AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

Navigating Form I-129 & I-539 in Light of New Public Charge Questions[1]

July 13, 2020[2]

On August 14, 2019, the Department of Homeland Security (DHS) issued a final rule fundamentally changing the requirements for determining inadmissibility on public charge grounds under INA 212(a)(4). Under this law, a foreign national who is likely to become a public charge may be inadmissible to the United States. This new rule clarifies factors considered when determining whether someone is likely to become a public charge. The rule affects foreign nationals seeking immigrant and nonimmigrant visas abroad, admission to the United States on immigrant and nonimmigrant visas, and those seeking to adjust status to lawful permanent residence. This rule is effective as of February 24, 2020.

The regulations define a public charge as a foreign national who receives one or more public benefits, for more than 12 months **in the aggregate** within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months). The rule may make foreign nationals who have received these public benefits inadmissible and nonimmigrants may be ineligible for a change of status or extension of stay. However, because a public charge inadmissibility determination is prospective in nature, any duration (and amount) of public benefits received may be considered in the totality of circumstances, as well as in view of factors such as: age, health, family status, assets, resources, financial status, and education and skills.

Public Benefits Included	Public Benefits Not Included But Must Be Disclosed
• Any federal, state, local, or tribal cash assistance for income maintenance • Supplemental Security Income (SSI) • Temporary Assistance for Needy Families (TANF)	• The receipt of Medicaid for the treatment of an emergency medical condition • Services or benefits funded by Medicaid but provided under the

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[2] Editor's Note (7/31/20): Please note that this practice pointer was prepared earlier this summer and finalized in mid-July. **On July 29, 2020 the U.S. District Court for the Southern District of New York (SDNY) enjoined the government from enforcing, applying, implementing or treating as effective the USCIS Final Rule on Inadmissibility on Public Charge Grounds for any period during which there is a declared national health emergency in response to the COVID-19 outbreak**. On July 31, 2020, USCIS issued guidance in light of the SDNY court order, which included guidance indicating that applicants and petitioners whose applications or petitions are postmarked on or after July 29, 2020, should not include the Form I-944 or provide information about the receipt of public benefits on Form I-485, Form I-129, or Form I-539/I-539A. For more information on this development, please see Practice Alert: Impact of the Nationwide Injunction on Submission of Applications and Petitions Subject to the Public Charge Rules.

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• Federal, state or local cash benefit programs for income maintenance (often called "General Assistance" in the state context, which may exist under other names) • Supplemental Nutrition Assistance Program (SNAP, or formerly called "Food Stamps") • Section 8 Housing Assistance under the Housing Choice Voucher Program • Section 8 Project-Based Rental Assistance (including Moderate Rehabilitation) • Public Housing under section 9 the Housing Act of 1937, 42 U.S.C. 1437 et seq. • Federally funded Medicaid (with certain exclusions)	Individuals with Disabilities Education Act • School-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under state or local law • Medicaid benefits received by a foreign national under 21 years of age • Medicaid benefits received by a woman during pregnancy and during the 60-day period beginning on the last day of the pregnancy • Benefits received by a foreign national (or their spouse and children) who is enlisted in the U.S. armed forces, serving in active duty, or in any of the Ready Reserve components of the U.S. armed forces • Benefits received by children, including adopted children, who will acquire U.S. citizenship

This practice pointer will provide members with strategies on handling the various privacy and employment law issues stemming from the revised USCIS forms requiring disclosure of public benefits information.

I. Issues and considerations relating to Form I-129 and strategies for working with client / beneficiary to prepare and submit this form

In connection with the Public Charge Final Rule, the USCIS revised Form I-129, Petition for a Nonimmigrant Worker, to include a lengthy Section 6, requiring the petitioner – i.e. the sponsoring employer – to confirm if the sponsored foreign national received any of the delineated public benefits (as set forth in 8 CFR Section 212.21(b)), on or after February 24, 2020, regardless of the duration, since obtaining the nonimmigrant status the foreign national seeks to extend or change. As explained in the Form I-129 Instructions, Page 7, you may skip Part 6 if you are filing the petition without a request for the beneficiary's change of status or extension of stay. Thus, there is no need to complete the information if you are filing a request for consular notification, but we recommend at least putting "N/A – petition is for consular notification" in the blank spaces.

The detailed request for specific public benefits information about the beneficiary puts the employer in an awkward and potentially adversarial position with its employee. The employer is ostensibly expected to rely upon information provided by the sponsored foreign national regarding what, if any, public benefits they have received. And, to confound matters, the petitioner must

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sign the form and certify to the truthfulness and accuracy of its contents under the penalty of perjury. While the foreign national employees are unlikely to have ever been eligible for public benefits, difficult legal issues remain, such as privacy (for the foreign national), potential employment discrimination (by the employer), and a much higher degree of potential liability assumed by the employer and, in particular, the signatory on the Form I-129.

Practitioners representing both the employer and employee should discuss the specific public charge questions on the Form I-129 with the employer to determine the employer's preferences on how to obtain this information from the sponsored employee. Most, if not all, employers will likely prefer that the practitioner have the sponsored employee sign, under the penalty of perjury, a statement confirming which if any public benefits they have received (essentially mimicking the form and incorporating the same delineated benefits). Please see the following "Public Benefits Questionnaire" which serves as an example of a statement to be signed by the sponsored employee and forwarded to the immigration practitioner. In practice, this statement may also be incorporated into an immigration case management system's questionnaires if that system also requires the employee to sign a statement of truthfulness upon submission of the responses. A signed statement allows the employer to sign the I-129 and attest to all of the contents, also under the penalty of perjury, by relying on the employee's attestations. Regardless of the method by which the required information is requested and obtained, practitioners should review their representation agreements to ensure they are adequately compensated for the additional time and expertise required to comply with the new public charge inadmissibility determination.

While the completion and execution of this statement (attesting to no receipt of any delineated benefits) may be the most common outcome, privacy and confidentiality issues remain. If the employer or sponsored employee should raise such concerns about the specific public charge questions, the practitioner should refer the matter to an experienced employment law attorney. Similarly, if the foreign national had, either by mistake or by fraud, obtained public benefits, a likely conflict would arise in the joint representation of the employer and the employee and either the employer or employee should seek their own counsel. Again, an employment lawyer may be needed if the employer plans either to terminate employment or rescind an offer of employment if the foreign national had in fact obtained public benefits by fraud or by mistake. The new public charge disclosures require employers to consider carefully a myriad of legal, human resources and business issues in determining how best to protect the interests of both the company and the employee.

II. Issues relating to Form I-539 and strategies for working with client / beneficiary to prepare and submit this form

Nearly all nonimmigrants seeking to change or extend their status via Form I-539 will not be eligible to apply for or receive "public benefits", but will be subject to the Public Charge Rule, and so, the requisite inquiry will be relatively straightforward and simple.

However, there are some nonimmigrant classifications that *can* apply for what might be considered "public benefits", such as unemployment insurance benefits (e.g., H-4, L-2) or Medicaid to cover

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pregnancy-related costs throughout the pregnancy and for sixty (60) days after birth. There are also some classifications to which the Public Charge Rule is *not* applicable (e.g., U visa).

Accordingly, it is necessary for the practitioner to begin by evaluating whether or not the applicant is in, or changing status to, a non-immigrant classification that is subject to the Public Charge Rule.

When The Applicant is Subject to Public Charge Rule

If the applicant *is* in a classification that is subject to the Public Charge Rule, then the practitioner should advise the applicant of the new guidelines (https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge, summarized with relevant clarifying statements at https://www.uscis.gov/news/public-charge-fact-sheet), identifying the new framework in which USCIS will consider an applicant's qualification for or receipt of public benefits as a bar to receiving the requested nonimmigrant status.

When The Applicant has Received Benefits Unlawfully

If the applicant is subject to the Public Charge Rule, but should not be eligible for public benefits *and has received such benefits*, (e.g., F-1, B-1/B-2), then the practitioner should advise the applicant about the June 28, 2018 NTA memorandum (PM PM-602-0050.1), that specifically identifies abuse of public benefits as a removal priority that will trigger an NTA. Consequently, the practitioner would be seriously remiss not to explore possible consequences of removal proceedings and relief options with the applicant before submitting Form I-539.

When The Applicant has Received Benefits Lawfully

If an applicant has received or qualified for one or more public benefits—regardless of whether the specific benefit will render the applicant inadmissible—Form I-539 nevertheless requires the applicant to disclose the benefit received and/or certified. Once identified, the applicant may then identify the applicable exemption. For instance, Medicaid benefits received during pregnancy or for 60 days after pregnancy, will not render an applicant inadmissible, but must *still* be disclosed with supporting documentation.

It is important to note that the Public Charge Rule is focused on the duration for which the public benefits were received, not the value or amount of the benefit. If a client received a benefit for 12 individual months over a 36-month period, the application may be denied on public charge grounds. To this end, all documentation relevant to the applicant's receipt of public benefits should be maintained, reviewed, and evaluated for probative value, with specific attention paid to: (1) the circumstances leading to the applicant's application for public benefits; (2) the amount of time that the applicant receipt the public benefits; and/or (3) the circumstances relating to the applicant's decision not to accept public benefits if the applicant was certified to receive public benefits, but did not accept them. Each of these items will prove crucial in presenting a persuasive narrative to the adjudicating officer regarding his/her determination of the applicant's likelihood of becoming a "public charge".

When The Applicant and their Spouse File Together through the Spouse's Employer

Where an applicant files an I-539 concurrently with their spouse's I-129, through the spouse's employer, privacy and/or confidentiality issues may arise. Thus, it is good practice to prepare the applicant and/or the client for potential review or processing difficulties, as well as have a discussion about potential privacy or confidentiality issues where the applicant's information will be revealed to the spouse's employer and/or third-party attorney(s).
The applicant does not have many avenues to restrict their spouse's employer and/or its attorney from reviewing the I-539, though one option is to file the I-539 separate from the I-129. With each petition and application presumed to be treated as its own filing, regardless of whether they are filed together, this would be a safe option that would not likely have much of an impact on processing.

Alternatively, if the applicant accepts that the spouse's employer and/or its attorney will have access to the application, but wishes to restrict the disclosure of that information to third-parties, then some options may be: (i) to have the applicant provide the package in a signed-and-sealed envelope to the spouse's employer; (ii) for the attorney to present the spouse's employer with a waiver of disclosure for execution, with the application package; and (iii) to have the applicant submit a signed disclaimer about the Form I-539 application package, thereby authorizing the spouse's employer to receive information for immigration processing and no other purpose, with disclosure only to relevant parties.

III. Ethics Considerations

The revised USCIS forms requiring public benefits information raise ethics concerns regarding client confidentiality, conflicts of interest, communication, and candor for lawyers representing employers filing petitions for beneficiaries seeking to change their status or extend their stay.

Form I-129 had already required petitioners to certify the accuracy of information obtained from beneficiaries regarding their qualifications, biographic information, and nonimmigrant status. The revised Form I-129 now also requires petitioners to certify the accuracy of information provided by the beneficiary pertaining to public benefits received by the beneficiary since obtaining their nonimmigrant status. The petitioner, beneficiary, and the preparer each have separate interests regarding the I-129 petition. The beneficiary risks denial of the petition for receiving impermissible public benefits. The petitioner and the preparer each certify under penalty of perjury that the public benefits information provided is complete, true, and correct. An attorney preparing Form I-539 has the additional obligation of submitting a completed Form G-28 attorney authorization while also certifying under penalty of perjury that the information is complete, true, and correct.

According to the preamble to the ABA Model Rules of Professional Conduct, "virtually all difficult ethical problems arise from conflict between a lawyer's responsibility to clients, to the legal system and to the lawyer's own interest in remaining ethical while earning a satisfactory living." The Model Rules recognize the lawyer's ongoing challenge, inherent in legal practice, of balancing these conflicting responsibilities.

Who is the Client?

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Lawyers filing Forms I-129 and I-539 need to identify their clients at the outset. Do they represent the petitioning employer, the employee beneficiary, the dependents, or all of them? The ethics concerns vary according to the lawyer's response to this initial question.

Creating an attorney-client relationship may be done inadvertently or accidently. Regardless of what the lawyer assumes, the client's perception is also a critical factor regarding the formation of a lawyer-client relationship. The relationship may be established when a person asks a lawyer for advice and the lawyer provides it, even without a signed representation agreement or payment.

To avoid creating an inadvertent attorney-client relationship, the lawyer who decides only to represent the petitioner needs to convey this position to the beneficiary as clearly as possible at the outset, and to be careful throughout the representation not to advise the beneficiary or prepare dependent applications that would change this initial approach as a result of the beneficiary's reasonable reliance. The lawyer representing only one client would still need to get information from the beneficiary to prepare the revised I-129 petition. Because of the certification requirements, the beneficiary would provide petitioner with the same statement, signed under penalty of perjury, on the details of any public benefits received or certified to be received since being approved for his or her current nonimmigrant status. The lawyer who is representing only the petitioner would need to comply with Model Rule 4.3 on dealing with unrepresented persons when asking the beneficiary for this public benefits information, by clearly identifying the petitioner as the lawyer's client to avoid a misunderstanding and being careful not to give legal advice. The request for public benefits information is not obviously related to the immigration case, and the beneficiary is unlikely to be sufficiently experienced in dealing with legal matters to understand the significance of the request. Without giving legal advice to explain the public charge condition, the lawyer would also need to clarify that the public benefits information from the beneficiary would not remain private or confidential following disclosure to the petitioner's lawyer. This careful approach would be necessary to keep the beneficiary from misconstruing the nature of the relationship with the lawyer.

Does the new public charge condition preclude common representation?

The easier approach for I-129 petitions and concurrently filed I-539 applications may be to recognize joint or concurrent clients in the petitioner, the beneficiary, and dependents. They each have the shared goal of gaining visa status for the beneficiary to work for the petitioner with the ability of the beneficiary's family members to gain a dependent visa status. In addition, representation of each party by different lawyers would be cumbersome and expensive.

But the lawyer undertaking joint representation needs to decide whether a conflict of interest exists through direct adversity or a significant risk that representation of one client will be materially limited by the lawyer's responsibilities to another. If there is a conflict, but no direct adversity, the lawyer must decide whether the clients could consent to the representation, and if consent is possible, the lawyer must consult with the clients to obtain their informed consent confirmed in writing.

Because the parties continue to have shared goals, the new public charge questions would not, by themselves, create direct adversity or a significant risk of a material limitation. However, because

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these questions heighten the risk of conflict, the lawyer should address the public benefits information requirements in the conflict of interest disclosure at the outset, to explain the implications of common representation and the possible effects on loyalty, confidentiality, and the attorney-client privilege and risks involved. The lawyer would advise both parties about the required public benefits information for approving an extension of stay or change of status request, emphasizing how common representation affects client-lawyer confidentiality and the attorney-client privilege, namely that the privilege does not apply between jointly represented parties. The beneficiary would need to know that the public benefits information will be shared with the petitioner, as would public benefits information for dependents if the I-539 application is filed concurrently, even if it could later adversely impact the employment relationship. For example, if the beneficiary client asks the lawyer not to disclose public benefit information to the petitioner, common representation would not be a viable option, since the lawyer has an equal duty of loyalty to each client, and each has the right to be informed of anything that might affect the other's interests. In this circumstance, the lawyer may need to withdraw.

What type of public benefits disclosure is ethically required?

The extent of the disclosure required depends on whether the lawyer represents one or more parties filing the I-129 petition. The lawyer who recognizes only the I-129 petitioner as the client may not be able to address the beneficiary's specific questions on the public charge condition without violating the rules regarding communicating with unrepresented parties or risking the creation of an accidental lawyer-client relationship. According to Model Rule 4.3, "the lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interest of the client." Conversely, the lawyer representing both parties would be obligated under Model Rule 1.4(b) to explain the matter to the extent necessary to permit the client to make an informed decision. The lawyer would explain the reason for the requirement, the benefits covered, the exemptions, and the regulatory threshold of not receiving one or more public benefits for more than 12 months, in the aggregate, within any 36-month period. The beneficiary who receives Medicaid benefits during pregnancy or for 60 days after pregnancy, for example, would need to be advised of the obligation to disclose receipt of those benefits despite the existence of a specific exception. The lawyer representing both parties would also need to explain the exception for school-based services to the applicant filing a concurrent I-539. Because of the limits on communicating with unrepresented parties, the lawyer may not be able to provide reassurance to non-clients regarding the scope of the public benefits condition. The obligation of explaining matters applies only to clients.

Does the lawyer need to disclose receipt of public benefits if the client refuses to disclose them?

The lawyer has a fundamental duty to protect client confidences. The lawyer who signs as preparer must certify that the I-129 petitioner has not only reviewed the completed petition, but also informed the preparer that all information is complete, true, and correct. The lawyer who signs as preparer must also certify that the I-539 beneficiary has reviewed and understands the completed application and that all of the information is complete, true, and correct. For both forms, the preparer is responsible for reviewing the completed form with the applicant and getting assurance that the information is complete, true, and correct.

If the lawyer suspects that the I-129 petitioner or the I-539 applicant is not providing complete, true, and correct information, the lawyer is not obligated to submit the petition. Model Rule 1.16(b) permits a lawyer to withdraw from representing a client is several circumstances, including if withdrawal can be accomplished without material adverse effect on the interests of the client. The lawyer should consider withdrawing from the representation if not satisfied that the clients were providing accurate information regarding the public charge questions.

If the lawyer has already filed the petition, other ethical obligations may apply that go beyond withdrawal. The most significant obligation to consider is addressed in Model Rule 3.3(b) on candor toward the tribunal. This rule imposes a duty to disclose information the lawyer knows to be false even when the information is protected by the duty of confidentiality. Rule 3.3 creates a careful balance; a lawyer may not ignore obvious lies, but disclosure without actual knowledge that the statement or evidence is false violates Rule 1.6 requiring the protection of client confidentiality. The lawyer may suspect that the client received public benefits that the client refuses to disclose, but that suspicion may not be enough to trigger the duty of candor. The lawyer needs to consider whether the rule applies, whether the lawyer has actual knowledge and whether the matter is before a tribunal. If the rule does apply, the lawyer still needs to consider what actions are required before taking the extreme measure of disclosure. The rule requires reasonable remedial measures, which includes remonstrating with the client confidentially, advising the client of the lawyer's duty of candor to the tribunal, and seeking the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. The disclosure has serious consequences, including betrayal of the client, loss of the case, and prosecution for perjury, and it is a step that can only be taken after careful analysis and exhaustion of all required remedial measures.

IV. Employment Law Considerations

For all Form I-129 petitions postmarked on or after February 24, 2020, USCIS requires the use of the 1/27/20 edition of the form. The 1/27/20 edition requires employers to certify whether an employee applying for an extension or change of status has received any of the specified public benefits. As a result of this change, employers are now tasked with certifying this information to the federal government. Additionally, this process now provides the employer with knowledge it likely did not have before, namely whether the employee or applicant in questions has received public assistance.

With this new knowledge comes new concerns for employers. For example, the information the employer submits and certifies to the federal government will only be as good and as accurate as the source itself, namely the employee/applicant. Additionally, concerns have arisen whether and under what circumstances an employer can fire or refuse to hire an employee who reveals he or she has received public assistance. The question ultimately becomes whether the receipt of any of the enumerated benefits places that employee in a "protected category" or "protected class," thereby shielding him or her from a negative job action such as termination or refusal to hire. Because the change requiring public benefits disclosure is relatively recent, there exists no case law directly on this issue. However, the general framework for other types of protected classes in federal employment discrimination can provide guidance.

Form I-129 Specifics

In order to appreciate any potential discrimination issues, one first needs to understand the changes to Form I-129 that generate this discussion. The new benefits reporting requirement applies to a request to extend the beneficiary's stay or change the beneficiary's status. Additionally, it must be noted that the employer is only required to report public benefits received by the beneficiary on or after February 24, 2020. If the beneficiary has received any of the enumerated benefits for more than 12 months in the aggregate within any 36-month period, that beneficiary is ineligible for an extension or change of status unless he or she qualifies for certain exemptions also specified in the form.

But Is It Discrimination?

Once an employer has confirmed that an employee or applicant has, in fact, received public assistance, the question becomes what, if anything, can the employer do with this information? While there has been no definitive answer provided by case law yet due the recency of the change, there does not appear to be any legal restriction preventing an employer from firing an employee or refusing to hire an applicant because that individual has received public benefits. Unlike other statutes, such as the Immigration Reform and Control Act (IRCA) which sets forth specific protections for non-citizens and Title VII which prohibits discrimination based on an individual's membership in a specified protected class, the relevant provisions of the Immigration and Nationality Act (i.e. 8 U.S.C. sections 1154, 1184, and 1258) contain no such prohibitions, nor does it contain any enforcement provisions for employer violations. In addition, the unfair immigration-related employment discrimination provisions of 8 U.S.C 1324b apply principally to U.S. citizens, permanent residents, refugees and asylees. Significantly, there is nothing to indicate that Congress intended for receipt of public assistance to create a new protected class for such recipients. Without being a member of an enumerated protected class (such as one based on race, color, gender, national origin, religion, age or disability), an employee would be unable to establish a claim under Title VII or any of the similar state-based civil rights statutes. Likewise, the IRCA creates a protected category based on immigrant or citizenship status, but neither the IRCA nor Title VII create protection based solely on an individual's receipt of public assistance. The bottom line is that the new public charge reporting requirement does not appear to create a new protected class of employees or job applicants.

But Be Mindful of Disparate Impact Discrimination

The bad news, however, is that employers must still be careful not to wade into a disparate impact discrimination situation. Disparate impact (as opposed to disparate treatment) discrimination is often referred to as unintentional discrimination. It occurs when a policy or practice that appears to be neutral on its surface results in a disproportionate impact on a protected group. When viewed in light of the public charge reporting requirements for Form I-129 extensions of stay or changes of status, it is not a stretch to see how a claim of disparate impact discrimination could arise. By way of example, if an employer were to adopt a policy or practice prohibiting employment to any current employee or applicant who receives public benefits, that policy on its face and as written appears to be neutral and nondiscriminatory. It does not target members of any protected class (race, color, gender, national origin, religion, age or disability) and can be applied equally and

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fairly across all employees and applicants. However, when applied and then viewed through the lens of disparate impact discrimination, the answer becomes less clear. One would obviously need to verify the statistics, but it certainly seems possible that such a policy could disproportionately impact members of certain protected classes, namely race, color or national origin. To the extent individuals who receive any of the public benefits enumerated in Form I-129's reporting requirement are disproportionately represented in these protected classes, a claim for disparate impact discrimination becomes more plausible.

An analogy can be found by viewing hiring policies that screen applicants' prior arrest and conviction records. While seemingly neutral on its face, a policy prohibiting employment to someone who has been arrested or convicted of a crime has a disparate impact on members of certain protected classes. Because members of certain races and groups of national origin have historically been arrested in numbers that are disproportionate to their representation in the general American population, such a policy will always have a disparate discriminatory impact on those groups. The same analysis can be applied to recipients of public assistance – if recipients disproportionately receive benefits compared to the rest of the population, a disparate impact claim could arise. Thus, when deciding whether or how to use the information gained from an employee/applicant as part of the Form I-129 public charge process, employers should carefully consider the nuances of disparate impact discrimination and tread carefully.