 212.100 through 212.112 address?

212.101 What law governs a determination of whether I am inadmissible on public charge grounds?

212.102 What is the meaning of "public charge" for admissibility and adjustment of status purposes?

212.103 What specific benefits are considered to be "public cash assistance for income maintenance"?

212.104 What factors will make me inadmissible or ineligible to adjust status on public charge grounds?

212.105 Are there any forms of public assistance that I can receive without becoming inadmissible as a public charge if I should later apply for a visa, admission, or adjustment of status?

212.106 If I have received public cash assistance for income maintenance, have been institutionalized for long-term care at Government expense, or have been deemed a public charge in the past, will I be inadmissible or ineligible to adjust status on public charge grounds now or in the future?

212.107 Will I be required to pay back any public benefits that I have received before an immigration officer or immigration judge will find me admissible or eligible to adjust status?

212.108 Are there any special requirements for aliens who are seeking to immigrate based on a family relationship or on employment?

212.109 Will I be considered likely to become a public charge because my spouse, parent, child, or other relative has become, or is likely to become, a public charge or has received public cash assistance?

212.110 Are there any individuals to whom the public charge ground of inadmissibility does not apply?

212.111 Are there any waivers for the public charge ground of inadmissibility?

212.112 Is it possible to provide a bond or cash deposit to ensure that I will not become a public charge?

Subpart G—Public Charge Inadmissibility

§ 212.100 What issues do §§ 212.100 through 212.112 address?

(a) Sections 212.100 through 212.112 of this part address the public charge grounds of inadmissibility under section 212(a)(4) of the Act. It applies to all aliens seeking admission to the United States or adjustment of status to lawful permanent residency, except for the categories of aliens described in § 212.110 or other categories of aliens who may be exempted by law.

(b) In §§ 212.101 through 212.112 of this part, the terms "I," "me" and "my" in the section headings and "you" and "your" in the text of each section refer to an alien who may be inadmissible or ineligible to adjust status on public charge grounds.

§ 212.101 What law governs a determination of whether I am inadmissible on public charge grounds?

The public charge grounds of inadmissibility are found under section

212(a)(4) of the Act. A Department of State (State Department) consular officer makes the public charge determination if you are applying for a visa overseas. A Service officer makes the public charge determination if you are applying for admission at a port-of-entry to the United States or for adjustment of status to that of a lawful permanent resident. Under section 212(a)(4) of the Act, you will be found inadmissible or ineligible to adjust status if, "in the opinion of" the consular officer or Service officer making the decision, you are considered "likely at any time to become a public charge." If you have been placed in removal proceedings where issues of your admissibility or eligibility to adjust status arise, an immigration judge will decide whether you are likely to become a public charge.

§ 212.102 What is the meaning of "public charge" for admissibility and adjustment of status purposes?

(a) (1) "Public charge" for purposes of admissibility and adjustment of status means an alien who is likely to become primarily dependent on the Government for subsistence as demonstrated by either:

(i) The receipt of public cash assistance for income maintenance purposes, or

(ii) Institutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime).

(2) Institutionalization for short periods for rehabilitation purposes does not demonstrate primary dependence on the Government.

(b) For purposes of §§ 212.100 through 212.112 of this part:

(1) The term "government" refers to any Federal, State or local government entity or entities.

(2) The term "cash" includes not only funds you receive in the form of cash from a government agency, but also funds received from a government agency by check, money order, wire transfer, electronic funds transfer, direct deposit, or any other form that can be legally converted to currency, *provided that* the funds are for purposes of maintaining your income.

(c) As described in §§ 212.103(c) and 212.105 of this part, some forms of public assistance will not be considered for public charge purposes because they do not result in primary dependence on the Government. Immigration officers and immigration judges must also consider many other factors, as described in §§ 212.101–212.112 of this part, before making a final public charge determination.

§ 212.103 What specific benefits are considered to be "public cash assistance for income maintenance"?

(a) Public benefits considered to be "public cash assistance for income maintenance" include:

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

(2) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601, *et seq.*, but not including supplemental cash benefits excluded from the term "assistance" under TANF program rules (see 45 CFR 260.31) or any non-cash benefits and services provided by the TANF program; and

(3) State and local cash assistance programs for income maintenance (often called State "General Assistance," but which may exist under other names).

(b) Due to the constantly changing nature of the numerous Federal, State and local benefits for which you may be eligible, it is not possible to give a complete listing of such benefits that could be considered for public charge purposes. If you are receiving, or contemplate receiving, any public cash assistance (as "cash" is described in § 212.102(b)(2)) for purposes of maintaining your income, an immigration officer or immigration judge may consider it as a factor in making a decision as to whether you are likely to become primarily dependent on the Government.

(c) Some forms of cash benefits are not intended for income maintenance and, therefore, will not be considered for public charge purposes under §§ 212.101 through 212.112. Examples of such cash benefits that are supplemental in nature include the Low Income Home Energy Assistance Program (LIHEAP), 42 U.S.C. 8621 *et seq.*; the Child Care and Development Block Grant Program (CCDBGP), 42 U.S.C. 9858 *et seq.*; Food Stamp benefits issued in cash (see, e.g., 7 U.S.C. 2026(b)); certain educational assistance benefits; and non-recurrent, short-term crisis benefits, and other services funded in cash by the TANF program that do not fall within the TANF program's definition of "assistance," as described in paragraph (a)(2) of this section.

(d) Cash benefits that have been earned continue to be irrelevant to the public charge ground of inadmissibility. A few examples of such earned benefits that will not be considered include benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, government pension benefits, and veterans' benefits.

§ 212.104 What factors will make me inadmissible or ineligible to adjust status on public charge grounds?

(a) Under section 212(a)(4)(B) of the Act, the immigration officer or consular official must consider, "at a minimum," your age, health, family status, assets, resources, financial status, education, and skills in making a decision on whether you are likely to become a public charge. The decision-maker may also consider any Affidavit of Support filed by your sponsor(s) on your behalf under section 213A of the Act and 8 CFR part 213a. The decision-maker will consider the "totality of circumstances" before determining whether you are likely to become a public charge. No single factor, other than the lack of a sufficient Affidavit of Support as required by section 212(a)(4)(C) and (D) of the Act, will control this decision, including past or current receipt of public cash benefits, as described in paragraph (b) of this section.

(b) You are inadmissible or ineligible to adjust status on public charge grounds if, after consideration of your case in light of all of the minimum factors in section 212(a)(4)(B) of the Act, any Affidavit of Support (Form I-864) filed on your behalf under 8 CFR part 213a, and any other facts that may be relevant, the immigration officer, consular officer, or immigration judge determines that it is likely that you will become primarily dependent for your subsistence on the Government, at any time, as demonstrated by:

(1) Receipt of public cash assistance for income maintenance, including SSI, cash TANF (other than cash TANF benefits excluded in § 212.103(a)(2)), or State or local cash benefit programs for income maintenance, such as "General Assistance"; or

(2) Institutionalization for long-term care (other than imprisonment for conviction of a crime) at Government expense. Institutionalization for short-term rehabilitation purposes does not demonstrate primary dependence on the Government.

§ 212.105 Are there any forms of public assistance that I can receive without becoming inadmissible as a public charge if I should later apply for a visa, admission, or adjustment of status?

(a) The only benefits that are relevant to the public charge decision are public cash assistance for income maintenance and institutionalization for long-term care at Government expense. Institutionalization for short periods for rehabilitation purposes will not be considered. Non-cash public benefits are not considered because they are of a supplemental nature and do not

demonstrate primary dependence on the Government.

(b) Although it is not possible to list all of the non-cash public benefits that will not be considered, you will not risk being found inadmissible as an alien likely to become a public charge by receiving non-cash benefits under the following programs or benefit categories:

(1) The Food Stamp program, 7 U.S.C. 2011, *et seq.*,

(2) The Medicaid program, 42 U.S.C. 1396, *et seq.* (other than payments under the Medicaid program for long-term institutional care);

(3) The Children's Health Insurance Program (CHIP), 42 U.S.C. 1397aa, *et seq.*;

(4) Health insurance and health services (other than public benefits for costs of institutionalization for long-term care), including, but not limited to, emergency medical services, public benefits for immunizations and for testing and treatment of symptoms of communicable diseases, and use of health clinics;

(5) Nutrition programs, including, but not limited to, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), 42 U.S.C. 1786; and programs that operate under the National School Lunch Act, 42 U.S.C. 1751 *et seq.*; the Child Nutrition Act, 42 U.S.C. 1771 *et seq.*; and the Emergency Food Assistance Act, 7 U.S.C. 7501 *et seq.*;

(6) Emergency disaster relief;

(7) Housing benefits;

(8) Child care services;

(9) Energy benefits, such as LIHEAP, 42 U.S.C. 8621 *et seq.*;

(10) Foster care and adoption benefits;

(11) Transportation vouchers or other non-cash transportation services;

(12) Educational benefits, including benefits under the Head Start Act and aid for elementary, secondary, or higher education;

(13) Non-cash benefits or services funded by the TANF program;

(14) Job training programs;

(15) State and local supplemental, non-cash benefits that serve purposes similar to those of the Federal programs listed in this paragraph;

(16) Any other Federal, State, or local public benefit program, under which benefits are provided in-kind, through vouchers, or any other medium of exchange other than payment of cash assistance for income maintenance to the eligible person.

(c) Although the non-cash public benefits described in paragraph (b) of this section will not be considered for admissibility purposes, you may still be inadmissible or ineligible to adjust

status if, in the opinion of the officer making the decision, you are likely to become a public charge following his or her analysis of the totality of the circumstances, as described in § 212.104. This includes consideration of all the minimum statutory factors described in section 212(a)(4)(B) of the Act.

§ 212.106 If I have received public cash assistance for income maintenance, have been institutionalized for long-term care at Government expense, or have been deemed a public charge in the past, will I be inadmissible or ineligible to adjust status on public charge grounds now or in the future?

(a) Such past circumstances do not necessarily mean that you will be found inadmissible or ineligible to adjust status on public charge grounds based on a present application for admission or adjustment. The immigration officer, consular officer, or immigration judge who makes the decision must consider all of the relevant facts of your case. Past receipt of public cash assistance or institutionalization under circumstances that made you a public charge would support a finding that you are inadmissible only if, in light of all the factors listed in § 212.104, it is likely that you will continue to be, or become again, a public charge in the future.

(b) The length of time during which you previously received benefits or were institutionalized at Government expense, as well as the distance in time from your current application for admission or adjustment, are significant to the decision. Public cash benefits received in the recent past are more predictive of your likelihood to become a public charge in the future than benefits received in the more distant past. Similarly, public cash benefits received for longer time periods are more predictive than benefits received in the past for shorter periods. In addition, small amounts of public cash assistance for income maintenance received in the past are weighed less heavily than greater amounts under the "totality of the circumstances" analysis. The negative implication of your past receipt of public cash benefits for income maintenance or institutionalization for long-term care, however, may be overcome by positive factors in your case demonstrating that you are unlikely to become primarily dependent on the Government for subsistence.

§ 212.107 Will I be required to pay back any public benefits that I have received before an immigration officer or immigration judge will find me admissible or eligible to adjust status?

Immigration officers and immigration judges do not have the authority to require that you reimburse public benefit-granting agencies for assistance that you have received. However, they may consider your receipt of public cash assistance for income maintenance purposes or your institutionalization for long-term care at Government expense as factors in deciding whether you are likely to become a public charge in the future, regardless of whether the agency granting the benefit has sought reimbursement from you or any other party obligated to pay back the benefit on your behalf. If there is a final judgment against you for failure to repay the costs of public cash benefits or institutionalization that has not been satisfied, immigration officers or judges may also consider this failure to repay as one of the relevant factors in deciding whether you are likely to become a public charge.

§ 212.108 Are there any special requirements for aliens who are seeking to immigrate based on a family relationship or on employment?

Under section 212(a)(4)(C) and (D) of the Act, you must file an "Affidavit of Support Under Section 213A of the Act" (Form I-864) from your sponsor(s) in accordance with section 213A of the Act and 8 CFR part 213a if you are seeking to immigrate in certain family-based visa categories or as an employment-based immigrant who will work for a relative or a relative's firm. If you do not file the Affidavit of Support as required, you will be inadmissible or ineligible to adjust status on public charge grounds. Certain widows and widowers, battered spouses and children of U.S. citizens and lawful permanent residents are currently exempt under section 212(a)(4)(C) of the Act from filing an Affidavit of Support.

§ 212.109 Will I be considered likely to become a public charge because my spouse, parent, child, or other relative has become, or is likely to become, a public charge or has received public cash assistance?

(a) The fact that one, or all, of your close relatives has become, or is likely to become, a public charge will not make you inadmissible as a public charge, unless the evidence shows that you, individually, are likely to become a public charge.

(b) Public cash benefits for income maintenance received by your relatives will not be attributed to you for

admission or adjustment purposes, unless they also represent your sole support. If such benefits are attributed to you because they are your sole support, they must be considered along with all of the other factors related to your case, as described in § 212.104, before you may be found inadmissible as a public charge.

§ 212.110 Are there any individuals to whom the public charge ground of inadmissibility does not apply?

(a) The Act and various other statutes contain exceptions to the public charge ground of inadmissibility for the following categories of aliens:

(1) Refugees and asylees at the time of admission and adjustment of status to legal permanent residency according to sections 207(c)(3) and 209(c) of the Act;

(2) Amerasian immigrants at admission as described in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, section 584, contained in section 101(e), Public Law 100-202, 101 Stat. 1329-183 (1987) (as amended), 8 U.S.C. 1101 note;

(3) Cuban and Haitian entrants at adjustment as described in the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, Title II, section 202, 100 Stat. 3359 (1986) (as amended), 8 U.S.C. 1255a note;

(4) Nicaraguans and other Central Americans who are adjusting status as described in the Nicaraguan Adjustment and Central American Relief Act (NACARA), Public Law 105-100, section 202(a), 111 Stat. 2193 (1997) (as amended), 8 U.S.C. 1255 note;

(5) Haitians who are adjusting status as described in the Haitian Refugee Immigration Fairness Act of 1998, section 902, Title IX, Public Law 105-277, 112 Stat. 2681 (Oct. 21, 1998), 8 U.S.C. 1255 note;

(6) Aliens who entered the United States prior to January 1, 1972 and who meet the other conditions for being granted lawful permanent residence under section 249 of the Act and 8 CFR part 249.

(b) Other categories of aliens may also be excepted from the public charge provisions in section 212(a)(4) of the Act by subsequent legislation. The list of such aliens in paragraph (a) of this section may not include every excepted category.

(c) In addition, aliens who have been previously admitted for lawful permanent residence ("LPRs") and who re-enter the United States are not applicants for admission and, therefore, are not subject to the grounds of inadmissibility, unless they are covered by one of the six categories described in

section 101(a)(13)(C) of the Act, including being absent from the United States for over 180 days.

§ 212.111 Are there any waivers for the public charge ground of inadmissibility?

There are no waivers available for the public charge grounds of inadmissibility, except for the waiver for certain aged, blind, or disabled applicants for adjustment of status under section 245A of the Act. (See 8 U.S.C. 1255a(d)(2)(B)(ii)(IV).) However, various laws have exempted certain categories of aliens from the requirements of section 212(a)(4) of the Act. Several of these categories are described in § 212.110(a).

§ 212.112 Is it possible to provide a bond or cash deposit to ensure that I will not become a public charge?

The Service may accept a suitable, legally binding public charge bond or cash deposit on your behalf that meets the conditions set forth in 8 U.S.C. 1183 and in 8 CFR part 213. Acceptance of such a bond or cash deposit is discretionary.

6. Part 237 is added to read as follows:

PART 237—DEPORTABLE ALIENS

Subpart A—Public Charge Deportability

Sec.

237.10 What issues do §§ 237.10 through 237.18 address?

237.11 What law governs whether I am deportable on public charge grounds?

237.12 What does it mean to be a “public charge,” for purposes of removal as a deportable alien?

237.13 What specific benefits are considered to be “public cash assistance for income maintenance?”

237.14 Are there any forms of public benefits that I can receive without becoming deportable as a public charge?

237.15 What other conditions must be met for me to be deportable as a public charge?

237.16 Is the “Affidavit of Support under Section 213A of the Act” (Form I-864) relevant to removal on public charge grounds of deportation?

237.17 Does the 5 year period in section 237(a)(5) of the Act run only from my first entry into the United States?

237.18 Will I be considered a public charge because my spouse, parent, child, or other relative has accepted public benefits or has become a public charge?

Subpart B—[Reserved]

Authority: 8 U.S.C. 1227(a)(5), 8 U.S.C. 1183a, 8 CFR part 213A.

Subpart A—Public Charge Deportability

§ 237.10 What issues do §§ 237.10 through 237.18 address?

(a) Sections 237.10 through 237.18 of this part address the public charge

ground of deportation under section 237(a)(5) of the Act.

(b) In §§ 237.10 through 237.18 of this part, the terms “I,” “me” and “my” in the section headings and “you” and “your” in the text of each section refer to an alien who may be deportable as a public charge.

§ 237.11 What law governs whether I am deportable on public charge grounds?

(a) Section 237(a)(5) of the Act describes which aliens are deportable on public charge grounds. If the Service brings a removal proceeding against you charging that you are subject to deportation on public charge grounds, the Service must prove that you became a public charge within 5 years of your entry to the United States.

(b) If you can prove that the causes that led to your becoming a public charge arose after your entry to the United States, you will not be deported.

§ 237.12 What does it mean to be a “public charge” for purposes of removal as a deportable alien?

(a)(1) “Public charge” for purposes of removal as a deportable alien means an alien who has become primarily dependent on the Government for subsistence as demonstrated by either:

(i) The receipt of public cash assistance for income maintenance purposes, or

(ii) Institutionalization for long-term care at Government expense (other than imprisonment for conviction of a crime).

(2) Institutionalization for short periods for rehabilitation purposes does not demonstrate primary dependence on the Government.

(b) For purposes of §§ 237.10 through 237.18 of this part:

(1) The term “government” refers to any Federal, State or local government entity or entities.

(2) The term “cash” includes not only funds you receive in the form of cash from a government agency, but also funds received from a government agency by check, money order, wire transfer, electronic funds transfer, direct deposit, or any other form that can be legally converted to currency, *provided that* the funds are for purposes of maintaining your income.

(c) As described in §§ 237.13(c) and 237.14 of this part, some forms of public assistance will not be considered for public charge purposes because they do not result in primary dependence on the Government. In addition, you will not be found deportable on public charge grounds unless the other conditions in §§ 237.11, 237.15, and 237.16 of this part (if § 237.16 applies to your case) have been met.

§ 237.13 What specific benefits are considered to be “public cash assistance for income maintenance”?

(a) Public benefits considered to be “public cash assistance for income maintenance” include:

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

(2) Temporary Assistance for Needy Families (TANF), 42 U.S.C. 601, *et seq.*, but not including supplemental cash benefits excluded from the term “assistance” under TANF program rules (see 45 CFR 260.31) or any non-cash benefits and services provided by the TANF program; and

(3) State and local cash assistance programs for income maintenance (often called State “General Assistance,” but which may exist under other names).

(b) Due to the constantly changing nature of the numerous Federal, State and local benefits for which you may be eligible, it is not possible to give a complete listing of such benefits that could be considered for public charge purposes. If, within 5 years of your entry into the United States, you have received any public benefit that is provided in the form of cash (as that term is described in § 237.12(b)(2) of this part) for purposes of maintaining your income, it may serve as a basis for your deportation on public charge grounds, *provided that* all of the requirements of section 237(a)(5) of the Act and the other conditions for deportation described in §§ 237.11, 237.15, and 237.16 of this part (if § 237.16 applies to your case) have been satisfied.

(c) Some forms of cash benefits are not intended for income maintenance, and therefore, will not be considered for public charge purposes under §§ 237.10 through 237.18 of this part. Examples of such cash benefits that are supplemental in nature include the Low Income Home Energy Assistance Program (LIHEAP), 42 U.S.C. 8621 *et seq.*; the Child Care and Development Block Grant Program (CCDBG), 42 U.S.C. 9858 *et seq.*; Food Stamp benefits issued in cash (see, e.g., 7 U.S.C. 2026(b)); certain educational assistance benefits; and non-recurrent, short-term crisis benefits, and other services funded in cash by the TANF program that do not fall within the TANF program’s definition of “assistance,” as described in paragraph (a)(2) of this section.

(d) Cash benefits that have been earned continue to be irrelevant to the public charge ground of inadmissibility. A few examples of such earned benefits that will not be considered include benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*,

government pension benefits, and veterans' benefits.

§ 237.14 Are there any forms of public benefits that I can receive without becoming deportable as a public charge?

(a) The only benefits that are relevant to the public charge decision are public cash assistance for income maintenance and institutionalization for long-term care at Government expense. Institutionalization for short periods for rehabilitation purposes will not be considered. Non-cash public benefits are not considered because they are of a supplemental nature and do not demonstrate primary dependence on the Government for subsistence.

(b) Although it is not possible to list all of the non-cash public benefits that will not be considered, you will not risk being found deportable as a public charge by receiving non-cash benefits under the following programs or benefit categories:

(1) The Food Stamp program, 7 U.S.C. 2011, *et seq.*,

(2) The Medicaid program, 42 U.S.C. 1396, *et seq.* (other than payments under the Medicaid program for long-term institutional care);

(3) The Children's Health Insurance Program (CHIP), 42 U.S.C. 1397aa, *et seq.*;

(4) Health insurance and health services (other than public benefits for costs of institutionalization for long-term care), including, but not limited to, emergency medical services, public benefits for immunizations and for testing and treatment of symptoms of communicable diseases, and use of health clinics;

(5) Nutrition programs, including, but not limited to, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), 42 U.S.C. 1786; and programs that operate under the National School Lunch Act, 42 U.S.C. 1751 *et seq.*; the Child Nutrition Act, 42 U.S.C. 1771 *et seq.*; and the Emergency Food Assistance Act, 7 U.S.C. 7501 *et seq.*;

(6) Emergency disaster relief;

(7) Housing benefits;

(8) Child care services;

(9) Energy benefits, such as LIHEAP, 42 U.S.C. 8621 *et seq.*;

(10) Foster care and adoption benefits;

(11) Transportation vouchers or other non-cash transportation services;

(12) Educational benefits, including benefits under the Head Start Act and aid for elementary, secondary, or higher education;

(13) Non-cash benefits or services funded by the TANF program;

(14) Job training programs;

(15) State and local supplemental, non-cash benefits that serve purposes

similar to those of the Federal programs listed in this paragraph;

(16) Any other Federal, State, or local public benefit program, under which benefits are provided in-kind, through vouchers, or any other medium of exchange other than payment of cash benefits for income maintenance to the eligible person.

§ 237.15 What other conditions must be met for me to be deportable as a public charge?

(a) In addition to the requirements of section 237(a)(5) of the Act, and except as provided in paragraph (b) of this section, you are not deportable as a public charge unless the Service shows that:

(1) The Government entity that provided, or is providing, either the public cash assistance for your income maintenance as described in §§ 237.12 and 237.13 of this part or the costs of institutionalization for your long-term care as described in § 237.12, has a legal right to seek repayment of those benefits against either you or another obligated party, such as a family member or a sponsor; and

(2) Within 5 years of your entry to the United States, the public entity providing the benefit demanded that you or another obligated party repay the benefit; and

(3) You or another obligated party failed to repay the benefit demanded;

(4) There is a final administrative or court judgment obligating you or another party to repay the benefit. (As long as the demand for repayment under paragraph (a)(2) of this section occurred within 5 years of your entry, the final judgment may be rendered against you or another obligated party at any time thereafter);

(5) The benefit-granting agency, or other applicable Government entity, has taken all actions necessary to enforce the judgment, including all collection actions.

(b) If a legal right to seek repayment of the public benefits described in §§ 237.12 and 237.13 of this part is established, but the Service proves that there was no one against whom repayment could be enforced, thereby making a demand for repayment futile, then the Service need not show that a demand was made and a final judgment for repayment of the public benefits rendered.

§ 237.16 Is the "Affidavit of Support Under Section 213A of the Act" (Form I-864) relevant to removal on public charge grounds of deportation?

(a) The "Affidavit of Support Under Section 213A of the Act" (Form I-864) required under section 213A of the Act

and 8 CFR part 213a is relevant to removal on the public charge grounds for deportation in certain circumstances. Section 213A of the Act provides that the Affidavit of Support may support a legally enforceable claim against your sponsor(s) for repayment of certain Federal, State, or local means-tested public benefits provided to you. You may be found deportable on public charge grounds if the Service proves that:

(1) An Affidavit of Support under Section 213A of the Act and 8 CFR part 213a was filed on your behalf and is currently in effect; and

(2) Within 5 years after your admission to the United States, you

(i) Obtained SSI, cash TANF benefits, or other Federal, State, or local public benefits that were cash assistance for income maintenance purposes and that, at the time the Affidavit of Support was signed, had been designated as "means-tested public benefits" by the Government entity responsible for administering the benefit; or

(ii) Were institutionalized for long-term care at Government expense (other than imprisonment for conviction of a crime); and

(3) Such benefits have not been repaid as provided in § 237.15.

§ 237.17 Does the 5-year period in section 237(a)(5) of the Act run only from my first entry into the United States?

(a) The 5-year period begins again each time you enter the United States, unless you are a returning alien lawfully admitted for permanent residency (an "LPR") who is not considered an applicant for admission as described in paragraph (b) of this section.

(b) If you have been lawfully admitted for permanent residence (LPR status), you are not considered an applicant for admission upon return to the United States after a trip abroad unless you are covered by one of the categories specified in section 101(a)(13)(C) of the Act, including an absence of 180 days or more from the United States. If you are not covered by one of the categories listed in section 101(a)(13)(C) of the Act, the 5-year period for public charge deportation purposes would still be counted from your last entry to the United States.

§ 237.18 Will I be considered a public charge because my spouse, parent, child, or other relative has accepted public benefits or has become a public charge?

(a) The fact that one, or all, of your close relatives has received public cash benefits for income maintenance, or has become a public charge, will not make you deportable as a public charge, unless the evidence shows that you,

individually, have become a public charge.

(b) Public cash benefits for income maintenance received by your relatives will not be attributed to you for deportation purposes, unless they also represent your sole support. If such benefits are attributed to you because they are your sole support, all of the requirements of §§ 237.11, 237.15, and 237.16 of this part (if § 237.16 is applicable to your case) must also be met before you may be found deportable as a public charge.

Subpart B—[Reserved]

Dated: May 20, 1999.

Janet Reno,

Attorney General.

Appendix to Preamble

The following are the texts of letters received by Immigration and Naturalization Service officials from officials from the Department of Health and Human Services, the Social Security Administration, and the Department of Agriculture.

BILLING CODE 4410-10-U

The Deputy Secretary of Health and Human Services

Washington, D.C. 20201

March 25, 1999.

Commissioner Doris Meissner,

*Immigration and Naturalization Service,
Department of Justice, 425 Eye Street
NW., Washington, D.C. 20536*

Dear Commissioner Meissner: According to my colleagues at the U.S. Department of Health and Human Services (HHS), I understand that the Immigration and Naturalization Service (INS) plans to issue some form of guidance explaining the public charge ground of inadmissibility to and deportation from the United States. The guidance is critical to clarifying for immigrant families and communities what the potential immigration consequences are of receiving certain government benefits.

Over the past several years, there has been a significant decline in the receipt of welfare, health, and nutrition benefits by immigrant families and their citizen children, even though many of these families (or individuals within these families) are eligible for such benefits. HHS has received numerous reports from state and local government officials, program administrators, and community leaders around the country that a significant factor contributing to this decline in participation is the confusion and fear that immigrant families have in relation to public charge policies. There is particular concern that this lack of access to critical services may lead to negative health outcomes for immigrant families and children, as well as potentially undermining public health.

HHS supports the efforts of INS and the Department of Justice to clarify the meaning of "public charge" in a way that meets the objectives of both the immigration laws and the Administration's health policies. The

INS, as we understand it, is proposing to define "public charge" to mean an alien who has, or is likely to become, "primarily dependent on the government for subsistence." An important issue that has arisen is receipt of which benefits is evidence of this dependency. HHS agrees that in making such an assessment about an individual, it is important to articulate a principle that distinguishes clearly those public benefits that should be relevant to public charge determinations from those that should not be of any consequence. We further understand that under immigration law, receipt of benefits is only one of many factors that INS and Department of State officers consider in making public charge determinations.

This letter responds to your request for advice from benefit-granting agencies with expertise in subsistence matters about which types of benefit receipt would demonstrate that an individual is primarily dependent on the government for his or her support. The best available evidence of whether someone is primarily dependent on government assistance for subsistence is whether that individual is receiving *cash assistance for income maintenance purposes*, (i.e., cash assistance under the Temporary Assistance to Dependent Families program (TANF)), the Supplemental Security Income (SSI), and state general assistance programs, or is institutionalized in a long-term care facility at government expense.¹

The receipt of cash benefits or long-term care institutionalization are the most effective proxies for identifying an individual as one who is primarily dependent on government assistance for subsistence.

First, nearly all individuals or families receiving cash assistance for purposes of income maintenance are also receiving other non-cash support benefits and services as well, (e.g., Medicaid, Food Stamps, housing assistance, child care, energy assistance), and they are likely not to be receiving any income from other sources. For example, virtually all of those receiving AFDC cash assistance in 1995 were also receiving Medicaid (97 percent) and Food Stamps (89 percent), (1998 Green Book). By the end of 1997, 82 percent of families receiving TANF reported having no earned income. (AFDC/TANF Quality Control Data). In these cases, the individuals or families receiving cash assistance would meet the standard of "primarily dependent on government assistance for subsistence."

Second, it is extremely unlikely that an individual or family could subsist on a combination of non-cash support benefits or services alone. Without cash assistance, it is extremely unlikely that the individual or family could meet the basic subsistence requirements related to food, clothing and shelter. These non-cash assistance programs typically provide only supplemental and marginal assistance, (e.g., Food Stamps, housing assistance, energy assistance) or services, (e.g., health insurance coverage,

medical care and child care) that do not directly provide subsistence and together are insufficient to provide primary support to an individual or a family absent additional income. Moreover, programs such as Child Care enable parents to work and earn income in order to be self-sufficient. In addition, depending on eligibility rules, some programs such as Medicaid, may or may not be available to all family members or for all periods of time. HHS is unable to conceive of a situation where an individual, other than someone who permanently resides in a long-term care institution, could support himself or his family solely on non-cash benefits so as to be primarily dependent on the government. Thus, virtually all families receiving non-cash support benefits, *but not receiving cash assistance*, must rely on other income (usually earned income) in order to meet their subsistence needs.

Finally, non-cash support benefits and services are generally designed to supplement and support the diet, health, and living conditions of recipients, many of whom are low- to middle-income working families, and are generally provided as vouchers or direct services.² Also, these non-cash services often have a primary objective of supporting the overall community or public health, by making services generally available to everyone within a community, providing infrastructure development and support, or providing stable financing for services and systems that benefit entire communities. Compared to cash benefit programs, non-cash support programs generally have more generous eligibility rules so as to be available to individuals and families with incomes well above the poverty line. For example, states have a great deal of flexibility to set income eligibility rules under Medicaid and the Children's Health Insurance Program, and many states cover certain populations, such as children and pregnant women, up to 200 percent of the poverty line and sometimes higher. Moreover, in 1997 nearly half (49 percent) of Medicaid recipients were not receiving any cash assistance (SSI or AFDC/TANF), and two-thirds (64 percent) of adult recipients reported working full or part time. (March 1998 Current Population Survey). Similarly, about one-third of Food Stamp recipients in 1997 did not receive cash assistance and

² Although most support programs provide vouchers or direct services, it should be noted that at HHS some of these programs can also provide cash for the reimbursement of specific costs. For example, the Low Income Home Energy Assistance Program (LIHEAP) and the Child Care Development Fund (CCDF) are authorized to make cash payments, but these payments are for specific purposes other than income maintenance. LIHEAP is authorized to provide cash payments for energy costs, and providers do so in very limited circumstances such as when a vendor (such as a log supplier) does not have an agreement with the administering entity, (i.e., state, county, or nonprofit organization). In the case of CCDF, in FY 1997 that program gave cash payments to recipients in 7% of all cases specifically for the reimbursement of beneficiaries' child care costs. Under the proposal articulated here, cash payments in these programs would not give rise to a public charge determination since such payments are not provided for income maintenance purposes.

¹ Note that SSI is administered by the Social Security Administration, and general assistance programs are administered by the several states. However, we believe these are the relevant cash assistance programs that support the analysis in this letter.

reported earnings in 1997. (Characteristics of Food Stamp Recipients, 1998). In these cases the individual or family receiving non-cash benefits, but not receiving cash assistance, would not meet the standard of "primarily dependent on government assistance for subsistence."

The one circumstance in which receipt of non-cash benefits would indicate that an individual is primarily dependent on government assistance for subsistence, and therefore potentially a public charge, is the case of an individual permanently residing in a long-term care institution and relying on government assistance for those long-term care services. In this case, all of the individual's basic subsistence needs are assumed by the institution, and the individual has no need for cash assistance. Aside from this narrow instance, the receipt of a non-cash support benefits and services should not be relevant to a public charge determination under INS' proposed definition.

Based on these considerations, HHS recommends that benefit receipt should only be relevant to public charge determinations when an individual receives the benefits defined below:

1. Cash-Assistance for Income Maintenance: Cash assistance under TANF, SSE, and state/local equivalents (including state-only TANF).

2. Long-Term Institutionalized Care: The limited case of an alien who permanently resides in a long-term care institution (e.g., nursing facilities) and whose subsistence is supported substantially by public funds (e.g., Medicaid).

Thank you for your time and consideration. Please let me know if I or HHS staff can be of any further assistance regarding this important policy issue.

Sincerely,

Kevin Thurm,

Deputy Secretary of Health and Human Services.

Social Security

May 14, 1999.

Dr. Robert L. Bach,

Executive Associate Commissioner for Office of Policy and Planning, Immigration and Naturalization Service, 425 I Street, Washington, DC 20536

Dear Dr. Bach: We understand that the Immigration and Naturalization Service (INS) is planning to publish proposed regulations on the definition of "public charge" for purposes of determining who can be admitted to and who can be deported from the United States under the provisions in sections 212(a)(4) and 237(a)(5) of the Immigration and Nationality Act (INA). More specifically, INS plans to define "public charge" to mean an individual who "has become" or is "likely to be primarily dependent on the government for subsistence." You have asked the Federal agencies that administer public benefit programs whether a noncitizen's receipt of the benefits might indicate that the noncitizen primarily relied on these benefits for subsistence. This letter is in response to that request.

We agree that the receipt of Supplemental Security Income (SSI) could show primary dependence on the government for subsistence fitting the INS definition of public charge *provided that* all of the other factors and prerequisites for admission or deportation have been considered or met. We believe, however, that many mitigating factors discussed below, coupled with specific public charge exemptions under immigration law, also discussed, would result in a minimal impact of the public charge provisions on the SSI noncitizen population.

The SSI program is a nationwide Federal means-tested income maintenance program administered by the Social Security Administration (SSA). SSI guarantees a minimum level of income for needy aged, blind, and disabled individuals. The program is designed to provide assistance for individuals' basic needs of food, clothing, and shelter. Individuals eligible for SSI are among the most vulnerable people in the United States. For them, SSI is truly the program of last resort and is the safety net that protects them from complete impoverishment.

Lawful permanent residents and noncitizens permanently residing in the United States under color of law were eligible for SSI when the program began in 1974. The 1996 welfare reform legislation (Public Law 104-193) restricted SSI eligibility for qualified noncitizens to those who were in specific, limited categories, such as refugees and asylees, individuals who served in the U.S. military, and lawful permanent residents who worked in the United States for at least 40 quarters. Subsequent legislation in 1997 and 1998 expanded the categories to include individuals who had received SSI or were in the United States prior to enactment of welfare reform and who are disabled or blind. These later laws added other discrete classes of noncitizens as well. Still, the categories of noncitizens eligible for SSI are limited.

Under INS' proposed rule, the receipt of SSI could lead to a determination that a person is or is likely to be a public charge. As mentioned earlier, only limited, specified categories of noncitizens are eligible for SSI. Our analysis of the proposed INS public charge rule leads us to conclude that many of these SSI-eligible noncitizen categories would either be exempt from the public charge provisions by law, or would not be deemed public charges because of the operation of other factors required under the proposed rule. For example, aged, blind, and disabled refugees, asylees, Amerasian immigrants, Cubans and Haitians may be eligible for SSI benefits after they have been in the United States for 30 consecutive days. We understand that the first three categories and certain Cuban/Haitians are exempt from the proposed public charge policy under other provisions in immigration law. In addition, the public charge provision for deportation under section 237(a)(5) of the INA, applies only in cases in which a noncitizen became a "public charge from causes not affirmatively shown to have arisen since entry." Many individuals who are

eligible for SSI are healthy when they first come to the United States but become aged, blind or disabled after they enter. If these conditions occurred after entry giving rise to the use of the public benefits, we understand that they would not be deportable on public charge grounds.

Another mitigating factor in the proposed public charge rule as it applies to SSI beneficiaries involves reimbursement of SSI benefits received. As we understand the proposed rule, in order for a noncitizen to be determined deportable on public charge grounds, there must in part be a legal obligation for the individual or his or her sponsor to repay the benefits received during the first 5 years after entry into the United States. SSA has no authority to require the individual to repay the benefits for which they are entitled. Thus, nonsponsored noncitizens would not be required to reimburse, and the public charge provision for deportation would not apply to them. However, sponsors who have signed a new affidavit of support under section 213A of the INA are required to reimburse SSA for SSI benefits paid to the sponsored noncitizen. Only if the sponsor refuses to repay would the SSI beneficiary potentially be subject to deportation.

Even for those individuals who do not come under one of the exempted categories, the draft rules state that the mere receipt of SSI does not automatically make a noncitizen inadmissible, ineligible to adjust status, or subject to deportation. In the admission context, the INS plans to apply a "totality of circumstances" test which includes the consideration of several mandatory statutory factors. Examples of such factors include an alien's age, health, family status, assets, resources, financial status, education and skills. No single factor, other than the lack of a sufficient affidavit of support, if required, will determine whether a noncitizen is likely to be a public charge, including past or current receipt of SSI. In the deportation context, mere receipt of benefits also will not make a person deportable. There must also have been a demand for repayment by the benefit agency, failure to meet that demand by the alien or other obligated party, a final judgment, and all steps taken to enforce that judgment. Without the satisfaction of these prerequisites, the alien is not deportable.

Further, we understand that INS will take into account the specific circumstances surrounding the past or current receipt of SSI. For example, if a noncitizen received SSI in a past period of unemployment, but he or she is currently working and is self-supporting, a public charge determination may not be made. Every admission decision is made on a case-by-case basis carefully balancing the totality of the circumstances. We also understand that INS will accord less significance to the receipt of SSI if a noncitizen received SSI sometime ago or a noncitizen received or is receiving a small amount of SSI.

INS' proposed rule concerning deportations on public charge grounds indicates that such deportations are rare since the standards are very strict. We believe that these strict criteria would result in the deportation provision rarely being applied against a noncitizen SSI beneficiary.

Thank you for the opportunity to comment on this important matter.

Sincerely,
Susan M. Daniels,
*Deputy Commissioner for Disability and
Income Security Programs.*

Department of Agriculture

*Office of the Secretary, Washington, D.C.
20250*

April 15, 1999.

Honorable Doris M. Meissner,
*Commissioner, Immigration and
Naturalization Service, 425 I Street, NW,
Room 7100, Washington, D.C. 20536*

Dear Commissioner Meissner: This is in reference to a letter that the Department of Health and Human Services recently sent you suggesting that the receipt of public benefits should only be relevant to a public charge determination when an individual receives cash assistance for income maintenance or long-term institutionalized care. We have reviewed the letter and are in agreement with its contents.

We believe that neither the receipt of food stamps nor nutrition assistance provided under the Special Nutrition Programs administered by this Agency should be considered in making a public charge determination for purposes of admission,

deportation, or adjustment of an alien's status.

Please let us know if we can be of any assistance regarding this matter.

Sincerely,
Shirley R. Watkins,
*Under Secretary, Food, Nutrition and
Consumer Services.*

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