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GMS Flash Alert

Immigration Edition

2019-131 | August 15, 2019

United States - "Public Charge" Rule Limits Green Card & Visa Access

On August 12, 2019, the U.S. Department of Homeland Security announced a final rule expanding the definition of a "public charge," and the government's ability to reject Adjustment of Status (i.e. green card) applications filed by those deemed likely at any time to rely on public benefits.[1]

The new public charge final rule is expected to be effective October 15, 2019. All applications and petitions postmarked on or after this date will be subject to the final rule.

WHY THIS MATTERS

Homeland Security estimates that an average of 544,000 individuals apply for lawful permanent residence in the United States each year. From this population, it is estimated that approximately 382,264 (or 70%) will be subject to a public charge review for inadmissibility during their green card application process under the new final rule. Of note, even if an applicant has never used government benefits in the past, Homeland Security is looking at the totality of the circumstances to determine whether an individual is likely at any time to become a public charge. The final rule provides immigration officers greater discretion in evaluating factors such as age, health, family size, education and skills, financial assets and resources, etc. to determine whether an applicant for immigration benefits is likely to become a public charge in the future.

Adjustment of status applicants who are subject to the public charge ground of inadmissibility and those seeking an extension of stay or change of status to their nonimmigrant status, must clearly demonstrate that they meet the requirements under the final rule in their applications for immigration benefits, otherwise their applications may be denied.

Employers should review and identify the employee population at risk of being affected by the new public charge final rule, and plan for alternate long-term resourcing or consider the possibility of filing green card or visa petitions for these employees prior to the final rule's effective date.

Context

Under the *Immigration and Nationality Act*, individuals seeking admission to the United States and those seeking to adjust status to permanent residence are inadmissible if they are likely at any time to become a public charge.

Historically, "public charge" has been interpreted to mean a foreign national who is primarily dependent on the government for subsistence, demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at the government's expense. Put differently, an individual's reliance on or receipt of non-cash benefits (e.g., SNAP or food stamps, Medicaid, and housing subsidies) was not considered by Homeland Security in determining whether an individual was likely to become a public charge.

Aimed at ensuring that foreign nationals seeking to enter and remain in the United States are self-sufficient,[2] the new final rule redefines the term "public charge" to refer to a foreign national who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period, counting receipt of two benefits in one month as two months. The rule further expands the term "public benefits" to include cash benefits for income maintenance (SSI and TANF), SNAP, most forms of Medicaid, Section 8 housing and rental assistance, and certain other forms of subsidized housing.

The final rule also addresses USCIS's authority to permit foreign nationals to submit a bond to overcome inadmissibility as a potential public charge in the context of their adjustment of status (green card) applications.

Lastly, the final rule expands the class of foreign nationals subject to a public charge review to include nonimmigrants such as those on H-1B, L-1, and TN temporary work visas. The final rule renders nonimmigrants ineligible for an extension of stay or a change of status if they have received one or more public benefits for more than 12 months in the aggregate within any 36-month period since obtaining nonimmigrant status.

The public charge rule will *not* apply to refugees, asylum seekers, special immigrant juveniles, domestic violence and trafficking victims, Temporary Protected Status (TPS) applicants, and other special categories. The full text of the final rule was published by the Federal Register on August 14, 2019.[3]

Next Steps

Applicants for adjustment of status will soon be required to file a Declaration of Self-Sufficiency (Form I-944) with their Application to Register Permanent Residence or Adjust Status (Form I-485) to demonstrate that they are not likely to become a public charge. The Form I-944 requirement does not replace the requirement to file an Affidavit of Support (Form I-864), and only applies to applicants for adjustment of status and not applicants for admission at a port-of-entry. Failure to submit Form I-944 after this date may result in a rejection or denial of the green card application without USCIS providing the applicant an opportunity to correct any deficiencies through a response to a request for evidence or intent to deny notice.

Applicants seeking to extend or change their nonimmigrant status must also affirm that they have not received one or more public benefits for more than 12 months total within any 36-months period since obtaining their nonimmigrant status.

KPMG NOTE

Our office is tracking these matters closely. We will endeavor to keep readers of GMS *Flash Alert* posted on any important developments as and when they occur.

FOOTNOTES:

1 For more information about public charges for the purpose of immigration, click here.

2 To read the US Citizenship and Immigration Services August 12, 2019 news release, click here.

3 For the full text of the final rule published in the Federal Register on August 14, 2019, click here.

Contact us

For additional information or assistance, please contact your local GMS or People Services professional* or one of the following professionals with the KPMG International member firm in Canada:

Sylvia Yong
Associate Attorney
U.S. Immigration
KPMG Law LLP – Tax + Immigration, Canada
Tel. +1-416-943-7894
sylviayong@kpmg.ca

Asha Sairah George
Manager/Attorney
U.S. Immigration
KPMG Law LLP – Tax + Immigration, Canada
Tel. +1-416 943 7816
ashasairahgeorge@kpmg.ca

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